



Bulletin TAS CAS Bulletin

2021/01



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT

Bulletin TAS
CAS Bulletin
2021/1

Lausanne 2021

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Editorial

In this Olympic year, the Court of Arbitration for Sport (CAS) has opened two temporary offices in Japan for the Tokyo 2020 Olympic Games (the Games) which have been postponed due to the coronavirus pandemic and have been held this year from 21 July to 8 August 2021.

The Tokyo Games looked like no other, with strict sanitary controls and isolation of athletes and officials, media etc. and without foreign visitors (outside the Olympic accredited persons). Japan is a country where the proportion of infected persons is one of the lowest on the planet and the Japanese authorities decided to take all appropriate measures to allow these Games to take place from 23 July to 8 August 2021 in the safest environment possible.

Given the restrictions in place in Tokyo, the composition of the CAS delegation (CAS ad hoc Division, CAS ADD and staff) has been cut almost by half, with some arbitrators working remotely in case of need. Most hearings took place by video-conference, or in a mixed format, considering that the athletes were not allowed to leave the athletes' village (other than going to the training field or to the stadium).

Like in Pyeongchang 2018, the temporary CAS divisions established on the site of the Olympic Games Tokyo 2020 to resolve Olympic legal disputes and anti-doping cases started to operate 10 days prior to the Opening Ceremony of the Games, i.e. on 13 July 2021, until the Closing Ceremony on 8 August 2021. The Presidents and arbitrators for each division were selected by the International Council of Arbitration for Sport (ICAS). The secretariat in Tokyo was headed by the CAS Director General, Mr Matthieu Reeb, and staffed by CAS employees. In agreement with the Tokyo Bar Association, pro bono lawyers based in Tokyo were available to assist and represent Games participants before the CAS Divisions.

The CAS ad hoc Division at the Olympic Games Tokyo 2020 was headed by Mr Michael Lenard (USA), President, assisted by Dr Elisabeth Steiner (Austria) and Prof. Giulio Napolitano (Italy) participating remotely as Co-Presidents. It registered 15 procedures, mainly related to the eligibility to compete at the Olympic Games.

The CAS Anti-doping Division at the Olympic Games Tokyo 2020, handled doping cases referred to it in accordance with the IOC Anti-doping Rules, was presided over by Judge Ivo Eusebio (Switzerland), assisted by Mr David W. Rivkin (USA), participating remotely as Co-President. It registered 3 procedures. With respect to the CAS ADD generally, it is worth noting that, in a recent decision 4A 612-2020 involving an Olympic champion in biathlon and the International Biathlon Union in relation to an anti-doping rule violation, the Swiss Supreme Court confirmed the jurisdiction of the CAS ADD as a first instance.

We are pleased to publish in this issue an article prepared by Emilio Garcia Silvero, FIFA's Chief Legal and Compliance Officer, entitled "Financial Fair Play and CAS jurisprudence: a brief panoramic view". Furthermore, an analysis of the fundamental rights of the parties before the CAS by Estelle de La Rochefoucauld, CAS Counsel is also included in this Bulletin.

The trend observed in previous years is confirmed as the number of cases before the CAS at this time of the year continues to stay at a high level, compared to previous years. 2021 will be another record year in this respect.

As usual, the majority of the so-called "leading cases" selected for this issue reflects the high proportion of football jurisprudence dealt with by CAS Panels in general.

Thus, in the field of football, the cases 6463 Saman Ghoddos v. SD Huesca & Östersunds FC & Amiens Sporting Club & FIFA and 6533 Club Al Arabi S.C. v. Sérgio Dutra

Junior deal with the termination of the employment contract and its consequences.

In the case 7356 SK Slovan Bratislava v. UEFA & KI Klaksvik, the forfeiture of a match due to the impossibility to play it before the applicable deadline because of the COVID 19 pandemic in Europe is examined. The case CAS 2020/A/7061 Athletics Club v. UEFA addresses a governance issue whereas in 7092 Panathinaikos FC v. FIFA & Club Parma Calcio 1913, a sporting succession issue is analysed.

In the field of doping, the case 6978 Andrea Iannone v. FIM deals with the criteria, standard & burden of proof regarding the Ineligibility for Presence of a Prohibited Substance and burden of proof. The case 6180 WADA v. USADA and Ryan Hudson mainly examines the preliminary issue of

CAS jurisdiction based on WADA's right to appeal a national level decision.

On the procedural level, in the case 6918 Cristina Iovu v. IWF, the admissibility of an appeal is dealt with especially regarding the establishment of the date of reception of a decision sent by email.

Summaries of the most recent judgements rendered by the Swiss Federal Tribunal in connection with CAS decisions have been also enclosed in this Bulletin.

I wish you a pleasant reading of this new edition of the CAS Bulletin.

Matthieu REEB
Director General

Articles et commentaires
Articles and Commentaries
Artículos y comentarios



Financial Fair Play and CAS jurisprudence: a brief panoramic view

Emilio García Silvero*

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I. Club Licensing and Financial Fair Play: an innovative UEFA tool for football

A. The origins

In September 1999 and at the initiative of the then called UEFA Professional Football Committee, the UEFA administration was commissioned to prepare initial studies on two innovative topics: i) the potential introduction of a European club licensing system, and ii) the consideration of salary caps. These studies concluded that a club licensing system would be feasible, whereas a mandatory salary control would not be appropriate without greater comparability of clubs’ financial data and without the necessary legal framework.¹

Based on this preliminary assessment, in March 2002 and following an extensive consultation process with the UEFA national associations and other football stakeholders, UEFA published its first-ever UEFA Club Licensing Manual (version 1.0, March 2002). The UEFA President at that time, Mr Lennart Johansson, described the main goal of this then-pioneering system in the following way:²

“(...) this club licensing system is a matter of consolidating the supremacy of European football for the future, placing it on a broader and more solid basis and improving quality standards on different items”.

When considering the launch of this mechanism for European football, UEFA took inspiration from the French licensing system put in place in the 70s. This was also

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¹ See, UEFA. Here to Stay – Club Licensing. 2009, page 8.

² UEFA Club Licensing System – Season 2004/2005 – Version 1.0 E – March 2002, preface.

highlighted by Mr Johansson in the introductory words of the first Manual:³

“European and World champions France have shown that the introduction of club licences with various requirements can be developed successfully in the long term. As long ago as the 1970s, they recognised the sign of the times and took the necessary steps to impose financial, sporting and infrastructure-related criteria on French clubs. Through the development of broad coach education and the creation of compulsory training centres, the representatives of the associations, leagues and clubs established the necessary sporting basis for the promotion of talent. The continuous further development of the criteria has improved the starting position of the clubs, and made the current success of France possible. In this respect, the fact should not be concealed that unpopular and drastic disciplinary sanctions have also had to be imposed (forced relegation). These measures ensure, however, that only financially sound, youth-orientated, long-term planning clubs are rewarded for their serious work by being awarded a licence”.

Although it is true that this UEFA project initiated in early 2000 was an innovation at the time in the European and world football context,⁴ a type of financial control, as well as the establishment of certain minimum standards in specific parameters (infrastructure, legal, administrative, etc.) were already a constant in other sporting models, particularly in the context of the North American professional leagues.⁵

³ UEFA Club Licensing System – Season 2004/2005 – Version 1.0 E – March 2002, preface.

⁴ In the words of its then General Secretary, Gerhard Aigner: “The most important project UEFA ever had”. Cf. UEFA. Here to Stay – Club Licensing, 2009, page 5.

⁵ For a comparative analysis between the North American model and the UEFA system see, Joel Maxcy: The American View on Financial Fair Play, 2014.

⁶ As from the 2021/2022 season, UEFA will hold a third club competition, known as the UEFA Europa Conference League. The UEFA Executive Committee approved the regulations of this new European club competition at its meeting of 19 April 2021. Article 4(1)(c) of the Regulations of the UEFA Europa Conference League also stipulates that to be eligible to

At the end of the 90s, the financial and, in some aspects too, structural position of many of the largest European football clubs was a long way off some of the professional standards required for a competition that had changed substantially in the previous decade: not only had the original *Coupe d'Europe* been abandoned in favour of the rebooted Champions League, but the most successful European club competition had undergone a substantial transformation during that same period in favour of greater professionalisation and revenue generation for participants.

It is in this context that UEFA decided to establish several financial, infrastructural, technical/administrative and other requirements, firstly through the club licensing system for its two club competitions (the UEFA Champions League [UCL] and the UEFA Europa League [UEL]),⁶ and, a few years later, as a development of this through the Financial Fair Play rules.⁷

Both systems, without prejudice to the current specific requirements determined by the UEFA Club Licensing and Financial Fair Play Regulations (UEFA CL&FFP), are indebted to two general principles which are essential to the viability thereof and to which CAS has attached importance in its decisions: firstly, the strict observance of the deadlines established in the rules in order to guarantee appropriate sporting organisation as well as

participate in the competition clubs must: “have obtained a licence issued by the competent national body in accordance with the UEFA Club Licensing and Financial Fair Play Regulations and be included in the list of licensing decisions to be submitted by this body to the UEFA administration by the given deadline”.

⁷ The original regulatory basis thereof, since the reform of the UEFA Statutes in the 2000s, has been found in the hitherto unchanged Article 50(1)bis: “The Executive Committee shall define a club licensing system and in particular: a) the minimum criteria to be fulfilled by clubs in order to be admitted to UEFA competitions; b) the licensing process (including the minimum requirements for the licensing bodies); c) the minimum requirements to be observed by the licensors”.

legal certainty and security,⁸ and, secondly, collaboration with the respective national association (club licensing) or UEFA (club monitoring –financial fair play⁹) during the respective processes, particularly the clubs’ obligation to provide true and accurate financial information.¹⁰

The lines below initially aim, before examining applicable CAS jurisprudence, to introduce several basic ideas for a better understanding of the two systems of control (club licensing and Financial Fair Play) which, on many occasions, tend to be considered to be the same thing or directly confused. As will be seen below, they are two systems of control with different requirements, which, however, they complement each other.

B. Club Licensing

In line with what has been stated above, since the 2004/2005 season, all clubs which are entitled to participate in the UCL or UEL on the basis of their sporting performances must obtain the “UEFA licence” before being formally allowed to compete. These requirements are, therefore, conditions of eligibility for access to the UEFA club competitions (*ex ante* criteria), irrespective of

their qualification on sporting merit at domestic level.

In other words, the simple fact of qualifying for UEFA club competitions on sporting merit does not automatically determine admission to the respective European competition, but the latter is subject to compliance with the criterion of admission determined by Article 4(1)(c) of the UCL/UEL Regulations:

*“have obtained a licence issued by the competent national body in accordance with the UEFA Club Licensing and Financial Fair Play Regulations and be included in the list of licensing decisions to be submitted by this body to the UEFA administration by the given deadline”.*¹¹

In order to be granted the “UEFA licence”, clubs have to demonstrate compliance with various requirements in the following fields: i) Sporting, ii) Infrastructure, iii) Personnel and administrative, iv) Legal, and v) Financial.

The process for obtaining the “UEFA licence” is conducted annually by the respective national association of each applicant club, based on the common requirements established by the UEFA

⁸ “In this context, the Panel underlines that the clubs must not only fulfil the material requirements set in the regulations, but they also need to meet these conditions on a certain date. In this regard, the Panel stresses that for the good organization of any competition, strict deadlines are inevitable. As stated by another CAS Panel (CAS 2008/A/1579), “[t]he matter of deadlines has to be considered under the principles of equality of treatment; it is a must to treat all the clubs and the national football associations the same way”. In addition, the purpose of the deadline set forth in Article 50 of the CL&FFP Regulations is also to serve the interests of legal certainty and security, taking into consideration that [the] UEFA Europa League first qualifying round usually takes place in early July” (CAS 2013/A/3233 PAE PAS Giannina 1966 v. UEFA, at paragraph 80). See also CAS 2006/A/1110, PAOK FC v. UEFA, considered to be the first case on the matter.

⁹ For the purposes of this paper, we will use both terms interchangeably.

¹⁰ “The disclosure obligations are essential for UEFA to assess the financial situation of the clubs that are participating in its competitions and for this reason, as

the Panel can confirm from the above quoted regulations, the disclosure must be correct and accurate” (CAS 2012/A/2821 Györi ETO v. UEFA, at paragraph 136). In the same direction, CAS 2012/A/2821 Bursaspor Kulübü Derneği v. UEFA, at paragraph 115, or, more recently, in CAS 2020/A/7685 Manchester City FC v. UEFA, at paragraph 327. In these latter proceedings, the English club Manchester City was penalised precisely for failing to collaborate in the investigation and adjudication process before the UEFA CFCB (see paragraphs 315 to 321).

¹¹ Under the same terms, for example, and as an eligibility requirement, clubs must “not have been directly and/or indirectly involved, since the entry into force of Article 50(3) of the UEFA Statutes, i.e. 27 April 2007, in any activity aimed at arranging or influencing the outcome of a match at national or international level” (Article 4 (1)(g) of the Regulations of the UCL and UEL). In this respect, Emilio García Silvero: “The match-fixing eligibility criteria in UEFA competitions: an overview of CAS case law”, CAS Bulletin, 2018/1, pages 6-20.

CL&FFP Regulations.¹² Therefore, it is up to the national association and not UEFA to assess compliance with these requirements and, where appropriate, issue or refuse the “UEFA licence”¹³, which thus becomes the final passport issued at national level to participate in the respective UEFA club competition.

Without prejudice to the other requirements established in the UEFA CL&FFP Regulations, there is no doubt that the financial requirement constitutes a fundamental pillar and, on occasions, an insuperable barrier for clubs which, having qualified for the UCL or UEL on sporting merit, are not admitted to these competitions as they are in breach of this regulatory requirement.

To this effect, Articles 49, 50 and 50bis of the UEFA CL&FFP Regulations require clubs to prove that as at 31 March preceding the licence season, they have no overdue payables towards: (i) other football clubs as a result of transfers undertaken prior to the previous 31 December, (ii) employees as a result of contractual or legal obligations that arose prior to the previous 31 December, or (iii) social/tax authorities as a result of contractual or legal obligations in respect of their employees that arose to the previous 31 December¹⁴.

Since the effective implementation of the UEFA licensing system in the 2004/2005 season, numerous clubs have failed to obtain a licence owing to breaches of the regulatory

requirements and, most particularly, owing to a failure to meet the financial requirements.¹⁵

C. Financial Fair Play

On 27 May 2010, the UEFA Executive Committee approved the combined framework that has since become known as the UEFA Club Licensing and Financial Fair Play Regulations. Even though these regulations were approved before the start of the 2010/2011 European season, the main requirements laid down for clubs participating in the UCL and UEL did not come into force until 1 June 2011, and, with regard to the break-even requirement, until the reporting period ending in 2012.¹⁶

At that time, UEFA presented this development of the club licensing system that had been operating since the 2004/2005 season as follows:¹⁷

“The major objective of the Financial Fair Play concept is to improve the financial fairness in European competitions, as well as the long-term stability of European club football. In order to achieve this goal, a set of measures will be put in place. These include an obligation for clubs whose turnover is over a certain threshold, over a period of time, to balance their books or break even. Under the concept, clubs cannot repeatedly spend more than their generated revenues”.

The then UEFA General Secretary, Mr Gianni Infantino, also emphasised at the time something that became a key factor of the Financial Fair Play system, collaboration

¹² Cf. Article 5 *et seq.* UEFA CL&FFP Regulations.

¹³ Subject to the subsidiary competence of the UEFA CFCB pursuant to Article 5(1)(a) CFCB Procedural Rules (edition 2021) in combination with Article 71 UEFA CL&FFP Regulations.

¹⁴ In view of the impact of COVID-19 on European club football, UEFA issued its Circular Letter 07/2021 of 15 February 2021 by means of which a “partial derogation of Article 16 of the Club Licensing and Financial Fair Play Regulations and exclusively with regard to the 2021/22 UEFA club competitions” was introduced. The practical consequence of this temporary regime is that “failure to satisfy Article 50

and Article 50bis of the Club Licensing and Financial Fair Play Regulations would not automatically lead to the refusal of a UEFA licence”.

¹⁵ See Club Licensing, 10 years on. Evolvement of the club licensing system since its introduction in 2004. 2015, pages 32 *et seq.*

¹⁶ Cf. Article 74(3) UEFA Club Licensing and Financial Fair Play Regulations (edition 2010).

¹⁷ <https://www.uefa.com/insideuefa/protecting-the-game/news/0254-0d7c87e72463-23e4c100b95f-1000--uefa-exco-approves-financial-fair-play/> (retrieved on 1 July 2021).

between the regulatory bodies and so-called stakeholders¹⁸:

“When we introduced the financial fair play rules, we introduced them together with the clubs. We established these rules not to sanction or to punish anyone – we established them to help club football, to assist the clubs. If the rules are not respected then I think UEFA has a reputation of being hard but fair – so if the rules are not respected, there will be sanctions which will be taken; the ultimate sanction is exclusion from UEFA competitions.

However, a sanction on a club will not be the key to the success of the rules. The key to the success of the rules will be if the financial situation of European club football improves. We are very confident of this, and this is the objective that we want to reach”.

These initial objectives established more than ten years ago are still clearly present in the current edition of the UEFA CL&FFP Regulations, being reflected in the regulations as follows:¹⁹

- to improve the economic and financial capability of the clubs, increasing their transparency and credibility;
- to place the necessary importance on the protection of creditors and to ensure that clubs settle their liabilities with employees, social/tax authorities and other clubs punctually;
- to introduce more discipline and rationality in club football finances;
- to encourage clubs to operate on the basis of their own revenues;
- to encourage responsible spending for the long-term benefit of football; and

¹⁸ <https://www.uefa.com/insideuefa/about-uefa/news/01f4-0e796c23d4dc-1882f248e365-1000--financial-fair-play-makes-football-more-sustainable/> (retrieved on 1 July 2021).

¹⁹ Article 2(2) UEFA CL&FFP Regulations (edition 2018).

²⁰ Cf. Article 57 UEFA CL&FFP Regulations (edition 2018).

²¹ Cf. Article 65 UEFA CL&FFP Regulations (edition 2010), in place as from June 2011. For more detail, see Compliance and Investigation Activity Report 2011-2013, Bulletin 2013.

- to protect the long-term viability and sustainability of European club football.

Basically, the Financial Fair Play system was called upon to complement the club licensing system in which UEFA, through its new control bodies, was going to take a predominant position in determining additional requirements (*ex post*) for participating in European club competitions. While the UEFA CL&FFP Regulations have referred to the process for obtaining club licences nationally as UEFA Club Licensing, the term UEFA Club Monitoring has been identified in the regulations to refer to the requirements laid down in the context of the Financial Fair Play system, which are required once the clubs have qualified for the respective UEFA club competition.²⁰

Essentially, there were three highlights in the new UEFA Financial Fair Play regulations introduced in 2010: firstly, the inclusion of additional requirements in the control of overdue payables as at 30 June and 30 September in each season;²¹ secondly, and the one for which the system is basically known, the so-called break-even requirement;²² and, finally, the establishment of an ad hoc body for the monitoring and enforcement of the new regulatory requirements: the UEFA Club Financial Control Body (UEFA CFCB).

Supervision of these additional requirements for clubs participating in the UEFA club competitions was thus assigned to the new UEFA CFCB.²³ Divided into two separate chambers, and with specific *ad hoc* procedural rules (the UEFA Procedural rules governing

²² The break-even criterion was only assessed by the UEFA CFCB for the first time as of July 2013. For more detail, see Compliance and Investigation Activity Report 2011-2013, Bulletin 2013.

²³ A new UEFA Organ for Administration of Justice which was formed following the amendment to the UEFA Statutes made at the Congress in Istanbul in 2012 (cf. Articles 32 (1)(c) and 34ter), UEFA Statutes, edition 2012). The new UEFA CFCB thus replaced the UEFA Club Financial Control Panel, a body which since 2009 had supervised the implementation of the transition and development process for UEFA Club Licensing and UEFA Financial Fair Play.

the UEFA Club Financial Control Body [CFCB Procedural Rules]²⁴), it constitutes, together with the crucial work of the UEFA administration, the essential part of the entire system designed by the European confederation.²⁵

What is certain is that since its full implementation in the 2012/2013 season, although various authors had been critical of the potential results of the new system,²⁶ the combination of the club licensing programme and the requirements established by the Financial Fair Play rules has greatly facilitated the development and financial self-monitoring process for clubs participating in the UCL and UEL, which has led to constant endorsement by various European institutions.²⁷

The various studies published by UEFA have indicated this. For example, in 2011, 63% of clubs in the top tiers had an operating loss of

€388 million. 55% percent of clubs had an operating loss of €1.675 million. Finally, 38% of the clubs reported a negative net equity in 2011.²⁸ The latest edition of the classic UEFA European Club Footballing Landscape report before COVID-19 arrived into our lives highlighted that the “2018 financial year was the second consecutive year of overall profitability for European top-division club football – a significant turnaround compared with the €5bn of losses that were recorded in just three years at the turn of the decade before UEFA’s Financial Fair Play regulations were introduced”.²⁹

Having said that, the club licensing system and the subsequent requirements introduced under Financial Fair Play have incurred constant criticism in academic circles around a purely sporting concept: the notion that the pursuit of competitive balance in European football has been abandoned.³⁰

²⁴ The first edition was approved by the UEFA Executive Committee on 18 May 2012 and entered into force on 1 June that same year. The current rules correspond to the 2021 edition, approved by the UEFA Executive Committee on 28 June 2021, in force as from 1 July that year (cf. UEFA Circular Letter 45/2021 of 1 July 2021). All versions are accessible on <https://documents.uefa.com>, retrieved on 1 July 2021.

²⁵ The 45th Ordinary UEFA Congress held on 20 April 2021 in Montreux (Switzerland) introduced changes to the classic structure of the UEFA CFCB, determining the formation within that body of a first instance chamber and an appeals chamber, replacing the original structure of the Investigatory Chamber and the Adjudicatory Chamber (see Article 34ter UEFA Statutes 2021). The reasons given for this change were as follows: “This amendment aims at giving more flexibility to the UEFA Executive Committee to regulate the decision-making power of the two chambers of the UEFA Club Financial Control Body (CFCB) with the view of granting in the future the CFCB appeals chamber with the exclusive power to hear appeals against decisions of the CFCB first-instance chamber”. According to Article 69(9) UEFA Statutes (edition 2021) this new provision comes into force as from 1 July 2021 (cf. UEFA Circular Letter 24/2021 of 23 April 2021). While the UEFA Statutes (edition 2021) refer to the “first instance chamber” (cf. Article 34ter), the new CFCB Procedural Rules (edition 2021) referring to the same body use the denomination “First Chamber” (cf. Article 3). In this

paper, we will refer to the term used in the UEFA Statutes: “first instance chamber”.

²⁶ Among others, J. Fletcher: “The Fairness of UEFA Financial Fair Play Rules”, *Sport and the Law Journal*, Volume 18, issue 3, (2010), or J. Lindholm: “The Problem with Salary Caps under European Union Law: The Case Against Financial Fair Play”, *Texas Review of Entertainment & Sports Law*, Volume 12, 189 (2010).

²⁷ See, among others, the European Parliament resolution of 29 March 2007 on the future of professional football in Europe (at paragraph 20) or the joint statement by the Vice-President of the European Commission and the UEFA President dated 21 March 2012.

²⁸ The European Club Licensing Benchmarking Report, Financial Year 2011, 2011. Also, Valerie Kaplan: “UEFA Financial Fair Play Regulations and European Antitrust Law Complications”, *Emory International Law Review*, 29, 2014.

²⁹ The European Club Footballing Landscape, 11th edition, 2020. The most recent edition of the European Club Footballing Landscape (12th edition, 2021) is very much focused on the impact of COVID-19 and how it has affected European Football.

³⁰ Cf. Markus Sass: “Long-Term Competitive Balance under UEFA Financial Fair Play Regulations”, Working Paper 5/2012, Faculty of Economics and Management, Universität Magdeburg, 2012 or Holger Preuss, Kjetil K. Haugen and Mathias Schubert:

Similarly, and even though the UEFA club licensing system has generated a very positive cascade effect at domestic level in various European national associations and leagues³¹, the lack of direct UEFA monitoring of most European clubs, as they do not have the sporting right to participate in the continental competitions and, therefore, are not subject to compliance with the strict financial requirements of the UEFA CL&FFP Regulations, means that greater domestic controls, where these exist, have not been sufficient to avoid cases of debt accumulation throughout Europe.³²

D. FIFA and the other confederations

UEFA's implementation of the club licensing system in all its national associations as from the 2004/2005 season did not pass unnoticed at international level and, in October 2007, FIFA's Executive Committee adopted the FIFA Club Licensing Regulations, which became compulsory for confederations and national associations as from 1 January 2008.

FIFA's club licensing system was no more than a translation of the principles adopted by UEFA at European level to the global stage, although the particular features of the now 156 non- "European" national associations affiliated to FIFA and the five remaining confederations mean that its automatic implementation has been a challenge over the last 15 years.

"UEFA Financial Fair Play: the curse of regulation", *European Journal Sports Science*, 2/2014.

³¹ The vast majority of the national associations and leagues in Europe have developed their own financial control systems. In this context, see the following report: FIFA Professional Football Report 2019 (cf. <https://img.fifa.com/image/upload/jlr5corccbsef4n4brde.pdf>, retrieved on 1 July 2021).

³² See, for instance, the recent report on the FIFA Fund for Football Players, 2021 (cf. <https://www.fifa.com/media-releases/fifa-fund-for-football-players-over-1-000-applications-approved>, retrieved on 1 July 2021).

³³ See, for instance, the AFC Club Licensing Regulations (edition 2021). Several cases were also considered by the CAS concerning these regulations, the most recent one CAS 2021/A/7712 Shandong Luneng FC v. AFC. In the same context, considerable

Consequently and since 2008, in coordination with the other national confederations and associations, FIFA has developed various projects in order to expand the basic principles of the club licensing system beyond the European territory³³. Current figures show that, without prejudice to the challenges inherent in a solution based on the particular features of European football, the progress made over this period has been outstanding.³⁴

II. CAS jurisprudence on Financial Fair Play cases

A. Introductory remarks

Although CAS jurisprudence is equally prolific within the context of decisions on the club licensing system adopted by the respective national associations,³⁵ it has been considered advisable, at least in this first paper, to focus more specifically on the decisions adopted by the UEFA CFCB on the examination of disputes over the requirements laid down in the club monitoring process or, what amounts to the same thing, those essentially deriving from the implementation of the Financial Fair Play Regulations.

In other words, the analysis undertaken in this paper focuses exclusively on the decisions adopted by the UEFA CFCB since the actual implementation of the Financial

progress has been made in the South American Football Confederation (CONMEBOL) with the approval of the Licensing Club Regulations (edition 2016) and the most recent Licensing Regulations for Women's Football (edition 2020).

³⁴ According to the recent figures published by FIFA, 91% of the FIFA member associations have club licensing systems in place (cf. FIFA Professional Football Report 2019 and FIFA Professional Football Landscape - <https://landscape.fifa.com>, retrieved on 1 July 2021).

³⁵ Both with regard to decisions adopted by the respective national associations in accordance with Article 5(1) UEFA CL&FFP Regulations, and those adopted as an exception within this field by the UEFA CFCB pursuant to Article 5(1)(a) Procedural Rules CFCB (edition 2021) in combination with Article 71 UEFA CL & FFP Regulations.

Fair Play system, basically covering the following aspects:³⁶ overdue payables, the break-even rule, settlement agreements, the so-called “three-year rule”, and other relevant procedural matters within the procedures before the UEFA CFCB.

Since the introduction of the UEFA Financial Fair Play system back in 2010, several clubs from all over Europe have been prevented from participating in UEFA competitions in application of the requirements. In some cases, other kinds of disciplinary measures (fines, squad limits, etc.) have been imposed in addition to the sporting sanctions.

Inevitably, many of these cases have resulted in proceedings before CAS.³⁷ To date, according to the information available, CAS has reviewed more than twenty cases in which clubs participating in UEFA competitions have been examined on grounds relating to alleged breaches of the UEFA CL&FFP Regulations:³⁸

- CAS 2011/A/2476 Football Club Timisoara SA v. UEFA
- CAS 2012/A/2702 Györi ETO v. UEFA
- CAS 2012/A/2821 Bursaspor Kulübü Derneği v. UEFA
- CAS 2012/A/2824 Besiktas JK v. UEFA
- CAS 2013/A/3067 Málaga CF v. UEFA
- CAS 2013/A/3233 PAS Giannina 1966 v. UEFA
- CAS 2013/A/3453 FC Petrolul Ploiesti v. UEFA
- CAS 2014/A/3533 FC Metallurg v. UEFA
- CAS 2014/A/3870 Bursaspor Kulübü Derneği v. UEFA
- CAS 2016/A/4492 Galatasaray v. UEFA

- CAS 2016/A/4692 Kardemir Karabükspor Kulübü Derneği v. UEFA
- CAS 2018/A/5808 AC Milan v. UEFA
- CAS 2018/A/5957 Galatasaray v. UEFA
- CAS 2018/A/5937 Paris Saint-Germain Football SASP v. UEFA
- CAS 2018/A/5977 FC Rubin Kazan v. UEFA
- CAS 2019/A/6288 Waterford FC v. UEFA
- CAS 2019/A/6298 Manchester City FC v. UEFA
- CAS 2019/A/6294 PFC Lviv LLC v. UEFA
- CAS 2019/A/6356 Trabzonspor A.S. V. UEFA
- CAS 2020/A/6785 Manchester City FC v. UEFA
- CAS 2020/A/7169 Trabzonspor A.S. v. UEFA

With all these cases in mind, the following pages will try to address the key legal aspects relating to the different requirements of the UEFA Financial Fair Play system in the light of CAS jurisprudence.

B. CAS awards: main legal issues

a. Overdue payables

The concept of overdue payables has become an essential requirement both of club licensing and of the financial fair play system. Consequently, since the original UEFA manual on the club licensing system of 2002, it has become necessary to comply with this financial requirement for admission to and

³⁶ As an exception, in this analysis we have decided to include decisions which, even though technically part of the club licensing process, are adopted extraordinarily by UEFA within the context of the interpretation to be made of the so-called “three-year rule” (cf. Article 12 UEFA CL&FFP Regulations).

³⁷ In this respect, see Marc Hovell: “A Review of Key Financial Fair Play Cases Through the Lens of the CAS”, LawinSport, 2018.

³⁸ Listed in chronological order, excluding consent or confidential/non-published awards, and including CAS decisions on the three-year rule.

subsequent participation in the UEFA club competitions.

Since the approval of the UEFA CL&FFP Regulations in 2010, the definition of this notion and the conditions laid down have remained unchanged, apart from minor technical adjustments.

Consequently and as far as the Financial Fair Play requirements are concerned, Articles 65, 66 and 66bis of the UEFA CL&FFP Regulations require that, as at 30 June and as at 30 September of the year in which the UEFA club competitions commence, clubs admitted to the UCL or UEL have to prove that they have: i) No overdue payables towards football clubs, ii) No overdue payables in respect of employees, and iii) No overdue payables towards social/tax authorities³⁹.

The concept of overdue payables and the respective requirements are laid down in detail in Annex VIII to the UEFA CL&FFP Regulations, this Annex having been considered by CAS to be “perfectly clear”, as a result of which it “could see no substantial arguments regarding its lawfulness”⁴⁰.

In CAS jurisprudence, the interpretation of the concept of “overdue payables” has given rise to several decisions since 2011, which have provided clarity when examining and judging the respective cases.

In the first proceedings that dealt indirectly with the aspects deriving from overdue payables within the context of the UEFA CL&FFP Regulations, CAS maintained a general principle that was later repeated in subsequent awards:

³⁹ In this context, it is particularly relevant to consider the so-called 2020 Addendum to the UEFA CL&FFP Regulations, which altered “exclusively for the assessment during the 2020/2021 license season” some paragraphs of Articles 65, 66 and 66bis of these regulations. Basically, the classic deadline of 30 June described above is moved to the 31 July, due to the impact of COVID-19 on the situation of the European clubs. See also UEFA Circular Letter 39/2020 of 22 June 2020.

“(…) under UEFA regulations, domestic laws are irrelevant and cannot be considered in assessing issues related to the UEFA club licensing”⁴¹.

In these specific proceedings, CAS 2012/A/2702 Györi ETO v. UEFA, the debt due to the transfer of a player between a Hungarian club (Györi ETO) and the Estonian club FC Flora Tallinn was examined. CAS’s conclusion reproduced above advocated an autonomous concept of the notion of an overdue payable, without any possibility of recourse to European or national law for an interpretation thereof within the context of the specific dispute before the UEFA committees.

In CAS 2013/A/3067 Málaga CF SAD v. UEFA, the autonomous concept of overdue payables and its interpretation in the light of the national law of a country was examined a second time, although in this case based on far more detailed reasoning and conditions than in CAS 2012/A/2702 Györi ETO v. UEFA.⁴²

Basically, the dispute in these proceedings centred on whether or not to consider certain sums which had to be paid by the Spanish club Málaga CF to the Spanish Tax Agency (approximately €7 million) as overdue payables. While Málaga CF maintained that, according to Spanish law and the jurisprudence of the Spanish Supreme Court, the mere unilateral application for postponement of the debt led to its classification as non-overdue, UEFA advocated again for a totally autonomous application of this concept as provided for by the UEFA CL&FFP Regulations and taking into consideration the grounds of CAS 2012/A/2702 Györi ETO v. UEFA.

⁴⁰ Cf. CAS 2012/A/2824 Besiktas JK v. UEFA, at paragraph 118.

⁴¹ CAS 2012/A/2702 Györi ETO v. UEFA, at paragraph 144.

⁴² In similar terms and with regard to the analysis of the break-even requirement, several considerations can be seen with regard to the conflict between national law and the principles laid down under the UEFA CL&FFP Regulations in CAS 2020/A/7169 Trabzonspor A.S. v. UEFA, at paragraph 214.

In a well-reasoned judgment, CAS reinforced the idea of a specific, global concept of the term “overdue payable” in the sense of giving precedence to that determined by the UEFA CL&FFP Regulations. In this respect and in general it maintained the following⁴³:

“That there is a need to have a uniform definition of what constitutes an overdue payable cannot be disputed and is perfectly illustrated in the case at hand. It appears that the various legal systems differ as to what consequences follow from the fact that a debt is ‘overdue’. In some jurisdictions the creditor may be entitled to file a claim and/or to seek enforcement of the claim; he may be (also) eligible for interests and/or entitled to offset a claim directed against him. The characterization of a debt as overdue may in addition – in some jurisdiction – also be a prerequisite when assessing whether or not a debtor is illiquid in terms of insolvency law. If the term ‘overdue’ were not defined in the CL&FFP, it would be difficult to know to what consequences the term ‘overdue’ used in the CL&FFP refers”.

In casu, CAS concluded as follows with regard to Málaga CF’s debt and the alleged application of Spanish law:⁴⁴

“(…) the CL&FFP is designed to uniformly and autonomously define the term ‘overdue’ clearly follows from the CL&FFP. There is no room for the application of the contra proferentem rule here. Thus, the Panel holds that – contrary to what the Appellant submits – Spanish law does not apply within the definition at UEFA level of the expression ‘overdue payables’”.

⁴³ CAS 2013/A/3067 Málaga CF SAD v. UEFA, at paragraph 9.5.

⁴⁴ At paragraph 9.5.

⁴⁵ At paragraph 9.7.

⁴⁶ Cf. Article 60(1) UEFA CL&FFP Regulations (edition 2010).

⁴⁷ Thomas Peeters & Stefan Szymanski: “Financial Fair Play in Football”, Research Paper 2013-021, September 2013.

⁴⁸ Which is not the case for the essential factors for the calculation thereof, currently regulated in Annexes X and XI to the UEFA CL&FFP Regulations.

⁴⁹ Also in this context, it is important to consider the so-called 2020 Addendum to the UEFA CL&FFP Regulations, which amended – “exclusively for the

It did, though, leave the door open for recourse to national law, albeit only under very exceptional circumstances⁴⁵:

“(…) the Panel finds that recourse to a national law in the context of the CL&FFP is legitimate only (i) if necessary for the application of the CL&FFP and (ii) where recourse to national laws does not undermine the very purpose of the CL&FFP”.

b. The break-even rule

In 2010, at the time when the break-even concept first became familiar to the main European clubs owing to the entry into force of the first version of the UEFA CL&FFP Regulations, this legal/financial concept was defined in the regulations as follows:

*“The difference between the relevant income and relevant expenses is the break-even result, which must be calculated in accordance with Annex X for each reporting period”.*⁴⁶

Even though the scholars initially considered the concept and its limits to be complex,⁴⁷ the passage of time – notwithstanding the intrinsic technical complications – has generated a basic consensus on its conceptualisation, as the wording given to Article 60 UEFA CL&FFP Regulations has remained unchanged since then.⁴⁸

According to Article 64 UEFA CL&FFP Regulations⁴⁹, the break-even requirement is fulfilled by the clubs if, for the current monitoring period,⁵⁰ and, if applicable, for the projected monitoring period,⁵¹ the club has

assessment during the 2020/2021 license season”- some paragraphs of Articles 59, 62 and Annex X of these regulations due to the impact of COVID-19 on the situation of the European clubs. See UEFA Circular Letter 39/2020 of 22 June 2020. The articles transcribed in this paper correspond to the 2018 edition without considering the temporary wording of the so-called 2020 Addendum.

⁵⁰ Pursuant to Article 59(1) UEFA CL&FFP Regulations: “A monitoring period covers three consecutive reporting periods on which a licensee is assessed for the purpose of the break-even requirement”. (cf. footnote above).

⁵¹ Cf. Article 63 UEFA CL&FFP Regulations.

either an aggregate break-even surplus, or, alternatively, an aggregate break-even deficit which is within the acceptable deviation.⁵²

For almost the entire ten years of its validity, the break-even system has also been subject to arbitration disputes at CAS, although the main disagreement and analysis of this concept have focused exclusively on the compatibility of the rule with EU antitrust policy and, to a certain extent, with Swiss law.⁵³

CAS 2016/A/4492 Galatasaray v. UEFA is a leading case in this field as for the first time it confronted EU competition law with the practical applicability of the UEFA CL&FFP Regulations,⁵⁴ and with the break-even requirement in particular.⁵⁵ Essentially, the appellants maintained that the break-even rule was incompatible with Articles 101 (restriction or distortion of competition within the internal market) and 102 (abuse of a dominant position) of the Treaty on the Functioning of the European Union (TFEU), and with Articles 45 (free movement of workers), 56 (free movement of services) and 63 (free movement of capital) of the same legal text.

Following an evaluation of the three conditions required by EU jurisprudence to declare a decision “automatically void” based on Article 101 TFEU, the Panel maintained as its initial conclusion that:

⁵² According to Article 61(1) UEFA CL&FFP Regulations: “The acceptable deviation is the maximum aggregate break-even deficit possible for a licensee to be deemed in compliance with the break-even requirement as defined in Article 64”. Article 61(2) UEFA CL&FFP Regulations determines as follows: “The acceptable deviation is EUR 5 million. However, it can exceed this level up to EUR 30 million if such excess is entirely covered by contributions from equity participants and/or related parties. A lower amount may be decided in due course by the UEFA Executive Committee”.

⁵³ On the application of EU law in Swiss international arbitration, see Ulrich Haas: “The Influence of EU Law on International Arbitration, in particular in Switzerland”, in *New Developments in International Commercial Arbitration 2012*, Muller/Rigozzi, 2012.

“(…) the declared objectives of the CL&FFP Regulations, and in particular their provisions relating to financial fair play, the legality of which is challenged by the Club, are legitimate”.⁵⁶

It essentially based itself on the rationale that:⁵⁷

“(…) the break-even rule of the CL&FFP Regulations is not a blunt restriction on clubs' spending, since the CL&FFP Regulations calculate compliance with the 'break-even' requirement over a rolling three years' period and therefore allow 'overspending' in one or two years, provided the revenues generated in the subsequent(s) year(s) of the period cover it; and investment in infrastructures, for instance, are allowed without limits”.

It concluded as follows in this respect, even though the appellant itself had already failed to demonstrate the actual restriction on competition by the UEFA CL&FFP Regulations:⁵⁸

“(…) the Panel notes that the CL&FFP Regulations do not appear to prevent the clubs from competing among themselves on the pitch or in the acquisition of football players. The Panel agrees with the Respondent that, on the contrary, they produce the effect that competition is not distorted by 'overspending', i.e. by those clubs that, operating at a loss, allow themselves operations that could not be conducted on a sound commercial basis, and gain an advantage over those clubs which respect the constraints of financial balance (i.e., which take a behaviour that should be expected by any reasonable

⁵⁴ A commentary on this key CAS decision can be found in Antoine Duval: “CAS 2016/A/4492, Galatasaray v. UEFA, Award of 3 October 2016”, in Antoine Duval and Antonio Rigozzi: *Yearbook of International Sports Arbitration 2016*.

⁵⁵ Outside the arbitration scope of CAS, the FFP rules have been challenged in various national courts without any of these actions being successful to date. On some of these proceedings, see Gaetano Taormina: “UEFA’s Financial Fair Play: Purpose, Effect, and Future”, *Fordham International Law Journal*, Volume 42, Issue 4, 2019.

⁵⁶ At paragraph 63.

⁵⁷ At paragraph 70.

⁵⁸ At paragraph 70.

entity in normal market conditions). In other words, their effect is to prevent a distortion of competition. Further, they do not limit the amount of salaries for the players: clubs are free to pay as much as they wish, provided those salaries are covered by revenues. In addition, they do not ‘ossificate’ the structure of [the] market (large dominant clubs have always existed and will always exist) and do not exclude clubs from ‘essential facilities’: the UEFA professional club competitions cannot be compared to railway infrastructures or to grids in the electric market. Finally, it is to be noted that the ‘break-even’ calculations take place over rolling periods of three years. Therefore, ‘overspending’ is allowed during one or two football season[s], provided it is covered in the following one(s)”.

With regard to the potential violation of Article 102 TFEU by the UEFA CL&FFP Regulations, the analysis was more limited,⁵⁹ due to the fact that the appellant club – the Turkish club Galatasaray⁶⁰:

“(…) failed to submit a sound assessment of the effects on the market of the CL&FFP Regulations and therefore failed to demonstrate that they distort competition.

As a result, the Panel finds that the Appellant did not demonstrate that the CL&FFP Regulations constitute an abuse of dominant position: it is not necessary to enter into the issue of whether UEFA is in a dominant position on a given market, because in any case there is no evidence of any abuse”.

Leaving this particular aspect aside, CAS jurisprudence also provides other but less extensive analyses of the break-even rule, which were basically examined in CAS 2020/A/7169 Trabzonspor A.S. v. UEFA and CAS 2020/A/6785 Manchester City FC v. UEFA.

⁵⁹ Similarly, compatibility with the other provisions of the TFEU adduced (Articles 45, 56 and 63) or Swiss law was briefly assessed by the panel in the absence of proof in that respect, beyond mere allegations (see CAS 2016/A/4492 Galatasaray v. UEFA, at paragraphs 85 to 90).

⁶⁰ At paragraphs 82 & 83.

In CAS 2020/A/7169 Trabzonspor A.S. v. UEFA essentially examined two issues regarding the break-even rule⁶¹. The first of these concerned the concept of “acceptable deviation” provided for by Article 61 UEFA CL&FFP Regulations and its application to the break-even result for a single reporting period within the framework of the conditions of a settlement agreement, something which the Panel totally rejected along these lines:⁶²

“(…) the reference to an acceptable deviation is in Article 61 of the FFP Regulations and is in the context of an aggregate break-even requirement – i.e. an aggregate/total sum of the break-even results across a three-year period”.

The second consideration that deserves to be highlighted in this decision with regard to the interpretation of the break-even rule reminds us partly of the conflict previously mentioned in relation to the concept of overdue payables and its interpretation and application in the light of the UEFA CL&FFP Regulations and/or the national law governing the club.

On this occasion, the issue revolved around the requirements of Annex VII to the UEFA CL&FFP Regulations and, in particular, around the club’s obligations to present the financial statements under the general principle of fair representation,⁶³ even though the regulations themselves require them to be based on the accounting standards required by local legislation.⁶⁴ Once again, CAS recalled in this respect the principle of equality with which all clubs must be treated from the point of view of the UEFA CL&FFP Regulations and the uniform approach that must be adopted based thereon, maintaining that:⁶⁵

⁶¹ This CAS award was subsequently confirmed by the Swiss Federal Supreme Court in a judgement rendered on 29 December 2020 (4A_478/2020).

⁶² At paragraph 187.

⁶³ Article A(3) Annex VII UEFA CL&FFP Regulations.

⁶⁴ Article A(1) Annex VII UEFA CL&FFP Regulations.

⁶⁵ At paragraph 213.

“Moreover, this could result in an unfair advantage for the Turkish football club in comparison to clubs in other European countries”.

In CAS 2020/A/6785 Manchester City FC v. UEFA, and as far as the break-even rule is concerned⁶⁶, the Panel was confronted with an alleged equity contribution provided to the English club by its ultimate owner (GBP 204,000,000), which was supposedly disguised as sponsorship income with the main goal of counting this amount with the break-even calculation as relevant income for monitoring purposes.

While this arbitral procedure attracted the media attention at worldwide level for months, unfortunately the relevant legal considerations which could be useful for the analysis of the break-even rule were narrow⁶⁷. If something should be emphasised for this purpose, it is more the importance of the evidence when evaluating serious violations of this principle⁶⁸:

“(…) given the particular severity of the allegations at stake in the present proceedings the evidence must be particularly cogent, the majority of the Panel finds that (…) there are not sufficient evidence to conclude that MFCF committed the violations alleged by UEFA”

c. Settlement agreements

In January 2014, shortly before the first effective decisions on compliance with the break-even criteria implemented in the UEFA CL&FFP Regulations of 2010, the UEFA Executive Committee introduced changes to the CFCB Procedural Rules incorporating a particular tool aimed at offering those clubs that might be in breach

of the break-even requirement a type of second chance: the so-called “settlement agreements” thus appeared in the FFP system.⁶⁹

From the outset, the nature and *raison d'être* of settlement agreements was clearly expressed by UEFA:⁷⁰

*“The main objective of a settlement agreement is to ensure that clubs in breach of the break-even requirement become break-even compliant within a certain timeframe, and no more than three years after concluding the settlement agreement”.*⁷¹

As the Panel in CAS 2018/A/5808 AC Milan v. UEFA put it:⁷²

“The settlement agreement (..) is a mere legal instrument at the disposal of the CFCB to regulate a certain matter, in the case at hand to react to infractions of the CL&FFP Regulations committed by a licensee”.

These agreements were even considered as a form of plea bargain in CAS 2016/A/4492 Galatasaray v. UEFA:⁷³

“The Panel notes that the very text of the Settlement Agreements appears to indicate that the obligations therein accepted by the Club (in a sort of ‘plea bargaining’) are themselves based on the CL&FFP Regulations”.

The regulatory conditions originally established for the adoption of this consensual arrangement have not changed since 2014, hence the various versions of the CFCB Procedural Rules determines the same

⁶⁶ In these arbitral proceedings, Manchester City was only charged by the UEFA CFCB for violation of Article 62 UEFA CL&FFP Regulations (break-even information), and not for a breach of Article 64 of the said regulations (fulfilment of the break-even requirement).

⁶⁷ The case was basically decided based on the weight of the evidence brought by UEFA and the degree of satisfaction of the arbitrators when assessing such evidence.

⁶⁸ At paragraph 244.

⁶⁹ See Article 15 CFCB Procedural Rules (edition 2014).

⁷⁰ UEFA Compliance and Investigation Activity Report 2013-2015, 3rd Bulletin, page 32.

⁷¹ Currently the aim is for the club to become break-even compliant “no more than four years after being found to be in breach by the CFCB investigatory chamber”. See UEFA Compliance and Investigation Activity Report 2017-2019, Bulletin 2019, page 44.

⁷² At paragraph 139.

⁷³ At paragraph 53.

parameters for their potential adoption⁷⁴. Basically, a settlement agreement may be concluded in circumstances that justify an effective, equitable and dissuasive resolution of the case.

Since then, the UEFA CFCB has offered this option on several occasions to clubs in breach of the break-even requirement.⁷⁵ For example, in the first 18 months after this provision was adopted alone (1 January 2014 – 30 June 2015), the UEFA CFCB Chief Investigator reached 23 settlement agreements with clubs participating in UEFA club competitions.⁷⁶ Since 2018, this legal instrument has also been adopted with regard to potential breaches of the UEFA CL&FFP Regulations by national associations. Consequently, the UEFA CFCB Chief Investigator concluded its first settlement agreements with the Football Association of Albania, the Kazakhstan Football Federation and the Football Association of Serbia, following investigations into compliance with their regulatory obligations for the issuance of licences.⁷⁷

As is to be expected, the application and enforcement of these settlement agreements have given rise to jurisprudence containing many special features with regard to this particular figure. As a starting point, CAS jurisprudence has confirmed the principal

idea underlying this legal instrument: a second chance for clubs in breach of the break-even requirement.

In CAS 2016/A/4492 Galatasaray v. UEFA, the Panel referred to this concept as follows:⁷⁸

“The Panel considers that the sanction imposed on the Club by the CFCB Decision is not disproportionate, in view of the fact that it was imposed as a sanction for a second violation. After its first breach of the CL&FFP Regulations, the Club had the benefit of a second chance through the conclusion of the Settlement Agreement”.

This idea was also adopted several months later by CAS 2016/A/4692 Kardemir Karabükspor Kulübü Derneği v. UEFA in the following terms, and has been repeatedly echoed by other panels thereafter:⁷⁹

*“By entering into the Settlement Agreement, the Appellant was in fact given a second chance to fulfil the said requirements and, thus, avoid having sanctions imposed on it subject to its fulfilment of the requirements set out in the Settlement Agreement”.*⁸⁰

The second of the relevant aspects examined by CAS regarding the legal instrument of settlement agreements was discussed *in extenso* in CAS 2018/A/5808 AC Milan v. UEFA. Basically, the discussion centred on determining to what extent clubs are entitled to expect a settlement agreement to be

⁷⁴ Including the new Article 15(3) of the CFCB Procedural Rules (edition 2021). It should be pointed out that settlement agreements are technically different from voluntary agreements. The latter, introduced for the first time in the 2015 edition of the UEFA CL&FFP Regulations, authorise a club, on its own initiative and in predetermined situations, to agree a series of specific conditions with the Investigatory Chamber of the UEFA CFCB with the aim of complying with the break-even requirement. On this matter, see Annex XXII UEFA CL&FFP Regulations, which was examined by CAS jurisprudence in CAS 2016/A/4492 Galatasaray v. UEFA, at paragraphs 91 *et seq.*

⁷⁵ Until the 2021 edition of the CFCB Procedural Rules (Article 14(1)(b)), it was up to the CFCB Chief Investigator, after having consulted with the other members of the investigatory chamber, to conclude the settlement agreements. According to Article 15 of the CFCB Procedural Rules (edition 2021) the first

chamber of the CFCB is now competent to conclude the settlement agreements.

⁷⁶ To date, more than forty settlement agreements have been agreed between the Investigatory Chamber of the UEFA CFCB and clubs. The decisions in this respect from 2014 to 2021 can be found on the following website:

<https://www.uefa.com/insideuefa/protecting-the-game/club-financial-controlling-body/#Cases> (retrieved on 1 July 2021).

⁷⁷ UEFA Compliance and Investigation Activity Report 2017-1029, Bulletin 2019, page 14. According to the new CFCB Procedural Rules (edition 2021), the competence to conclude a settlement agreement lies with the first instance chamber of the CFCB (cf. Article 15(1)).

⁷⁸ At paragraph 115.

⁷⁹ Similarly, CAS 2018/A/5977 FC Rubin Kazan v. UEFA, at paragraph 187 (redacted version).

⁸⁰ At paragraph 7.13.

offered by the UEFA CFCB Chief Investigator when they are in breach of the break-even requirement, and whether, should such a legitimate expectation exist, it is limited in any way.

The Panel in CAS 2018/A/5808 AC Milan v. UEFA adopted a clear position in this respect, stressing that:

*“Whether to offer a settlement agreement or not (and to refer the case to the CFCB Adjudicatory Chamber) is within the discretion of the CFCB Chief Investigator”.*⁸¹

It went on to emphasise that:

*“The Appellant has no right to be offered a settlement agreement under the applicable rules. Even if a settlement agreement would be ‘effective, equitable and dissuasive’ in a given case, the Appellant cannot claim a settlement agreement according to the express wording of Article 15(1) of the Procedural Rules, because even in such circumstances it remains within the discretion of the Chief Investigator to proceed with the offering of a settlement agreement or to refer the case to the CFCB Adjudicatory Chamber”.*⁸²

This principle whereby clubs have no predetermined right to obtain a settlement agreement within the scope of their potential breaches of the break-even requirement is reaffirmed by the approach of CAS jurisprudence to this mechanism, according to which the pure disciplinary sanctions available to the UEFA CFCB and the possibility of concluding a settlement agreement are seen as interchangeable:⁸³

“(..) are somewhat interchangeable also follows from Article 15(2) of the Procedural Rule[s], according to which the settlement agreement “may set out ... the possible application of disciplinary measures.

(...) At the end of the day, settlement agreements and disciplinary sanctions are two legal instruments serving the same purpose, issued on a similar factual basis and with interchangeable contents. There is no need to define or limit the discretion in Article 15(1) in light of the principle of legality, since any solution obtainable by a settlement agreement can also be achieved via Articles 28 et seq. of the Procedural Rules”.

d. Three-year rule

In 2005, with the actual experience of the issue of the first club licences by the national associations for the 2004/2005 UEFA club competitions, UEFA published its second UEFA Club Licensing System, Manual. This Manual was a new, much-revised version of the March 2002 edition.⁸⁴

Without prejudice to other innovations of importance to the overall system, UEFA’s amendment to Article 4.3 of the Manual now required the *licence applicant* (in practical terms, the club wishing to participate in the respective UEFA club competition) to be:

“any legal entity according to national law and/or national association statutes, which is [a] member of the national association and/or its affiliated league,

⁸¹ At paragraph 141.

⁸² At paragraph 141. The regulatory configuration given to settlement agreements until the 2021 edition of the CFCB Procedural Rules has led jurisprudence to conclude that even a potential breach of the principle of equal treatment between clubs to which this legal instrument is offered and those to which it is not would not in itself undermine the legitimacy of the decision: “from a legal point of view, the Panel finds that even if there had been unequal treatment, this would not render the Decision illicit, because – as previously stated – the choice of the legal instrument (settlement agreement or sanction) is in itself neutral, does not impact on the Appellant’s rights and

therefore, cannot invalidate or infect the Decision. The same is true when looking at the case in light of Article 28 CC or European competition law. Both legal concepts require that the Appellant’s rights be infringed. The Appellant, however, failed to substantiate why the mere choice between two equivalent legal instruments – completely independently of their contents – infringes upon the Appellant’s rights”. (CAS 2018/A/5808 AC Milan v. UEFA, at paragraph 142).

⁸³ CAS 2018/A/5808 AC Milan v. UEFA, at paragraphs 139 and 140, respectively.

⁸⁴ UEFA Club Licensing System, Manual Version 2.0 (edition 2005), preamble.

provided that such membership has lasted at least for a period of three years”.⁸⁵

This amendment was certainly significant, as it sought to counter a growing phenomenon at both national and European level: the folding of clubs and immediate appearance of new clubs under the same football identity basically to avoid the assumption and actual payment of financial debts⁸⁶.

This provision had such importance that, in the original version of the UEFA CL&FFP Regulations (edition 2010), the new definitions of a licence applicant and of the three-year rule were supplemented with specific provisions aimed at limiting the aforesaid practice. The following was thus categorically required:⁸⁷

“The membership and the contractual relationship (if any) must have lasted – at the start of the licence season – for at least three consecutive years. Any alteration to the club’s legal form or company structure (including, for example, changing its headquarters, name or club colours, or transferring stakeholdings between different clubs) during this period in order to facilitate its qualification on sporting merit and/ or its receipt of a licence to the detriment of the integrity of a competition is deemed as an interruption of membership or contractual relationship (if any) within the meaning of this provision”.

The first proceedings that dealt with this particular issue based on a decision adopted by UEFA were CAS 2011/A/2476 FC

⁸⁵ This requirement could in any event be waived on an exceptional basis, subject to UEFA’s approval (cf. UEFA Club Licensing System, Manual Version 2.0 (edition 2005), footnote number 2).

⁸⁶ On this particular topic, see Article 15(4) FIFA Disciplinary Code (edition 2019). Also, Jordi López Batet: La sucesión deportiva de clubes de fútbol: consideraciones a la vista de la jurisprudencia del TAS en la materia, CAS Bulletin, 2020/02.

⁸⁷ Cf. Article 12(2) UEFA CL & FFP Regulations (edition 2010). This version has remained basically unchanged to date, including the current regulations (edition 2018).

⁸⁸ Since the approval of the current UEFA CL&FFP Regulations (edition 2018), the potential decision on the evaluation of an exception on this matter falls under the responsibility of the Investigatory Chamber

Timisoara v. UEFA.⁸⁸ This judgment contains the *ratio legis* for this provision:⁸⁹

“The Panel recognises that this so-called three years rule has been adopted to avoid, as UEFA put it, ‘circumvention of the UEFA licensing system’. In particular, clubs are not to be permitted to create a new company or change their legal structure so as to ‘clean up’ their balance sheet while leaving their debts in another legal entity (which is likely to go bankrupt). If allowed, this kind of device would obviously harm the integrity of competition and would contradict the interest of the sport as well as putting at risk the interests of creditors”.

Even though the public information available to date only corresponds to the 2018/2019 season,⁹⁰ numerous applications have been made by clubs to obtain a waiver thereof since this requirement was established by the UEFA Club Licensing System, Manual Version 2.0 (edition 2005).

The objectives confirmed by the first proceedings before CAS which evaluated this provision not only live on, but they have arguably been reinforced by official documents of UEFA which gave the provision significant value in the club licensing process.⁹¹ Consequently, what has been codified as the three-year rule has six declared objectives:⁹² i) to act as a deterrent against financial misconduct, ii) to protect clubs’ creditors, iii) to encourage new investments into existing clubs; iv) to preserve clubs’ identities, v) to help safeguard

of the UEFA CFCB (cf. Annex I.B.1). According to the new CFCB Procedural Rules (edition 2021), this competence is now exercised by the first instance chamber of the CFCB (cf. Article 5(1)(g)). Beforehand, this competence was exercised by the UEFA administration, whose decision was adopted by its General Secretary (see, for instance, Annex I, (A)(1)(d) UEFA CL&FFP Regulations – edition 2015).

⁸⁹ At paragraph 3.16.

⁹⁰ See UEFA Compliance and Investigation Activity Report 2017-2019, Bulletin 2019, Page 18.

⁹¹ As this competence is not delegated by UEFA to the national associations, even though, as pointed out, it is a basic requirement of the UEFA club licensing process.

⁹² UEFA Compliance and Investigation Activity Report 2017-2019, Bulletin 2019, Page 17.

the integrity of the competitions, and vi) to avoid the circumvention of the UEFA CL & FFP Regulations.

Since CAS 2011/A/2476 FC Timisoara v. UEFA, two further cases have dealt with the interpretation of the three-year rule of what is now Article 12 of the UEFA CL&FFP Regulations, offering both material and formal positions for a suitable understanding of this rule.

In CAS 2019/A/6288 Waterford FC v. UEFA, the Sole Arbitrator essentially determined the restrictive nature when interpreting the possible exceptions to the general application of the rule by the UEFA CFCB, affirming that:⁹³

“From that premise the Appealed Decision states the possibility to grant exceptions to the three year rule must be strictly interpreted (ditto). The Sole Arbitrator agrees. It is well established law that such is the correct approach to any exception to a general rule”.

This is on top of the discretionary, though not arbitrary, power held by the UEFA body to adopt such decisions:⁹⁴

“The grant of an exception to the three year rule was under the Regulations a matter for the discretion of UEFA (Annex 1 (B) (5) of the CL&FFP Regulations”.

More procedural aspects were the object of the dispute in CAS 2019/A/6294 PFC Lviv LLC v. UEFA, whose panel offered a series of more formal considerations on the legal system applicable to the process of obtaining an exception, on the understanding that the

CFCB Procedural Rules do not apply to these specific proceedings:⁹⁵

“The proceeding for granting exceptions to the three-year rule is therefore not a proceeding governed by the Procedural Rules. The competence of the IC CFCB to decide is derived from Annex I of the CL&FFP Regulations and the jurisdiction of the IC CFCB to decide the matter is not in this case derived from Article 3 of the Procedural Rules governing jurisdiction of the CFCB”.

e. Assessing the evidence: The “photo finish” concept

As is widely known, one of the fundamental principles of the CAS system lies in Article R57(1) of the CAS Code:

“The Panel has 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”.

Based on this provision, minimally limited by the addition of paragraph 3 thereof,⁹⁶ CAS has maintained extremely broad competence for a complete and absolute review of final sporting decisions within the sphere of its competence.

According to CAS jurisprudence, and applying this fundamental principle of the entire international sports arbitration system, the date of the hearing before the Court of Arbitration represents the final moment at which evidence must be examined and evaluated by the respective Panel. This was stated, for example, in CAS 2018/A/5808 AC Milan v. UEFA:⁹⁷

⁹³ At paragraph 76.

⁹⁴ At paragraph 78 (i).

⁹⁵ At paragraph 73.

⁹⁶ Article R57(3) of the CAS Code: “The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered”. In this respect, see Despina Mavromati and Pauline Pellaux: Article R57 of the CAS Code: A Purely Procedural Provision? International Sports Law Review, Issue 2/2013, pp.

36-44 and Despina Mavromati: The Panel’s right to exclude evidence based on Article R57 para.3 CAS Code: a limit to CAS’s full power of review?, CAS Bulletin 1/2014, pp. 48-56. In the context of UEFA, a similar regulatory provision has existed since the origins of the CAS competence over UEFA’s decisions (cf. Article 57 UEFA Statutes, edition 1997), without this having any particular relevance recognised in the CAS jurisprudence (see Article 62(6) UEFA Statutes, edition 2021).

⁹⁷ At paragraph 131.

“Article R57 of the Code provides for a de novo hearing. Such concept implies – in principle – that also new evidence may be taken into account that was not presented or available before the first instance. Thus, in principle, the correct reference to judge the correctness of the Decision is the date of the CAS hearing”.

This general rule, within the context of evaluating proceedings within the framework of the UEFA CL&FFP Regulations, leads to a clear conclusion:⁹⁸

“Whether the Decision is factually correct or not may depend also on the relevant reference date”.

CAS itself is fully aware of this:⁹⁹

“The Panel is aware that the above concept of a de novo hearing results somehow in a moving target and that the insecurity that comes with it may be troubling in a situation where under tight time restraints a federation must decide whether or not to admit a club to a certain competition and where such decision not only affects the direct addressee, but also other competitors. The Panel notes that access to justice may be restricted (by freezing the relevant reference date) for just cause, i.e. in the interest of good administration of justice. Whether to do so or not is, in principle, in the autonomy of the relevant federation”.

Consequently, within the framework of this classic interpretation made by CAS, decisions adopted by the UEFA CFCB on clubs and their potential participation in the UEFA club competitions in the following season depended on the development over time of the circumstances of each case, sometimes invalidating decisions pronounced weeks apart by the UEFA CFCB due to new evidence or facts being considered at the subsequent CAS hearing. The panel firmly expressed itself on this aspect and in the mentioned CAS 2018/A/5808 AC Milan v. UEFA:

⁹⁸ At paragraph 130.

⁹⁹ At paragraph 132.

¹⁰⁰ Cf. Article 34(3) CFCB Procedural Rules (edition 2019).

¹⁰¹ Later settled between UEFA and the historic Italian club by means of the consent award, CAS

“(…) the Procedural Rules provide that – once a case is referred to the CFCB Adjudicatory Chamber – the latter may hold a hearing (Article 21 Procedural Rules) and bear evidence (Article 23 of the Procedural Rules) that was not before the CFCB Investigatory Chamber. Thus, the Procedural Rules provide that the decision to be taken by the Adjudicatory Chamber may be based on an evidentiary basis different from the one of the CFCB Investigatory Chamber. The same principle applies – absent any rules to the contrary – in relation between the CAS and the CFCB Adjudicatory Chamber”.

In a clear response to the invitation offered in this decision, with effect from 1 June 2019, UEFA amended Article 34 of the CFCB Procedural Rules, adding paragraph 3, reading as follows:

*“In view of (i) the specific requirements of the financial fair play system, (ii) the need to apply monitoring and reporting periods in a consistent manner to all clubs, (iii) the aim to treat all clubs equally, and therefore in the interest of good administration of justice, the relevant reference date for the assessment of financial and economic data, facts and evidence submitted by the parties in proceedings before the CAS shall be no later than the date of the final decision of the CFCB investigatory or adjudicatory chamber, respectively”.*¹⁰⁰

This regulatory amendment was clearly intended to avoid the repetition of a case as particular as that of AC Milan,¹⁰¹ in which the Italian club's financial position had allegedly changed substantially within a period of less than 30 days, between the date of the CFCB's decision and CAS's final decision, even submitting new business plans on the very day of the hearing that led to the partial upholding of the appeal lodged.¹⁰²

This approach has been reinforced in the most recent version of the CFCB Procedural

2019/A/6083 AC Milan S.p.A v. UEFA and CAS 2019/A/6261 AC Milan S.p.A v. UEFA.

¹⁰² On this particular situation, see Despina Mavromati: “A review of the CAS Panel's decision in AC Milan v. UEFA – The devil is in the (procedural) detail”, LawInSport (retrieved on 1 July 2021).

Rules (edition 2021), in which article 34 (2) and (3) reads as follows:

“2. In view of (i) the specific UEFA club licensing criteria and monitoring requirements, (ii) the need to apply club licensing and monitoring in a consistent manner to all clubs, and (iii) the aim of treating all clubs equally, and therefore in the interests of the good administration of justice, the relevant reference date for the assessment of financial and economic data, facts and evidence submitted by the parties in proceedings before the CAS shall be no later than the date of the final decision being appealed against before the CAS”

“3. In any event, the CAS shall not take into consideration any substantial new facts or evidence that were available to or could reasonably have been discovered by the appellant and were not adduced by the latter before the CFCB”¹⁰³

f. Other procedural matters

Finally, within the scope of the various proceedings on UEFA CFCB decisions pursuant to the UEFA CL&FFP Regulations that have been reviewed by CAS, collateral aspects have also arisen which, even without constituting the direct basis of the dispute between the club and UEFA, have given rise to relevant interpretations for an understanding of the system. The lines below aim to provide an analysis of some of these aspects which, although originally ancillary, have led to a specific position held by CAS on matters of procedural relevance within the context of cases brought before the UEFA CFCB.

The first of the “other procedural matters” that deserve to be pointed out in this section involves a specific situation that was examined both in CAS 2018/A/5808 AC Milan v. UEFA and in CAS 2019/A/6298 Manchester City FC v. UEFA. It involved answering the following question: can the decisions of the UEFA CFCB Chief Investigator to refer a case to the Adjudicatory Chamber of the UEFA CFCB, or not to conclude a settlement agreement with the club be appealed against independently?¹⁰⁴

In a nutshell, the solution adopted by both panels was clear and direct, categorising these decision-making procedures provided for in the then CFCB Procedural Rules as non-final decisions and, consequently, denying them the status of decisions that may be appealed against independently before CAS.

In the eyes of the Panel in CAS 2019/A/6298 Manchester City FC v. UEFA:¹⁰⁵

“The bottom line as to the Referral Decision is that a decision of the Investigatory Chamber to refer a case to the Adjudicatory Chamber does not bring an end to the matter in dispute wholly or partially. Instead the matter in dispute before the Adjudicatory Chamber remains identical to the one before the Investigatory Chamber that was referred to the Adjudicatory Chamber. Thus, the Adjudicatory Chamber may still decide to dismiss the entire case against MCFC, in which case MCFC would be exonerated. Therefore, until the Adjudicatory Chamber issues its final decision, the legal remedies of

¹⁰³ In a similar way, see Article 62(6) UEFA Statutes (edition 2021).

¹⁰⁴ Pursuant to the CFCB Procedural Rules until the 2021 edition and within the framework of the structural configuration of the UEFA CFCB, the Investigatory Chamber of the CFCB had a range of potential decisions that put an end to the investigation in itself (Article 14 CFCB Procedural Rules, 2019 edition). In particular, the CFCB Chief Investigator was able to “refer the case to the adjudicatory chamber”, which technically activates the adjudicatory phase (see Article 19 *et seq.* CFCB Procedural Rules, 2019 edition).

¹⁰⁵ At paragraph 95. The same concept underlies paragraph 90 of this decision, although expressed

differently: “As a corollary, a decision rendered by the Investigatory Chamber to refer a case to the Adjudicatory Chamber is not final and can therefore in principle not be appealed to CAS directly, because the Adjudicatory Chamber is competent to take any of the decisions listed in Article 27 CFCB Procedural Rules, that are described as being final. It follows from the above that a referral decision issued by the Investigatory Chamber, in principle, does not qualify as a final decision that can be appealed to CAS and that only once the Adjudicatory Chamber renders one of the decisions listed in Article 27 CFCB Procedural Rules has a final decision been rendered that can be appealed to CAS”.

MCFC are not exhausted and an appeal to CAS is, in principle, premature”.

In this same decision, an idea was added that further reinforced the clear conclusion on the non-final nature of “referral decisions”, granting the Adjudicatory Chamber of the UEFA CFCB the status of a quasi-further instance of appeal for the purposes of interpreting this dispute. It did so based on the following analogy:¹⁰⁶

“Also, the distinction between the Investigatory Chamber and the Adjudicatory Chamber is not meaningfully different from a distinction between a first instance body and an appeals body. By comparison, if this were a typical disciplinary case before UEFA, the UEFA Appeals Body would be competent to deal with appeals filed against decisions of the UEFA CEDB, before an appeal to CAS could be admitted. Accordingly, the Panel finds that MCFC is not meaningfully prejudiced by the Referral Decision, certainly not more than a party that is convicted in an internal first instance would be”.

In CAS 2018/A/5808 AC Milan v. UEFA, the Panel was confronted with the same problem, but only with regard to one specific aspect of the dispute: the UEFA CFCB Chief Investigator’s decision not to conclude a settlement agreement with the club. Even in that case, the same conclusion was reached:¹⁰⁷

“(…) a systematic reading of the Procedural Rules indicates that Article 34 of the Procedural Rules is only applicable to decisions of the CFCB Adjudicatory Chamber. The Panel also notes that a

¹⁰⁶ At paragraph 96. Without prejudice to these conclusions, the Panel in these same proceedings did not discount the good faith of any club when challenging a potential referral decision directly before CAS, with regard to UEFA’s position in different proceedings on this matter. The Panel expressed itself as follows: “However, the Panel also finds that the fact that UEFA in CAS 2019/A/6261 – for reasons unknown – did not follow previous CAS jurisprudence has created legal uncertainty for clubs subjected to proceedings before the CFCB, as a consequence of which any club assisted by prudent counsel would be well-advised to challenge referral decisions directly before CAS in order to exclude the possibility that UEFA will later argue that it should have appealed one or certain aspects of a referral decision. While this legal

similar provision as Article 34 of the Procedural Rules is missing in chapter 1 (Articles 12-18 of the Procedural Rules) that deals with the CFCB Investigatory Chamber. This is all the more noteworthy, considering that Article 16(1) of the Procedural Rules specifically provides that the decision of the Investigatory Chamber not to offer a settlement agreement (unlike the decision to conclude a settlement agreement) cannot be reviewed by the CFCB Adjudicatory Chamber”.

Turning to a different procedural issue, the disputes relating to proceedings CAS 2018/A/5937 Paris Saint-Germain Football SASP v. UEFA and CAS 2018/A/5957 Galatasaray v. UEFA provide further good examples of collateral procedural aspects having a significant bearing on the overall outcome of the proceedings.¹⁰⁸ Both cases hinged on the interpretation of the then Article 16 (1) of the CFCB Procedural Rules, which regulated the powers of the Adjudicatory Chamber of the UEFA CFCB to review decisions adopted by the UEFA CFCB Chief Investigator.

Article 16 (1) of the CFCB Procedural Rules up to its 2018 version determined the following:

“Any decision of the CFCB chief investigator to dismiss a case or to conclude a settlement agreement or to apply disciplinary measures within the meaning of Article 14(1)(c) may be reviewed by the adjudicatory chamber on the initiative of the CFCB chairman

uncertainty created by a rather non-transparent internal policy of UEFA has no impact on the interpretation of the applicable rules, it does have an impact on whether or not MCFC filed its appeal in good faith, which is an important aspect to be taken into account when it comes to the allocation of the costs in these proceedings” (at paragraph 105).

¹⁰⁷ CAS 2018/A/5808 AC Milan v. UEFA, at paragraph 97, and with additional considerations at paragraphs 98 and 99.

¹⁰⁸ A redacted version of both awards is available on the CAS official website at <http://jurisprudence.tas-cas.org/Shared%20Documents/5937.pdf> and <http://jurisprudence.tas-cas.org/Shared%20Documents/5957.pdf> (retrieved on 1 July 2021).

within ten days from the date of communication of the decision to the CFCB chairman”.

In both proceedings, the Investigatory Chamber of the UEFA CFCB had initiated formal investigations – against Paris Saint-Germain Football SASP and Galatasaray – for alleged breaches of the UEFA CL&FFP Regulations. Following an analysis of the circumstances, the UEFA CFCB Chief Investigator decided to close the proceedings in view of the absence of breaches of the UEFA CL&FFP Regulations in the case of the French club¹⁰⁹ and to conclude a settlement agreement insofar as the Turkish club was concerned.¹¹⁰

As detailed above, these specific types of decisions (to dismiss a case or to conclude a settlement agreement) were subject to potential review by the Adjudicatory Chamber of the UEFA CFCB pursuant to the CFCB Procedural Rules.¹¹¹

In both proceedings, the UEFA CFCB Chairman formally notified the clubs of his desire to review these decisions and embarked on such a review, a power exercised within the period of ten days as from notification of the respective decisions by the UEFA CFCB Chief Investigator to PSG and to Galatasaray.

Both clubs, dissatisfied with this decision taken by the UEFA CFCB Chairman, appealed to CAS, on the understanding that the ten days determined by the aforesaid Article 16 (1) of the CFCB Procedural Rules represented the deadline not only for giving notice of the body’s desire to review the decision, but for adopting a formal decision on the merits of the case, which formed the crux of the cases in question.

The dispute and potential detailed analysis of the provision was partly limited at CAS, since, as explained by the Panel in CAS 2018/A/5937 Paris Saint-Germain Football SASP v. UEFA:¹¹²

“(…) as to the merits of the present proceedings, UEFA agrees with PSG that the Appealed Decision is to be set aside and that the Chief Investigator Decision is to be confirmed as being final and binding. The parties’ requests for relief only deviate in respect of the costs of the proceedings”.

Under such a procedural scenario, the Panel’s power to review the appealed decision was limited almost entirely, as expressly pointed out:¹¹³

“In light of the parties’ positions in this regard, the sole task of the Panel is to verify the bona fide nature of the parties’ joint position on the bifurcated issue to ensure that the will of the parties has not been manipulated to commit fraud and to confirm that their positions are not contrary to public policy principles or mandatory rules of the law applicable to the dispute”.

“The Panel wishes to emphasise that it is aware of the fact that the ratification and endorsement by an arbitral tribunal of an agreement in a case with disciplinary elements (although the present proceedings are not governed by Article R65 CAS Code, because it is not exclusively of a disciplinary nature), should be considered with utmost caution, also considering potential interests third parties may have against setting aside the Appealed Decision. Bearing this in mind, the Panel, on the basis of a prima facie analysis of the facts and evidence presented by the parties in this particular case, considers the parties’ positions and the outcome of the present proceedings reasonable and is therefore satisfied to set aside the Appealed Decision and confirm that the Chief Investigator Decision is final and binding”.

¹⁰⁹ CAS 2018/A/5937 Paris Saint-Germain Football SASP v. UEFA, at paragraph 12.

¹¹⁰ CAS 2018/A/5957 Galatasaray v. UEFA, at paragraph 9.

¹¹¹ Article 16(1) CFCB Procedural Rules (edition 2019). Under the current CFCB Procedural Rules (edition 2021), articles 15, 17 and 18 are applicable.

¹¹² At paragraph 64.

¹¹³ At paragraphs 65 and 66.

It did, however, provide several considerations on the dispute, albeit within the limited context of the review:¹¹⁴

“Indeed, the Panel finds that Article 16(1) UEFA CFCB Procedural Rules should be interpreted in a sense that the Adjudicatory Chamber had the possibility to review the Chief Investigator Decision, but that the Adjudicatory Chamber had to decide on such review within 10 days of receipt of the latter decision by the CFCB Chairman, i.e. on 24 June 2018 at the latest”.

“The Panel considers that the existence of a manifest error of assessment must be obvious, so that any such error should be quickly and easily identifiable, and finds that this supports the interpretation of PSG that the review should be completed within 10 days of receipt of the Chief Investigator Decision by the CFCB Chairman”.

From an eminently practical perspective, the interpretation finally adopted seems to expressly suggest that Article 16(1) of the CFCB Procedural Rules, applicable at that time, had to be interpreted to the effect that the Adjudicatory Chamber of the UEFA CFCB must: i) examine whether there is a clear material error in the decision of the UEFA CFCB Chief Investigator; ii) following that, guarantee the prosecuted party’s right to be heard, the taking of evidence and a potential hearing; and, finally¹¹⁵, iii) pronounce judgment in that respect¹¹⁶, all within a period of ten days.

This conclusion might have some unresolved practical angles, particularly in the context of the review systems of the international sports federations but also looking at the basic principles of due process which should be guaranteed in the adjudicatory phase of these kind of proceedings.

Finally, in this context, it may be important to point out that, even if only the redacted version of both awards is publicly available, any objection was raised to the potential interlocutory nature of the decision adopted by the Adjudicatory Chamber of the UEFA CFCB.¹¹⁷

In order to avoid the same dispute in the future, UEFA immediately revised Article 16(1) of the CFCB Procedural Rules as from the 2019/2020 season, in order to provide greater clarity for operators of the system, including the Adjudicatory Chamber of the UEFA CFCB, when reviewing final decisions adopted by the UEFA CFCB Chief Investigator. Since 1 June 2019, Article 16(1) of the CFCB Procedural Rules was worded as follows:

“Any decision of the CFCB chief investigator to dismiss a case or to conclude or amend a settlement agreement or to apply disciplinary measures within the meaning of Article 14(1)(c) may be reviewed by the adjudicatory chamber in circumstances where the review is initiated by the CFCB chairman within ten days from the date of communication of the decision (and all relevant evidence) to the CFCB chairman. A decision of the adjudicatory chamber on the review is taken within thirty days from the date of communication of the decision (and all relevant evidence) to the CFCB chairman”.

The wording adopted at the UEFA Executive Committee meeting of 29 May 2019 offered, at least from a purely technical perspective, absolute clarity as to the exercise of this power of review for future proceedings: ten days as from notification by the UEFA CFCB Chief Investigator, with a further twenty days for pronouncement of the relevant decision¹¹⁸.

¹¹⁴ At paragraphs 71 and 73.

¹¹⁵ Cf. Article 20 *et seq.* CFCB Procedural Rules (edition 2018).

¹¹⁶ Cf. Article 24 to 27 CFCB Procedural Rules (edition 2018).

¹¹⁷ Which might be a justified procedural option, in the light of the considerations used in CAS 2018/A/5808 AC Milan v. UEFA and CAS 2019/A/6298

Manchester City FC v. UEFA (at paragraphs 93-100 and paragraphs 91-112, respectively).

¹¹⁸ This concrete procedural situation becomes moot, following the new system adopted by the CFCB Procedural Rules (edition 20210, particularly, articles 15, 17 and 18).

Finally, CAS 2020/A/6785 Manchester City FC v. UEFA dealt with two additional matters which beforehand had not been expressly dealt with in FFP proceedings and which could be classified as classic in purely disciplinary cases: i) the standard of proof when providing evidence of infringements; and ii) the statute of limitations.¹¹⁹

Both aspects, according to Swiss law, fall under the specific autonomy of the respective international sports federation, whose regulatory option is solely limited by public order.¹²⁰ Consequently, we have to consult the specific regulatory provisions in order to ascertain the approach adopted by the competent bodies of the international sports federation.

With regard to the standard of proof applicable to proceedings before the UEFA CFCB, it should be noted that neither the UEFA CL&FFP Regulations nor the CFCB Procedural Rules opt for a specific solution, remaining silent on this aspect¹²¹. Therefore, this would have to be resolved initially based on the application of the UEFA Disciplinary Regulations in proceedings before the UEFA CFCB, pursuant to Article 41 of the CFCB Procedural Rules¹²²:

“Matters not provided for in these rules are decided in accordance with the relevant provisions of the UEFA Disciplinary Regulations, which apply by analogy”.

To this effect, Article 24(2) of the UEFA Disciplinary Regulations expressly determines the standard of proof applicable to UEFA disciplinary proceedings and, consequently, to proceedings before the UEFA CFCB:

“The standard of proof to be applied in UEFA disciplinary proceedings is the comfortable satisfaction of the competent disciplinary body”.

In CAS 2020/A/6785 Manchester City FC v. UEFA, the analysis of this technical issue was finally not dealt with directly, due to the parties’ express agreement on the standard of proof applicable: comfortable satisfaction. What led to an added dispute in this context was the classic discussion on how this standard was to be applied, and whether the alleged principle “the more serious the allegation, the more cogent the supporting evidence must be” should be followed. This solution, in practical terms, would lead to the increase in the standard of proof in certain situations, putting it on the verge of the classic criminal standard of proof beyond reasonable doubt, something which the panel expressly rejected:¹²³

“The Panel agrees that the standard of proof is that of comfortable satisfaction and that the seriousness of UEFA’s allegations does not increase such standard to effectively being beyond reasonable doubt”.

Without prejudice thereto, and for the first time in proceedings relating to the breach of UEFA CL&FFP Regulations, the panel, in its assessment of the evidence, had recourse to proposals adopted within the scope of cases of corruption, in which access to evidence is particularly constrained by the very nature of international sports federations. The panel thus specifically reasoned on this issue in CAS 2020/A/6785 Manchester City FC v. UEFA:¹²⁴

“The Panel also finds that, when assessing the evidence, it should keep well in mind the mantra that has been repeatedly cited in CAS jurisprudence, which

¹¹⁹ A brief commentary on this case can be found in Dolf Segaar: “UEFA club licensing and financial fair play regulations”, Sports Law & Taxation, 2020/24.

¹²⁰ With regard to the power to determine the standard of proof, CAS 2011/A/2621, Savic v. PITOS, at paragraph 8.3. With regard to the regulatory limits of the federations for establishing this, among others, CAS 2009/A/1926 ITF v. Gasquet and CAS 2009/A/1930 WADA v. ITF & Gasquet, at paragraph 11.

¹²¹ Including the new CFCB Procedural Rules (edition 2021).

¹²² At the time in which the decision was rendered, it was Article 42 CFCB Procedural Rules (edition 2019). The only difference between both editions (2019 and 2021) is the word “cases”, which now reads “matters” at the beginning of the sentence.

¹²³ At paragraph 205.

¹²⁴ At paragraph 207.

is that ‘corruption is, by nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing’ (CAS 2010/A/2172, paragraph 21 of the abstracts published on the CAS website). The Panel finds that this mantra is not only applicable to cases involving corruption, but also to cases concerning an alleged dishonest concealment of equity funding as sponsorship contributions for CLFFPR purposes”.

Finally, CAS 2020/A/6785 Manchester City FC v. UEFA also offers, for the first time, an interpretation of then Article 37 of the CFCB Procedural Rules on the statute of limitations for potential offences, an aspect that was extremely significant to the final result in this specific case. Pursuant to this article applicable at the time of the dispute:

“Prosecution is barred after five years for all breaches of the UEFA Club Licensing and Financial Fair Play Regulations”.

Faced with opposing stances, that of the English club Manchester City, which maintained that “the date of the prosecution is the date of the final decision rendered by the Adjudicatory Chamber of the UEFA CFCB”, and that of UEFA, which understood that “the date of the prosecution is the date of the opening of the investigation by the Investigatory Chamber of the UEFA CFCB”, the Panel, by a majority, opted for a debated third solution, which was to align the date of the prosecution with the referral decision of the then Article 37 of the CFCB Procedural Rules:¹²⁵

“Prosecution starts with the filing of charges, i.e. when the suspect is formally informed of the case he needs to answer, which is considered to be consistent with the definition of ‘prosecution’ in the online Oxford dictionary”.

¹²⁵ At paragraph 170.

¹²⁶ At paragraph 171.

¹²⁷ On this issue, see Björn Hessert: “The Duty To Cooperate – Questions Arising From The Man City V UEFA Decision”, LawinSport (retrieved on 1 July 2021).

It then concluded as follows within the specific context of the CFCB Procedural Rules:¹²⁶

“For the present purposes, the majority of the Panel finds that this moment is the moment of issuance of the Referral Decision, because it was this document that explicitly and formally served MCFE with the charges filed against it. With the issuance of the Referral Decision the Investigatory Chamber concludes its investigations and the matter is put in the hands of the Adjudicatory Chamber, which body is then required [to] adjudicate and decide the case”.

As can be seen, the Panel’s interpretation of the rule was not only literal but, close to concepts of criminal law and perhaps taken out of context of the true *raison d’être* of sports disciplinary proceedings and, in particular, of the system of judging cases in the context of breaches of the UEFA CL&FFP Regulations.¹²⁷

In any case, the most recent version of the CFCB Procedural Rules, which is in force as from 1 July 2021, reacted against this interpretation by providing more clarity in this regard¹²⁸:

“Opening of proceedings for any breaches of the UEFA Club Licensing and Financial Fair Play Regulations is barred after five years”

C. The principle of proportionality in FFP awards

Until CAS 2018/A/5808 AC Milan v. UEFA, CAS jurisprudence on reviewing the proportionality of sanctions in FFP matters followed the position mostly maintained over so many years by the Lausanne Arbitration Tribunal in disciplinary matters; the proportionality of the sanction was evaluated based on the principle of granting a certain

¹²⁸ Cf. Article 37 CFCB Procedural Rules (edition 2021). It also reflects the new structural configuration given to the UEFA CFCB, in which the former investigation proceedings (cf. Article 12 CFCB Procedural Rules, edition 2019) is now replaced by a formal proceedings (cf. Article 12 CFCB Procedural Rules, edition 2021).

deference to the respective resolution of the federative body, which, in principle, had a more immediate technical knowledge of the matter, and based on the premise that a review thereof was admissible only when the sanction exceeded certain limits that rendered it an evidently and grossly disproportionate decision.¹²⁹

Examples of this position in decisions on FFP are constant in CAS jurisprudence:¹³⁰

“On the question of proportionality, the Panel accepts the position of UEFA, as established by the CAS jurisprudence it cited – just because another sanction could be issued, it does not make the one issued disproportionate. The Appellant would have to demonstrate that the Appealed Decision was grossly disproportionate”.

In CAS 2018/A/5808 AC Milan v. UEFA, while drawing on the same principles, the Panel finds that they must be interpreted and applied with care, taking the following points into consideration:¹³¹

“(…) the above restriction to the scope of review originates in Swiss law of associations and was developed in the context of a review of disciplinary measures by state courts (cf. BK-ZGB/RIEMER, 1990, Art. 75 no. 25). The reason for imposing restrictions on state courts when reviewing decisions of associations follows from the Swiss Constitution (Article 23), i.e. the autonomy of associations, which protects sports federations from excessive state interference. No such state interference is at stake in the present context, where a private institution (CAS) was mandated by private parties to resolve a dispute between them.

Second, 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.

In addition, it appears rather arbitrary to try to draw a persuasive line between decisions that are ‘simply’ or ‘grossly’ disproportionate.

Finally, the constant jurisprudence of the CAS according to which procedural flaws committed by the judicial organs of a federation ‘fade to the periphery’ in appeals proceedings before the CAS (CAS 98/211) would have to be revised, if CAS were prevented from exercising its full mandate in disciplinary proceedings, i.e. to review the facts and the law of the case (CAS 2012/A/2912, para. 87)”.

Based on all of the above, the Panel concludes that:¹³²

“(…) its 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”.

Remarkably, when evaluating subsequent Financial Fair Play cases CAS has reverted to the more conservative approach maintained up until 2018, repeating the initial limitation on the review of the disciplinary decisions rendered by sport’s governing bodies:¹³³

“The Panel sees no good reason to depart from this consistent jurisprudence and determines that the fine

¹²⁹ Among others, see CAS 2016/A/4595 Al Ittihad Saudi v. FIFA, at paragraph 59 – redacted version: “In this latter respect, this Panel agrees with the CAS jurisprudence under which the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence (see e.g. the awards of: 24 March 2005, CAS 2004/A/690, § 86; 15 July 2007, CAS 2005/A/830, § 10.26; 26 June 2007,

2006/A/1175, § 90; and the advisory opinion of 21 April 2006, CAS 2005/C/976 & 986, § 143)” (CAS 2009/A/1817 & CAS 2009/A/1844)”.

¹³⁰ CAS 2012/A/2824 Besiktas JK v. UEFA, at paragraph 127.

¹³¹ At paragraph 134.

¹³² At paragraph 135.

¹³³ CAS 2019/A/6356 Trabzonspor v. UEFA, at paragraph 99.

imposed by the AC of the CFCB in the Appealed Decision can only be reviewed if it is considered to be evidently and grossly disproportionate to the offence”.

III. Conclusions

As CAS has noted on different occasions when dealing with the application of the UEFA CL&FFP Regulations:¹³⁴

“the declared objectives of the CL&FFP Regulations, and in particular their provisions relating to financial fair play, are legitimate”.

Virtually twenty years have passed since the first steps taken towards establishing a structural and financial control system for European football, essentially with regard to clubs that have been participating in the UCL or UEL. Given how the figures have trended, no one can have any doubt as to the benefits that the combined club licensing and club monitoring (Financial Fair Play) system has generated for football in Europe in particular and for the world in general. The level of debt of European clubs has fallen drastically, and professionalisation has also been fostered at all levels.

Likewise, the “UEFA system” has served as an example for similar projects based on the same principles to spring up not just among European associations and leagues but also at other non-European national confederations and associations, helping to consolidate the development of professional football worldwide, both structurally and financially.

These last two decades have also seen many CAS awards on decisions in both fields, Club Licensing and Financial Fair Play¹³⁵. The next few years will certainly bring new and relevant decisions that will enable us to continue discussing, from a purely legal point of view, the interpretation of a set of rules that have changed the face of football as we knew it at the end of the last century in Europe.¹³⁶

Nevertheless, the real effectiveness of the UEFA CL&FFP Regulations, as predicted years ago by one of the most reputable sports economists, will always depend on the credibility of the sanctions applied.¹³⁷

¹³⁴ See, among others, CAS 2016/A/4492 Galatasaray v. UEFA, at paragraph 78.

¹³⁵ The CFCB Procedural Rules (edition 2021), with the new structural configuration given to the CFCB, will surely bring us new complex procedural matters which will be ultimately solved by the CAS.

¹³⁶ In March 2021, UEFA’s official position regarding the future of the CL&FFP system was made known at a public forum under the title “Reinforcing the regulatory system for financial sustainability in European football” held on 25 March 2021. At that forum, it expressed the desire to initiate a consultation process in order to introduce relevant changes to the CL&FFP system, adapting it overall to the current

post-COVID-19 situation. This was subsequently confirmed by the UEFA President, Mr Aleksander Čeferin, first during his opening speech at the 45th UEFA Congress held in Montreux (Switzerland) on 20 April 2021 (video available at <https://www.uefa.com/insideuefa/about-uefa/organisation/congress/>, retrieved on 1 July 2021) and, a few weeks later, in his Foreword to the European Club Footballing Landscape (12th edition, 2021).

¹³⁷ Thomas Peeters and Stefan Szymanski: “Financial Fair Play in Football”, Research Paper 2013-021, September 2013.

The Fundamental Rights of the parties before the CAS

Estelle de La Rochefoucauld*

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I. Introduction

According to Wikipedia, the fundamental rights or fundamental freedoms can be defined as “a set of rights and freedoms that are essential for the individual and are in principle guaranteed in a state governed by the rule of law and a democracy”. It is an abstract concept for which there is no unanimous definition. The fundamental rights include in part human rights in the broad sense. A distinction can be made between freedoms or public liberties including notably personal freedom, human dignity, right to privacy, freedom of circulation, freedom of religion, the right to free speech, economic freedom; The guarantees of the rule of law including the right to equal treatment, the prohibition of arbitrariness, the principle of legality in criminal law, procedural guarantees; The social rights and; The political rights.

The Court of Arbitration for Sport (CAS) has the task of resolving legal disputes in the field of sport through arbitration. In order for arbitration before the CAS to constitute a genuine means for the parties to exercise their right to a judge while avoiding the fragmentation of sports litigation, it is necessary that the parties be judged by “*un tribunal structurellement indépendant des institutions sportives et que ce tribunal assure une protection satisfaisante de leurs droits, en particulier de leurs droits fondamentaux*” (a court that is structurally independent of the sports institutions and that this court provides satisfactory protection of their rights, in particular their fundamental rights) [Free translation].¹ The independence of the CAS has been recognized and repeatedly confirmed by the Swiss Federal Tribunal (SFTI)² and by the European Court of Human Rights (ECtHR)³. The need to protect the fundamental rights of the parties has also been consistently emphasized in the CAS case law.⁴

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¹ Maisonneuve M., *Le Tribunal Arbitral du Sport et les droits fondamentaux des athlètes*, RDLF 2017 chron. N°09.

² Principled decision *Lazutina* of 27 May 2003 ATF 129 III 445 consid. 3.3.; ATF 144 III 120 consid. 3.4.2; ATF 133 III 235 consid. 4.3.2.3(Mutu Pechstein); arrêts 4P.149/2003 of 31 October 2003 consid. 1.1; 4A_612/2009 of 10 February 2010 consid. 3.1.3; 4A_428/2011 of 13 February 2012 consid. 3.2.3; 4A_102/2016 of 27 September 2016 consid. 3.2.3; 4A_600/2020 consid. 5.5.2 & 5.6.

³ ECHR *Mutu and Pechstein v. Switzerland*, ECHR 324 of 2 October 2018. Compulsory arbitration in sport - in that one of the parties would not have voluntarily consented to the arbitration clause in favour of the CAS contained in the statutes of a federation - is permissible provided the arbitral tribunal is sufficiently independent and impartial which the ECtHR found CAS to be (See par. 149 and 159), recently confirmed (See ECtHR *Michel Platini v. Switzerland* 11 February 2020, par. 65).

⁴ “The CAS jurisdiction cannot be imposed to the detriment of an athlete’s fundamental rights. In other

A study of CAS jurisprudence shows that in many of the disputes dealt with by the CAS, the fundamental rights of the parties are at stake, whether they are disciplinary cases such as doping cases, player transfer cases, selection cases or more specific cases such as the hyperandrogenism and Difference in Sexual Development cases.

Among the fundamental rights identified in the CAS case law, two main categories stand out: the procedural rights or guarantees, including in particular the right to a fair trial and, the substantive rights including notably the right to privacy, the freedom of expression, the right to work, the freedom of movement, the right to practice a sporting activity, the right to free disposal of one's body and the right to integrity.

These essential or fundamental rights are protected by the CAS in different ways depending on the case. They are, in any event, protected through the indirect application of the European Convention on Human Rights (ECHR) at the procedural level (1) and to a certain degree at the substantive level (2); Substantive rights are protected through the application of fundamental rights of a state nature under the concept of public policy (3); Through the general principles of law constituting the *lex sportiva* (4); Through the direct application of sports regulations recognizing and protecting some aspects of the parties' fundamental rights (5) and; Through the application of certain principles of Community law (6).

The object of this paper is to examine how and to what extent, the athletes' and other parties' fundamental rights can be invoked and are protected before the CAS. Against this background, it is worth noting that certain fundamental principles are protected

words, an athlete basically cannot be precluded from obtaining in CAS arbitration at least the same level of protection of his/her substantive rights that he or she could obtain before a State court. As an author put it (U. Haas, Role and Application of the European Convention on Human Rights in CAS Procedures, in

at the same time by various legal instruments which echo each other and which, according to the circumstances applicable to a particular case, are applicable before the CAS. For example, the right to a fair trial is protected by numerous national laws, by international conventions such as the ECHR, and also by the *lex sportiva*. Therefore, there is inevitably an element of arbitrariness in the classification adopted below. Moreover, although the choice of CAS awards included in this article is both arbitrary and non-exhaustive, the selected awards are relevant to date keeping in mind that the CAS jurisprudence is likely to be enriched in this area.

II. Application of Procedural Rights under the European Convention on Human Rights: The Indirect Application of Article 6(1) ECHR

Article 6(1) ECHR, *Right to a fair trial* provides:

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.

Traditionally, according to the doctrine and case law, international conventions on

Int'l Sports Law Review 3, 42, at 53-54) "arbitration may be accepted, in the eyes of the European Convention on Human Rights, as a valid alternative to access to State courts, only if arbitration proceedings constitute a true equivalent of State court proceedings". CAS 2012/A/3031 par. 68.

fundamental rights such as the ECHR are only considered as directly applicable by the signatory States. However, these conventions are not considered as directly applicable law to the merits of the dispute by the arbitrators.⁵ Yet, the CAS jurisprudence considered that in disputes concerning civil rights and obligations, “(...) *certaines garanties procédurales découlant de l'article 6.1 de la CEDH, dans les litiges portant sur des droits et obligations de caractère civil, sont indirectement applicables même devant un tribunal arbitral – d'autant plus en matière disciplinaire. Cela est dû au fait que la Confédération suisse, en tant que partie contractante à la CEDH, doit veiller à ce que, au moment de la mise en œuvre des sentences arbitrales (au stade de l'exécution de la sentence ou à l'occasion d'un appel tendant à son annulation), les juges s'assurent que les parties à l'arbitrage aient pu bénéficier d'une procédure équitable, menée dans un délai raisonnable par un tribunal indépendant et impartial*”. (...) Certain procedural guarantees arising from Article 6(1) of the ECHR are indirectly applicable even before an arbitral tribunal - all the more so in disciplinary matters. This is because the Swiss Confederation, as a contracting party to the ECHR, must ensure that, at the time of enforcement of arbitral awards (at the stage of enforcement of the award or on the occasion of an appeal to set aside the award), judges ensure that the parties to the arbitration have had the benefit of a fair hearing, conducted within a reasonable time by an independent and impartial tribunal [Free translation].⁶

The respect of procedural guarantees is thus essential since it is these guarantees that ensure the safeguard of fundamental rights.

⁵ TAS 2011/A/2433, par. 23 “... par principe, les droits fondamentaux et les garanties de procédure accordés par les traités internationaux de protection des droits de l'homme ne sont pas censés s'appliquer directement dans les rapports privés entre particuliers et donc ne sont pas applicables dans les affaires disciplinaires jugées par des associations privées. Cette façon de voir est en harmonie avec la jurisprudence du Tribunal fédéral suisse, qui, dans le cadre d'un recours formé contre une décision du TAS, a précisé que “le recourant invoque les art. 27 Cst. et 8 CEDH. Il n'a cependant pas fait l'objet d'une mesure étatique, de sorte que ces dispositions ne sont en principe pas

These guarantees are enshrined both in the Swiss Constitution (Articles 29 to 32 of the Swiss Constitution), which can be applicable on a subsidiary basis by CAS arbitral tribunals on the basis of Article R58 of the CAS Code, and in the international treaties ratified by Switzerland, such as the ECHR (Article 6(1)) and the International Covenant on Civil and Political Rights (Article 14)⁷. These include, first of all, the right of access to the judge for any person wishing to bring an action, which results in the prohibition of denials of justice. This is a fundamental right recognised by the SFT⁸ which is included since 2000 in Article 29a of the Swiss Constitution. Recourse to the court must be effective, which translates into an obligation for signatory States to the ECHR to provide legal aid if it is necessary for effective access to the court. In this respect, a legal aid procedure has been established by the International Council of Arbitration for Sport (ICAS) to facilitate access to CAS arbitration for individuals without sufficient financial means.⁹ The procedural guarantees also include the right to be tried by a competent, independent and impartial tribunal established by law. This may be a State court or an arbitral tribunal competent to decide certain types of disputes such as the CAS.¹⁰ This guarantee presupposes that the tribunals are independent of the parties and of the State. In the case of the CAS, independence must be guaranteed vis-à-vis the parties and the sports institutions such as the International Olympic Committee, the World Anti-Doping Agency, the International Federations, the National Olympic Committees. Again, CAS independence vis à

applicables” (Arrêt du Tribunal fédéral du 11 juin 2001, Abel Xavier c. UEFA, consid. 2d, reproduit dans Bull. ASA 2001, p.566; partiellement publié aux ATF 127 III 429).

See also TAS 2012/A/2862 par. 106.

⁶ Ibid, par. 24.

⁷ For the purposes of this article and in the context of CAS jurisprudence, reference will only be made to Article 6 ECHR.

⁸ ATF 124 I 336, 340 Michailov.

⁹ Article S6 of the Code of Sport-related Arbitration (CAS Code).

¹⁰ CEDH Lighow 8 July 1986, Série A, n°102, 72.

vis sport institutions has been recognized by the SFT and the ECtHR. According to the SFT, the guarantee of an impartial judge prevents circumstances outside the trial from influencing the judgment in a way that would not be objective, in favour or to the prejudice of a party.¹¹

Article R59 para. 7 of the CAS Code provides for the principle of publicity of awards rendered on appeal unless the parties decide otherwise by mutual agreement. This principle derives from the notion of a fair trial provided for in Article 6(1) ECHR, as does the principle of publicity of the proceedings which was included in the CAS Code in 2019 at Article R57 par. 2 following the judgment of the ECtHR in the aforementioned Mutu Peschtein case.¹² Thus, following this decision, the CAS updated its procedural rules to widen the scope for hearings to be held in public, which can be held at the sole request of the athlete when the dispute is of a disciplinary nature. This possibility has been used shortly afterwards in the case WADA v. Sun Yang & FINA.¹³

At the international level, respect for the right to be heard is linked to the general guarantee of the right to a fair trial listed in Article 6(1) CEDH.¹⁴ According to the SFT, *“Le droit d’être entendu, tel qu’il est garanti à l’art. 29 al. 2 Cst. et aux art. 29 ss PA, comprend notamment le droit pour l’intéressé de s’exprimer sur les éléments pertinents avant qu’une décision ne soit prise touchant sa situation juridique, de produire des preuves pertinentes, d’obtenir qu’il soit donné suite à ses offres de preuve pertinentes, de participer à l’administration des preuves essentielles ou à tout le moins de*

s’exprimer sur son résultat, lorsque cela est de nature à influencer sur la décision à rendre. Le droit d’être entendu porte avant tout sur les questions de fait”. ([T]he right to be heard as guaranteed in Art. 29 para. 2 Cst. and Art. 29 ff. PA includes, *inter alia*, the right of the person concerned to express his or her views on relevant matters before a decision is taken affecting his or her legal position, to produce relevant evidence, to have its offers of relevant evidence acted upon, to participate in the taking of essential evidence or at least to express his or her views on its outcome, where this is likely to have an influence on the decision to be taken. The right to be heard relates primarily to questions of fact). [Free Translation].¹⁵ It is ensured by the CAS through the application of the procedural rules enshrined in the Code of Sport-related Arbitration.

In any event, the CAS panels have always sought to guarantee the parties’ respect for the fundamental principles of procedure, in accordance with the notion of procedural public order as defined by the case law of the SFT.

In CAS 2011/A/2426, the CAS panel stressed that *“[W]ith specific regard to the ECHR, international treaties on human rights are meant to protect the individuals’ fundamental rights vis-à-vis governmental authorities and, in principle, they are inapplicable per se in disciplinary matters carried out by sports governing bodies, which are legally characterized as purely private entities. (...) However, the Panel is mindful that some guarantees afforded in relation to civil law proceedings by article 6.1 of the ECHR are indirectly applicable even before an arbitral tribunal – all the more so in*

It is worth noting that in its judgement 4A_486/2019, in an appeal against a CAS decision, the SFT held that even if Article 6 ECHR applied, the exclusion of the public from the preliminary hearing did not infringe Article 6(1) ECHR because the hearing only concerned purely legal and highly technical issues based on undisputed underlying facts.

¹¹ See CAS 2019/A/6148.

¹² Auer/Malinverni/Hottelier, *Droit Constitutionnel Suisse* Vol. II, *Les Droits Fondamentaux*, p. 603 par. 1313.

¹³ ATF 129 II 497, 505.

¹¹ Auer A., Malinverni G., Hottelier M., *Droit Constitutionnel Suisse*, Vol. II, *Les droits fondamentaux* p.575 par. 1236; ATF 38 I 95 Flotron;
¹² Article R57 al. 2 “At the request of a physical person who is party to the proceedings, a public hearing should be held if the matter is of a disciplinary nature. Such request may however be denied in the interest of morals, public order, national security, where the interests of minors or the protection of the private life of the parties so require, where publicity would prejudice the interests of justice, where the proceedings are exclusively related to questions of law or where a hearing held in first instance was already public”.

disciplinary matters – because the Swiss Confederation, as a contracting party to the ECHR, must ensure that its judges, when checking arbitral awards (at the enforcement stage or on the occasion of an appeal to set aside the award), verify that parties to an arbitration are guaranteed a fair proceeding within a reasonable time by an independent and impartial arbitral tribunal. These procedural principles thus form part of the Swiss procedural public policy".¹⁶

In CAS 2012/A/2747, the arbitral panel underlined the right to a fair trial enshrined in Article 6(1) ECHR and considered that "An exclusion of any external review (be it by a state court or an arbitral tribunal) of disciplinary decisions taken by the judicial organs of an association would be in contradiction with this fundamental right, since internal bodies of federations do not meet these requirements. According to the principle of good faith ("Vertrauensprinzip") the rules and regulation of a federation should be interpreted in a way that are consistent with the mandatory provisions and principles. An (ex ante) exclusion of any external review of disciplinary measures in the rules and regulations of an association would be null and void from a Swiss law perspective".¹⁷ Likewise, according to the jurisprudence of the ECtHR, where a party has access to a court or an arbitral tribunal like the CAS that has full judicial review jurisdiction including on the merits, the decision of a first instance authority is not in breach of Article 6 of the ECHR.¹⁸

Regarding the issue of anonymous witness, the CAS jurisprudence also recognized that the matter "is linked to the right to a fair trial guaranteed under Article 6 ECHR, especially the

right for a person to examine or have examined witnesses testifying against him or her (Article 6(3) ECHR). As provided under Article 6(1) ECHR, this principle applies not only to criminal procedures but also to civil procedures". Again, the panel recalled that "[E]ven though it is not bound directly by the provisions of the ECHR (cf. Art 1 ECHR), it should nevertheless account for their content within the framework of procedural public policy. Furthermore, Article 29.2 of the Swiss Constitution guarantees the same rights, aimed at enabling a person to verify and discuss the facts alleged by a witness".¹⁹ In this regard, the CAS panel admitted that the admission of anonymous witnesses possibly "infringes upon both the right to be heard and the right to a fair trial of a party guaranteed by the ECHR and the Swiss Constitution since personal data, record of a witness and the right to ask questions are important elements of information to have in hand when testing the witness' credibility".²⁰ However, with respect to anonymous witness statements, the SFT decided, in the context of criminal proceedings, that their admission does not necessarily violate the right to a fair trial.²¹ According to the SFT, if the applicable procedural code provides for the possibility to prove facts by witness statements, it would infringe the principle of the court's power to assess the witness statements if a party was prevented from the outset from relying on anonymous witness statements. Against this background, the right of a party to use anonymous witness statements must be subject to strict conditions, namely the witness must be concretely facing a risk of retaliations by the party he is testifying against if his identity was known; The witness must be questioned by the court itself which must

¹⁶ CAS 2011/A/2426 pars 66, 67; See SFT 4P.64/2001, ATF 127 III 429 consid. 2d.

¹⁷ CAS 2012/A/2747 par. 5.17; CAS 2011/A/2384 & 2386, par. 172; CAS 2011/A/2433, par. 58.

¹⁸ Case 43509/08, A. Menarini Diagnostics SRL v. Italy.

See also CAS 2011/A/2362 par. 41 and CAS 2019/A/6388 pars 155, 156 "This CAS jurisprudence [de novo jurisprudence] is actually in line with European Court of Human Rights decisions, which in par. 41 of the Wickramasinghe Case concluded that "even where an adjudicatory body determining disputes over civil rights and obligations does not comply with Article 6 (1) [ECHR] in some respect, no

violation of the Convention will be found if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 (1)".

¹⁹ CAS 2011/A/2384 & 2386 pars 21-23.

²⁰ Ibid. par. 24. See also CAS 2009/A/1920; CAS 2019/A/6388 pars 124 – 137: as a matter of principle, the hearing of "anonymous" witnesses is not *per se* prohibited as running against the fundamental right to a fair trial, as recognized by the ECHR (Article 6) (and the Swiss Constitution (art. 29(2)).

²¹ ATF 133 I 33.

check his identity and the reliability of his statements and; The witness must be cross-examined through an “audiovisual protection system”.²² In another case, the arbitration panel cited the ECHR, which emphasised in a criminal context that while Article 6 guarantees the right to a fair trial, it does not regulate the admissibility of evidence as such, which is therefore primarily a matter for domestic law.²³

Equally, in CAS 2015/A/4304, the CAS recognized that fair proceeding excludes the retroactive application of a longer statute of limitation. It does not necessarily follow from the qualification of the statute of limitation as a “procedural rule” that there are no limits to a retroactive application of such rule. Instead, it follows from Article 6(1) ECHR that the procedure must be “fair”. Applying retroactively a longer statute of limitation to a case that was already time-barred at the time of the entry into force of the new provision is incompatible with a “fair proceeding”. All the interests protected by a statute of limitation, in particular the legitimate procedural interests of the “debtor” / “defendant” would be violated if an association could retroactively allow for the persecution of a disciplinary offense already time-barred. Such open-ended approach to disciplinary cases poses a serious threat to the principle of legal certainty that constitutes a violation of Article 6(1) ECHR.²⁴

Moreover, in CAS 2017/A/5003, the CAS panel noted that the privilege against self-incrimination has been recognized as an implied right under Article 6 ECHR in various judgments of the ECtHR on the

fairness of criminal trials²⁵. However, the guarantees recognized in a criminal trial are inapplicable *per se* in a disciplinary proceeding before the CAS. The CAS panel considered that the privilege against self-incrimination is the result of a balance of interest and, thus, must be assessed in light of the respective procedural and factual framework. In this respect, under the circumstances of the particular case, the panel considered “[S]ince – differently from criminal law – the Appellant has voluntarily submitted to the rules and regulations of FIFA and considering that, unlike public authorities, sports governing bodies have limited investigative powers, compulsory cooperation for fact-finding is in principle permissible. Establishing and applying such rules is, in principle, essential to maintaining the image and integrity of sports. For this reason, there is no contradiction in the [FIFA Code of Ethics] FCE placing the burden of proving an infringement on FIFA, while imposing on parties an obligation to cooperate in fact-finding, as the Appellant suggests [...]. Of course, the fact that the privilege against self-incrimination may not be invoked in this sports disciplinary proceeding by the Appellant does not mean that there is a duty on someone in his position to confess to his own disciplinary wrongdoing, but merely that there is a duty to cooperate and, in particular, to attend interviews with disciplinary bodies if so requested”.²⁶

Because sports sanctions do not come under criminal law within the meaning of the ECHR, Article 6 (2) of the ECHR related to the presumption of innocence & Article 6 (3) of the ECHR related to the examination of witnesses for everyone charged with a criminal offence are not applicable before the CAS, even indirectly.²⁷

²² See notably CAS 2011/A/2384 & 2386 par. 31.

²³ TAS 2011/A/2433 par. 27.

²⁴ CAS 2015/A/4304 pars 46 – 50.

²⁵ e.g. *Funke v. France* of 25 February 1993, *John Murray v. United Kingdom* of 8 February 1996, *Saunders v. The United Kingdom* of 17 December 1996.

²⁶ CAS 2017/A/5003 pars 265 - 267.

²⁷ CAS 2013/A/3139 par. 90: “Insofar as the Club relies on Article 6(2) of the ECHR in order to argue that UEFA violated the *nulla poena sine lege* principle, this argument must fail as Article 6(2) is only

applicable to criminal proceedings and the present proceedings are not of a criminal nature”.

CAS 2011/A/2463 pars 12 – 16: “In application of Article R44.3 of the CAS Code, a CAS panel has the power to order the examination of witnesses if deemed necessary. In this respect, the mere fact for a panel to refuse, for valid reasons, to use its investigatory powers to hear a witness does not violate the principle of equality of arms provided for in the European Convention for Human Rights (ECHR). As a general rule, only shortcomings in legal representation which are imputable to the State

Likewise, there is no direct application of international human rights treaties, in particular Article 8 of the ECHR regarding the right to private life.²⁸ In this respect, a CAS panel refused to apply Article 1 of the Additional Protocol to the ECHR on respect for property or Article 8 of the ECHR on the right to privacy.²⁹ A special mention should be made to a judgement of the ECtHR that established that in the context of the fight against doping, there was no violation of the principle of respect for private and family life in relation to Article 8 of the ECHR due to the whereabouts obligation for target group athletes. The Court had examined the merits of this obligation, as enshrined in the French Sport Code pursuant to the World Anti-Doping Code and considered that the infringement of these rights pursued legitimate aims.³⁰

III. Application of Substantive Rights under the European Convention on Human Rights

Article 10 ECHR, *Freedom of expression* provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or

authorities can give rise to a violation of Article 6(3)(c) ECHR”.

See also TAS 2017/A/4999 para. 97; CAS 2010/A/2311 & 2312, par. 33.

²⁸ TAS 2011/A/2433 par. 57 and TAS 2012/A/2862 par. 105.

public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

In an appeal against a decision issued by the World Karate Federation (WKF) imposing upon the former General Secretary of the WKF the disciplinary sanction of suspension of membership for a period of six months, the CAS panel emphasized the importance of protecting - subject always to the limits imposed by law - freedom of speech and the right to criticize in good faith those in positions of authority even if there may be errors of fact in the criticism. In this respect, the CAS panel referred to the jurisprudence of the ECHR as indicative, and, in jurisdictions to which it applies, compulsive.³¹ The panel also stressed that whistle blowers can perform a valuable service in exposing mismanagement (or worse) in the affairs of sports governing bodies as in other areas.

It cannot be excluded that other substantial rights than the freedom of expression protected under the ECHR will also be safeguarded by the CAS in the future.

IV. Indirect Application of Substantive Rights of a State Nature under the Concept of Public Policy

According to the Swiss doctrine, “*Il est maintenant admis que la compétence de l'arbitre ne peut se limiter à l'adjudication d'intérêts privés. Il entre dans sa mission le devoir de sauvegarder les valeurs universelles et donc d'ordre public*” (It is now accepted that the competence of the arbitrator cannot be limited to the

²⁹ TAS 2012/A/2862 par. 107 and CAS 2009/A/1957 pars 14, 18 – 25.

³⁰ FNASS et al. c. France, n° 481581/11 et 77769/13 18 janv. 2018.

³¹ CAS 2014/A/3516 par. 116 and ECtHR *Reynolds v Times Newspapers* 2001 .2 AC 127 and the Strasbourg cases cited at pp.203-204.

adjudication of private interests. It is part of his mission to safeguard universal values and therefore public policy) [Free translation].³²

In any case, in the event of an appeal to the SFT, the CAS awards will be reviewed in particular with regard to public order.

According to the definition adopted by the STF, an award is incompatible with public policy if it disregards the essential and widely recognised values which, according to the prevailing conceptions in Switzerland, should constitute the foundation of any legal order.³³ A distinction is made between a substantive and a procedural public order.³⁴ In its case law, the Federal Court has given the following definition of this dual concept:³⁵

“L’ordre public procédural garantit aux parties le droit à un jugement indépendant sur les conclusions et l’état de fait soumis au Tribunal arbitral d’une manière conforme au droit de procédure applicable; il y a violation de l’ordre public procédural lorsque des principes fondamentaux et généralement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de la justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit”. (Procedural public policy guarantees the parties the right to an independent judgment on the findings and facts submitted to the arbitral tribunal in a manner consistent with the applicable procedural law; There is a violation of procedural public policy when fundamental and generally recognised principles have been violated, leading to an unbearable contradiction with the sense of justice, so that the decision appears to be incompatible with the values recognised in a constitutional state). [Free translation].

“Une sentence est contraire à l’ordre public matériel lorsqu’elle viole des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l’ordre juridique et le système de valeurs déterminants; au

nombre de ces principes figurent, notamment, la fidélité contractuelle, le respect des règles de la bonne foi, l’interdiction de l’abus de droit, la prohibition des mesures discriminatoires ou spoliatrices, ainsi que la protection des personnes civilement incapables”. (An award is contrary to substantive public policy if it violates fundamental principles of substantive law to such an extent that it can no longer be reconciled with the relevant legal order and system of values; These principles include, *inter alia*, contractual fidelity, respect for the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory or spoliating measures, and the protection of civilly incompetent persons). [Free translation].

Article R58 of the CAS Code dealing with the law applicable to the merits, provides with regard to the appeal procedure that *“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*

By agreeing to submit a dispute to the CAS as the court of arbitration according to the CAS Code, the parties have made a choice of law by indirectly agreeing to the application of Article R58 of the CAS Code.³⁶

According to the Swiss doctrine, *“This implicit agreement on Art. R58 of the CAS Code takes precedence over any explicit choice of law by the parties (for example in the contract), since the purpose of Art. R58 of the CAS Code is to restrict the autonomy of the parties. This Article provides for a mandatory hierarchy of the applicable legal framework, which the parties cannot change. Consequently, the parties are entitled to freedom of choice of law solely within the limits set by Art. R58 of the CAS Code, with the*

³² Serge Lazareff, *Mélanges en l’honneur de Pierre Tercier, Schulthess, Peter Gauch, Franz Werro, Pascal Pichonnaz*, p. 851.

³³ ATF 132 III 389, consid. 2.2.3.

³⁴ *Ibid* consid. 2.2.1.

³⁵ SFT 4A_370/2007, consid. 5.1.

³⁶ CAS 2014/A/3850, pars 45 et seq.; see also Mavromati/Reeb, *The Code of the Court of Arbitration for Sport*, 2015, Art. 58 no. 101.

*result that they can only determine the subsidiarily applicable law. In contrast, under Art. R58 of the CAS Code the “applicable regulations” always primarily apply, regardless of the will of the parties”.*³⁷

Against this background, where there is a gap in the applicable sports regulation, the CAS arbitral panels will use the subsidiary applicable law to enforce the parties’ fundamental rights. In practice, as many sport institutions have their seats in Switzerland, Swiss law will often be the subsidiary applicable law on the basis of Article R58 of the CAS Code.

Thus, in CAS 2019/A/6345, the Sole Arbitrator resorted to Swiss law to fill the gaps of the applicable regulation regarding the protection of human rights: *“To the extent that there are gaps in these statutes [FIFA Statutes], the Sole Arbitrator will have recourse to Swiss law (which, anyway reflects a standard of protection of human rights at least equivalent to that embedded in the European Convention on Human Rights) in order to fill the observed gaps”.*³⁸

Likewise, the CAS panels applied Articles 27 and 28 of the Swiss Civil Code to protect the personality rights of the parties involved:

- In TAS 2011/A/2433, the CAS panel considered that sport federations’ regulations must not undermine the personality rights of its members. In particular, the panel found that FIFA cannot limit itself to respecting its own regulations. Indeed, while it is true that the Swiss legislator wished to leave a large degree of autonomy to the associations as

regards their operation and organisation, no regulatory provision may infringe the personality rights of its members.³⁹

- In the same case 2433, the respect of privacy has been asserted as one of the rights protected by Article 28 of the Swiss Civil Code.⁴⁰
- In TAS 2012/A/2720, the freedom to exercise a sporting activity of one’s choice has been asserted. In this respect, the CAS panel considered that the freedom to engage in a sporting activity of one’s choice, between partners of equal value and against equivalent opponents, is one of the personality rights protected by Article 28 CC.⁴¹
- In the same award 2720, the right to fulfilment through sporting activity has been stated as part of the personality rights including in particular the right to participate in competitions with athletes of the same level.⁴²
- In the doping case CAS 2016/O/4481, although the athlete contended that the covert recordings used to prove that she was doped were illegally obtained evidence in violation of her fundamental and procedural rights as well as the principle of good faith, the CAS panel found that under the circumstances, the interest in discovering the truth should prevail over the interest of the athlete not to use the covert recordings against her. The athlete based her argument particularly on a violation of her privacy

³⁷ U. Haas, Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law, CAS Bulletin 2015-2. See also CAS 2015/A/4105 pars 32 ff and CAS 2015/A/4350 par. 44 ff.

³⁸ CAS 2019/A/6345, par. 35.

³⁹ CAS 2011/A/2433 par. 85.

⁴⁰ TAS 2011/A/2433 par. 56: “De manière générale, il ne fait aucun doute que le respect de la vie privée fait partie des droits protégés par l’article 28 CC”. However, as seen previously [see footnote n°30], this assertion must be nuanced by the fact that, in the context of the fight against doping, there is no

violation of the principle of respect for private and family life in relation to Article 8 of the ECHR due to the whereabouts obligation for target group athletes, since the infringement of the privacy right in this respect are considered to pursue legitimate aims.

⁴¹ TAS 2012/A/2720 par. 10.23.

⁴² TAS 2012/A/2720 par. 10.24. “En ce qui concerne le sport amateur, la doctrine relève que le droit à l’épanouissement par l’activité sportive, que ce soit professionnellement ou non, fait partie des droits de la personnalité du sportif. Ce droit comprend notamment le droit de participer à des compétitions réunissant des sportifs du même niveau que lui”.

rights. The panel was not prepared to accept that the principle of good faith had been violated.⁴³

- In CAS 2013/A/3091, 3092 & 3093, the CAS panel found that according to Articles 28 et seq. of the Swiss Civil Code, any infringement of personality rights caused by another is presumed to be illegal and subject to penalties unless there is a justified reason that overturns this presumption. Personality rights apply to the world of sport. For athletes, personality rights encompass in particular the development and fulfilment of personality through sporting activity, professional freedom and economic freedom. An athlete who is not actively participating in competitions depreciates on the market and reduces his future career opportunities. Athletes have therefore a right to actively practice their profession. To the extent that Articles 28 et seq. of the Swiss Civil Code protect parties from negative actions and require offending parties to refrain therefrom, but do not grant rights to positive actions, such right to actively practice one's profession is resolved notably by labour law.⁴⁴
- In CAS 2010/A/2261 & 2263, the CAS panel considered that in terms of substantive public policy, a strict application of the principles of proportionality of sanctions and personality rights has to be applied by the CAS. In this respect, only a manifest and serious violation, out of proportion to the conduct sanctioned or going beyond a "mere" disregard of Articles 27 and 28 of the Swiss Civil Code could lead to the annulment of a CAS award before the

SFT. In this regard, the SFT annulled a CAS award that confirmed a disciplinary sanction which infringed a player's economic freedom and which had the effect of handing him over to the "arbitrariness of his former employer"; The CAS decision dismissing the player's submissions related to Articles 27 and 28 CC was then annulled by the SFT for a violation of privacy contrary to public policy (Art. 190 (2) (e) PILA)⁴⁵.

In a judgement dismissing an appeal against a CAS award, the SFT considered that "[S]i la Convention européenne des droits de l'homme ne s'applique pas directement à l'arbitrage puisque la violation des dispositions de cette convention ne compte pas au nombre des griefs limitativement énumérés par l'art. 190 al. 2 LDIP, la prise en considération des principes sous-tendant ces dispositions-là lors de l'examen des griefs ne devrait pas être exclue d'emblée. Dans ce sens, on peut admettre que serait contraire à la notion d'ordre public matériel, telle que la conçoit le droit suisse, une sentence qui porterait atteinte, même indirectement, à un principe aussi fondamental que celui de l'interdiction du travail forcé". ([A]lthough the European Convention on Human Rights does not apply directly to arbitration, since the violation of the provisions of this Convention is not one of the complaints listed exhaustively in Article 190(2) of the Swiss Private International Law Act (PILA), consideration of the principles underlying these provisions when examining the complaints should not be excluded from the outset. In this sense, it can be accepted that an award that infringes, even indirectly, a principle as fundamental as the prohibition of forced labour would be contrary to the concept of substantive public policy as understood in Swiss law). [Free translation].⁴⁶

⁴³ CAS 2016/O/4481, par. 106.

⁴⁴ CAS 2013/A/3091, 3092 & 3093 pars 224 & 225. See also ATF 120 II 369; ATF 102 II 211; ATF 137 III 303; ATF 137 III 303; SFT 4A_558/2011; BADDELEY M., *Le sportif, sujet ou objet?*, in: Revue de Droit Suisse; 1996 II, pp. 135 et seq., p. 162; LUDWIG/SCHERRER, *Sportsrecht, eine Begriffserläuterung*, Zürich 2010, p. 212; AEBI-MÜLLER/MORAND, *Die persönlichkeitsrechtlichen*

Kernfragen der "Causa FC Sion", CaS 2012, p. 234-235; OSWALD D., *Le règlement des litiges et la repression des comportements illicites dans le domaine sportif*; in: Mélanges Grossen, Basel 1992, p. 74

⁴⁵ SFT 4A_558/2011.

⁴⁶ SFT 4A_370/2007, consid. 5.3.2.

See also 4A_178/2014, consid. 2.4.; REHBINDER/STOCKLI, *Berner Kommentar*, 2010, N 13 to Art. 328;

V. Recourse to the General Principles of Law Constituting the *Lex Sportiva*

*“The term ‘Lex sportiva’ has been the subject of numerous academic debates. Its content, nature and application are constantly approached through different prisms: a jurisdictional approach, a national approach, a liberal approach, a formalistic approach etc. It is however, commonly accepted that the Lex sportiva is constantly being interpreted and implemented and evolved through the jurisprudence of sports tribunals, in particular the Court of Arbitration for Sport (CAS)”.*⁴⁷ *The majority of legal scholars admit that the Lex sportiva is – at least – associated with the jurisprudence of CAS. The CAS awards and advisory opinions of CAS have been received as either a source of the Lex sportiva or as a “common law of interpretation” of regulatory documents which relate to sports*⁴⁸.

At this stage, it shall be observed that the principles recognised as being part of the *lex sportiva* often have their origin in national public orders.

Under the CAS jurisprudence, some principles have been established in this respect.

- The principle of prohibition of arbitrary or unreasonable rules and measures. *“Sports law has developed and consolidated along the years, particularly through the arbitral settlement of disputes, a set of unwritten legal principles – a sort of lex mercatoria for sports or, so to speak, a lex ludica – to which national and international sports federations must conform, regardless of the presence of such principles within their own statutes and regulations or within any applicable national law, provided that they do not conflict with any national “public policy” (“ordre public”) provision applicable to a given case. General principles of law drawn from a comparative or common denominator reading of various domestic legal systems and, in particular, the prohibition of arbitrary or unreasonable rules and*

⁴⁷ Andreas Zagklis, *Lex Sportiva – From Theory to Practice: Lessons to be learned from the Jurisprudence of the Court of Arbitration for Sport (CAS) and of the Basketball Arbitral Tribunal (BAT)*, *Lex Sportiva* edited by Klaus Vieweg Duncker & Humblot, p.179.

⁴⁸ *Ibid.* p. 180.

measures can be deemed to be part of such lex ludica”.

⁴⁹

- The principle of proportionality, in particular related to sanctions has been constantly asserted. In CAS 91/56 and CAS 92/63, the panel stated 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 infringement. The CAS has evidenced the existence and the importance of the principle of proportionality on several occasions”.*⁵⁰ In the same vein, the CAS also stressed the requirement of proportionality in the context of IOC regulations prohibiting doped athletes from participation in the next Olympic Games and providing therefore for an extended period of ineligibility (non-participation) not provided for under the WADA Code (the so-called “Osaka “rule”). The rule constituted a substantive change to the WADA Code, which signatories of the WADA Code have contractually committed themselves not to do and which is prohibited by Article 23.2.2 of the WADA Code.⁵¹

- The protection of legitimate expectations, in particular the protection of athletes’ legitimate expectations has repeatedly been recognised by the CAS: *“[W]here the conduct of one party has led to legitimate expectations on the part of a second party, the first party is estopped from changing its course of action to the detriment of the second party”*⁵² The CAS ad hoc division considered that in the absence of a clear provision in the Olympic Charter and in the rules of the relevant International Federation entitling the IOC to intervene in the disciplinary proceedings taken by that International Federation, an athlete had a legitimate expectation that, once he had completed the punishment imposed on him, he would be permitted to enter and participate in all competitions absent some new reason for refusing his entry. If it were

⁴⁹ CAS 98/200, par. 156.

⁵⁰ See also CAS 99/A/246 para. 31.

⁵¹ CAS 2011/O/2422 para. 51.

⁵² CAS 98/200, par. 60; See also CAS 94/129 par. 33; CAS 2002/O/401 par. 68.

otherwise, there would be a real risk of double jeopardy.⁵³

- The prohibition to contradict oneself to the detriment of others “*venire contra factum proprium*”. A final decision might be modified subsequently only in limited circumstances, i.e. if a party to the decision requests the revision or interpretation thereof. The principle of immutability of final decisions is not overridden by considerations on the merits, i.e. even if a decision is materially wrong, once it has become final, it cannot be modified, unless through such a request.⁵⁴ “*This consequence also results from the general principle of prohibition of contradictory actions or “venire contra factum proprium nulli conceditur”. In addition, (...) an administrative body might review its decision, if a new circumstance exists. The application of the above Swiss law principles is vouched for by Article R58 of the Code of Sports-related Arbitration (the “Code”), given that the regulations of the [Fédération Equestre Internationale] FEI are silent on the issue of conflict between two successive decisions”*.”⁵⁵

- The Principle of legal certainty has been recognized by the CAS.⁵⁶

- The principle of legality and predictability of sanctions has been constantly asserted by the CAS. Every sanction requires an express and valid rule providing that someone could be sanctioned for a specific offence. The different elements of the rules of a federation shall be clear and precise, in the event they are legally binding for the athletes. Inconsistencies/ambiguities in the rules must be construed against the legislator, as per the

principle of “*contra proferentem*”. Furthermore, when interpreting the rules of a federation, it is necessary to consider whether the spirit of the rule (in as much as it may differ from the strict letter) has been violated. It follows that an athlete or official, when reading the rules, must be able to clearly make the distinction between what is prohibited and what is not. The principle of legality and predictability of sanctions which requires a clear connection between the incriminated behaviour and the sanction and calls for a narrow interpretation of the respective provision should be protected. However, the control upon the rules of the federations is manifestly relativized by the fact that the certitude of the elements provided for disciplinary sanctions is not as strict as criminal law’s requirements in this respect. Such case law rather recognizes general elements, which constitute the basis for disciplinary sanctions.⁵⁷ This principle can be linked to the principle of strict interpretation in repressive matters.⁵⁸ The principle that follows the principle of legality and predictability of sanctions is the principle “*nulla poena sine culpa*”⁵⁹.

- The respect for the rights of the defence. This principle has been illustrated notably in CAS case 2007/O/1381 where a regulatory provision allowing an athlete to be excluded permanently from a competition on the basis of mere suspicion, on the sole condition that an investigation had been opened against the athlete and without the athlete having been heard, was found to violate the principle of “*nulla poena sine culpa*”, the principle of equal treatment and the right to be heard.⁶⁰

⁵³ CAS 02/001 par. 15.

⁵⁴ SFT of 12 September 2001, published in SJ 2002 I p. 9 ff., consid.3a and 3b.

⁵⁵ CAS 2010/A/2058, par. 18. See also CAS 98/200 par. 60; TAS 2008/A/1740, par.132 and TAS 2001/A/340 par. 23.

⁵⁶ TAS 2004/A/791 SP par. 50; TAS 2003/O/530 par. 2; CAS 2015/A/4304 pars 46 – 50.

⁵⁷ CAS 2014/A/3832 & 3833 par. 86. See also CAS 2007/A/1363 par. 16.

⁵⁸ TAS 99/A/230 par. 10.

⁵⁹ CAS 2014/A/3516 par. 104. “It is, however axiomatic that before a person can be found guilty of

a disciplinary offence, the relevant disciplinary code must proscribe the misconduct with which he is charged. *Nulla poena sine lege*. It is equally axiomatic for the relevant provision with which he is charged to be in breach first in accordance with the *contra proferentem* rule will be strictly construed. *Nulla poena sine lege clara*. (CAS 207/O/1381 par. 61 CAS 205/C/976 986 par. 126). It is not sufficient to identify a duty; it is necessary as well to stipulate that breach of such duty will attract disciplinary sanctions”.

⁶⁰ 2007/O/1381 par. 82, 83. See also CAS 2000/A/290 par. 10.

- The respect of the right to a fair procedure⁶¹ among which the fundamental right of an athlete to be notified of and be given the opportunity to attend the opening of his B sample in a doping context.⁶²

- The interpretation of federations' rules and regulations in light of principles of "human rights". In CAS 2015/A/4304, the CAS panel stressed that "[a] federation cannot opt out from an interpretation of its rules and regulations in light of principles of "human rights" just by omitting any references in its rules and regulations to human rights".⁶³

- The Principle of non-retroactivity in repressive matter, subject to *lex mitior*.⁶⁴

- The Principle of prohibition of denial of justice.⁶⁵

- The principle *non bis in idem*.⁶⁶

- The principle of freedom of expression.⁶⁷

VI. Recognition of Athlete's Fundamental Rights on the Basis of Sport Regulations

As seen, when dealing with a dispute, the CAS panels should first apply the applicable sport regulations. Those regulations may include some rules recognizing and protecting the athlete's fundamental rights acknowledged by the relevant sport federations such as the prohibition of discrimination, racism, sexual harassment and the protection of human rights.

- *Prohibition of discrimination*

CAS jurisprudence enshrined the principle of non-discrimination recognized by the IOC

⁶¹ CAS 2013/A/3309 par. 87.

⁶² CAS 2014/A/3639 par. 83; See also CAS 2010/A/2161 and CAS 2002/A/385.

⁶³ CAS 2015/A/4304 par.7

⁶⁴ CAS 2000/A/289 par.7.

⁶⁵ CAS 2017/A/5086 par. 129;

⁶⁶ CAS 2007/A/1396 & 1402, para. 118; CAS 2015/A/4319 paras. 70-72.

Charter, the national laws applicable on a subsidiary basis and the relevant International Federations' regulations.

In CAS 2014/A/3759, the CAS panel found the International Association of Athletics Federations' (IAAF) Hyperandrogenism Regulations on a *prima facie* discriminatory based on the IOC Charter, the IAAF Constitution and the laws of Monaco. The CAS panel mainly considered that those regulations only applied to female athletes and that it is not in dispute that it is *prima facie* discriminatory to require female athletes to undergo testing for levels of endogenous testosterone when male athletes do not. In addition, it is not in dispute that the Hyperandrogenism Regulations placed restrictions on the eligibility of certain female athletes to compete on the basis of a natural physical characteristic (namely the amount of testosterone that their bodies produce naturally) and were therefore *prima facie* discriminatory on that basis too. As a result, the regulations were suspended.⁶⁸

Four years later, in the Caster Semenya case, the CAS panel found that the IAAF Difference in Sexual Developments (DSD) regulations were also discriminatory but it considered on the current state of the evidence, that such discrimination were necessary, reasonable and proportionate to ensure the fairness of competitions, the integrity of women's athletics and the maintenance of the "protected class" of female athletes in certain events.⁶⁹

In CAS 2017/A/5306, the CAS panel found that conduct will be considered to be "discriminatory" for the purposes of Article 58 of the Asian Football Confederation Disciplinary and Ethics Code (AFC Code) if it "*offends the dignity of a person or groups of persons*

⁶⁷ CAS 2014/A/3516 par.116; CAS 2020/A/6693 par. 137 (6).

⁶⁸ 2014/A/3759, para. 448:

⁶⁹ CAS 2018/O/5794. The appeal made by Caster Semenya and ASAF before the Swiss Federal Tribunal against the CAS decision has been dismissed. An appeal against the SFT decision is pending before the ECtHR.

through contemptuous, discriminatory or denigratory words or actions concerning race, colour, language, religion or origin (...)". A banner exposed in a stadium on the date of a match containing the words "*Annihilate British Dogs, Exterminate Hong Kong Independence Poison*", displayed statements constituting "discrimination" within the meaning of Article 58.1 of the AFC Code. Understood in context, the words contained in the banner were clearly contemptuous and denigratory of the people of Hong Kong and their historical connection to Great Britain. The words were also discriminatory of people of Hong Kong origin and the reference to "Independence" in the context of Hong Kong's recent history was an opinion of a political character.⁷⁰

Similarly, in CAS 2014/A/3562, disciplinary sanctions for behaviour offending the dignity of a group of persons after the conclusion of a match (racism) i.e. words having a discriminatory connotation were decided by the CAS panel on the basis of Article 58(1)(a) of the FIFA DC.

In CAS 2010/A/2204, referring to part 2 Art. 22 of the applicable Labour Code of the Russian Federation that stipulates, *inter alia*, the obligation for the employer to ensure equal payment to employees for their labour of equal value, the CAS panel found that there was a discrimination of the labour rights of the football players in question relative to other players and officials of the Russian Football Union.⁷¹

- Prohibition of sexual harassment

In CAS 2019/A/6388, a life ban was imposed on a football official who violated the FIFA Code of Ethics (FCE) and committed offences that violated basic human rights and damaged the mental and physical dignity and integrity of young female players, i.e. Lack of protection, respect or safeguard (violation of articles 23 para. 1 FCE; Sexual harassment (violation of articles 23 para. 4 FCE); Threats and promises of

advantages (violation of articles 23 para. 5 FCE); Abuse of position (violation of article 25 FCE)⁷².

- Principle of proportionality of sanctions

In CAS 2020/O/6689, the CAS panel found that "*pursuant to the [International Standard for Code Compliance with Signatories (of the World Anti-Doping Code)] ISCCS, [T]he Panel bears firmly in mind at all times the paramount need to consider notions of proportionality in the imposition of Signatory Consequences (para. 719). In applying principles of proportionality, the Panel does not consider it is necessary to extend the application of any of the Proposed Signatory Consequences to the Youth Olympic Games (para 732).*

(...) the Panel considers it would be disproportionate to impose severe restrictions on the next generation of Russian athletes. In particular, as the doping schemes addressed in the McLaren Reports occurred between 2012 and 2016, (...) it is very unlikely that any athletes who will be participating in the Youth Olympic Games were involved in those schemes (para 733).

The Panel considers that these young athletes ought to be encouraged to participate in international sporting events as a generation of athletes that respect clean sport. (...) it is necessary to protect the new generation of Russian athletes to achieve the goal of clean Russian sport. (para 734).

- Human rights

In the above referred case CAS 2020/O/6689, the panel considered that "*(...) pursuant to Article 4.4.2 of the [International Standard for Code Compliance with Signatories (of the World Anti-Doping Code)] ISCCS, the Panel is to interpret and apply the ISCCS in light of the fact that it has been drafted giving due consideration to the principles of respect of human rights, proportionality and other applicable legal principles (para. 545).*

[T]he requirement to compete as neutral athletes, in the manner determined by the Panel (which permits use of national colours and the name Russia on a limited basis), does not violate the human dignity or

⁷⁰ CAS 2017/A/5306 par. 146.

⁷¹ CAS 2010/A/2204 par. 50.

⁷² CAS 2019/A/6388 par. 231 ff.

any other right of Russian athletes. The neutrality requirements set by the Panel do not exceed the high threshold required to constitute such an infringement (para. 810).

With respect to the question of collective punishment, this is primarily a principle of international humanitarian law or criminal law, and there is no specific prohibition on collective punishment in the ECHR (para 811).

Finally, both the CAS jurisprudence and various legal opinions confirm that the World Anti-Doping Code (WADC) mechanisms are not contrary to human rights legislation.⁷³

VII. Application of Certain Principles of Community law

- *Application of non-discrimination EC law principles to Russian cases involving economic activities in the EU*

In CAS 2009/A/1788, the CAS panel agreed that the EC Law is applicable to economic activities carried out in whole or in part within the European Union and is relevant to consider certain issues. The Panel noted that there is some authoritative case law of the European Court of Justice that non-discrimination EC Law principles may apply to non-European cases involving economic activities in the European Union.⁷⁴ In this respect, it can be appropriate within the meaning of Article R58 of the CAS Code to apply EC Law, if needed, in particular Art. 81 and 82 EC Treaty.

- *Guarantee of the free movement of workers*

In a case related to the validity of the elimination regulations applicable to the Euro League Women basketball tournament (ELW), the parties disagreed on the application of European Community Law (EC Law). The appellant, a Russian women's basketball club, referred to the facts that the

Fédération Internationale de Basketball (FIBA) Europe was the organizer, director and rule maker of the ELW; with its seat in Munich, Germany, a Member State of the European Union; And that the participating clubs were professional clubs with “significant economic interests”, as such the “Respondent’s [FIBA Europe’s] activities in organising and ruling the ELW ...constitutes an economic activity within the meaning of Article 2 EC Treaty”. The Appellant also referred to the Communities-Russia Partnership Agreement. The Respondent, FIBA Europe, on the other hand, stated that EC Law was not applicable, as the Appellant was Russian and Russia is not a member of the European Union. The panel considered that the European Court of Justice made it clear “that the practice of sport could be treated as an economic activity like any other and that organised sporting activities were subject to the same guarantees under Community law as were other economic activities. In that connection, the ECJ established that professional football players are workers who have a personal right not to be subject to discriminatory or restrictive rules which prevents them from leaving their country to pursue gainful employment in other Member States. Although sporting federations still hold regulatory authority to determine regulations’ substantive principles concerning player movement rights, they too are subject to and must respect Community law and principles”.⁷⁵

In another case related to the sanctions applicable to a club for contravening the ban on third party ownership listed at Articles 18a and 18b of the FIFA Regulations on the Status and Transfer of Players, the CAS panel took into consideration the application of the European Union law and the legality of Articles 18a and 18b RSTP with regard to the freedom of movement and competition law insofar as they constitute mandatory provisions of foreign law within the meaning of Article 19 PILA. The panel found that Articles 18a and 18b RSTJ constituted

⁷³ CAS 2011/A/2307 par. 99-105; see also CAS 2011/A/2353 par. 39.

⁷⁴ CAS 2009/A/1788 par. 8; See also ECJ C-265/03 Simutenkov, where it was held that the non-discrimination clause in the Communities – Russia

Partnership Agreement meant that a sporting regulation imposing a quota on non-EU players could not be applied to Russian nationals legally employed in the EU.

⁷⁵ CAS 2012/A/2852 par 77.

obstacles to the free movement of capital, workers and services. However, it considered that these provisions pursued legitimate objectives such as preserving the stability of players' contracts, guaranteeing the independence and autonomy of clubs and players with regard to recruitment and transfers, safeguarding the integrity of football and the fairness and equity of competitions, preventing conflicts of interest and maintaining transparency in transactions relating to the transfer of players, and were proportionate insofar as they restricted the freedoms of movement only to a limited extent. Moreover, the CAS panel found that alternative measures did not reasonably appear to be able to achieve the objectives pursued.⁷⁶ The appeal subsequently filed before the SFT against the CAS decision was dismissed.⁷⁷

VIII. Conclusion

There is no doubt that the procedural rights of the parties are in any event protected before the CAS either through the indirect application of Article 6(1) ECHR or through other juridical instruments such as the applicable national laws and the *lex sportiva*. Even if they are not expressly mentioned in the applicable sport regulations, the parties' substantive rights are also protected before the CAS in various ways: through the indirect application of substantive rights of a state nature under both the ECHR and the concept of public policy, the recourse to the general principles of law constituting the *lex sportiva*, the recognition of the athlete's fundamental rights on the basis of sport regulations and the direct application of certain principles of Community law. Furthermore, under pressure from civil society, there is a growing trend of major sports institutions to include human rights provisions in their regulations. This pattern will, in time, have an impact at all levels of the sports organization and give the CAS an additional tool to protect the substantive rights of athletes.

⁷⁶ TAS 2016/A/4490 par. 91 ff.

⁷⁷ SFT 4A_260/2017,

Jurisprudence majeure* Leading Cases Casos importantes



* Nous attirons votre attention sur le fait que la jurisprudence qui suit a été sélectionnée et résumée par le Greffe du TAS afin de mettre l'accent sur des questions juridiques récentes qui contribuent au développement de la jurisprudence du TAS.

We draw your attention to the fact that the following case law has been selected and summarised by the CAS Court Office in order to highlight recent legal issues which have arisen and which contribute to the development of CAS jurisprudence.

Llamamos su atención sobre el hecho de que la siguiente jurisprudencia ha sido seleccionada y resumida por la Oficina del Tribunal del TAS con el fin de poner de relieve las recientes cuestiones jurídicas que han surgido y que contribuyen al desarrollo de la jurisprudencia del TAS.

CAS 2019/A/6180

World Anti-Doping Agency (WADA) v. United States Anti-Doping Agency (USADA) and Ryan Hudson

10 March 2020

Weightlifting; Doping (DHCMT); CAS jurisdiction based on an arbitration agreement; CAS jurisdiction based on WADA's right of appeal to the CAS from a national decision of a national level; Scope of appeal; Date of commission of an Anti-Doping Rule Violation;

Panel

The Hon Michael Beloff QC (United Kingdom), Sole Arbitrator

Facts

The World Anti-Doping Agency (WADA or the Appellant) is a Swiss private-law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms, including by enforcing its World Anti-Doping Code (WADC).

The United States Anti-Doping Agency (USADA or the First Respondent) is the National Anti-Doping Organization (NADO) in the United States of America for Olympic, Paralympic, and Pan-American Sport, responsible for protecting clean athletes and the integrity of sport.

Mr Ryan Hudson (the Athlete or Second Respondent) is an American citizen and professional weightlifter, born on 16 December 1978.

The substantive issue in this proceeding is whether USADA's Acceptance of Sanction dated 27 November 2018 (imposing a four-year period of ineligibility starting on 14 June 2017) in the Athlete's case should be set aside; and whether, in lieu, he be found to

have committed a second anti-doping rule violation (ADRV) and be sanctioned with an eight-year period of ineligibility starting on 24 May 2020, i.e. the date immediately following the end of the period of ineligibility accepted by him in respect of a first ADRV (the First ADRV) (the Substantive Issue).

Aside from the Athlete, who has opted not to participate actively in most aspects of this proceeding, the Parties in the interest of procedural economy have agreed, that the Sole Arbitrator should decide certain threshold issues (the Preliminary Issues), namely:

- c. whether the Court of Arbitration for Sport (CAS) has jurisdiction over the appeal (Jurisdiction);
- d. if the CAS does have jurisdiction, what is the scope of the appeal, i.e. does it extend to whether the Athlete committed a second ADRV or is it limited to the sanction for such violation (Scope); and
- e. whether a "presence" violation is committed (for the purposes of Article 10.7.4.1 of the WADC) on the date of ingestion of a prohibited substance or on the date of the doping control test ("Date").

Although any decision on the Substantive Issue might be of limited significance given that the Athlete has apparently retired from his sport of weightlifting, decisions on the jurisdiction and the date issues would have by contrast more general impact.

On 5 December 2015, the Athlete underwent a doping control test by USADA at the American Open. The sample collected resulted in an Adverse Analytical Finding (AAF) for stanozolol (and its metabolites 16B-hydroxystanozolol and 4B-hydroxystanozolol).

On 14 December 2016, the Athlete accepted an ADRV (i.e. the First ADRV). The Athlete

was sanctioned with a four-year period of ineligibility as described in the International Weightlifting Federation (IWF) Anti-Doping Policy (ADP) and the WADC, beginning on 24 May 2016.

On 14 June 2017, the Athlete underwent an out-of-competition doping control test by USADA.

On 11 July 2017, the WADA-accredited laboratory in Salt Lake City, Utah, United States of America (the Salt Lake Laboratory) reported that the Athlete's A-Sample resulted in an AAF for dehydrochloromethyltestosterone (DHCMT). The B-Sample analysis confirmed the results of the A-Sample.

On 10 September 2017, the Athlete signed a "Stipulation of Uncontested Facts and Issues" (the "Stipulation"), which specified notably:

- Mr. Hudson acknowledges he has committed his second anti-doping rule violation". [emphasis added]

On 7 March 2018, the Athlete informed USADA that he intended to retire from competing in the sport of Weightlifting.

On 10 August 2018, USADA charged the Athlete with an ADRV for the presence of DHCMT in his Sample and for the use and/or attempted use of DHCMT pursuant to Articles 2.1 and 2.2 of the IWF ADP and Articles 2.1 and 2.2 of the WADC (the latter of which has been incorporated into the USADA Protocol for Olympic and Paralympic Movement Testing - the USADA Protocol). The USADA Charge Letter also stipulated that USADA would seek up to an eight-year period of ineligibility for the Athlete's second ADRV.

On 27 November 2018, the Athlete signed an "Acceptance of Sanction" for an ADRV. The Athlete was sanctioned with a four-year period of ineligibility beginning on 14 June 2017 (the "Appealed Decision"). The

Appealed Decision was rendered by USADA in application of the USADA Protocol.

On 4 March 2019, in accordance with Article R47 of the Code of Sports-related Arbitration (2019 edition) (the "CAS Code"), WADA filed a Statement of Appeal with the CAS challenging the Appealed Decision.

Reasons

1. CAS jurisdiction based on an arbitration agreement

WADA's submissions may be summarised in essence as follows:

- It is a fundamental tenet of the WADC, founded on the need for harmonisation in the fight against doping in sport, that WADA has a right of appeal against, *inter alia*, all first instance decisions (including agreed outcomes such as Acceptances of Sanction).
- All provisions of the WADC are mandatory, although only those set out at Article 23.2.2 must be incorporated verbatim.
- Article 13.2.2 WADC is not one of the provisions that must (or even can) be incorporated verbatim because it requires that decisions not covered by Article 13.2.1 (which can only be appealed to the CAS) must be appealable to an independent and impartial reviewing body in accordance with rules established by the relevant NADO, which in this instance is USADA.
- USADA's alternative position is irrational since it is all the more important that there be review before the CAS of decisions that are agreed between the athlete and a NADO without a hearing process or prior review of an independent tribunal. The signed Acceptance of Sanction (i.e. the Appealed Decision) itself explicitly

provides for WADA to appeal to the CAS.

USADA's submissions, in essence, may be summarized as follows:

- WADA in its pleadings relied only on the USADA Protocol; an argument that there are other bases for its appeal to the CAS should not be entertained at all.
- WADA has no right of appeal under Article 13.2.2 of the WADC against the Appealed Decision since Article 13.3.2 has not been incorporated into the USADA Protocol.
- More generally (and consistently with the WADC), WADA has no right of appeal against any USADA/American Arbitration Association ("AAA") decisions that does not involve International-Level Athletes or arise from testing at International Events, neither of which criteria apply to the Athlete.
- Alternatively, there is a right of appeal to the CAS in national cases, but only where they are adjudicated by the AAA as opposed to agreed/settled between the athlete and USADA.

The validity and scope of the arbitration agreement are governed by Article 178(2) of the Swiss Private International Law Act (PILA) which provides (in English translation):

"As regards its substance, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law".

On this basis, an appellant such as WADA may therefore establish the validity of the arbitration agreement based on either: (i) the law chosen by the parties; (ii) the law governing the subject matter of the dispute; or (iii) Swiss law. The Swiss Federal Tribunal (SFT) has consistently held that an approach which favours arbitration should

be taken with respect to the resolution of sports disputes (see ATF 138 III 29, paragraph 2.2.2., See also 4A_460/2010, SFT judgment of 18 April 2011.).

It follows from Article R47 of the CAS Code that CAS jurisdiction can be based on either: (i) a specific arbitration agreement; or (ii) a provision in the applicable regulations. Article R47 of the CAS Code requires only that at the time of initiation of an appeal one or other or both of the bases exists, a matter to be determined by the CAS panel seized of the appeal (see Mavromati & Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*, Kluwer Law International, 2015, at page 27). Under Swiss law, consent to the arbitration agreement results from the entirety of all the parties' expressions of intent evidenced by the text found therein. (See Dr. M. Arroyo, *Arbitration in Switzerland: The Practitioner's Guide*, Kluwer Law International, 2013, para. 22. See also ATF 130 III 66).

The Appealed Decision that was signed by the Athlete and USADA on 27 November 2018 states, *inter alia*:

"I [the Athlete] understand that USADA will communicate my acceptance to USA Weightlifting who will impose this sanction, and to the World Anti-Doping Agency ('WADA'), IWF and the USOC. I understand that neither IWF nor WADA is bound by this resolution and that either or both may appeal this resolution to the Court of Arbitration for Sport ('CAS'). In the event of an appeal, CAS has the authority to impose any sanction it chooses in accordance with the applicable rules if requested to do so by IWF or WADA. Also, in the event of such an appeal I reserve the right to file a cross-appeal with CAS and request that the sanction be reduced or eliminated".

The Sole Arbitrator concludes that the Appealed Decision does contain an agreement providing for WADA to appeal to the CAS against the sanction imposed on the Athlete. USADA, by being a party to the Appealed Decision but seeking nonetheless to disavow part of it, is, in the Sole Arbitrator's view, impermissibly blowing

hot and cold. The Sole Arbitrator would add that WADA's appeal against the Appealed Decision regarding the quantum of the sanction does not *ipso facto* mean that it cannot rely upon that part of it which constitutes an Arbitration Agreement: Article 178(3) of the PILA expressly provides that "*the Validity of an Arbitration Agreement cannot be contested on the ground that the main contract may not be valid*" (see further SFT Judgement 121 III 495 at p 499). It is indeed consistent with a principle found in many jurisdictions that an arbitration clause is severable from other parts of an agreement as providing the mechanism by which the validity *vel non* of the agreement itself may be resolved.

Indeed, under Article 178(3) of the PILA, if the appealed decision contains an arbitration agreement establishing a right to submit an appeal to the CAS, that by itself is dispositive in favour of the jurisdiction issue.

2. CAS jurisdiction based on WADA's right of appeal to the CAS from a national decision of a national level

According to Article 13.2.2 of the World Anti-Doping Code (WADC), in doping cases not arising from participation in an international event or in cases involving non-international level athletes, the decision may be appealed to an independent and impartial body in accordance with rules established by the National Anti-Doping Organization (NADO). Article 13.2.1 WADC provides for a direct appeal to the CAS in cases arising from participation in an international event or in cases involving international level athletes. The denial of an opportunity to WADA to challenge a decision of a national body before the CAS by simply not establishing such a body at all would be wholly inconsistent with the WADC's intention to create a harmonized global code and would further allow for the possibility of unredressable, so called "home-town", decisions. It is a fundamental principle of *lex sportiva* that in international

sport all who are bound by the sports rules must in fairness be treated equally thereunder irrespective of the idiosyncrasies of national jurisdictions (see *inter alia*, *Peñarol v Bueno, Rodriguez & PSG CAS 2005/A/983 & 984*, para 24; *Comitato Olimpico Nazionale Italiano (CONI) CAS 2000/C/255*, para 56; *Valcke v FIFA CAS 2017/A/5003*, para 265; *ICC v Ikope*, ICC Disciplinary Tribunal, 5 March 2019 at para 6.16). This principle must extend to the process by which alleged ADRVs and/or sanctions therefor are made subject to scrutiny and adjudication. The exclusion of Article 13.2.2 WADC from the list of those Articles which must be implemented without variation means only that it need not be incorporated verbatim. It does not mean that its substantive content, including, materially, WADA's right of appeal to the CAS from a national decision of a national level, to which decision WADA objects, can be ignored.

The deletion of Article 13.2.2 in Annex A of the USADA Protocol clearly does not remove a right of appeal to the CAS against AAA awards in national cases which *ex hypothesi* fall outside of the ambit of Article 13.2.1 WADC, given that such appeal is expressly provided for by Article 17(b) of the USADA Protocol. The question raised by such deletion is whether, in consequence, there is no appeal from decisions in national cases which are not made by the AAA, which is, absent consent of the parties, the unique forum for appeals against ADRVs and/or sanctions. (See USADA Protocol Article 17 and 17(a)). In order to ensure that USADA is code-compliant, such right of appeal by WADA to the CAS against a decision affecting a non-international level athlete, who did not appeal a proposed sanction to the AAA, should be implied. Such exercise of interpretation by adding words is not unknown where such addition is required by a superior legal norm. (See, for example, where English domestic, including statutory, law has to be modified to comply with the law of the European Union or of the European Convention on Human Rights.).

For all the reasons set out above, the Sole Arbitrator holds that there is a specific arbitration agreement in the Appealed Decision entitling WADA to appeal it to the CAS. Moreover, an applicable regulation – the USADA Protocol – properly interpreted, also provides such a right of appeal to WADA.

3. Scope of appeal

The Sole Arbitrator considers that the issue of whether the Athlete committed a second ADRV is closed. Throughout the history of this matter, USADA itself has proceeded on the basis that it was concerned with a second ADRV.

USADA’s attempt to change the basis of the agreed sanction – i.e. that the DHCMT positive should be treated as a second ADRV – should not, in the Sole Arbitrator’s view, be entertained. The fact of the Athlete’s second ADRV is the very premise of WADA’s appeal and hence outwith its scope. The scope of WADA’s appeal is limited to the appropriate sanction for the Athlete’s second ADRV; his commission of that second violation is to be treated as *res judicata*.

4. Date of commission of an Anti-Doping Rule Violation

WADA’s essential submission is that a presence violation is established only at the date of the sample collection.

USADA’s essential submission is that a presence violation is committed at the date of ingestion.

Both the title and text of Article 2.1 WADC “presence violation” show that the *actus reus* of this violation is the presence of the prohibited substance in a doping control sample, even if, all but inevitably, such substance must have been present in the athlete’s body before he or she was subject to the doping control test which proved that

presence. The violation is necessarily established and therefore committed on the date of the doping control regardless of when the prohibited substance was ingested. It would be unreasonable to require NADOs to ascertain the moment of ingestion or use, as it would depend on factors such as dose, regimen, mode of administration etc. that may be known to the athlete but are certainly not known to the NADO.

Decision

The Court of Arbitration for Sport has jurisdiction over the appeal filed by the World Anti-Doping Agency on 4 March 2019 against the decision rendered by the United States Anti-Doping Agency on 27 November 2018, regarding Ryan Hudson.

The scope of the appeal filed by the World Anti-Doping Agency on 4 March 2019 is limited to the appropriate sanction for Ryan Hudson’s second Anti-Doping Rule Violation; his commission of that second violation is to be treated as *res judicata*.

An Anti-Doping Rule Violation contrary to Article 2.1 (i.e. a “presence” violation) of the World Anti-Doping Code cannot be committed on any date other than the date of the collection of the sample in which the prohibited substance is found to be present.

CAS 2019/A/6463

Saman Ghoddos v. SD Huesca & Östersunds FC & Amiens Sporting Club & FIFA

CAS 2019/A/6464

Östersunds FK Elitfotboll AB v. SD Huesca & FIFA & Saman Ghoddos & Amiens Sporting Club

10 November 2020

Football; Termination of the employment contract without just cause by the player during the protected period; Video-conference hearing and right to be heard; Failure to request an extension of a deadline and equality of the parties; Consequences of the inadmissibility of a late answer; Status of FIFA as a party in contractual disputes and position of the appellant(s) when an answer is not submitted; Validity of the employment contract; Principles of compensation for the unilateral, unjustified termination according to Art. 17 para. 1 RSTP; Club found to be in breach of contract or found to be inducing a breach of contract according to Art. 17 para. 4 RSTP

Panel

Prof. Massimo Coccia (Italy), President

Mr Mark Hovell (United Kingdom)

Prof. Ulrich Haas (Germany)

Facts

Mr. Saman Ghoddos (the “Player”) is a professional football player of Iranian nationality born on September 6, 1993. He currently plays for the Amiens Sporting Club. Östersunds FK Elitfotboll AB (“Östersunds FC”) is a professional football club seated in Östersunds (Sweden) and currently competing in the top Swedish championship *Allsvenskan*. Östersunds FC is affiliated to the Swedish Football Association (*Svenska Fotbollförbundet* or “SFA”). Sociedad Deportiva Huesca SAD (“SD Huesca”) is a professional football

club seated in Huesca (Spain) which was promoted to the Spanish top championship *La Liga* at the end of the 2017-2018 season, was relegated to *Segunda División* at the end of the 2018-2019 season and, after winning that championship, was promoted again to *La Liga* for the upcoming 2020-2021 season. SD Huesca is affiliated to the Royal Spanish Football Federation (*Real Federación Española de Fútbol* or “RFEF”). Amiens Sporting Club (“Amiens SC”) is a professional football club seated in Amiens (France) and currently competing in the French *Ligue 2* after being relegated from *Ligue 1* following the 2019-2020 season. Amiens SC is affiliated to the French Football Federation (*Fédération Française de Football* or “FFF”).

On 13 February 2018, the Player signed a contract with Östersunds FC effective from that date until 31 December 2020 (the “Östersunds Employment Contract”), which extended his employment relationship with the Swedish club that had started back in 2016.

On 7 August 2018, following an exchange of negotiation proposals, SD Huesca made a formal proposal to Östersunds FC, valid until 9 August 2018, to purchase the federative rights of the player for EUR 3 million plus a 20 percent sell-on fee. The very same day, Östersunds FC accepted the offer by email. As requested by Östersunds FC, later on 7 August 2018, SD Huesca sent the draft transfer agreement to the Swedish club. The next day, on 8 August 2018, Östersunds FC emailed SD Huesca regarding the draft transfer agreement and pointed out that it contained some mistakes. Östersunds FC asked whether it or SD Huesca should fix the mistakes, to which SD Huesca replied: “Please, change the mistakes and send us the contract signed ok? The player has just signed too”.

Late on 7 August 2018, the Player travelled with his brother to Huesca with the full awareness and permission of Mr. Daniel Kinberg, President of Östersunds FC. At 8:00 am on 8 August 2018, the Player and his

brother met with SD Huesca representatives. At this meeting the Player signed an employment contract with SD Huesca (the “Huesca Employment Contract”), as well as a registration request form for his registration at the RFEF for the 2018-2019 season. He later underwent and passed a medical examination. At the time the Player signed the Huesca Employment Contract, his brother had received and shown to him the email in which Östersunds FC declared that the “offer is ok”.

Pursuant to the Huesca Employment Contract, the Player would provide his services to SD Huesca as a professional football player from 8 August 2018 until 30 June 2022 in exchange for a net salary of EUR 600,000 per year. The Player’s salary would be automatically reduced by 50 percent to EUR 300,000 per year in the event that SD Huesca was relegated to the Spanish *Segunda División* following the 2018-2019 season unless the Player accepted a transfer or temporary loan to a team that agreed to assume the Player’s full salary. The contracting Parties also agreed under Article 1.3 of the Huesca Employment Contract that if the Player unilaterally terminated the contract early he would be liable to pay SD Huesca EUR 40 million as indemnification.

On 8 and 9 August 2018, Mr. Kindberg and the Player had various text conversations in which Mr. Kindberg expressed in very strong terms that he was not happy with the Player signing the Huesca Employment Contract. Following his return to Östersunds, the Player trained with the Swedish club for two weeks and on 12 August 2018 participated in an official match against Kalmar FF before being transferred to Amiens SC on 24 August 2018.

On 14 August 2018, SD Huesca sent a letter to Östersunds FC in which it requested that it proceed within 24 hours to “*formalize in writing the transfer agreement and introduce in the TMS [FIFA Transfer Matching System] both the transfer order of the player and the information and documents required by the system*”. However,

Östersunds FC did not comply with the request; the draft transfer agreement was never signed, and the Player was never registered with the RFEF.

Instead, on 18 August 2018, the Player, pressured by Mr. Kindberg, terminated the Huesca Employment Contract by letter (the “Termination Letter”). In the Termination Letter, the Player declared the following: “*(...). As you were and are aware of, during last week my current club Östersunds FK authorized me to travel to Huesca only to visit the city and the facilities of your Club as one of my possible destinations during the current registration period. (...) Once arriving at your club, with my brother as only support and without speaking Spanish, (...) your representatives handed me a document suggesting me that it was a standard template necessary to be signed with the sole scope to possibly undergo medical visits at a later stage and for your Club to officially starting negotiations with Östersunds FK for my transfer. (...) Only upon my return to Sweden, after having let translate the document, I realized that it was a draft of a labour contract. (...) It is therefore evident that I was induced by you in error to sign such document, in a language I do not master at all and against my conscious will. The alleged contract is thus null and void. At any rate, I note that eventually your Club and Östersunds FK have not found any agreement on the terms and conditions of my possible transfer. Therefore, even if the alleged labour contract is valid – which is obviously not – I can never be registered with your Club, start any employment relationship or validly performing any service according to such alleged labour contract. (...) In view of all the above, for the sake of clarity only and without this would imply any recognition of its validity or entering into force, I hereby formally terminate the alleged labour contract I was mistakenly induced to sign with your club. (...)*”.

On 20 August 2018, the General Manager of SD Huesca replied to the Player’s letter by WhatsApp: “*I received your letter two days ago and I understand someone forced you to sign it. (...) Tomorrow, we will translate your case to FIFA*”.

On 22 August 2018, after a period of negotiations during which at some point

Amiens SC even temporarily suspended the offer in order to determine whether there was truth to the rumours that SD Huesca held the federative rights of the Player, Östersunds FC and Amiens SC signed an agreement for the definite transfer of the Player in exchange for a transfer fee of EUR 4 million (hereinafter the “Amiens Transfer Contract”). Östersunds FC and Amiens SC also agreed on (i) “additional transfer fees”, and (ii) a sell-on fee. On 23 August 2018, the Player and Östersunds FC terminated the Östersunds Employment Contract and the Player signed an employment contract with Amiens SC. On 24 August 2018, the SFA issued the related ITC and the Player was registered with the FFF by Amiens SC.

On 31 August 2018, SD Huesca filed a complaint against the Player, Östersunds FC and Amiens SC before the FIFA Dispute Resolution Chamber (the “DRC”). On 28 August 2019, the DRC issued the grounds of its decision passed on 14 June 2019. The DRC ordered the Player to pay SD Huesca the amount of EUR 4 million, plus five percent interest *p.a.* until the date of effective payment, for the early termination without just cause of the Huesca Employment Contract and held that Östersunds FC was jointly liable for that amount. It also placed a four-month restriction on the Player’s eligibility to play in official matches (which he has since served) and a ban on Östersunds FC from registering any new players, either nationally or internationally, for two entire and consecutive registration periods (the “Appealed Decision”).

On 18 September 2019, the Player filed a Statement of Appeal with the Court of Arbitration for Sport (“CAS”) against SD Huesca, Östersunds FC, Amiens SC and FIFA with respect to the Appealed Decision rendered by the DRC on 14 June 2019. On the same day, Östersunds FC filed a Statement of Appeal against SD Huesca, FIFA, the Player, and Amiens SC with respect to the Appealed Decision. Östersunds FC also requested to stay the

transfer ban the Appealed Decision imposed against it.

On 18 November 2019, SD Huesca filed its Answer. The deadline to submit the Answer was 12 November 2019 and SD Huesca did not request an extension of that time limit. On 16 January 2020, the Player challenged the admissibility of SD Huesca’s Answer on the grounds that the Answer was not filed within the deadline.

On 1 April 2020, the Parties were advised that pursuant to Article R57 of the CAS Code, the Panel decided to hold a hearing and invited the Parties to inform it whether they preferred to hold the hearing in person or by video conference. On 15 April 2020, after careful review of the Parties’ positions (i.e. that the Appellants preferred an in-person hearing, that SD Huesca and FIFA preferred a hearing by video conference, and that Amiens SC remained silent on the matter), the Panel decided not to procrastinate the case and to hold the hearing by video conference in light of the CAS Emergency Guidelines of 16 March 2020 related to the ongoing Covid-19 pandemic, which encouraged that hearings be conducted by video conference due to the circumstances. The Panel also informed the Parties that there would be no closing oral pleadings at the hearing and instead the Parties would be granted the opportunity to file written post-hearing briefs. On 22 April 2020, the Player and Östersunds FC (i) requested the Panel to reconsider hosting the hearing over video conference for a number of reasons that they considered to put them at a disadvantage, and (ii) objected to SD Huesca’s participation in the hearing and filing of a post-hearing brief. On 28 April 2020, the Panel rejected the requests by the Player and Östersunds FC to reconsider the decision not to hold an in-person hearing, for reasons that would be given in this final Award. As for the objection to SD Huesca filing post-hearing briefs, the Panel referred to its letter of 7 February 2020 and indicated that the objection would be fully dealt with in the

final Award. On 25 May 2020, the hearing took place entirely by video conference.

Reasons

1. Video-conference hearing and right to be heard

As indicated in the letters of 15 and 22 April 2020, the Panel was to give in the final award its reasoning for its decision to hold the hearing by video-conference.

The Panel rejected this Appellants' request. It held that deciding to hold a video-conference hearing did not violate any right of the parties, including the right to be heard. The CAS Code did not grant the parties a right to a hearing. In fact, pursuant to Article R57 of the CAS Code, a CAS panel had the discretion, after consulting with the parties and if it considered to be sufficiently well informed, not to hold a hearing at all. Therefore, *a fortiori*, the parties had no right to an in-person hearing over one by video-conference. In addition, Article R.44.2 of the CAS Code – applicable to appeals proceedings through Article R57 – expressly provided that the “*President of the Panel may decide to conduct a hearing by video-conference*”.

2. Failure to request an extension of a deadline and equality of the parties

SD Huesca had acknowledged that it had filed its Answer late but nevertheless had argued that the late filing had simply been a result of a “*material error in the calculation of the deadline*” and that such an error could not lead to its Answer's inadmissibility. In its opinion, this would have been excessively formalistic and have violated the principle of equal treatment, considering that all of the other Parties to the proceeding had received extensions to file their respective Answers.

In the Panel's view, the CAS Code was clear that requests for extensions could not be made, and therefore not granted, after the expiration of a deadline. According to Article R32 of the CAS Code, an extension

could only be granted “*if the circumstances so warrant and provided that the initial time limit has not already expired*”. It was irrelevant that the other parties to the proceeding had requested and obtained extensions. The CAS Code did not stipulate that an automatic extension had to be provided to one party where another party had properly requested and obtained an extension of its own. Moreover, the equality of the parties and a fair proceeding was not guaranteed by bending the CAS Code in favour of the needs of one party. Instead, it was guaranteed by (i) requiring all of the parties to respect the CAS procedural rules, and (ii) having the CAS generally and evenly apply said rules to all parties. The Panel therefore confirmed that SD Huesca's Answer was inadmissible pursuant to Article R55 of the CAS Code.

3. Consequences of the inadmissibility of a late Answer

Aside from the inadmissibility of the Answer, the Panel had to determine what were the other consequences of this belated filing. In this regard, the Appellants had submitted that SD Huesca should “*not be allowed to cure the inadmissibility*” of the Answer by pleading orally or in writing, in particular by filing post-hearing briefs.

The Panel observed that there was no rule of the CAS Code providing that a respondent would lose its right to be a party altogether and/or to defend itself in the subsequent stages of the arbitration proceeding if it filed a belated answer. Article R55 of the CAS Code, which dealt with it, only indicated that “[*i*]f the Respondent fail[ed] to submit its answer by the stated time limit, the Panel [*might*] nevertheless proceed with the arbitration and deliver an award”. In addition, Article R56 of the CAS Code did not preclude the respondent from pleading at the hearing within the scope of the submissions it had made in the first instance proceedings, or from submitting post-hearing briefs strictly limited to commenting on the evidence presented at the hearing. To hold otherwise would have

meant that, under Article R56 of the CAS Code, all parties to CAS appeals proceedings would have always been restricted in their oral statements to repeating exactly what they had already written in their briefs prior to the hearing; this would have essentially rendered all oral pleadings at hearings meaningless and unnecessary.

In the Panel's opinion, late filing of an answer nevertheless did not come "without a price". The party was sanctioned by not being allowed to: (i) have its answer on file and, in turn, not being able to further elaborate on the arguments it had presented in the first instance proceedings; (ii) raise those objections that were only permitted to be made within the first written defence (such as, for example, a jurisdictional objection); (iii) submit any evidence or ask for evidentiary measures, including not being allowed to submit fact or expert witness statements, to call witnesses to testify at the hearing, or to requests for the production of documents, etc.; and (iv) put forward any motions for relief, given that it was constant CAS practice that motions for relief might not be amended at the hearing. Besides, the party could not cure the inadmissibility of its answer by submitting, in post-hearing briefs, the arguments and evidence that had been disregarded as a consequence of the answer's inadmissibility.

4. Status of FIFA as a party in contractual disputes and position of the appellant(s) when an Answer is not submitted

The Appellants had further submitted that SD Huesca's late filing of the Answer meant that the Appellants' position had gone unchallenged and that, therefore, considering the *de novo* nature of a CAS appeals under Article R57 of the CAS Code and FIFA's alleged status as a nominal party only, the Appellants' case had to be deemed proven on the facts and the law and their appeal accepted in full.

The Panel rejected this submission and first found that in a contractual dispute that led

to disciplinary sanctions being challenged before the CAS, FIFA was not merely a "nominal" party, or one of "second class" or "inferior status". FIFA had standing to be sued and was a full respondent, given that it was the association that had issued the appealed decision and imposed sanctions on the appellant(s); as such, its submissions had to be taken into account to the same extent as those of the appellant(s) and it was not limited to pleading only on the disciplinary sanctions imposed, but also with respect to the facts which had led to said sanctions even if based on a contractual dispute that, in itself, had not involved FIFA.

Second, it held that a respondent's failure to submit an answer did not mean that the CAS panel had to blindly accept the position of the appellant(s). The panel was tasked with assessing whether the appealed decision had to be confirmed or overturned, in part or in full, and it could make such assessment and reach a conclusion thereon even in the absence of one of the parties' answers in accordance with Article R55 of the CAS Code.

5. Validity of the employment contract

The Appellants had argued that no breach of Article 17 RSTP could have occurred since there was no valid employment agreement. More specifically, they had argued that, before the Huesca Employment Contract, the clubs had had to enter into a written transfer agreement and the Player had had to terminate the Östersunds Employment Contract.

The Panel observed that there was no rule in the RSTP setting out the specific order of steps that had to be taken to sign a player. While the ideal or "ordinary course" of a transfer might be the signature of a transfer agreement followed by the signature of the employment contract, this was not the only and mandatory way. In practice, transfers occurred in a variety of different manners. As there was no mandatory sequence of events for the transfer of a player, the

validity of an employment contract could not be preconditioned on the clubs entering into a written transfer agreement or on the termination of an existing employment contract.

6. Principles of compensation for the unilateral, unjustified termination according to Art. 17 para. 1 RSTP

Having found that the Player had no valid just cause to terminate the Employment Contract as he had entered it willingly and without fraud or mistake, the Panel then had to determine what, if any, was the compensation payable to SD Huesca for the breach.

The Panel recalled that compensation for the unilateral, unjustified termination of an employment contract was calculated pursuant to Article 17.1 RSTP. The list of criteria set out in Article 17.1 RSTP was illustrative and not exhaustive. Other objective factors could and had to be considered, such as the loss of a possible transfer fee and the replacement costs, provided that there existed a logical nexus between the breach and loss claimed. In the analysis of the relevant criteria, the order by which those criteria were set forth by Article 17.1 RSTP was irrelevant and needed not be exactly followed by the judging body. It was for the latter to carefully assess, on a case by case basis, all the factors and determine how much weight, if any, each of them should carry in calculating compensation. While each of the factors set out in Article 17.1 or in CAS jurisprudence might be relevant, any of them might be decisive on the facts of a particular case. While the judging authority had a “*wide margin of appreciation*” or a “*considerable scope of discretion*”, it should not set the amount of compensation in a fully arbitrary way, but rather in a fair and comprehensible manner. At the same time, as the CAS Code sets forth an adversarial rather than inquisitorial system of arbitral justice, a CAS panel had no duty to analyse and give weight to any specific factor listed in Article 17.1 RSTP or set out in the CAS

jurisprudence, if the parties did not actively substantiate their allegations with evidence and arguments based on such factor. In calculating compensation, the panel was to be guided by the principle of the so-called “positive interest” or “expectation interest” and accordingly determine an amount which should basically put the injured party in the position that the same party would have had if no contractual breach had occurred.

In the present case, the Panel recalled that SD Huesca and the Player had agreed to a liquidated damages clause of EUR 40 million (Article 1.3) and that in accordance with Article 17.1 RSTP, it should first have been taken into account. However, it had been “disregarded” by the DRC as disproportionate and SD Huesca had not appealed that decision to the CAS. Therefore, that decision had become final and binding and could not be reviewed by the Panel. As a result, even though the Panel believed that the DRC had erred in “disregarding” the liquidated damages clause and that it should have had, in accordance with Swiss law, reduced the amount to a proportionate level, the Panel did not have the power to take into account the liquidated damages clause and accordingly had to assess damages based on the other criteria of Article 17.1 RSTP.

The Panel observed that the DRC had calculated damages to be EUR 4 million because that was the Player’s market value at the time of the breach, as evident from the transfer fee Amiens SC had agreed to pay Östersunds FC for the Player. In the Panel’s view, the DRC, however, had failed to deduct from that amount the costs that SD Huesca (i) had incurred in obtaining the Player and (ii) had saved due to the Player’s departure, as it should have done pursuant to CAS jurisprudence. In particular, the DRC had failed to take into account that SD Huesca had saved a relevant sum by never paying (i) the transfer fee of EUR 3 million agreed-upon for the transfer of the Player, and (ii) the Player’s salary under the Huesca Employment Contract, which was EUR

600,000 for the 2018-19 season, EUR 300,000 for the 2019-2020 season (due to the club's relegation), EUR 600,000 for the 2020-2021 season (as SD Huesca has been promoted back to La Liga), and a minimum of EUR 300,000 for the remaining season. Taking both of these heads of cost into account and noting that SD Huesca had not cited any other losses (such as replacement costs), the Panel found that SD Huesca had not proven that it had suffered any damages from the Player's breach of the Huesca Employment Contract and thus held that no damages were to be awarded to SD Huesca under Article 17.1 RSTP.

7. Club found to be in breach of contract or found to be inducing a breach of contract according to Art. 17 para. 4 RSTP

Östersunds FC was arguing that it was not subject to an Article 17.4 RSTP sanction because (i) it was not the "new club" and therefore could not be presumed as having induced the Player to breach the Huesca Employment Contract, and (ii) there was no actual proof of inducement.

The Panel nevertheless found that Östersunds FC had to be deemed as the "signing club" (i.e. the "*club signing a professional who had terminated his contract without just cause*") for the purposes of Article 17.4 RSTP. As consistently held by the CAS, FIFA rules had to be interpreted in a way that reflected their true meaning. The clear purpose of Article 17.4 RSTP was to ensure contractual stability and ensure that the club behind or abetting a player's breach of contract within the protected period was punished. With this in mind, the notion of "signing club" under Article 17.4 RSTP could not be interpreted restrictively to mean only the club with which the player first formally signed and registered after his unjustified termination of an employment contract; it had to be interpreted more generally as the club which benefited from said termination by having the player at its disposal after the breach. In the present case, it was obvious to the Panel that the

benefiting club, having the Player at its disposal after the termination without just cause of the Huesca Employment Contract, had been Östersunds FC, given that, after calling the Player back under the Östersunds Employment Contract, it had transferred him to Amiens SC to obtain EUR 1 million more than it would have received under the transfer agreement with SD Huesca.

As the "signing club" under Article 17.4 RSTP, Östersunds FC was presumed to have induced the Player into breaching the Huesca Employment Contract, and the Panel found that it failed to rebut this presumption. But even disregarding such presumption, the Panel was persuaded that the evidence on file actually proved that Östersunds FC had induced the breach (and Article 17.4 RSTP punished not only the "new club" or "signing club" but "*any club [...] found to be inducing a breach of contract during the protected period*"). The Player had testified before the DRC that he had been pressured into signing the Termination Letter, which was fully corroborated by (i) the WhatsApp messages between the Player and his brother, (ii) the Player's text conversation with Mr. Kindberg in which he declared that he was happy to sign with SD Huesca and to play in La Liga, (iii) Mr. Kindberg's message to the Player that he should sign the Termination Letter, and (iv) the fact that Östersunds FC had a clear interest in transferring the Player to Amiens SC for a higher price than that agreed with SD Huesca.

In light of the above, the Panel upheld the sanction imposed on Östersunds FC by the FIFA DRC.

Decision

In light of the foregoing, the Panel partially upheld the appeals filed by Mr. Saman Ghoddos and Östersunds FK Elitfotboll AB.

CAS 2019/A/6533

Club Al Arabi S.C. v. Sérgio Dutra Junior

CAS 2019/A/6539

Sérgio Dutra Junior v. Al Arabi S.C. & FIFA

14 December 2020

Football; Termination of the employment contract by the player; Just cause; Compensation for damages; Duty to mitigate; Standing to require that a sanction be imposed

Panel

Mr Frans de Weger (The Netherlands), Sole Arbitrator

Facts

Club Al Arabi S.C. (the “Club”) is a professional football club based in Doha, Qatar. The Club is affiliated to the Qatar Football Association (the “QFA”) which in turn is affiliated with FIFA. Sérgio Dutra Junior (the “Player”) is a professional football player of Brazilian nationality, born on 25 April 1988.

On 14 February 2015, the Player and the Club concluded an employment contract valid from the date of signature until 30 June 2019 (the “Employment Contract”). The Employment Contract contained, *inter alia*, Article 10 which provided that the Club and the Player were entitled to terminate it “before its expiring term, by fifteen (15) days’ notice in writing for just cause according with the FIFA Regulations governing this matter as well as the Law of the State of Qatar”. The same provision also provided that “3-When the termination of the Contract is not due to a just cause or a mutual agreement between the Parties concerned, the FCC or the Player shall be entitled to receive from the other party in breach of the Contract a compensation for a net amount:

-To The AL-ARABI SPORTS CLUB .Co, Euro 20.000.000/- (Twenty Million Euro).

-To the player: Sergio Dutra Junior, (The remaining salaries of the contract)”.

The total amount of the Employment Contract was EUR 8’000’000 net, to be paid as follows:

a) For the season 2014/2015, EUR 500’000 net:

- EUR 100’000 as advance payment due in February 2015;
- EUR 100’000 per month to be paid from 01/03/2015 to 30/06/2015;

b) For the season 2015/2016, EUR 1’500’000 net:

- EUR 300’000 as advance payment due in September 2015;
- EUR 100’000 per month to be paid from 01/07/2015 to 30/06/2016;

c) For the season 2016/2017 EUR 2’000’000 net:

- EUR 400’000 as advance payment payment due in September 2016;
- EUR 160’000 per month to be paid from 01/09/2016 to 30/06/2017;

d) For the season 2017/2018 EUR 2’000’000 net:

- EUR 400’000 as advance payment due in September 2017;
- EUR 160’000 per month to be paid from 01/09/2017 to 30/06/2018;

e) For the season 2018/2019 EUR 2’000’000 net:

- EUR 400’000 as advance payment due in September 2018;
- EUR 160’000 per month to be paid from 01/09/2016 to 30/06/2019.

On 17 March 2016, the Player sent a letter (the “Warning Letter”) to the Club putting it in default in writing, stating, *inter alia*, that the salaries of the months of January, February and

March 2016 had not been paid. On 3 April 2016, the Player sent another letter (the Termination Letter”) to the Club indicating that he did not receive any reply or payment of the Club. In the letter, the Player informed the Club about his “irrevocable decision to terminate unilaterally and with just cause, the employment contract signed on 14 February 2014”.

On 6 September 2017, the Player lodged a claim in front of FIFA against the Club maintaining that the Club had breached the Employment Contract and that he terminated it with just cause. In particular, the Player requested:

- a) EUR 300’000 as outstanding remuneration for the months January, February and March 2016, plus 5% interest *p.a.* as from the last day of each respective month until the date of effective payment;
- b) EUR 6’300’000 as compensation for breach of contract;
- c) Sporting sanctions on the Club.

On 11 November 2017, the Club submitted its reply to the claim and lodged a counterclaim against the Player, maintaining that the latter did not have a just cause to terminate the Employment Contract. In particular, the Club requested:

- a) EUR 20’000’000 as compensation for breach of contract;
- b) Sporting sanctions to be imposed on the Player.

On 9 May 2019, the DRC rendered the Appealed Decision, with, *inter alia*, the following operative part:

“1. *The claim of the Claimant / Counter-Respondent, [the Player], is partially accepted.*

2. *The Respondent / Counter-Claimant, [the Club], has to pay to the Claimant / Counter-Respondent, within 30 days as from the date of notification of this decision, outstanding remuneration in the amount of EUR 300,000, plus interest at the rate of 5% p.a. until the date of effective payment, [...].*

3. *The Respondent / Counter-Claimant has to pay to the Claimant / Counter- Respondent, within 30 days as from the date of notification of this decision, compensation for breach of contract in the amount of EUR 4,725,000.*

[...]

6. *Any further claim of the [the Player] is rejected.*

[...]

8. *The counterclaim of the Respondent / Counter-Claimant is rejected”.*

On 23 October 2019, the Club filed a Statement of Appeal with the CAS against the Appealed Decision.

On the same day, 23 October 2019, the Player also filed a Statement of Appeal with the CAS against the Appealed Decision.

Reasons

1. Just cause

Did the Player have just cause to terminate the Employment Contract?

Basically, the Player was invoking four separate sets of arguments in justifying the unilateral termination of the Employment Contract: i) when he decided to terminate the Employment Contract unilaterally on 3 April 2016, the Club had failed to pay the (monthly) salaries regarding January, February and March 2016; ii) he had been deregistered without any reason, explanation or communication; iii) he had been prohibited to attend training sessions with the professional (first) team; and iv) the

Club had failed to provide any medical assistance whatsoever during the period he was diagnosed with mumps.

The Sole Arbitrator first recalled that just cause exists whenever the terminating party can in good faith not be expected to continue the employment relationship. The definition of “just cause”, as well as the question and whether just cause in fact existed, shall be established in accordance with the merits of each particular case. In other words, the event that leads to the immediate termination must so significantly shatter the trust between the parties that a reasonable person could not be expected to continue to work with the other party who is responsible for the just cause. Only material breaches of a contract can possibly be considered as “just cause” for the termination of the latter. Non-payment or late payment of remuneration by the employer does in principle – and particularly if repeated – constitute just cause for termination of the employment contract, since the employer’s payment obligation is his main obligation towards the employee. However, the outstanding amount may not be “insubstantial”. In addition, for a party to be allowed to validly terminate an employment contract, it must have warned the other party, in order for the latter to have had the chance, if it deemed that the complaint to be legitimate, to comply with its obligations. The duty to issue a reminder or a warning, respectively, is not absolute, and there are circumstances where no reminder or warning is necessary, for instance where it is clear that the other side does not intend to comply with its contractual obligations or in case of a severe breach of a contract.

Looking then at the present case, the Sole Arbitrator held that the non-payment of salaries in a total amount of EUR 300’000 was not insubstantial. Besides, as opposed to what the Club claimed, it was not necessary that the

Player should have expressed his intention to terminate the Employment Contract. With the Warning Letter, the Club had officially been put in default and the Club had been given the chance to cure its default, which it had failed to do. For the Sole Arbitrator, at the moment when the Termination Letter was notified to the Club on 3 April 2016, the breach from the side of the Club was such that it rightfully caused the confidence, which the Player had in the future performance in accordance with the Employment Contract, to be lost. Consequently, the Player had just cause to terminate the Employment Contract on 3 April 2016. The Sole Arbitrator also held that the outstanding amounts to the Player were already sufficient reason for him to validly terminate the Employment Contract. Therefore, it was not necessary to address the issues and arguments from the side of the Player in relation to the deregistration, the prohibition to attend the training sessions and any failure from the side of the Club to provide medical assistance.

2. Compensation for damages

The Player was maintaining that the DRC had wrongly concluded that it could not apply the compensation clauses under the Employment Contract in view of the fact that these clauses established disproportionate benefit in favour of the Club and determined that the amount of compensation payable by the Club to the Player had to be assessed in application of the parameters set out in article 17(1) of the FIFA RSTP.

The Sole Arbitrator agreed with the Player. For the Sole Arbitrator, by means of Article 10 of the Employment Contract, the Player and the Club had contractually deviated from the default application of Article 17 (1) FIFA RSTP. To be valid, a liquidated damages clause like Article 10 did not necessarily have to be reciprocal. The validity rather depended on

whether there had been any excessive commitment from any of the contractual parties in respect of the conclusion of the applicable clause. In this specific case, Article 10 provided that the Player be entitled to the remaining salaries of the Employment Contract. This did not seem to the Sole Arbitrator to constitute an excessive commitment from the Player. Therefore, the Sole Arbitrator found that the Player was, as a starting point, entitled to receive the amount the Player would have earned as from the termination date on 3 April 2016 until the original expiration date of the Employment Contract, i.e. 30 June 2019, that is EUR 6,000,000.

3. Duty to mitigate

However, the Parties were in dispute about whether or not the Player was required to mitigate his damages.

The Sole Arbitrator noted that, in principle, players were required to mitigate their damages as followed from the application of Article 17 (1) RSTP. However, the latter also provided that parties were free to contractually deviate from its default application by means of liquidated damages clauses. This was in line with Swiss law, whose Article 361 of the Code of Obligations (SCO) provided that the obligation to mitigate the loss in case of unilateral termination of an employment relationship without cause according to Article 337c SCO was not a mandatory rule, and parties were entitled to derogate.

Having analysed Article 10 of the Employment Contract, the Sole Arbitrator found that the Player and the Club had expressly decided in advance, by means of this provision, that the Player would be entitled to the remaining salaries of his contract. Therefore, the DRC, when calculating the amount of compensation, should not have applied any deduction, as no

mitigation of damages was applicable. Consequently, the Player was entitled to receive the whole amount of compensation, i.e. EUR 6'000'000.

4. Standing to require that a sanction be imposed

The Player was submitting that the DRC by means of the Appealed Decision had also failed to impose sporting sanctions on the Club, considering that a unilateral termination of the Employment Contract had taken place within the *Protected Period*, as referred to in Article 17 (4) of the FIFA RSTP. In this regard, the Player was claiming that the DRC had disregarded that the Club had to be considered as a "*repeated offender*".

The Sole Arbitrator observed that the question was therefore whether the Player had the standing to require that a sanction be imposed upon the Club. He recalled that third parties had no legally protected interest in order to request that a sporting sanction be pronounced by FIFA. It was solely within FIFA's prerogative, also from the perspective that sports governing bodies had to be given a certain reasonable degree of deference to determine if and what sanctions were warranted in a concrete case upon a party.

Against this background, the Sole Arbitrator concluded that the Player had no standing to request that sporting sanctions be imposed upon the Club.

Decision

In light of the foregoing, the Sole Arbitrator held that i) the Player had just cause to terminate the Employment Contract on 3 April 2016; ii) the Club had to pay an amount of EUR 300'000 to the Player with regard to outstanding salaries, with interest at a rate of 5% *per annum*; iii) the Club had to pay

compensation to the Player for breach of contract in the amount of EUR 6'000'000, with interest at a rate of 5% *per annum*.

CAS 2020/A/6918

Cristina Iovu v. International Weightlifting Federation (IWF)

4 February 2021

Weightlifting; Admissibility of an appeal; Establishment of the date of reception of a decision sent by email; General obligation to daily check the spam folder of one's e-mail box

Panel

Prof. Peter Grilc (Slovenia), President

Prof. Ulrich Haas (Germany)

Mrs Carine Dupeyron (France)

Facts

Cristina Iovu (“the Athlete” or “the Appellant”) is a Romanian weightlifter, who was born in Moldova. She successively represented Azerbaijan and Romania in international competitions, and presently is a resident in Moldova.

The International Weightlifting Federation (“the IWF” or “the Respondent”) is the international governing body for the sport of weightlifting and is recognized as such by the International Olympic Committee. The registered seat of the IWF is in Lausanne, Switzerland, and the registered office in Budapest, Hungary.

This Award focuses on the sole question of admissibility from the **point of view** of the Appeal against the IWF Hearing Panel Decision (the “Appealed Decision”) based on IWF Anti-Doping Policy (“IWF ADP”) of 3 March 2020. The decision was sent by Ms Lilla Sagi of the IWF on 3 March 2020 at 21:25 by email to the following email recipients: Mr Christof Wieschmann, the Appellant’s Attorney; Ms Cristina Iovu, the Appellant; Mr

Alex Padure of Federatia Romana de Haltere; the office address of Federatia Romana de Haltere; the recipient named “frh” of Federatia Romana de Haltere; Mr Milan Mihajlovic; Mr Tryggve Duun; and Ms Lilla Sagi of the IWF.

On 30 March 2020, the Athlete filed her Statement of Appeal against the decision of the IWF Hearing Panel. On 14 April 2020, the IWF sent an objection to the admissibility of the appeal from the point of view of its timeliness. On 20 April 2020, the Appellant (i) sent her position relating to the Respondent’s objection to admissibility and (ii) requested that the question of admissibility be decided by the Panel and not the President of the Appeals Arbitration Division of the CAS.

The CAS Court Office, on behalf of the Panel, invited the Appellant[’s Counsel] to state why he noticed the Appealed Decision on 9 March 2020 only and not at an earlier point in time. The Counsel for the Appellant explained that his office was in a process switching to another exchange server for email communication in 2019 and 2020. While checking his local folder named “*deleted elements*” on 9 March 2020 for other reason, the Counsel for the Appellant noticed a mail from Ms Marianne Saroli “*dated*” 3 March 2020, because it was marked as unread. The system notified the security certificate of the sender to be expired and not valid, therefore the mail was opened with the assistance of the IT services at 15:06. The Counsel for the Appellant cannot explain why the email of Ms Saroli was considered as expired / not valid, and nevertheless considers that this issue is definitely not in the sphere of the recipient to be solved and remains in the sphere of the sender.

The Respondent commented the Appellant’s reply, recalling that the Appellant has initially claimed that the deadline to appeal was triggered by receipt of the full case file on 10 March 2020, which was wrong. The Appellant

changed his position only after the Respondent intervened with its opposing interpretation. The email attaching the Appealed Decision was sent on 3 March 2020. According to the Respondent it is on that day that the Appealed Decision entered into the sphere of control of the Appellant. This position is also supported in CAS jurisprudence and consistent with Art. 14.3.8 of the IWF ADP. The IWF email was sent to several addressees, including the Athlete herself. Consequently, the IWF maintains that the appeal was manifestly late and that the proceedings should be terminated, or the appeal be declared inadmissible.

Following the aforementioned exchange of correspondence, the CAS Court Office, on behalf of the Panel, informed the Parties that the Panel has decided to render a preliminary decision on the issues of admissibility and bifurcation of the appeal.

Reasons

1. Establishment of the date of reception of a decision sent by email

Receipt of the decision for the purposes of Art. R49 of the CAS Code means that the decision must have come into the sphere of control of the party concerned (party herself/himself or of her/his representative or agent authorized to take receipt). The Panel's assessment is based on extensive case CAS jurisprudence whereby "receipt" does not imply (HAAS U., "The Time Limit for Appeal in Arbitration Proceedings before the Court of Arbitration for Sport", CAS Bulletin 2/2011, p. 11) that the party concerned actually took note of the content of the decision concerned (CAS 2006/A/1153, no. 40; see also CAS 2004/A/574, no. 60; MAVROMATI/REEB, "CAS Code Commentary", Art. 49 no. 95; RIGOZZI/HASLER, Art. R49: Time Limit for Appeal, in Arroyo, Arbitration in Switzerland, Wolters Kluwer 2013, p. 1003 at 9; HAAS U., op. cit. *supra*). Instead, it suffices

that the party concerned had a (reasonable) possibility of taking note of the decision (Swiss Federal Tribunal ATF 118 II 42 at 3b; see also CAS 2004/A/574, no. 60), broadly: "As a basic rule, it is unanimously recognized by the Swiss legal doctrine and the Swiss Tribunal Federal that under Swiss law a decision or other legally relevant statement are notified, if a person had the opportunity to obtain knowledge of the content irrespective of whether such a person has in fact obtained knowledge (ATF 118 II 44; Huguenin, *Obligationenrecht, Allgemeiner Teil, Zurich et al.* 2004, note 166). Thus, the relevant point in time is when a person receives the decision and not when it obtains actual knowledge of its content" (HAAS U., "The Time Limit for Appeal" in Arbitration Proceedings before the Court of Arbitration for Sport (CAS), in Schields VZ, *Zeitschrift fur Schiedsverfahren, German Arbitration Journal*, 1/2011, p. 8).

The Parties may agree – in principle – that only certain routes of notification allow for a message to enter the recipient's sphere of control. The Respondent submits that sending the decision by email is a permissible route of notification which may establish the Appellant's sphere of control. The Respondent refers insofar to Art. 14.3.8 of the IWF ADP. The provision reads as follows:

Any notice given under these Anti-Doping Rules shall, in the absence of earlier receipt, be deemed to have been duly given as follows: a) if delivered personally, on delivery; b) if sent by first class post, two clear business days after the date of posting; c) if sent by airmail, six clear business days after the date of posting; d) if sent by facsimile, at the expiration of 48 hours after the time it was sent; e) if sent by email, at the time at which it was sent.

The Appellant relies on the argument that Art. 14.3.8 of the IWF ADP should not apply because proceedings before the CAS are solely governed by the CAS Code. In this respect she relies on Art. R49 of the CAS Code. The Panel considers that Art. R49 of the CAS Code refers

for the length of the deadline to the autonomy of the federations, which results that the scope of the provision is limited only to that. Art. R49 of the CAS Code therefore does not relate to all other matter, as *i.e.* receipt or form of notification and does not preclude the application of Art. 14.3.8 of the IWF ADP. Sending the IWF ADP decision by email, being a permissible route of communication, therefore established the sphere of Appellant's control (Art. 14.3.8 *litera e*). Thus, undoubtedly, the Athlete was, in principle, in receipt of the IWF Decision within the meaning of Art. R49 CAS Code when the email from 3 March 2020 entered into her (her Counsel's) sphere of control, specifically, when it came into, even both, her and his computer folder. Consequently, when the Athlete lodged her Statement of Appeal on 30 March 2020, the twenty-one day-deadline to file an appeal with the CAS had elapsed.

2. General obligation to daily check the spam folder of one's e-mail box

The question here is whether the storing of the Appealed Decision in the SPAM folder of Appellant's Counsel, as explained by the Appellant, affects the notion of "*receipt*" by the Appellant, and accordingly the starting point of the deadline to appeal.

There is, to the best of the Panel's knowledge, no jurisprudence in Switzerland and in CAS case law on the issue, *i.e.* whether, when a declaration is deemed to be received, if sent by email and classified as SPAM by the recipient's computer, this is the responsibility of the sender or of the recipient. Consequently, comparative law was examined, mainly German (Landgericht Bonn, Urteil vom 10.01.2014 (Az: 5 O 189/13)) and Austrian jurisprudence (OGH 3 Ob 224/18i). In both countries, the jurisprudence indicates that there is a general obligation of the recipient to check the SPAM box on a regular, *i.e.* daily

basis. In particular, if a recipient has indicated (by making her/his email address available) that she/he communicates *via* email, then the declaration is deemed to have been received, even if located in the SPAM box. It is then expected that the recipient is able to read said email (*i.e.* during business hours). In Switzerland, a declaration becomes known to the recipient if it accesses the sphere of control of the recipient and the latter can be reasonably expected to read it. For the access of electronic declarations into the recipient's sphere of control, it is recognized in case law that the recipient's mailbox belongs to his/her sphere of control, at least if he/she has indicated that he/she can be reached *via* the email address (OGH 3 Ob 224/18i, judgment from 20 February 2019).

The Panel is of the opinion that this criterion is fulfilled because it is obvious that the IWF Hearing Panel was in possession of the Counsel's and the Appellant's email addresses through former communications. If the declaration is contained in an email, the sphere of control is accessed once the email is saved on the recipient's computer (SCHWENZER I., Schweizerisches OR - Allg. Teil, 7. Aufl. 2016: note 27.23; JÖRG F. in ARTER/JÖRG, Internet-Recht und Electronic Commerce Law (2001), Vertragsschluss im Internet und neue Geschäftsmodelle: Ausgewählte Rechtsfragen: p. 8 f.). Authors differentiate between business and private recipients. When in the context of business contacts, the recipient has a higher duty to control and check the emails, a private recipient is treated slightly differently. The latter receives the email, only once she/he checks the email. This means that in private communication that period may be quite long, because checking the email is a matter of habit, opportunity, decision of the user *etc.* Things may be different where the private recipient advised the other party to send the declaration *via* email. In such case also the private recipient is treated like a business recipient. For this

reason, despite the private e-mail connection, receipt does not rely on the effective opening of the e-mail, but on its storage on the server.

Considering that the legal starting point in Switzerland is the same as in Austria and Germany, the Panel finds above solutions persuasive. According thereto, the risk that a wrong “triage” is made by the computer of the recipient (into SPAM or deleted items folder) is the risk of the recipient, in particular in case of a business relationship. The commercial recipient is obliged to retrieve information, so that messages are stored on the respective server.

At the time of receipt and in the previous phases of the case as well, the Counsel for the Appellant was in possession of the Appellant’s power of attorney, therefore he was empowered to receive the IWF Hearing Panel Decision. He was the person, entrusted by the client. Consequently, there is no need for further exploration of legal consequences of the fact that the IWF Hearing Panel decision was sent to the athlete herself and several other recipients, which could have informed the athlete about the decision (and her counsel). Communication between IWF and the counsel, authorized with the power of attorney, is a relationship akin to two business entities in the meaning of the above delimitation between private and business relationships. For this reason, attorneys are expected to check the SPAM on a daily basis. In this respect (LG Bonn, Urteil vom 10.1.2014 - 15 O 189/13):

A lawyer violates his obligations under the mandate contract if he does not check his spam filter daily, although he has opened his e-mail address for business transactions. - free translation by the Panel -

The Panel is aware that the above is a high threshold that is difficult to meet in daily practice. However, the expectations of the

business community are such that an attorney shall at least try to open an email that was otherwise located in the deleted / SPAM folder, on the day or at least the very next day after receipt. Doing so, he would have achieved the same result as by opening it on 9 March 2020, when, after failing to open the IWF Hearing Panel decision, he was able to fix the problem by early afternoon of the same day. Consequently, the deadline for filing an Appeal Brief has started to run on 3 March 2020, keeping in mind the late hour of receiving the email, definitely no later than 4 March 2020.

Decision

The Appeal filed by Mrs Cristina Iovu to the Court of Arbitration for Sport on 30 March 2020 against the decision rendered by the International Weightlifting Federation Hearing Panel on 3 March 2020 is not admissible.

CAS 2020/A/6978

Andrea Iannone v. Fédération Internationale de Motocyclisme (FIM) & CAS 2020/A/7068

World Anti-Doping Agency (WADA) v. FIM and Andrea Iannone

10 November 2020

Motorcycling; Doping (Drostanolone); Criteria, standard & burden of proof regarding the Ineligibility for Presence of a Prohibited Substance; Precedent; Hair test; Sanction

Panel

Mr Hamid Gharavi (France), President

Judge Franco Frattini (Italy)

The Hon. Michael Beloff QC (United Kingdom)

Facts

Mr. Andrea Iannone (Mr. Iannone) is an Italian professional motorcycle racer of the Aprilia Racing Team Gresini who competed in the 2019 FIM World Championship MotoGP.

The World Anti-Doping Agency (WADA) is a non-profit organization based in Montreal, Canada, responsible for promoting, coordinating and monitoring fight against doping.

The Fédération Internationale de Motocyclisme (FIM) is an international organization based in Mies, Switzerland and recognized by the International Olympic Committee and the Global Association of International Sports Federations. FIM is responsible for the organization and supervision of motorcycling sports, notably the FIM World Championship MotoGP.

Mr. Iannone, WADA and FIM are hereinafter collectively referred to as “the Parties”.

From 1 to 3 November 2019, the FIM World Championship MotoGP, to which Mr. Iannone participated, took place at Sepang, Malaysia.

On 3 November 2019, Mr. Iannone underwent an in-competition doping control during which Mr. Iannone’s urine sample (sample no. 4501429) was collected and sent for testing to the Institute of Doping Analysis and Sport Biochemistry (IDAS), the WADA accredited laboratory in Germany.

On 28 November 2019, the IDAS informed FIM that the analysis of Mr. Iannone’s A sample resulted in an adverse analytical finding (AAF) as it revealed the presence of drostanolone metabolite 2 α -methyl-5 α -androstane-3 α -ol-17-one (Drostanolone) in a concentration of approximately 1.5ng/ml.

By letter of 16 December 2019, FIM informed Mr. Iannone of the test result and, in light of this result, of his provisional suspension from participating in any motorcycling competition or activity as of 17 December 2019 until further notice.

By letter of 8 January 2020, FIM informed Mr. Iannone that the analysis of the B sample requested by Mr. Iannone’s letter of 18 December 2019 confirmed the previous AAF and the presence of Drostanolone in a concentration of approximately 1.2ng/ml.

Drostanolone is a prohibited substance for which no quantitative threshold has been defined – i.e. the presence of Drostanolone at any level constitutes an Anti-Doping Rule Violation (ADRV) (WADA 2019 Prohibited List – S.1.1.a, group of Anabolic Androgenic Steroids (AAS)).

On 1 January 2020, Mr. Iannone submitted his Statement of Defence together with supporting exhibits to the FIM International Disciplinary Court (CDI), in which, *inter alia*, he asserted that the AAF was the result of his ingestion of contaminated meat.

Mr. Iannone has not denied the presence of a Prohibited Substance in his samples and has not contested having committed an ADRV under Article 2.1 of the FIM Anti-Doping Code (2019 edition) (ADC).

On 31 March 2020, the CDI rendered its decision (the “Appealed Decision”). The CDI found that Mr. Iannone committed an ADRV due to the presence of Drostanolone in his system, as revealed by the testing of Mr. Iannone’s A and B samples.

As per Article 10.2 of the ADC, “[t]he period of Ineligibility shall be four years where: [t]he anti-doping rule violation does not involve a Specified Substance, unless the Rider or other Person can establish that the anti-doping rule violation was not intentional”. The CDI found that Mr. Iannone discharged his burden of proof that the ADRV was not intentional by establishing on a balance of probabilities, that he was a “strong consumer of meat, both red and white meat, including during his stay in Malaysia and Singapore, and that [contamination] of meat by anabolic steroids in Asia, including Malaysia, is very likely”.

The CDI held that there was a “probability” that the contaminated meat scenario was correct.

As per Article 10.5.2 ADC, the CDI found that Mr. Iannone established that he bore “No Significant Fault or Negligence”. The CDI took into consideration that (i) only a small amount of Drostanolone was found in his system, which could be compatible with an unintentional occasional exposure to meat contaminated by Drostanolone, (ii) the negative hair test results confirmed that the

small amount of Drostanolone found in the Mr. Iannone’s system could result from contaminated meat, (iii) Mr. Iannone was in an unknown place without access to the hospitality area, his usual food providers and assistants and (iv) Mr. Iannone ate his meals in “high class hotels [...] where one does not expect to have contaminated food”. The CDI concluded that Mr. Iannone’s fault was not significant in relation to the ADRV and therefore the applicable period of ineligibility shall be reduced to eighteen months, i.e. by six months.

Both Mr. Iannone and WADA appealed the Decision before the Court of Arbitration for Sport (the CAS).

On 21 April 2020, Mr. Iannone filed its Statement of Appeal and supporting exhibits with the CAS against the Appealed Decision in accordance with R47 of the Code of Sports-related Arbitration (2019 edition) (the CAS Code).

On 12 May 2020, WADA filed its Statement of Appeal and supporting exhibits with the CAS against the Appealed Decision in accordance with R47 of the Case Code. WADA requested, as per Article R52 of the CAS Code, its appeal to be consolidated with Mr Iannone’s appeal as the two are directed against the same decision.

By emails of 19 May 2020, Mr. Iannone and FIM confirmed that they had no objection to the consolidation of the two proceedings.

By letter of 24 May 2020, the CAS informed the Parties that the procedures CAS 2020/A/6978 and CAS 2020/A/7068 were consolidated as per Article R52 of the CAS Code.

The Hearing was held on 15 October 2020.

Reasons

Mr. Iannone concurs with CDI's findings as to the fact that the ADRV was not intentional as it resulted from the consumption by Mr. Iannone of contaminated meat. Consequently, the Appealed Decision is not challenged on this point. Mr. Iannone primarily requests that the Appealed Decision be set aside and that, as per Article 10.4 ADC, the applicable ineligibility period be eliminated as he bears "No Fault or Negligence". Alternatively, Mr. Iannone argues that, as per Article 10.5.1.2 ADC, the applicable period of ineligibility shall be reduced to the minimum under this Article, i.e. a reprimand, as he bears "No Significant Fault or Negligence" and Drostanolone "came from a Contaminated Product". As a further alternative, Mr. Iannone submits that, as per Article 10.5.2 ADC, the applicable period of ineligibility shall be reduced to one year as he bears "No Significant Fault or Negligence".

FIM argues that the presence of Drostanolone was revealed by the test of Mr. Iannone's A sample and confirmed by the test of the B sample, which have been accepted by Mr. Iannone himself. FIM submits that Mr. Iannone cannot rely on Article 10.4 ADC to justify the elimination of the period of ineligibility since Article 10.4 ADC only applies in "exceptional circumstances" in which the athlete exercised the "utmost caution in avoiding doping". According to FIM, Mr. Iannone failed to exercise the utmost caution as he should have known that there was a risk of meat contamination. FIM also claims that the hair test underwent by Mr. Iannone is irrelevant as hair test is "not suitable for general routine control" and is "considered solely as complement and not an alternative to the standard investigations". FIM further asserts that, as stated in the Appealed Decision, as per Articles 10.2.1 and 10.2.1.1 ADC, if the violation is not intentional the applicable period of ineligibility shall be of

maximum of two years. FIM considered that, although Mr. Iannone "could have been more active or investigative" by contacting the Malaysian competent authorities to obtain information on the risk of meat contamination and to identify the source of the prohibited substance, and despite Mr. Iannone's failure to provide any concrete evidence supporting the "food contamination scenario", the athlete had demonstrated on a balance of probability that the violation should still be considered as not intentional as it is probable that the "food contamination scenario" is correct.

WADA argues that Mr. Iannone committed an ADRV as proved by the in-competition doping control he underwent on 3 November 2019. WADA contends that, as per Article 10.2.1.1 ADC, the period of ineligibility shall be of four years unless it is established that the ADRV was not intentional. WADA submits on the basis of several consistent CAS decisions, prior to the Lawson¹ and Jamnicky case², that to demonstrate that the violation was not intentional, an athlete is generally required to establish the origin of the prohibited substance and that it is only in "extremely rare" cases with "exceptional circumstances" that an athlete might demonstrate that the violation was not intentional even if the origin of the prohibited substance cannot be established. WADA asserts that Mr. Iannone's case does not present "exceptional circumstances," consequently he is required to demonstrate the origin of the prohibited substance failing which the standard sanction of four years shall apply.

1. Criteria, standard & burden of proof regarding the Ineligibility for Presence of a Prohibited Substance

Article 10.2 ADC provides:

¹ CAS 2019/A/6313.

² CAS 2019/A/6443 and CAS 2019/A/6593. CAS 2019/A/6313.

The period of Ineligibility shall be four years where: [t]he anti-doping rule violation does not involve a Specified Substance, unless the Rider or other Person can establish that the anti-doping rule violation was not intentional.

The term intentional is defined at Article 10.2.3 ADC as follows:

[T]he term “intentional” is meant to identify those Riders who cheat. The term therefore requires that the Rider or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.

It is therefore for the athlete charged with an ADRV to demonstrate that the ADRV was not intentional, on a balance of probabilities pursuant to Article 3.1 ADC (see, for example, CAS 2016/A/4626; CAS 2017/A/5335; CAS 2017/A/5392; CAS 2016/A/4662):

Where these Anti-Doping Rules place the burden of proof upon the Rider 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.

As a result, pursuant to Article 3.1 ADC, it is for the athlete charged with an ADRV to demonstrate that the ADRV was not intentional, on a balance of probabilities. The definitions of “No Fault or Negligence” and “No Significant Fault or Negligence” at Article 10.4 and 10.5 ADC explicitly require the athlete to establish the origin of the prohibited substance to benefit from an elimination or reduction of the otherwise applicable sanction. By contrast, Article 10.2 ADC contains no such requirement. There is thus a possibility for an athlete to avoid having his or her ADRV be held to be intentional under Article 10.2 ADC in cases where the origin of the prohibited

substance cannot be established, subject to the athlete’s meeting his or her burden of proof on a balance of probabilities that the ADRV was not intentional. The extent of this possibility has been characterized as somewhat “theoretical” or limited to “exceptional circumstances” (see CAS 2016/A/4676; CAS 2017/A/5335). When the athlete is not able to establish the origin of the substance, the athlete will have to pass through the “narrowest of corridors” to discharge his burden of proof (see CAS 2016/A/4534). An assessment of the corridor depends on the very specific objective and subjective circumstances of the case. Thus, to avoid the standard four-year period of ineligibility for ADRVs involving non-specified substances, the athlete has to demonstrate either a lack of intent by providing concrete and persuasive evidence establishing such lack of intent on a balance of probabilities (see for example, CAS 2017/A/5369; CAS 2016/A/4919; CAS 2016/A/4676; CAS 2017/A/5335) or that such period should be reduced based on no significant fault or negligence which requires the establishment of the origin of the prohibited substance.

In this respect, the acceptance that a scenario of meat contamination was “possible” is not the same as probable. The fact that Mr. Iannone is a “strong consumer of meat, both red and white meat,” is devoid of any particulars as to what exactly was eaten, where, and its possible source. Its consideration of whether said ingestion is consistent with a meat contamination by Drostanolone, appears to the Panel to be somewhat cursory. The Panel finds that in any event the outcome would not have been any different had Mr. Iannone advanced particulars and established consumption of a specific meat, as he has failed to establish, on a balance of probabilities basis, that any meat that he may have possibly consumed in Singapore and/or Malaysia could have been contaminated by Drostanolone. Neither Mr. Iannone nor his experts were able

to establish specifically that there is an issue of meat contamination by Drostanolone. Mr. Iannone has essentially left the Panel with protestations of innocence, his clean record and his alleged lack of incentive to dope. Such factors are insufficient to establish, on a balance of probability that Mr. Iannone's ADRV was not intentional (see CAS 2018/A/5584).

The Panel finds that Mr. Iannone has not established on a balance of probabilities that the ADRV was unintentional and thus it upholds WADA's Appeal and sets aside in its entirety the Appealed Decision.

2. Precedent

The Panel notes that CAS does not have a doctrine of binding precedent, such as it exists in common law jurisdiction, though in the interest of maintaining a consistent jurisprudence, any panel will pay respectful attention to the awards of its predecessors raising similar issues to those of the case before it. However, when an award departs from some well-established CAS case law, proper reasons for such change should be sufficiently stated. That said, failing a *stare decisis* effect or precedential value of CAS awards, this Panel is therefore not obliged to follow the legal analysis conducted by previous panels (see CAS Code Commentary Mavromati/Reeb, Art. R46 no. 47).

Apart from the general difficulty in proving a negative, the Panel accepts that it is in practice challenging to establish the non-intentional character of an ADRV in the absence of a demonstration of the origin of the prohibited substance. An assessment of the corridor depends on the very specific objective and subjective circumstances of the case, especially as no one case is exactly the same as another and will present its own specific human, factual and scientific particulars. This is in line with the

very text and spirit of Article 10.2 ADC, always bearing in mind the ground rules on the burden of proof, whose standard is set by Article 3.1.

In summary, to avoid the standard four-year period of ineligibility, Mr. Iannone has to demonstrate either a lack of intent by providing concrete and persuasive evidence establishing such lack of intent on a balance of probabilities – i.e. the test to which the Panel is bound to apply, nothing less, nothing more – or that such period should be reduced based on no significant fault or negligence (Article.10.5. ADC).

3. Hair test

The probative value of a hair test is controversial in the context of an ADRV. Moreover, it was carried out by Mr. Iannone after the results of the B sample, as opposed to earlier, i.e. after the results of the A sample, whereas it could, and ideally should have been carried out earlier given that the window of detection of drugs in hair can be affected by the washing out of acidic or neutral drugs, as established, as well as by environmental causes.

A hair test result cannot exclude the intentional use of a prohibited substance but could at most suggest that the athlete was not ingesting that substance over a longer time frame than the single instance at stake. For that reason, a hair test cannot trump a urine test.

4. Sanction

As Mr. Iannone failed to demonstrate that the ADRV was not intentional, the applicable sanction shall be the standard ineligibility sanction of four years as per Article 10.2 ADC.

Article 10.11.3 ADC provides that if a period of ineligibility is served pursuant to a decision that is subsequently appealed, the athlete shall receive a credit for such period of ineligibility

served against any period of ineligibility which may ultimately be imposed on appeal. Accordingly, Mr. Iannone is eligible for credit from 17 December 2019 to the date of this Award.

As per Article 9 and 10.8 ADC, Mr. Iannone shall also be sanctioned with disqualification of the results obtained in the completion in which the violation occurred, as well as any other competitive results of Mr. Iannone obtained from the date the positive sample was collected through the commencement of any provisional suspension or ineligibility period. Such disqualification shall result in forfeiture of any medals, points and prizes related to such results.

Decision

Mr. Iannone's Appeal against the Appealed Decision is necessarily dismissed as a result of the upholding of WADA's Appeal, as much as he is seeking the annulment of the sanctions which requires him to prove that his ADRV was not intentional. His alternative plea for a reduction thereof pursuant to Articles 10.4 and 10.5 ADC, is also necessarily dismissed since those Articles are engaged only if the ADRV is found not to be intentional and because in order to benefit from these Articles, it is *sine qua non* for Mr. Iannone to establish how the prohibited substance entered his body, which the Panel finds that he has not been able to do.

CAS 2020/A/7061

Athletic Club v. Union of European Football Associations (UEFA)

23 September 2020 (operative part of 16 July 2020)

Football; Governance; Limits to CAS panels' power as judicial bodies; Protection of third parties' rights and legitimate interests; Illegality/arbitrariness of a decision; Incompatibility of an UEFA decision with the UEFA Guidelines

Panel

Mr Rui Botica Santos (Portugal), President

Mr Pierre Muller (Switzerland)

Mr Patrick Lafranchi (Switzerland)

Facts

Athletic Club (“Appellant” or “Athletic”) is a Spanish professional football club founded in 1898 in Bilbao, Spain and a member of the Royal Spanish Football Federation (“RFEF”). It currently plays in the top Spanish football league (“La Liga Competition”) and it is qualified for the Spanish Football Cup final (“Spanish Cup” or “Copa del Rey”).

Union of European Football Associations (“Respondent” or “UEFA”) is an association under the Swiss law and has its headquarters in Nyon, Switzerland. UEFA is the governing body of football at the European level.

This case is about which Spanish football clubs would qualify for the UEFA Europa League 2020-2021 (“UEL”). UEL and UEFA Champions League (“Champions”) are part of the UEFA competitions (“UEFA Competitions”).

Originally scheduled for 18 April 2020, the Spanish Cup final between Athletic and Real Sociedad Fútbol, S.A.D (“Real Sociedad”) was indefinitely postponed on 11 March 2020 by the RFEF due to the Covid-19 pandemic, with the agreement of both the Appellant and Real Sociedad

On 23 April 2020, UEFA issued guidelines for its national associations (“UEFA Guidelines”) without specific provision regarding the eligibility of the clubs participating in the domestic cups. Basically, the UEFA Guidelines encourage the *“national associations and leagues to explore all possible options in order to bring all the domestic competitions giving access to UEFA club competitions to their natural end”*.

Prior to the UEFA Guidelines, on 16 April 2020, the RFEF unilaterally adopted a selection criterion (“RFEF Decision”) for the entry in the UEL in the event that the domestic competitions could not be completed. Considering the RFEF Decision, one of the cup finalists would always have access to the UEL. If one of the cup finalists would rank in the first 6 places on La Liga Competition, then the other cup finalist would be entitled to participate in the UEL. If none of the cup finalist could rank in the first 6 places of La Liga Competition, then the eligible club would be the best ranked club in La Liga Competition. On 16 April 2020, with 11 rounds remaining, Athletic were in 10th position in La Liga Competition and Real Sociedad in 4th position.

However, on 30 April 2020, the UEFA Executive Committee (“UEFA EC”) issued a circular letter to regulate the eligibility of club qualification for the UEL in case it would be impossible in some countries to complete their domestic cup competitions because of the Covid 19 pandemic and therefore determine the club that would enter the 2020/2021 UEL (“Appealed Decision” or “UEFA Decision”).

The Appealed Decision provides in substance that if a domestic cup cannot be completed, “the highest ranking non-qualified domestic championship club qualifies for the 2020/21 UEL”. Given the number of entries in the UEFA Competitions available to the RFEF under the UEFA Europa League Regulations 2018-21 Cycle (“UEFA Regulations”), this meant that the 7th ranked club in La Liga Competition would be qualified for the UEL. The Appellant is challenging the Appealed Decision in its capacity as the finalist of the 2019/2020 Spanish Cup.

On 11 June 2020, La Liga Competition resumed with all the remaining matches being played behind closed doors. The season is set to end on 19 July 2020 and the winner of the Spanish Cup will not be known by that date.

The Appellant *inter alia* prayed the following reliefs:

“Athletic Club applies for the Court of Arbitration for Sport to rule as follows:

I. The UEFA decision issued in its circular dated 30 April 2020 is null.

Alternatively to I

II. The UEFA decision issued in its circular dated 30 April 2020 is annulled.

Ruling de novo

III. Athletic Club is eligible to participate in the UEFA Europa League 2020-2021 as Spanish Cup 2020 finalist, in the situation where it does not rank in the first six places of the Spanish Liga 2019-2020 classification and the other Spanish Cup finalist 2020 ranks in the first six places of such classification. If neither of the Spanish Cup finalists 2020 ranks in the first six places of the Spanish Liga 2019-2020, then Athletic Club shall be eligible to participate in the UEFA Europa League 2020-2021 if it ranks above

the other Spanish Cup finalist in the Spanish Liga 2019-2020 (...).”

The Respondent inter alia asks CAS to issue an award “Dismissing Athletic Club’s appeal, to the extent it is inadmissible” and “Confirming the Decision under appeal (...).”

Reasons

1. Limits to CAS panels’ power as judicial bodies

The UEFA Decision is an act in the nature of a deliberation/resolution made by the UEFA EC in the exercise of and in accordance with its powers and duties (Article 23.1 of the UEFA Statutes). The purpose of the UEFA Decision is to resolve a lacuna in the UEFA Regulations that was caused by the Covid-19 pandemic, which unexpectedly resulted in the cessation of the domestic competitions *via* which clubs, which are finalists in domestic cup competitions, compete in UEFA Competitions. The UEFA Regulations, particularly Article 3.04 thereof, provide that only clubs that are cup winners can compete in UEFA Competitions. Article 3.04 of the UEFA Regulations clearly provides that if a domestic cup winner qualifies for the UEFA Competitions *via* its domestic championship, then the highest ranking non-qualified domestic championship club (*i.e.* the club ranked in 7th place, in Spain) qualifies to play in the UEL. Article 3.04 of the UEFA Regulations only applies where the domestic cup winner qualifies for the UEFA Competitions, but makes no provision with regard to domestic cup finalists, where the cup final is suspended and postponed to an uncertain date after the final date on which clubs can qualify for the UEFA Competitions. The UEFA Decision was made to resolve an obvious lacuna in the UEFA Regulations, which do not provide that finalist clubs are eligible to play in the European Competitions.

The UEFA Decision is therefore a regulatory provision that applies to all clubs that play in their domestic competitions, in a general and abstract manner.

By asking CAS to rule *de novo* and grant Athletic Club qualification for the 2020-2021 UEL at the expense of the club that finishes 7th in La Liga Competition, the Appellant is basically asking CAS to amend the UEFA Regulations. Article R57.1 of the CAS Code allows the Panel to rule *de novo*. This means reviewing the facts and the law and also curing procedural defects in the lower instances (CAS 2016/A/4704). CAS is a judicial body and its role, just like that of other courts across the world is to adjudicate, interpret and apply regulations and the law. CAS can only review the process through which the laws were passed and establish whether the governing body followed the due process or laid down procedures. The *de novo* power do not extend to amend regulations issued by governing bodies. This is the sole and exclusive discretion of UEFA as an executive and law-making body as was emphasized in CAS 2016/A/4787 (para. 137). In view of this, the Panel finds that it cannot grant the ruling *de novo* as the Appellant requests.

2. Protection of third parties' rights and legitimate interests

It is undeniable that the *annulment* or the *amendment* of the UEFA Decision, in the terms proposed and sought by the Appellant, could affect some Spanish clubs that, in accordance with the law of probabilities, can be ranked in 7th place in La Liga Competition and which would therefore forfeit access to the UEFA Competitions, at the expense of one of finalist clubs in the Spanish Cup. The issue in question is whether the affected parties have the right to be heard in this appeal procedure. It follows therefore that the preliminary issues with which the Panel is confronted are twofold, *i.e.*:

(i) whether the Spanish clubs potentially affected by the cancellation of UEFA Decision should be joined as Respondents in these appeal proceedings; and (ii) how to identify the Spanish clubs potentially affected by the cancellation of the UEFA Decision.

The Panel considers, so far as the first question is concerned, that the *erga omnes* effect of the mere *cancellation* of the UEFA Decision does require the intervention of all Spanish clubs potentially affected by a cancellation of the decision. The mere application for the *cancellation* of the UEFA Decision does not give rise to a preliminary procedural issue of failure to join necessary respondents, but is rather and above all a substantive issue, which affects all those, including the Appellant, who are subject to the decision and risk being placed in the position they would have been in, if it had never been made.

The Panel takes a different view regarding the request for the *amendment* of the UEFA Decision by a new CAS decision which ensures that one of the finalists in the Spanish Cup plays in the UEFA Competitions. Despite the Panel's determination above that it has no power to decide *de novo* in this case, it is considered appropriate to clarify some of the issues raised by the Respondent in this regard. The Appellant seeks to ensure that one the finalists in the Spanish Cup is automatically eligible to play in the UEFA Competitions, to the detriment of other clubs that would be automatically eligible to play in the UEL, if ranked in 7th position in La Liga Competition. The Panel considers that all Spanish clubs potentially affected by the outcome of this appeal by the "imposition" of the Appellant's participation in UEL would require their enjoining in the proceedings as respondents. The Panel is of the view that all potential affected clubs have a legitimate interest to be heard in this appeal procedure.

As the Appellant did not enjoin the clubs potentially interested in and affected by the outcome of the alternative prayer for relief at issue, the CAS is also unable – based on this additional argument – to consider the said request, or to hand down the new decision sought by the Appellant. This is also in line with the ruling on a request for provisional measures in CAS 2017/A/4947 (para. 26) where the CAS emphasized the importance of enjoining a third party that stood to be affected by an appeal challenging the eligibility of a club to participate in a competition.

There are, however, CAS jurisprudence with different views. According to CAS 2016/A/4642 (paras. 122 and 128), the point is whether any third parties’ “rights” are taken away. The participation of a third affected party should only be required if the decision to be taken affects the rights of an absent third party. Legitimate and potential “parties’ interests” should not be covered by a required participation in an appeal proceeding as co-respondent(s) because such third parties do not have any legal “right”.

The present Panel has a broader understanding of this issue and does unequivocally accept the principle that no order for relief can be granted which affects the rights and legitimate interests of absent third parties. This understanding is also supported by a few CAS jurisprudence (CAS/2014/A/3862; CAS 2011/A/2654; CAS 2011/A/2551 and CAS 2004/A/594). The UEFA’s submission that the non-joinder of all Spanish clubs potentially affected by the Award is fatal to this appeal, is only valid for the Appellant’s prayers for relief that may have a direct affect to the third parties’ legitimate interests and/or rights, regardless of its merits. In addition to the present Panel’s lack of power to rule *de novo* – as explained above – the Appellant’s 3rd request cannot be considered without the enjoining of all potentially affected clubs.

The Panel considers, with regard to the second issue on this topic, that the clubs in question should have been identified in abstract and in accordance with the law of probabilities. The Appellant should have enjoined all Spanish clubs that play in La Liga Competition and have a legitimate expectation of finishing in 7th position in La Liga Competition ranking, as respondents in the proceedings.

3. Illegality/arbitrariness of a decision

The UEFA Regulations had a lacuna in result of the exceptional situation caused by the Covid-19 pandemic. The UEFA Regulations do not contemplate the situation where there would be no cup winner. The Appealed Decision provides a clear rule precisely in anticipation of the scenario whereby a national association is not able to complete a domestic cup and, therefore, cannot determine a domestic cup winner that would enter the UEL. Under the UEFA Regulations, the cup finalists do not have any right or prerogative to participate in the UEL. Only the cup winner has this right. UEFA has filled such regulatory lacuna according to a criterion based on sporting merit: “(...) *should a National Association prematurely terminate for legitimate reasons (...) a domestic cup and, as a consequence, not be able to determine a domestic cup winner on sporting merit – in application by analogy of Article 3.04 of the UEL Regulations – the highest ranking non-qualified domestic champions club qualifies (...)*”. UEFA is not filling the lacuna in the UEL Regulations by an interpretation of the rules by analogy, but rather issuing a clear rule. The used expression “*in application by analogy*” is used – and must be construed - in the sense that Article 3.04 of the UEL Regulations is replaced by the new rule resulting from the UEFA Decision.

The Appellant has not invoked that the Appealed Decision violates either any public policy rule or any statutory provision. It has

not been possible to establish that the Appealed Decision breaches any universally applicable principle such as objectivity, transparency, non-discriminatory and fairness. In relation to the sporting merit criteria, the Panel highlights that it is not within its powers to decide which sporting merit criteria deserves better protection and relevance. UEFA is free, has full powers and discretion to adopt the rules that it considers more appropriate. UEFA has not violated any provision by considering only the winner of the cup competition and that, in the absence of a cup winner, precedent should be given to the highest ranking non-qualified club in the domestic championship. Sporting merit can be assessed in different perspectives and, as mentioned, UEFA is free to determine how it implements the principle of sporting merits in defining the conditions to assess its competence. It is not the role of a CAS Panel to adopt another rationale. In other words, the CAS Panel could only annul the decision if the rationale of such decision would violate (i) the sporting merit principles, (ii) a statutory provision, (iii) any applicable legal principle, or (iv) a public policy rule, which is not the case at stake. First, because the Appellant does not specify and consubstantiate such violations; and second, because the Appealed Decision is in line with the spirit of the UEFA Regulations and respects the sporting merit principles.

Finally, the Panel adds that UEFA EC has powers to rule on the matter, according to Articles 49(2)(b) and 50(1) of the UEFA Statutes. UEFA EC has the sole powers to establish the requirements of the eligibility criteria that should apply for a club to participate in the UEL if there is no cup winner.

4. Incompatibility of an UEFA decision with the UEFA Guidelines

The Panel disagrees with the Appellant that the Appealed Decision “*contradicts*”/ “*breaches*” the UEFA Guidelines and that UEFA should have the national associations decide which club of the domestic cup competition should participate in the UEL. First, because the UEFA Guidelines are only applicable in case of “*premature termination*” of the domestic competitions. The Spanish Cup was not prematurely terminated but postponed. Second, the UEFA Guidelines are neither binding regulations nor binding decisions and do not prevent UEFA from issuing rules in order to fill a lacuna. Third, UEFA has the prerogative to enact regulations governing the access to the UEFA Competitions and to issue decisions that complete said regulations when an unprecedented event occurs.

RFEF had enacted the rules after the adoption of the UEFA Guidelines and the latter did indeed contain a delegation of powers. However, this delegation of powers does not mean that UEFA EC could not have retracted such delegation by taking a new decision. The application of the estoppel principle implies - *inter alia* - that a person/entity, through its behavior, has created specific expectations on the Appellant in a manner that it is contrary to a good faith. The theoretical possible breach of legitimate expectations was created by the RFEF Decision, not by UEFA. But RFEF does not have the power to regulate on the eligibility of club qualification for the UEFA Competitions. Moreover, UEFA cannot be responsible for the RFEF adopting premature rules, which might end up contrary to the Appealed Decision, rendered afterwards.

Finally, it is true that the UEFA Decision does not give any consideration to the “*cup finalists*”, but only to the “*cup winner*”. This is UEFA’s own decision that must be respected. The cup finalists (Athletic and Real Sociedad) and RFEF have jointly decided to postpone the final of the Spanish Cup. The Panel

understands and respects the specific circumstances that led to the postponement of the Spanish Cup final, but the Appellant has not demonstrated – presented any evidence – that the organization of the Spanish Cup final is impossible or that legitimate reasons exist for not organizing the final match until 3 August 2020 (the deadline that the clubs need to respect for UEFA’s determination of the participating clubs in the UEL). The Appellant might not like the manner in which the Appealed Decision limits the chances of a cup finalist to participate in the UEL, but this does not make the Appealed Decision arbitrary or illegal. The Appellant still has (or had) the opportunity to play the Spanish Cup final together with Real Sociedad if RFEF proceeds to organize such match. There is nothing in the Appealed Decision that limits or restricts such possibility.

Decision

The appeal filed on 11 May 2020 by Athletic Club against the decision issued by the UEFA Executive Committee on 30 April 2020 is dismissed and the UEFA Decision is confirmed.

CAS 2020/A/7092

Panathinaikos FC v. Fédération Internationale de Football Association (FIFA) & Club Parma Calcio 1913

14 December 2020

Football; Disciplinary dispute; Categorization of pleas of lack of standing to sue or of lack of standing to appeal; Panels' freedom to determine how to address the sequence of the substantive questions submitted to its analysis; Absence of binding effect of previous CAS awards or of previous decisions of the FIFA Disciplinary Committee (DC); Identification and liability of a sporting successor

Panel

Mr Manfred Nan (The Netherlands), President
Mr Mark Hovell (United Kingdom)
Mr Fabio Iudica (Italy)

Facts

Panathinaikos FC (the “Appellant” or “Panathinaikos”) is a professional football club with its registered office in Athens, Greece. It is registered with the Hellenic Football Federation (the “HFF”), which in turn is affiliated to the *Fédération Internationale de Football Association*.

The *Fédération Internationale de Football Association* (the “First Respondent” or “FIFA”) is an association incorporated under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the world governing body of international football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and football players worldwide.

Club Parma Calcio 1913 (the “Second Respondent” or “Parma Calcio 1913”) is a professional football club with its registered office in Parma, Italy. Parma Calcio 1913 is registered with the Italian Football Federation (*Federazione Italiana Giuoco Calcio* – the “FIGC”), which in turn is also affiliated to the *Fédération Internationale de Football Association*.

On 20 August 2014, the FIFA Dispute Resolution Chamber (the “FIFA DRC”) rendered a decision (the “FIFA DRC Decision”), ordering the Italian club Parma FC S.p.A. (“Parma FC”) to pay training compensation to Panathinaikos in the amount of EUR 467,000 plus interest. On 5 March 2015, following an appeal being lodged with the Court of Arbitration for Sport (“CAS”) against the FIFA DRC Decision by Parma FC, CAS issued a Termination Order because Parma FC had failed to pay its advance of costs. On 19 March 2015, Parma FC was declared bankrupt. On 30 June 2015, Parma FC was disaffiliated from the FIGC and all its players were released from their contractual obligations towards Parma FC. On the same date, Parma Calcio 1913 was founded. On 27 July 2015, at the start of the football season 2015/2016, the FIGC admitted Parma Calcio 1913 to the Serie D, the highest amateur league in Italian football.

On 30 August 2019, Panathinaikos requested the FIFA Disciplinary Committee (the “FIFA DC”) to pass a decision against Parma Calcio 1913 for Parma FC’s failure to comply with the FIFA DRC Decision, arguing that Parma Calcio 1913 was the “sporting successor” of Parma FC. On 11 February 2020, disciplinary proceedings were opened against Parma FC in respect of a potential violation of Article 64 FIFA Disciplinary Code (2017 edition) (“FDC 2017”) / Article 15 (2019 edition) (“FDC 2019”). This letter was addressed to the FIGC and also notified to Parma Calcio

1913, the HFF and Panathinaikos. On the same day, the FIGC replied to the FIFA DC that “*at the end of the sport season 2014/2015, the club Parma FC was excluded by the organized football in Italy, for pending debts. The club was then declared bankrupt, by the State Tribunal of Parma and is no longer affiliated to our Football Association as of 30 June 2015. So, our Football Association cannot transmit your communication to the a/m club, which no longer exists*”. On 13 February 2020, Parma Calcio 1913 acknowledged receipt of FIFA’s communication addressed to Parma FC. Having taken note of Panathinaikos’ statements involving Parma Calcio 1913, the latter requested FIFA to be provided with a deadline to comment, which request was granted. On 20 February 2020, Parma Calcio 1913 filed written submissions, informing the FIFA DC that it was not the sporting successor of Parma FC, and as such not liable for the debts incurred by Parma FC. On 10 March 2020, the Chairman of the FIFA DC issued its decision (the “*Appealed Decision*”), with the following operative part:

*“1. All charges against [Parma Calcio 1913] are dismissed.
2. The disciplinary proceedings initiated against [Parma Calcio 1913] are hereby declared closed”.*

On 19 May 2020, Panathinaikos filed a Statement of Appeal with CAS against the *Appealed Decision* and submitted *inter alia* the following prayers for relief:

- “1) To declare the Appeal admissible.*
- 2) Deciding de novo, to set aside the Appealed Decision and issue a new decision sanctioning Parma Calcio 1913 – or ordering FIFA to sanction Parma Calcio 1913 – in accordance with the FIFA Disciplinary Code.*
- 3) To impose a fine, order a 6-point deduction and a transfer ban on Parma Calcio 1913 in accordance with Article 15 FDC 2019/64 FDC 2017.*
- 4) Subsidiarily, to set aside the Appealed Decision and revert the case back to the FIFA*

Disciplinary Committee for a new disciplinary procedure (...)”.

Reasons

The main issues to be resolved by the Panel are:

- 1. Does Panathinaikos have standing to appeal?*
- 2. Is Parma Calcio 1913 the “sporting successor” of Parma FC?*

1. Categorization of pleas of lack of standing to sue or of lack of standing to appeal.

The plea relating to the lack of standing to sue or standing to appeal is, according to settled jurisprudence of the CAS (CAS 2009/A/1869; CAS 2015/A/3959; CAS 2015/A/4131) and the Swiss Federal Tribunal (the “SFT”) (see SFT 128 II 50, 55), a question related to the merits of the case.

2. Panels’ freedom to determine how to address the sequence of the substantive questions submitted to its analysis

Accordingly, the Panel finds that the issue of Panathinaikos’ standing to appeal does not necessarily have to be addressed first. Indeed, an arbitral tribunal is free to determine how to address the sequence of the different substantive questions at stake in legal proceedings. The Panel notes that this approach is consistent with CAS jurisprudence (CAS 2016/A/4903, para. 81-82 of the abstract published on the CAS website; CAS 2017/O/5264-5266, para. 189). Given the Panel’s findings on the issue of whether or not Parma Calcio 1913 is the sporting successor of Parma FC addressed below, the Panel does not consider it necessary to make a final determination as to Panathinaikos’ standing to appeal.

3. Absence of binding effect of previous CAS awards or of previous decisions of the FIFA Disciplinary Committee (DC)

In assessing whether Parma Calcio 1913 is the sporting successor of Parma FC, the Panel does not consider itself bound by prior decisions of the FIFA DC or CAS, because such analysis is to be made on a case-by-case basis, *i.e.* elements present in a certain case may tip the balance in one direction, whereas elements present in a lesser or higher degree in another case, may tip the balance in the opposite direction. For the same reason, the Panel does not consider it inappropriate for the FIFA DC to conclude that Parma Calcio 1913 is not the sporting successor of Parma FC in the Appealed Decision, whereas it came to the opposite conclusion in previous decisions.

Obviously, it would be good if a certain coherence would transpire from the jurisprudence of the FIFA DC and CAS. However, the argument of Panathinaikos that the jurisprudence of the FIFA DC is arbitrary is not warranted, because the Chairman of the FIFA DC sets forth a detailed reasoning as to why he deviated from the conclusions reached with respect to Parma FC/Parma Calcio 1913 in previous FIFA DC decisions. The presence of elements not considered or valued in a different way in previous FIFA DC decisions certainly allowed (and indeed obliged) the Chairman of the FIFA DC to consider such (new) elements in the proceedings before him, which may subsequently also result in a decision with a different outcome.

4. Identification and liability of a sporting successor

The key issue is whether Parma Calcio 1913 is the sporting successor of Parma FC. It is clear that Parma FC failed to comply with the FIFA DRC Decision and would therefore, in principle, be subject to disciplinary measures

by the FIFA DC. Article 15(4) FDC 2019 provides as follows:

“The sporting successor of a non-compliant party shall also be considered a non-compliant party and thus subject to the obligations under this provision. Criteria to assess whether an entity is to be considered as the sporting successor of another entity are, among others, its headquarters, name, legal form, team colours, players, shareholders or stakeholders or ownership and the category of competition concerned”.

This provision does not leave any discretion for the adjudicatory body, *i.e.* if a club is considered to be a “sporting successor” of a non-compliant club, it shall also be considered a non-compliant party. Conversely, if Parma Calcio 1913 is not the sporting successor of Parma FC then Parma Calcio 1913 cannot be sanctioned on the basis of the above-mentioned provision.

Although Parma Calcio 1913 disputes the validity of a system whereby sanctions can be imposed for non-compliance with a decision of FIFA, while it was not a party to the proceedings, the Panel finds that this is not *per se* illegitimate, for it is a commonly accepted principle that in case of abuse the corporate veil may be pierced, *i.e.* *Durchgriff*. It is against this background that previous CAS panels have considered that a sporting successor is “*a sporting entity identifiable by itself that, as a general rule, transcends the legal entities which operate it*” (CAS 2013/A/3425, para. 139; also cited in CAS 2016/A/4550 & 4576, para. 135 of the abstract published on the CAS website).

Turning to the analysis of whether Parma Calcio 1913 is to be regarded as the sporting successor of Parma FC, Article 15(4) FDC 2019 refers to the following non-exclusive list of criteria that can be taken into account in making such assessment: headquarters; name; legal form; team colours; players; shareholders, stakeholders, ownership, management;

category of competition concerned. The Parties further refer to certain additional criteria: team crest / emblem / logo; stadium; reliance on bankrupt club's history; founding year; social media; acquisition of sporting assets; FIGC serial number; technical staff; reliance on credits of bankrupt club.

The Panel will first shortly examine each of these elements separately by determining whether such specific element is indicative of considering Parma Calcio 1913 as the sporting successor of Parma FC or not and by assessing the relevance of such specific element in the overall analysis, before assessing all criteria together and coming to a final conclusion as to whether Parma Calcio 1913 is the sporting successor of Parma FC. The Panel finds that the concept of "sporting successor" is mainly implemented in order to avoid abuse. In this respect, FIFA indicated in Circular no. 1681 that one of the three main changes in the FDC 2019 was as follows:

"FIFA will act against the sporting successor of a debtor, a practice that has unfortunately become more common in recent years as clubs attempt to avoid mandatory financial responsibilities towards other clubs, players, managers, etc."

The Panel will therefore endeavour to establish whether the bankruptcy of Parma FC and the creation of Parma Calcio 1913 was a set-up to avoid their financial responsibility. It is the task of this Panel to try and distinguish such potential contemplated set-up from a genuine bankruptcy of Parma FC and the initiative to set-up a new football club in the city of Parma that, merely in order to increase its chances of becoming an economic and sporting success over time, identifies itself with the past of Parma FC to attract fans and sponsorship. Against this background, the Panel now turns to assessing the individual criteria before coming to a general conclusion.

As to Parma Calcio 1913's headquarters, the Panel observes that the registered offices of Parma Calcio 1913 are located at a different address than the registered offices of Parma FC at the time. The Panel finds that this is not a particularly important element, because changing headquarters is relatively easy to accomplish for a club willing to abuse the concept of sporting succession to avoid mandatory financial responsibilities. The Panel finds that the change of headquarters is an element of minor importance against considering Parma Calcio 1913 as the sporting successor of Parma FC.

As to Parma Calcio 1913's name, the name *Parma Calcio 1913* is different from *Parma FC S.p.A.* but bears a certain resemblance. Both names refer to the city of Parma and both refer to football. It is likely that the public will most likely refer to Parma Calcio 1913 as "Parma", as was the case with Parma FC. Parma Calcio 1913 was founded in 2015, but its name refers to the year 1913, which is the year in which the ultimate predecessor of Parma FC was established. According to Parma Calcio 1913, 1913 was the year in which the sport of football made its introduction in the city of Parma. The Panel does not consider this to be a credible explanation for the addition of the year 1913 to its name. Indeed, the Panel finds that the reference to 1913 shows that Parma Calcio 1913 tries to associate itself with the history of Parma FC and its predecessors. The Panel finds this to be a relevant element in favour of considering Parma Calcio 1913 as the sporting successor of Parma FC.

As to Parma Calcio 1913's legal form, the Panel observes that the legal form of Parma Calcio 1913 was created as a *Società Sportiva Dilettantistica* (an "SDD"), which is an amateur non-for-profit organisation, and that it was later converted into a *Società a responsabilità limitata* (an "S.r.l."), a limited liability company,

whereas Parma FC was registered as a *Società per Azioni* (an “S.p.A”), a joint stock company. Accordingly, the legal form of Parma Calcio 1913 is clearly different from the legal form of Parma FC, especially at the time of creation of Parma Calcio 1913. The Panel finds that this is a relevant element against considering Parma Calcio 1913 as the sporting successor of Parma FC.

As to Parma Calcio 1913’s team colours, the team colours of Parma Calcio 1913 are the same as the ones of Parma FC: yellow and blue. It is not denied by Panathinaikos that these colours are linked to the city of Parma, as appears from the emblem of the city of Parma. Notwithstanding this link to the city of Parma, the Panel finds that Parma Calcio 1913 was in no way obliged to use the same colours, particularly if it wanted to distinguish itself from Parma FC. The Panel finds that this is a relevant element in favour of considering Parma Calcio 1913 as the sporting successor of Parma FC.

As to Parma Calcio 1913’s players, the Panel observes that only one first team player of Parma FC was registered with the first team of Parma Calcio 1913 after the bankruptcy of Parma FC. 92 out of 221 youth players registered with Parma Calcio 1913 were part of the youth divisions of Parma FC. All of them are from families from and residing in Parma and were younger than 14 years old. The Panel finds that, in making this assessment, the players of the first team are of significantly more relevance than youth players, for the players of the first team generally determine the level of economic and sporting success of a football club. The Panel finds that this criterion bears more weight than the elements addressed above. Indeed, if certain players of a first team would remain largely the same, the Panel finds that this is an important indication that the bankruptcy and subsequent creation of a new club may well have had the purpose of

eliminating debts and getting rid of certain underperforming players or of players earning high salaries, while continuing to rely on certain players to achieve sporting success. Considering that only one player of Parma FC was registered with Parma Calcio 1913, the Panel finds this to be an important element against considering Parma Calcio 1913 as the sporting successor of Parma FC.

As to Parma Calcio 1913’s shareholders, stakeholders, ownership and management, the Panel observes that the two shareholders of Parma FC have no shares in Parma Calcio 1913. The Board of Directors of Parma Calcio 1913 at the time of its creation was constituted by 7 persons and currently by 5 persons, none of whom was part of the 10-person Board of Directors of Parma FC. The Panel finds that, like the element “*players*”, this criterion bears more weight than the other elements addressed above. If certain shareholders and/or the Board of Directors would largely remain the same, this could be considered an important indication that it may have been the intention to eliminate the debts of the old club so as to enable the new club to be in a better position to achieve economic and/or sporting success, at the expense of the creditors of the old club, while certain natural or legal persons behind the new club would remain the same, as opposed to a genuine bankruptcy. Considering that no shareholders and/or board members of Parma FC were involved in Parma Calcio 1913, the Panel finds this to be an important element against considering Parma Calcio 1913 as the sporting successor of Parma FC.

As to Parma Calcio 1913’s category of competition concerned, the Panel notes that Parma FC was relegated from the Serie A to the Serie B at the end of the 2014/15 season. However, Parma Calcio 1913 started at amateur level in the Serie D. The Panel finds that in case there had been any intentional abuse by Parma FC and Parma Calcio 1913, the

latter would have tried to rely on Parma FC's sporting achievements in the past and to start in the Serie B. In this respect, the Panel observes that Article 52 of the Federal Internal Organisations Regulations (the "NOIF") of the FIGC sets out the preconditions under which the sporting title of a club can be awarded to another club, which includes a club's participation in a given championship. The Panel finds that it derives from Article 52 NOIF that the sporting title of Parma FC could not be transferred to Parma Calcio 1913, because the latter did not settle the sporting debts of the former. As a consequence, Parma Calcio 1913 could not invoke Parma FC's sporting title to be permitted to participate in the Serie B. Rather, Parma Calcio 1913 had to start from amateur level. The Panel finds that Article 52(3) and (10) NOIF create a distinction between a situation where the sporting title is awarded to another club and where this is not the case. The regulatory framework of the FIGC does not consider the situation of Parma FC and Parma Calcio 1913 as a transfer or succession of the sporting title of Parma FC. The Panel finds this to be an important element against considering Parma Calcio 1913 as the sporting successor of Parma FC.

As to Parma Calcio 1913's team crest / emblem / logo, the Panel observes that Parma Calcio 1913's crest bears a strong resemblance with Parma FC's crest. In choosing Parma Calcio 1913 could have distinguished itself from Parma FC. The mere fact that the crest has certain elements from the crest of the city of Parma does not make this any different, as it is by no means required to adopt elements in a club's crest from the crest of the city where a club is based. The Panel finds this to be a relevant element in favour of considering Parma Calcio 1913 as the sporting successor of Parma FC.

As to Parma Calcio 1913's stadium / training center, Parma Calcio 1913 uses the same stadium as Parma FC. The Panel does not consider it particularly important that the same stadium is used, because suitable stadiums in a city may well be limited. There is no indication that Parma Calcio 1913 could use the stadium based on agreements concluded by Parma FC, which would have been a relevant indication that the former is the sporting successor of the latter. Also, the Panel finds that it cannot be expected from a newly established club that it should necessarily use a stadium different from the one used by the bankrupt club, while the stadium used by the bankrupt club remains vacant. The same applies to the training center, although it must be added that Parma Calcio 1913 purchased [Parma FC's] training center, which indicates that it did not naturally belong to Parma Calcio 1913. The Panel finds that the use of the same stadium is an element of minor importance in favour of considering Parma Calcio 1913 as the sporting successor of Parma FC.

As to Parma Calcio 1913's reliance on bankrupt club's history, Parma Calcio 1913, on its official media channels, refers to the rich history of Parma FC and associates itself with such history. For instance, Parma Calcio 1913 mentions certain former players of Parma FC as its leading scorers and exhibits trophies won by Parma FC (and bought by Parma Calcio 1913). The Panel considers this to be an important element, because if Parma Calcio 1913 deliberately relies on the history of Parma FC, it presents a picture to the general public that is not accurate, as it maintains that there is no legal and/or sporting link between the two clubs, besides the fact that they are from the same city. The Panel finds that Parma Calcio 1913 took a large risk of being considered as the sporting successor of Parma FC by publicly relying on the history of Parma FC. The Panel finds this to be an important element in favour

of considering Parma Calcio 1913 as the sporting successor of Parma FC.

As to Parma Calcio 1913's social media, it is observed that the social media channels of Parma FC now automatically refer users to the social media channels of Parma Calcio 1913. The Panel finds that this is a relevant element in favour of considering Parma Calcio 1913 as the sporting successor of Parma FC.

As to Parma Calcio 1913's acquisition of sporting assets, the Panel observes that Parma Calcio 1913 purchased a number of trophies won by Parma FC at an auction. This element has two sides. First, it is another indication that Parma Calcio 1913 identifies itself with the sporting history of Parma FC. Second, the purchase of the trophies shows that the trophies did not naturally belong to Parma Calcio 1913. The mere fact that Parma Calcio 1913 purchased trophies won by Parma FC does not mean that Parma Calcio 1913 won these trophies. Indeed, the argument Parma Calcio 1913 tries to make is that it is not the sporting successor of Parma FC, which argument is contradicted by its reliance on Parma FC's sporting history. Since Parma Calcio 1913's reliance on Parma FC's history has already been addressed above, the Panel finds that this is not a separate element to be taken into account. Conversely, the Panel finds that it is to be taken into account that Parma Calcio 1913 had to pay a price to acquire the trophies of Parma FC. The Panel finds this last aspect to be a relevant element against considering Parma Calcio 1913 as the sporting successor of Parma FC.

As to Parma Calcio 1913's FIGC serial number, Parma Calcio 1913 was awarded a different serial number by the FIGC than Parma FC, whereas Parma FC had the same serial number of its predecessor Parma AC. The Panel finds that the opinion of the FIGC matters, but that this has already been taken

into account in the assessment of the element "*category of competition concerned*" and that the serial numbers allocated by the FIGC are not a separate element of relevance for the assessment. The Panel therefore finds that this criterion is of no additional relevance for the analysis to be made.

As to Parma Calcio 1913's technical staff, it is observed that the technical staff of the first team of Parma Calcio 1913 is entirely different from the technical staff of Parma FC. The Panel finds that this element can be placed on the same footing as the element "*players*", because both groups are employees of the club. The Panel finds that this element has already been taken into consideration and that the employment situation of the technical staff is not a separate element to be taken into account. The Panel therefore finds that this criterion is of no additional relevance for the analysis to be made.

As to Parma Calcio 1913's reliance on credits of bankrupt club, the Panel notes that the then FIGC's Head of Legal Affairs and Compliance testified that Parma Calcio 1913 did not claim any solidarity contribution for players trained by Parma FC, but that such funds were received by the FIGC. The Panel considers this to be an important element, for if Parma Calcio 1913 would have relied on credits of Parma FC to claim such (outstanding) amounts from debtors of Parma FC, as if it had been the training club of the player concerned, this would have been a very important element in favour of considering Parma Calcio 1913 as the sporting successor of Parma FC. The Panel finds this to be an important element against considering Parma Calcio 1913 as the sporting successor of Parma FC.

To conclude, the Panel classified the relevance of the different elements in three levels: i) elements of minor importance; ii) relevant elements; and iii) important elements.

Although such categoric distinction is admittedly somewhat artificial as certain elements overlap, the Panel considers it useful in coming to an overall conclusion. As indicated *supra*, on the one hand, the Panel considers the elements “*Players*”, “*Shareholders or stakeholders or ownership*”, “*Category of competition concerned*” and “*Reliance on credits of bankrupt club*” to be important, all pointing against considering Parma Calcio 1913 as the sporting successor of Parma FC. On the other hand, the Panel in particular considers the element “*Reliance on bankrupt club’s history*” important, which points in favour of considering Parma Calcio 1913 as the sporting successor of Parma FC. The Panel finds that Parma Calcio 1913 took a large risk in identifying itself with the history of Parma FC, including the reference to 1913 in its name and by purchasing trophies won by Parma FC, which may well have tipped the scale in favour of considering Parma Calcio 1913 as the sporting successor of Parma FC. Indeed, the more a new club associates itself with the bankrupt club, such as using the same colours, logos, and history, the larger the risk that it will be considered the sporting successor of the bankrupt club. The Panel also notes that Panathinaikos only requested the FIFA DC to open disciplinary proceedings against Parma Calcio 1913 on 30 August 2019, whereas Parma Calcio 1913 was created on 30 June 2015. The Panel finds that, although Panathinaikos was by no means barred to initiate action in August 2019, if Panathinaikos had genuinely believed that Parma Calcio 1913 was the sporting successor of Parma FC, it would have approached the FIFA DC earlier. Generally, whether or not a club is the sporting successor of another club is not something that is to be judged four years later, just because the new club had some sporting success.

Considering that the large majority of “important elements” point against, and although the majority of “relevant elements” point in favour, the Panel finds that, on

balance, Parma Calcio 1913 is not to be regarded as the sporting successor of Parma FC. As a consequence, the Panel finds that no sporting sanctions can be imposed on Parma Calcio 1913 and that the Appealed Decision is to be confirmed.

Decision

The appeal filed on 19 May 2020 by Panathinaikos FC against the decision issued on 10 March 2020 by the Chairman of the Disciplinary Committee of the *Fédération Internationale de Football Association* is dismissed and the Appealed Decision is confirmed.

CAS 2020/A/7356

SK Slovan Bratislava v. UEFA & KI Klaksvik

1 October 2020 (operative part of 4 September 2020)

Football; Forfeit of a match due to the impossibility to play it before the applicable deadline; Standing to be sued; Notification of a decision; Principles of interpretation of rules and regulations; Distinction between travel restrictions and travel conditions in the UEFA UCLR

Panel

Prof. Ulrich Haas (Germany), Sole Arbitrator

Facts

ŠK Slovan Bratislava (the “ŠK Slovan Bratislava” or the “Appellant”) is a professional football club with its registered office in Bratislava, Slovakia. KÍ Klaksvík (the “KÍ Klaksvík” or the “Second Respondent”) is a professional football club with its registered office in Klaksvík, Faroe Islands. ŠK Slovan Bratislava appeals a decision rendered by the UEFA’s Appeals Body (“Appeals Body”) dated 24 August 2020 (“Appealed Decision”). The Appeals Body declared the 2020/21 UEFA Champions League (“UCL”) first qualifying round match between KÍ Klaksvík and ŠK Slovan Bratislava as forfeited by ŠK Slovan Bratislava which was therefore deemed to have lost the match 3-0.

On 15 July 2020, via Circular Letter No. 53/2020, the UEFA administration notified its member associations and their clubs of the implementation of the so-called “UEFA Return to Play Protocol” (the “Protocol”). The Protocol is a set of rules addressing measures concerning the COVID-19 pandemic in Europe in relation to UEFA club

competitions. Particularly, it “sets out the framework of medical, sanitary and hygiene procedures together with the operational protocols that are to be applied when staging UEFA competition matches”.

On 3 August 2020, via Circular Letter No. 58/2020, the UEFA administration informed its member associations and clubs of the immediate introduction of Annex I to the Regulations of the UEFA Champions League 2020/2021 Season (“Annex I to the UCLR”). Annex I to the UCLR sets out “special rules applicable to the qualifying phase and play-offs due to COVID-19”.

The UEFA Champions League first qualification match between KÍ Klaksvík and ŠK Slovan Bratislava was scheduled for 19 August 2020 at 18:00 CET in Klaksvík, Faroe Islands (the “Match”). On 17 August 2020, the delegation of ŠK Slovan Bratislava (“First Delegation”) travelled to the Faroe Islands. Upon arrival at the airport the whole delegation had to undergo mandatory COVID-19 testing provided for by local legislation since 27 June 2020.

On 18 August 2020, the COVID-19 test of the team’s physical therapist returned a positive result. As a consequence, the Faroese health authorities decided to quarantine the entire First Delegation for a period of 14 days (“First Quarantine Decision”). The First Quarantine Decision also offered the opportunity for the team and officials of ŠK Slovan Bratislava to leave the Faroe Islands on the chartered flight they had arrived on. The ŠK Slovan Bratislava was notified of the First Quarantine Decision on the same day.

On 19 August 2020, ŠK Slovan Bratislava requested UEFA to postpone the Match to 21 August 2020 in order for it to provide a list of new players eligible to play the Match in accordance with the deadline stated in Annex I.3.1 to the UCLR. The Match was

subsequently rescheduled by UEFA to 21 August 2020 at 18:00 CET.

On 20 August 2020, the second delegation of ŠK Slovan Bratislava (“Second Delegation”) arrived in the Faroe Islands. All members of the Second Delegation were tested by the local authorities upon their arrival. On the same date, the Faroese health authorities informed the Appellant that one of its players returned a positive COVID-19 test result. The Faroese authorities ordered that the entire Second Delegation had to be quarantined for two weeks or until their departure from the Faroe Islands via chartered flight (“Second Quarantine Decision”). The Faroese health authorities, however, offered ŠK Slovan Bratislava the possibility of a retest of the player that had tested positive. Furthermore, they advised the Appellant that they would reassess the matter, if the player returned a negative COVID-19 result.

On 21 August 2020, the Faroese authorities notified the club that the retest of the player was also positive for COVID-19 and, thus, confirmed its Second Quarantine Decision of 20 August 2020. As a consequence, the rescheduled Match could not be played.

On the same date, ŠK Slovan Bratislava sent a letter to UEFA in which it – *inter alia* – stated that *“the home team KÍ failed to comply with the Paragraph I.1.2 and I.1.3 of the Annex I of the Regulations, as the quarantine conditions were not known to us at the time of the draw [...] there still is enough time for Q1 match KÍ – Slovan to be rescheduled, played either in neutral stadium or Bratislava and decided by sporting principles and fair-play – on the pitch”*.

On 21 August 2020, ŠK Slovan Bratislava was notified that UEFA had initiated formal disciplinary proceedings against it. The club was given a deadline to submit its statements

in relation to the disciplinary proceeding by 24 August 2020.

On 24 August 2020, the chairman of the UEFA Control, Ethics and Disciplinary Body (“CEDB”) referred the case to the Appeals Body. On the same date, the Appeals Body rendered the Appealed Decision, which provides the following operative part: *“To declare the 2020/21 UEFA Champions League first qualifying round match between KÍ Klaksvík and ŠK Slovan Bratislava, that was initially scheduled to be played on 19 August 2020, as forfeited by ŠK Slovan Bratislava, who is therefore deemed to have lost the match 3-0 in accordance with Annex I.2.1 to the Regulations of the UEFA Champions League (2020/21 Season)”*. Still on the same date, the UEFA notified ŠK Slovan Bratislava the grounds of the Appealed Decision.

On 25 August 2020, the Appellant filed its Statement of Appeal with the CAS against UEFA, KÍ Klaksvík and BSC Young Boys against the Appealed Decision of 24 August 2020. The Appellant requested an expedited proceeding in accordance with Article R52 para. 4 of the Code of Sports-related Arbitration (the “CAS Code”) without a hearing. On 27 August 2020, the Appellant withdrew its appeal against BSC Young Boys.

Reasons

For the Sole Arbitrator, four issues had to be solved in this appeal: 1) Does UEFA have standing to be sued?; 2) Did UEFA notify the correct person in the proceedings before UEFA’s judicial bodies?; 3) Did the Appeals Body have jurisdiction to issue the Appealed Decision?; and 4) Who is liable for the forfeiture of the Match?

1. Standing to be sued

For the Sole Arbitrator, it was uncontested between the Parties that UEFA, having issued

the disciplinary measure, had standing to be sued in respect to the Appellant's request to set aside such measure. The Parties, however, differed with respect to the second claim filed by the Appellant, i.e. to "order UEFA (i) to immediately reintegrate ŠK Slovan Bratislava into the 2020/2021 UEFA Champions League (...) and (ii) to adopt all measures necessary for that purpose".

The Sole Arbitrator recalled that the question of whether or not a party has standing to be sued (or to be sued) was an issue of substantive law. In the absence of specific provisions on the standing to be sued in the rules and regulations of UEFA, this *lacuna* had to be filled by Swiss law and guidance had to be taken from Article 75 of the Swiss Civil Code (SCC) which states that "Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such regulation in court within one month of learning thereof". Although the wording of Article 75 SCC was ambiguous with regard to challenges against decisions taken by an association other than resolutions of a general assembly, it was uncontested that said provision applied *mutatis mutandis* to decisions of other organs of the association. The wording of Article 75 SCC implied that an appeal, in principle, had to be directed against the association that had rendered the challenged decision. However, CAS jurisprudence allowed for exception to the above rule, in particular where the appealed decision was not of a disciplinary nature, i.e. where the sports association merely acted as an adjudicatory body in relation to a dispute between its members. Thus, when deciding who was the proper party to defend an appealed decision, CAS panels proceeded by a balancing of the interests involved and taking into account the role assumed by the association in the specific circumstances. Consequently, one had to ask whether a party stood to be sufficiently affected by the matter at hand in order to qualify as a proper respondent within the meaning of the law.

In light of the above, the Sole Arbitrator had serious doubts whether, as the Respondents had submitted, the Appellant in pursuing its request for reintegration into the competition should have directed its claim against all clubs participating in the competition. For the Sole Arbitrator, these other clubs derived their rights in the UEFA Champions League competition solely from UEFA as the major event organiser and sports governing body of European club football. Their legal position could, therefore, not be stronger than or different from the legal position held by UEFA itself. Thus, these other clubs are only indirectly affected in the case at hand and it is UEFA that is best suited to solely defend the common interests of the participants in this competition. In any case, the Sole Arbitrator held that he could leave the question of whether or not UEFA had standing to be sued undecided, if he was to decide that UEFA was correct in issuing the Appealed Decision.

2. Notification of a decision

The Appellant had submitted that UEFA had been wrong in notifying its decisions to one person, Mr Martin Kuran, instead of another one, Mr Tomas Cho, who was the main contact person of the Appellant.

The Sole Arbitrator acknowledged that the Appellant had requested the UEFA on 10 August 2020 to change of the details of the main contact person of the Appellant. UEFA following this request had confirmed the following update in their internal systems: "Mr Kuran (Anti-Doping & Disciplinary); Mr Cho (Key Contact, Anti-Doping & Disciplinary)". In a further email dated 10 August 2020, the Appellant had also requested that "[i]f possible, the communication in these areas [Anti-Doping and Disciplinary] could be sent to both", i.e. Mr Kuran and Mr Cho. For the Sole Arbitrator, it clearly followed from the above that the Appellant

had not asked UEFA that Mr Kuran be removed from the list of contact persons, but that any communication relating to anti-doping or disciplinary matter be notified – if possible – to both, Mr Kuran and Mr Cho. The question, thus, was whether UEFA by sending the communication to Mr Kuran only, had failed to notify its decisions to the Appellant.

The Sole Arbitrator recalled that in order for a decision to be notified to an addressee, the decision had to enter into the recipient's sphere of control. If the recipient was a company or association, the decision had to be sent to its authorized representative. It was beyond question that Mr Kuran had been authorized and entitled to receive communications by UEFA on behalf of the Appellant. If a company or association granted authority to serve as a point of contact to several representatives, communications could be sent to either of the representatives. Consequently, UEFA in the case was entitled to notify the respective decisions to the Appellant by sending them to Mr Kuran.

3. Did the Appeals Body have jurisdiction to issue the Appealed Decision? Principles of interpretation of rules and regulations

The Appellant was submitting that the CEDB was the only competent body to issue the Appealed Decision based on Annex I.2.1 to the UCLR. These provisions were *lex specialis* and, therefore, prevailed over the more general provisions of the UEFA DR. Consequently, the Appeals Body had no jurisdiction to issue the Appealed Decision.

The Sole Arbitrator recalled that a dispute concerning the relationship between the Annex I to the UCLR and the UEFA DR had to be determined through interpretation of the rules and regulations in question. It was generally admitted that rules and regulations of international sports federations are subject to

the methods of interpretation applicable to statutory provisions rather than contracts, i.e. literal interpretation, teleological interpretation, systematic interpretation and historical interpretation.

For the Sole Arbitrator, whether it followed from a literal reading of Annex I.2.1 to the UCLR providing that – subject to certain conditions – “*the match will be declared by the UEFA Control, Ethics and Disciplinary Body to be forfeited [...]*”, that the CEDB was exclusively competent appeared questionable. The provision did not state that these provisions on jurisdiction should trump the general provisions contained in the UEFA DR, especially when taking into account that Annex I.2.1 to the UCLR was part of a set of regulations concerning the extraordinary and exceptional situation in Europe due to the COVID-19 pandemic. In this respect, the UEFA Executive Committee had approved the “*special rules applicable to the qualifying phase and play-offs due to COVID-19*”, i.e. Annex I to the UCLR on 3 August 2020, with the primary aim to ensure that the qualifying phase for the 2020/2021 UEFA Champions League and therefore UEFA club competitions could be staged in the new 2020/2021 football season. When enacting these provisions, UEFA had been well aware of the urgency of the disputes that would have arisen due to the tight deadlines for rescheduling postponed matches. It was for this reason that the deadlines for protests and appeals had been shortened pursuant to Annex I.4 to the UCLR. These deadlines differed from the ones in the UEFA DR and therefore replaced the respective provisions in the UEFA DR. However, no similar provision could be found in the Annex I to the UCLR relating to the jurisdiction of the UEFA judicial bodies. In fact, nothing in the Annex I to the UCLR pointed towards the fact that UEFA intended to amend the structure of the internal judicial bodies of UEFA for disputes related to COVID-19.

If, however, the Annex I to the UCLR was based on the existence of two internal instances, the exhaustion of both legal remedies might have proven problematic in cases of extreme urgency. It was for this type of cases, when there is no time to exhaust both internal instances that Article 29(3) of the UEFA DR provided for the possibility of the CEDB to refer the matter to the Appeals Body, allowing the latter to decide as single instance. It would have been against the idea of procedural efficiency and effective access to justice, if the Annex I had to be interpreted such as to prohibit the application of Article 29(3) of the UEFA DR in COVID-19-related disputes. Thus, an interpretation based on the reasonable interests of the parties and the overall structure of the rules could not conclude that Article 29(3) UEFA DR was superseded by the Annex I to the UCLR.

To conclude, the Sole Arbitrator found that the CEDB was entitled to refer the matter to the Appeals Body because of the extreme urgency of the matter. Consequently, the chairman of the Appeals Body had jurisdiction to issue the Appealed Decision.

4. Distinction between travel restrictions and travel conditions in the UEFA UCLR and liability for the forfeiture of the Match

The Appellant was of the view that KÍ Klaksvík was responsible for the forfeiture of the Match, because it had failed to inform UEFA on the mandatory COVID-19 testing by the authorities of the Faroe Islands. It was, therefore, KÍ Klaksvík that was responsible for the Match not taking place within the meaning of Annex I.1.2 to the UCLR. The Respondent, on the contrary, submitted that the mandatory testing procedure upon arrival was not a travel restriction. Instead, it had to be qualified as a mere travel condition, since it did not have any consequences whatsoever on persons testing

negative for COVID-19. KÍ Klaksvík had no duty to inform it with respect to travel conditions under the applicable rules and, thus, could not be held liable for the forfeiture of the Match.

As a matter of introduction, the Sole Arbitrator recalled that issues arising in connection with the COVID-19 pandemic in Europe had caused unknown situations and new legal challenges that had not been experienced before. The exceptional nature of COVID-19 for European club football had been emphasised in UEFA's Protocol which made – *inter alia* – reference to testing and international travel procedures as follows: “[A]dditional test will be necessary on MD-1 on arrival at the host city if required by the relevant local authorities [...] Teams must also be prepared to comply with any SARS-CoV-2-RNA testing at the airport that is required by the relevant local authorities”.

In consideration of the regulations contained in Annex I to the UCLR, the Sole Arbitrator found that it was important to distinguish between the terms “travel restrictions” and “travel conditions”. Travel restrictions were set out in Annex I.1 to the UCLR and expressly referred to restrictions such as “*e.g. border closures and quarantine requirements*” that were applicable to all inbound travellers. In turn, testing requirements were not mentioned in Annex I.1. but only in Annex I.2 to the UCLR. Based on this systematic distinction in Annex I to the UCLR, the Sole Arbitrator was confidently satisfied that testing requirements could not be qualified as travel restrictions. Mandatory testing in itself did not prevent persons travelling to the Faroe Islands to reach their destination. It was rather a condition to enter the territory of the country concerned and had therefore – just like the requirement to show a passport or other document of identification upon arrival – to be considered as a travel condition. Consequently, KÍ Klaksvík had no obligation to inform UEFA

about the mandatory testing by Faroese local authorities upon arrival of the team or about the quarantine requirements in case someone entering the country was tested positive for COVID-19. In view of the above, KÍ Klaksvík had not breached its obligations pursuant to Annex I.1.1 to the UCLR.

On a side note, the Sole Arbitrator found that even if – *quod non* – KÍ Klaksvík would have been found in breach of its obligations, it could not have been held accountable for the forfeiture of the Match. It followed from the wording of Annex I.1.2 to the UCLR that the match was forfeited by the hosting team only if there was a causal link between the failure to provide the required information and the match not taking place (“*and as a consequence the match cannot take place*”). For the Sole Arbitrator, no such causal link existed in the case at hand. The true reason why the Match could not be played clearly rested in the sphere of responsibility of the Appellant, i.e. because some of its team members had tested positive for COVID-19. Furthermore, even if the Appellant would have been informed about the mandatory testing and the quarantine requirements in case of a positive COVID-19 test, it would – nevertheless – have travelled to the Faroe Islands. This was evidenced by the fact that the Appellant had sent a Second Delegation on 20 August 2020 after the First Delegation had been detained in quarantine. Thus, such information was immaterial for the Match being played or not.

Decision

In light of the foregoing, the Sole Arbitrator dismissed the appeal and confirmed the decision of the UEFA Appeals Body.

Jugements du Tribunal fédéral*
Judgements of the Federal Tribunal
Sentencias del Tribunal federal



* Résumés de jugements du Tribunal Fédéral suisse relatifs à la jurisprudence du TAS
Summaries of some Judgements of the Swiss Federal Tribunal related to CAS jurisprudence
Resúmenes de algunas sentencias del Tribunal Federal Suizo relacionadas con la jurisprudencia del TAS

4A_146/2019

6 juin 2019

Ruann Visser c. Agence Mondiale Antidopage (AMA), South African Institute for Drug-Free Sport (SAIDS)

Recours en matière civile contre la “lettre” du Tribunal Arbitral du Sport (TAS) datée du 25 février 2019 (CAS 2018/A/5990)

Extrait des faits

Ruann Visser (l'athlète ou le boxeur), domicilié en Afrique du Sud, est un boxeur professionnel.

L'Agence Mondiale Antidopage (l'AMA) est une fondation de droit suisse; son siège est à Lausanne. Elle a notamment pour but de promouvoir, au niveau international, la lutte contre le dopage dans le sport.

South African Institute for Drug-Free Sport (SAIDS) est l'agence sud-africaine de lutte contre le dopage.

Le 23 février 2018, le boxeur a fait l'objet d'un contrôle antidopage qui a révélé la présence d'un produit figurant sur la liste des substances interdites par l'AMA.

Le 16 avril 2018, SAIDS a informé l'athlète de l'ouverture d'une enquête disciplinaire en raison d'une violation présumée des règles antidopage et l'a suspendu à titre provisoire.

Dans le cadre de la procédure conduite par le Tribunal arbitral indépendant en matière de dopage du SAIDS (*Independent doping hearing panel*, le Tribunal indépendant), le boxeur a fait valoir que le contrôle antidopage qu'il avait subi était entaché de diverses irrégularités.

A la suite du retrait par SAIDS de la plainte dirigée contre l'athlète, le Tribunal indépendant, statuant le 5 octobre 2018, a constaté que le boxeur n'avait pas enfreint les règles antidopage et a confirmé la levée de sa suspension.

Le 6 novembre 2018, l'AMA a adressé au Tribunal Arbitral du Sport (TAS) une déclaration d'appel, dans laquelle elle requérait que son appel fût soumis à un tribunal arbitral composé de trois membres. Dans une note de bas de page, elle se réservait toutefois la possibilité de solliciter la désignation d'un arbitre unique, dans l'hypothèse où les défendeurs ne verseraient pas leur part de l'avance de frais.

Le 28 janvier 2019, le TAS a informé les parties que SAIDS n'avait réglé que la moitié de son avance de frais et que le boxeur n'avait rien payé. Il précisait notamment ce qui suit:

*“In view of the above, the Parties are advised that the Appellant’s footnote is understood in a way that in the given circumstances, a Sole Arbitrator is requested. Accordingly, and in the absence of any other information or indication by the Appellant by **Wednesday, 30 January 2019**, the name of the Sole Arbitrator will be communicated to the Parties in a further CAS Court Office letter”.*

Par courriel du même jour, l'AMA a maintenu sa requête tendant à la désignation d'un arbitre unique. Le 29 janvier 2019, le TAS en a avisé les parties. Déférant à une requête de l'athlète, le TAS, par courrier électronique du 29 janvier 2019, a imparti un délai aux

défendeurs pour se prononcer sur la requête de l'AMA. Le 1er février 2019, le boxeur, par le truchement de son précédent conseil, s'est déterminé sur ce point, en invitant le TAS à confier la cause à un tribunal arbitral composé de trois membres.

Le 25 février 2019, le TAS a informé les parties que la Présidente de la Chambre arbitrale d'appel (la Présidente de la Chambre d'appel) confirmait son choix de soumettre l'appel à un arbitre unique, dont le nom leur serait communiqué ultérieurement.

Le 28 février 2019, un arbitre unique a été désigné en la personne d'un avocat finlandais.

Par courrier électronique du 6 mars 2019, l'athlète a requis que lui soient communiquées par écrit les raisons ayant conduit le TAS à nommer un arbitre unique, en soulignant à cet égard que l'arbitre désigné présidait actuellement au Conseil de surveillance de l'agence antidopage finlandaise.

Le 13 mars 2019, le TAS a indiqué que la Présidente de la Chambre d'appel avait choisi de désigner un arbitre unique sur la base des art. R50 al. 1 et R54 du Code de l'arbitrage en matière de sport (dans sa version de 2017; le Code).

Le 15 mars 2019, l'athlète a relevé qu'en vertu de l'art. R50 al. 1 du Code, il y avait lieu de tenir compte des circonstances de l'affaire, parmi lesquelles, mais pas uniquement, le fait que l'intimé n'avait pas payé sa part des avances de frais dans le délai imparti pour ce faire. Il reprochait au TAS d'avoir pris exclusivement en considération cet aspect financier.

Par décision du 18 mars 2019, le Conseil International de l'Arbitrage en matière de Sport (CIAS) a fait droit à la demande

d'assistance judiciaire formée par le boxeur et l'a dispensé de payer une avance de frais.

Le 27 mars 2019, Ruann Visser (le recourant) a interjeté un recours en matière civile au Tribunal fédéral aux fins d'obtenir l'annulation de la *“décision rendue le 25 février 2019 par la Présidente de la Chambre d'arbitrage d'appel du Tribunal arbitral du sport soumettant la cause CAS 2018/A/5990 à un arbitre unique (...)”*.

L'AMA (l'intimée n° 1), SAIDS (l'intimée n° 2) et le TAS, qui a produit le dossier de la cause, n'ont pas été invités à déposer une réponse.

Extraits des considérant

Dans le domaine de l'arbitrage international, le recours en matière civile est recevable contre les décisions de tribunaux arbitraux aux conditions prévues par les art. 190 à 192 de la loi fédérale sur le droit international privé du 18 décembre 1987 (LDIP; RS 291), conformément à l'art. 77 al. 1 let. a LTF.

Le siège du TAS se trouve à Lausanne. Le recourant n'était pas domicilié en Suisse au moment déterminant. Les dispositions du chapitre 12 de la LDIP sont dès lors applicables (art. 176 al. 1 LDIP).

Le recours en matière civile visé par l'art. 77 al. 1 let. a de la Loi sur le Tribunal fédéral (LTF) en liaison avec les art. 190 à 192 LDIP n'est recevable qu'à l'encontre d'une sentence, qui peut être finale (lorsqu'elle met un terme à l'instance arbitrale pour un motif de fond ou de procédure), partielle, voire préjudicielle ou incidente. En revanche, une simple ordonnance de procédure pouvant être modifiée ou rapportée en cours d'instance n'est pas susceptible de recours. Est déterminant le contenu de la décision, et non pas sa dénomination (ATF 143 III 462 consid. 2.1).

De jurisprudence constante, la décision prise par un organisme privé, comme la Cour d'arbitrage de la Chambre de Commerce Internationale (CCI) ou le CIAS, au sujet d'une demande de récusation d'un arbitre, ne peut pas faire l'objet d'un recours direct au Tribunal fédéral (ATF 138 III 270 consid. 2.2.1; 118 II 359 consid. 3b; arrêt 4A_546/2016 du 27 janvier 2017 consid. 1.2.3). Elle pourra néanmoins être revue dans le cadre d'un recours dirigé contre la première sentence attaquant, motif pris de la composition irrégulière du tribunal arbitral (ATF 138 III 270, précité, consid. 2.2.1; arrêts 4A_546/2016, précité, consid. 1.2.3; 4A_644/2009 du 13 avril 2010 consid. 1).

De même, la décision de nomination d'un arbitre prise par un organisme privé — sur la base d'un règlement d'une institution d'arbitrage — ne constitue pas une sentence et n'est dès lors pas susceptible d'un recours direct au Tribunal fédéral (arrêts 4A_546/2016, précité, consid. 1.2.3; P.1703/1982 du 16 mai 1983 consid. 1d, in Bull. ASA 1984 p. 203; CHRISTIAN OETIKER, in Zürcher Kommentar zum IPRG, 3^oM. 2018, n^o 32 ad art. 190 LDIP; STEFANIE PFISTERER, in Basler Kommentar, Internationales Privatrecht, 3^o éd. 2013, n^o30 ad art. 190 LDIP; YVES TSCHANZ, in Commentaire romand, Loi sur le droit international privé - Convention de Lugano, 2011, n^o 46 ad art. 190 LDIP; MANUEL ARROYO, in Arbitration in Switzerland, The Practitioner's Guide, vol. I, 2^o éd. 2018, n^o 13 ad art. 191 LDIP; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 30 éd. 2015, n^o848; GIRSBERGER/VOSER, International Arbitration - Comparative and Swiss Perspectives, 3^o éd. 2016, n^o 731; KAUFMANN-KOHLER/RIGOZZI, International Arbitration, 2015, p. 428 S.;

SEBASTIEN BESSON, Chronique de jurisprudence arbitrale en matière sportive, in Revue de l'arbitrage 2014 p. 681; DIETER GRÄNICH, in Kommentar zur Schweizerischen Zivilprozessordnung, 3^e éd. 2016, n^o 5a ad art. 392 CPC¹ TARKAN GÖKSU, Schiedsgerichtsbarkeit, 2014, n^o 829; BOOG/STARK-TRABER, in Berner Kommentar, Schweizerische Zivilprozessordnung, vol. III, 2014, n^o 31 ad art. 361 CPC; PHILIPP HABEGGER, in Basler Kommentar, Schweizerische Zivilprozessordnung, 3^e éd. 2017, n^o 18 ad art. 361 CPC; FELIX DASSER, in Kurzkomentar ZPO, 2^e éd. 2014, n^o 7 ad art. 361 CPC).

Dans un arrêt du 13 novembre 2013, le Tribunal fédéral a relevé que la décision rendue par le Président de la Chambre arbitrale ordinaire du TAS relative au nombre d'arbitres ne s'apparente pas à une simple ordonnance de procédure pouvant être modifiée ou rapportée en cours d'instance (arrêt 4A_282/2013 consid. 5.3.2 non publié aux ATF 139 III 511). En effet, cette décision tranche définitivement une contestation au sujet de la composition de la Formation appelée à connaître de la cause opposant les parties. Aussi aurait-elle pu et même dû être déférée immédiatement au Tribunal fédéral. Toutefois, la Cour de céans a rappelé dans la foulée que les décisions prises par le CIAS sur demandes de récusation ne peuvent pas être attaquées directement devant le Tribunal fédéral par un recours en matière civile fondé sur l'art. 190 al. 2 let. a LDIP. Elle a souligné qu'il pourrait y avoir quelque incohérence à ouvrir un recours contre la décision de nomination d'un arbitre prise en cours de procédure par un autre organe de l'institution d'arbitrage. Le Tribunal fédéral a finalement laissé cette question indécise,

¹ Code de Procédure Civile suisse (CPC)

le recours devant de toute façon être rejeté (arrêt 4A_282/2013, précité, consid. 5.3.2).

Dans un arrêt non publié du 27 janvier 2017 rendu en matière d'arbitrage interne, la Cour de céans a déclaré irrecevable le recours dirigé contre deux courriers de la *Swiss Chamber's Arbitration Institution* avisant les parties de la nomination d'un arbitre unique (arrêt 4A_546/2016). En substance, elle a considéré que la désignation d'un arbitre par un organe administratif, chargé de gérer la procédure arbitrale, ne constituait pas une sentence arbitrale attaquant, puisqu'elle n'émanait pas d'un tribunal arbitral au sens du chapitre 3 du CPC, respectivement du chapitre 12 de la LDIP (arrêt 4A_546/2016, précité, consid. 1.3). Se référant expressément à l'arrêt 4A_282/2013, le Tribunal fédéral a en outre rappelé qu'il n'avait nullement modifié sa jurisprudence selon laquelle la désignation d'un arbitre par une institution d'arbitrage n'est pas susceptible de recours (arrêt 4A_546/2016, précité, consid. 1.3).

Conformément à la jurisprudence précitée, qui vaut *mutatis mutandis* pour l'arbitrage international, la nomination d'un arbitre unique par un organe du TAS ne peut pas être contestée directement devant le Tribunal fédéral dès lors qu'elle ne constitue pas une sentence arbitrale (cf. aussi MATTHIAS SCHERER, *Decisions of private bodies and institutions cannot be challenged under Art. 190 FIL Act — Really?*, Bull. ASA 2014 p. 107; cf. également le

commentaire de l'arrêt 4A_546/2016 paru dans la revue *causa sport* 1/2017 p. 28 *r Demnach ist beispielsweise die Ernennung eines Einzelschiedsrichters im Rahmen einer Schiedsorganisation, etwa durch den Präsidenten der ordentlichen Schiedskammer des TAS, nicht anfechtbar.*; cf. en outre, la doctrine citée *supra* au consid. 2.2; *contra*: MAVROMATI/REEB, *The Code of the Court of Arbitration for Sport*, 2015, n° 27 ad art. R40 du Code, qui estiment, en se référant à l'arrêt 4A_282/2013, que la nomination des arbitres peut faire l'objet d'un recours immédiat). Par conséquent, la désignation de l'arbitre unique ne pourra être revue que dans le cadre d'un recours dirigé contre la première sentence attaquant rendue par ledit arbitre.

Décision

Sur le vu de ce qui précède, le recours est irrecevable.

Invoquant l'art. 64 al. 1 LTF, le recourant a sollicité sa mise au bénéfice de l'assistance judiciaire. Comme son recours était voué à l'échec, l'une des deux conditions cumulatives à la réalisation desquelles la disposition citée subordonne l'octroi de l'assistance judiciaire n'est pas remplie en l'espèce. Ladite requête doit, dès lors, être rejetée.

Faisant application de la faculté que lui confère l'art. 66 al. 1 in fine LTF, la Cour de céans renoncera néanmoins à la perception de frais à titre exceptionnel.

4A_462/2019

29 juillet 2020

KS Skënderbeu c. Union des Associations Européennes de Football (UEFA)

Rrecours en matière civile contre la sentence rendue le 12 juillet 2019 par le Tribunal Arbitral du Sport (TAS) (CAS 2018/A/5734)

Extrait des faits

Klubi Sportiv Skënderbeu (le club) est un club de football professionnel albanais, membre de la Fédération albanaise de football, laquelle est affiliée à l'Union des Associations Européennes de Football (UEFA).

L'UEFA a notamment pour mission de traiter toutes les questions concernant le football européen. Elle exploite, de concert avec la société privée Sportradar, un système de détection des fraudes sur les paris sportifs (*Betting Fraud Detection System*; BFDS).

Le 13 mai 2016, les inspecteurs d'éthique et de discipline de l'UEFA (les inspecteurs de l'UEFA) ont rédigé un rapport dans lequel ils réclamaient que le club ne fût pas admis à participer à l'édition 2016/2017 de la Ligue des Champions, compétition annuelle réunissant les meilleurs clubs européens.

Par sentence du 21 novembre 2016 (CAS 2016/A/4650), le Tribunal Arbitral du Sport (TAS) a confirmé la décision rendue le 1er juin 2016 par l'Instance d'appel de l'UEFA interdisant au club de prendre part aux compétitions organisées par l'UEFA durant la saison 2016/2017.

A la suite de cette sentence arbitrale, les inspecteurs de l'UEFA ont ouvert une

nouvelle procédure dirigée contre le club. Dans leur rapport daté du 7 février 2018, ils ont conclu que, selon la réglementation disciplinaire de l'UEFA, le club était responsable des agissements de ses joueurs, entraîneurs et officiels.

Le 8 février 2018, le club a été avisé de l'ouverture d'une procédure disciplinaire à son encontre. Pour étayer ses accusations de manipulations de rencontres sportives (*match-fixing*), l'UEFA s'est fondée sur les rapports établis dans le cadre du BFDS (les rapports BFDS) concernant quatre rencontres disputées par le club en 2015.

Par décision du 29 mars 2018, l'Instance de contrôle, d'éthique et de discipline de l'UEFA a suspendu le club de toute compétition européenne pour les dix prochaines saisons et lui a infligé une amende d'un million d'euros.

Statuant le 26 avril 2018, l'Instance d'appel de l'UEFA a rejeté l'appel formé par le club et a confirmé la décision attaquée.

Le 14 mai 2018, le club a adressé au TAS une déclaration d'appel assortie d'une demande de mesures provisionnelles.

En date du 16 avril 2019, la Formation a tenu audience à Lausanne en présence des parties et de leurs conseils.

Par sentence du 12 juillet 2019, le TAS a rejeté l'appel et confirmé la décision attaquée.

Le 16 septembre 2019, le club (le recourant) a adressé au Tribunal fédéral un recours en matière civile en vue d'obtenir l'annulation de la sentence du 12 juillet 2019.

Dans sa réponse du 2 décembre 2019, l'UEFA (l'intimée) a conclu au rejet du recours dans la mesure de sa recevabilité.

Extrait des considérants

Dans un premier moyen, le recourant, invoquant l'art. 190 al. 2 let. e LDIP, dénonce une violation du principe *ne bis in idem*. Il prétend avoir été sanctionné deux fois sur la base des mêmes faits. A l'en croire, la première exclusion prononcée à son encontre le 21 novembre 2016 (dans la procédure CAS 2016/A/4650) empêchait de le sanctionner une seconde fois dans la sentence attaquée.

Un tribunal arbitral viole l'ordre public procédural, au sens de l'art. 190 al. 2 let. e de la Loi sur le Tribunal Fédéral (LTF), s'il statue sans tenir compte de l'autorité de la chose jugée d'une décision antérieure ou s'il s'écarte, dans sa sentence finale, de l'opinion qu'il a émise dans une sentence préjudicielle tranchant une question préalable de fond (ATF 136 III 345 consid. 2.1 p. 348 et les arrêts cités). La jurisprudence qualifie le principe *ne bis in idem* de corollaire ou d'aspect négatif de l'autorité de la chose jugée (arrêt 4A_386/2010 du 3 janvier 2011 consid. 9.3.1 et les arrêts cités). Ledit principe est inclus dans la notion de l'ordre public au sens de l'art. 190 al. 2 let. e de la loi fédérale sur le Droit International Privé (LDIP) (arrêts 4A_324/2014 du 16 octobre 2014 consid. 6.2.1). En droit pénal, il interdit de poursuivre deux fois la même personne pour le même fait délictueux (arrêt 4A_386/2010, précité, consid. 9.3.1). Que la violation du principe *ne bis in idem* tombe sous le coup de l'art. 190

al. 2 let. e LDIP est une chose. Que le droit disciplinaire sportif soit également soumis à ce principe, propre au droit pénal, en est une autre, qui ne va pas de soi (arrêts 4A_324/2014, précité, consid. 6.2.1; 4A_386/2010, précité, consid. 9.3.1). En l'occurrence, le TAS lui-même a jugé qu'il convenait d'appliquer ce principe en l'espèce (sentence, n. 143). Point n'est, dès lors, besoin d'approfondir ici la question de l'applicabilité dudit principe, propre au droit pénal, au droit disciplinaire sportif. Il suffira de vérifier l'application qui en a été faite *in concreto* par la Formation.

Se référant à plusieurs sentences rendues par le TAS, la Formation considère que la procédure en deux phases, prévue par la réglementation de l'intimée, ne contrevient pas au principe *ne bis in idem*. Pour elle, la première phase est de nature administrative, tandis que la seconde est une procédure disciplinaire, ce qui ressort expressément des dispositions réglementaires de l'intimée. Le déroulement de la procédure en deux phases distinctes est justifié. Il est en effet nécessaire de prévoir une procédure permettant d'exclure immédiatement un club d'une compétition sportive afin de préserver l'intégrité du sport, en particulier dans les cas de manipulations de rencontres sportives puisqu'il existe le risque qu'un club puisse continuer à truquer certaines rencontres au cours de la même compétition. L'objet de la première phase — administrative — de la procédure n'est ainsi pas de sanctionner un club mais de protéger les valeurs, la réputation et l'intégrité des compétitions organisées par l'intimée, tandis que la seconde phase — disciplinaire — vise à sanctionner le même club en appréciant le comportement qui lui est reproché à la lumière de l'ensemble des circonstances.

Dans la cause 4A_324/2014, le Tribunal fédéral a jugé que l'exclusion d'un club

turc de la Ligue des Champions durant une saison pour cause de *match-fixing*, prononcée en premier lieu à titre de mesure administrative par la Fédération turque de football, suivie, après la conduite d'une autre procédure par l'intimée, d'une sanction disciplinaire consistant en la suspension dudit club de toute compétition européenne pendant deux saisons, n'était pas contraire au principe *ne bis in idem*, La Cour de céans a relevé que le club n'avait pas tenu compte du fait que les deux procédures poursuivaient des objectifs différents et visaient à protéger des intérêts distincts. Le club recourant s'était en effet contenté de souligner que les sentences arbitrales faisaient toutes deux référence au terme de sanctions, ce qui ne suffisait pas à démontrer une identité d'objet entre les deux procédures. Le Tribunal fédéral a en outre relevé qu'il n'était pas évident de savoir, compte tenu de la procédure en deux étapes prévue par l'intimée, si le tribunal arbitral avait eu la possibilité, dans le cadre de la première procédure, de pouvoir apprécier l'intégralité des éléments de fait. Au terme de son examen, il a nié toute contrariété au principe *ne bis in idem* (consid. 6.2.3).

Dans son mémoire, le recourant s'emploie à tenter de démontrer que son argumentation diffère de celle du club turc dans l'affaire précitée. Il estime que la solution dans l'arrêt en question ne devrait pas être identique dans la présente espèce, dans la mesure où il aurait prétendument démontré que les deux procédures poursuivent le même but et conduisent à le sanctionner deux fois à raison des mêmes faits.

Il n'en est rien. L'argumentation que le recourant développe à cet égard, sur un mode essentiellement appellatoire, n'emporte pas la conviction de la Cour de céans. Comme le relève à juste titre l'intimée, l'intéressé s'évertue en effet à

démontrer par une analyse sémantique des sentences rendues par le TAS, en procédant à une mise en évidence sélective de certains passages, que les deux décisions seraient en réalité de nature disciplinaire. Cela ne suffit pas à infirmer la conclusion retenue dans la cause 4A_324/2014. Quoi que le recourant soutienne, l'exclusion d'une compétition pour une durée limitée, prononcée dans un premier temps, vise principalement à garantir l'intégrité et le bon déroulement de la compétition sportive en évitant que la participation d'un club soupçonné d'avoir truqué une rencontre ne puisse fausser les résultats de ladite compétition. En cela, elle se distingue de la suspension et de l'amende infligées au recourant dans la sentence attaquée, cette mesure-ci revêtant avant tout un caractère répressif. Quoi qu'en pense l'intéressé, le fait que la première décision d'exclusion puisse éventuellement comporter une dimension punitive accessoire ne signifie pas encore que la procédure en deux phases de l'intimée contreviendrait au principe *ne bis in idem*. Le recourant semble en outre confondre le Tribunal fédéral avec une cour d'appel lorsqu'il affirme que la procédure en deux phases, prévue par l'intimée ne se justifie pas.

Dans un autre pan de son argumentation, le recourant, citant l'arrêt de la Cour européenne des droits de l'homme (la Cour) *Zolotoukhine contre Russie* du 10 février 2009, fait valoir qu'il y a lieu d'adopter une approche fondée strictement sur l'identité des faits matériels au moment d'apprécier l'éventuelle violation du principe *ne bis in idem*. Selon lui, les faits matériels fondant les deux sanctions prononcées à son encontre seraient identiques, ce qui suffirait à admettre une contrariété au principe *ne bis in idem*.

Il est vrai que la Cour a précisé, dans l'arrêt précité, ce qu'il fallait entendre par une "même infraction" selon l'art. 4 du Protocole n° 7 de la Convention européenne des droits de l'homme. Selon elle, il ne s'agit pas uniquement de la qualification juridique de deux actes délictueux, mais de l'interdiction de poursuivre une personne pour une seconde infraction dans la mesure où celle-ci se base sur des faits identiques ou en substance les mêmes que ceux qui ont donné lieu à la première infraction). La Cour a ainsi opté pour une approche fondée sur l'identité des faits (cf. aussi ATF 144 IV 136 consid. 10.5 et les arrêts cités).

Le critère de l'identité des faits ne suffit cependant pas à lui seul à retenir une violation du principe *ne bis in idem*. En effet, il convient encore de se demander s'il y a eu répétition des poursuites (volet "bis" du principe). Sous cet angle, la Cour a admis, dans plusieurs affaires postérieures à l'arrêt *Zolothoukine*, que s'il existe un lien matériel et temporel suffisamment étroit entre les procédures concernées visant la même constellation de faits, de sorte qu'elles peuvent être considérées comme deux aspects d'un système unique, il n'y a pas de dualité de la procédure contraire au principe *ne bis in idem* (arrêts *A. et B. contre Norvège* du 15 novembre 2016, § 120 ss; *Rivard contre Suisse* du 4 octobre 2016, § 33; cf. aussi ATF 144 IV 136 consid. 10.5).

En l'espèce, les faits sur lesquels reposent les deux sentences rendues par le TAS sont similaires. La Cour de céans observe cependant l'existence d'un lien étroit entre les deux phases de la procédure prévue par la réglementation de l'intimée. A cet égard, elle constate que les deux mesures ont été prises par des organes juridictionnels de l'intimée. Elle relève aussi que les règles édictées par l'intimée permettant d'exclure un club d'une

compétition réservent expressément la possibilité de prononcer ultérieurement une sanction disciplinaire. En cas de soupçons de manipulations de rencontres, l'intimée doit en effet, lors de la première phase, agir rapidement afin de protéger l'intégrité de la compétition à laquelle entend participer le club mis en cause. L'unique mesure à sa disposition, à ce stade-là, est l'exclusion du club de ladite compétition pendant une année. Lors de la seconde phase, l'intimée doit déterminer si le comportement incriminé justifie le prononcé d'une sanction disciplinaire sur la base d'une autre réglementation. Ainsi, les organes de l'intimée n'appliquent pas la même réglementation lors des deux phases de la procédure. En outre, elles ne disposent pas du même éventail de sanctions, puisque, lors de la première phase procédurale, l'exclusion du club d'une compétition, durant au maximum une année, constitue l'unique mesure envisageable. La Cour de céans souligne en outre que la Formation indique que la durée d'inéligibilité d'un an découlant de la mesure administrative est prise en considération dans le cadre de la sanction disciplinaire (sentence, n. 151). Enfin, elle note encore l'existence d'un lien temporel étroit entre les deux procédures, puisque la seconde phase a été déclenchée peu après le prononcé de la première sentence. Tous ces éléments démontrent que les deux procédures présentent des liens suffisamment étroits entre elles pour qu'elles soient considérées comme deux aspects d'un système unique.

Dans ces conditions, force est d'admettre que la Formation n'a pas violé le principe *ne bis in idem*, si tant est que celui-ci soit applicable au droit disciplinaire sportif.

Dans un deuxième moyen, divisé en plusieurs branches, le recourant se plaint d'une série de violations de son droit d'être entendu.

La jurisprudence a déduit du droit d'être entendu, tel qu'il est garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, un devoir minimum pour le tribunal arbitral d'examiner et de traiter les problèmes pertinents. Ce devoir est violé lorsque, par inadvertance ou malentendu, le tribunal arbitral ne prend pas en considération des allégués, arguments, preuves et offres de preuve présentés par l'une des parties et importants pour la sentence à rendre. Il incombe à la partie soi-disant lésée de démontrer, dans son recours dirigé contre la sentence, en quoi une inadvertance des arbitres l'a empêchée de se faire entendre sur un point important. C'est à elle d'établir, d'une part, que le tribunal arbitral n'a pas examiné certains des éléments de fait, de preuve ou de droit qu'elle avait régulièrement avancés à l'appui de ses conclusions et, d'autre part, que ces éléments étaient de nature à influencer sur le sort du litige (ATF 142 III 360 consid. 4.1.1 et 4.1.3; arrêt 4A_478/2017 du 2 mai 2018 consid. 3.2.1).

En premier lieu, l'intéressé reproche au TAS d'avoir refusé de lui donner accès aux informations indispensables que sont, selon lui, les formules mathématiques, les algorithmes et la base de données numériques du BFDS.

Sous le couvert du grief tiré de la violation de son droit d'être entendu, le recourant s'en prend, en réalité, à l'appréciation des preuves à laquelle s'est livrée la Formation pour en tirer la conclusion que l'accès à ces informations n'était pas décisif pour l'issue du litige. La démonstration, à caractère purement appellatoire, à laquelle se livre l'intéressé dans son acte de recours, ne permet nullement d'établir que l'accès aux formules mathématiques, algorithmes et données numériques du BFDS, aurait pu influencer sur le sort du litige. En tout état de cause, on relèvera

que la Formation a aussi refusé de divulguer ces informations au recourant, aux motifs que celles-ci sont sensibles et confidentielles, qu'elles n'appartiennent pas à l'intimée mais à la société Sportradar, et qu'il existe le risque qu'elles puissent être utilisées à mauvais escient par la suite en permettant éventuellement à des personnes nourrissant de mauvaises intentions d'adopter de nouveaux comportements susceptibles de contourner le système BFDS.

En deuxième lieu, le recourant, dénonçant pêle-mêle une violation du droit d'être entendu, du principe de l'égalité des armes et de celui du contradictoire, fait grief à la Formation d'avoir considéré que le BFDS est un système fiable en se fondant sur le rapport Forrest dont les auteurs ont pu accéder, contrairement à lui, aux données mathématiques du BFDS.

Pareil reproche tombe à faux. Le recourant perd à nouveau de vue que les données mathématiques du BFDS n'ont pas été jugées décisives pour l'issue du litige. Aussi se plaint-il en vain de ne pas avoir eu accès à des données non pertinentes pour statuer sur les faits qui lui sont reprochés. Quoi que soutienne le recourant, il n'existe aucune contradiction à admettre que les données mathématiques et la partie algorithmique du BFDS sont en elles-mêmes insuffisantes à établir l'existence d'un cas de *match-fixing* et retenir que le BFDS, dans son ensemble, est un système fiable. Le moyen tiré d'une contrariété au principe de l'égalité des armes est tout aussi infondé puisque les auteurs du rapport Forrest n'ont pas été mandatés par l'intimée mais bel et bien par la société Sportradar. Le recourant ne peut pas davantage être suivi lorsqu'il prétend, de façon appellatoire, que le rapport Forrest ne constitue pas une véritable expertise, contrairement à ce qu'a retenu la Formation. En effet, en plaçant ainsi, il

se place exclusivement sur le terrain de l'appréciation des preuves, qui échappe en principe à l'examen du Tribunal fédéral lorsqu'il statue sur un recours en matière civile visant une sentence arbitrale internationale. Quant à la prétendue violation du principe du contradictoire, on se contentera de rappeler ici que le recourant s'est vu offrir, à réitérées reprises, la possibilité de requérir l'audition du Prof. Forrest et qu'il y a renoncé.

Mal fondé, le grief ne peut qu'être écarté.

En troisième lieu, le recourant reproche à la Formation de ne pas avoir donné suite à sa demande d'expertise judiciaire visant à apprécier le BFDS et le rapport Forrest, violant ainsi son droit d'être entendu, le principe du contradictoire et celui de l'égalité des armes.

Le recourant fait fausse route. Un tribunal arbitral peut en effet refuser d'administrer une preuve, sans violer le droit d'être entendu, si le moyen de preuve est inapte à fonder une conviction, si le fait à prouver est déjà établi, s'il est sans pertinence ou encore si le tribunal, en procédant à une appréciation anticipée des preuves, parvient à la conclusion que sa conviction est déjà faite et que le résultat de la mesure probatoire sollicitée ne peut plus la modifier (ATF 142 III 360 consid. 4.1.1 p. 361). Lorsqu'il statue sur un recours en matière d'arbitrage international, le Tribunal fédéral ne peut revoir une appréciation anticipée des preuves, sauf sous l'angle extrêmement restreint de l'ordre public (ATF 142 III 360 consid. 4.1.1 p. 361). Or, le recourant ne démontre pas, ni même ne soutient, que le refus d'ordonner une expertise judiciaire, sur la base d'une appréciation anticipée des preuves, serait contraire à l'ordre public. Il s'ensuit le rejet dudit grief.

En dernier lieu, le recourant soutient que le refus d'entendre l'ensemble des collaborateurs de Sportradar ayant participé à l'élaboration des rapports BFDS porterait atteinte à son droit d'être entendu.

Il sied de rappeler que le TAS, considérant que les parties avaient requis l'audition de plus de quarante témoins et soucieux d'assurer une conduite efficace du procès, a invité les parties à produire des témoignages écrits, étant précisé que seuls les témoins dont l'audition serait requise par la partie adverse, aux fins d'un contre-interrogatoire, assisteraient à l'audience. S'agissant des personnes chargées d'établir les rapports BFDS relatifs aux matchs litigieux, l'intimée a précisé que chaque rapport était le fruit d'un travail collectif pouvant réunir jusqu'à vingt personnes. Elle a également fait savoir au TAS que certains employés de Sportradar avaient reçu des menaces de mort. Après plusieurs échanges de courriers entre les parties, le TAS a accepté que l'intimée lui communique uniquement le nom et le curriculum vitae de quatre collaborateurs ayant participé à la rédaction des rapports BFDS.

Dans son mémoire de recours, l'intéressé se contente de soutenir, par une description par trop réductrice, que la décision de limiter le nombre de témoins était mue par de simples considérations de "confort". Ce faisant, il ne prétend pas ni ne démontre que l'audition d'autres employés de Sportradar pourrait influencer d'une quelconque manière sur le sort du litige. Le grief tiré d'une violation du droit d'être entendu tombe dès lors à faux. Pour le surplus, le recourant se borne à remettre en question l'appréciation des témoignages des quatre collaborateurs entendus lors de l'audience, ce qui n'est pas admissible dans un recours en matière d'arbitrage international.

Dans un troisième et dernier moyen, le recourant soutient que la sentence attaquée est contraire au principe de la légalité (*nulle poena sine lege*) puisque les règles adoptées par l'intimée ne permettent pas de sanctionner un club sans la preuve et l'imputation d'un comportement contraire auxdites règles à une personne physique. Il fait également valoir, dans une "hypothèse civiliste", que l'application faite par le TAS desdites règles contredit le principe de la fidélité contractuelle.

Il sied d'emblée de relever que le Tribunal fédéral ne s'est jamais formellement prononcé sur le point de savoir si le principe *nulle poena sine lege*, qui domine l'interprétation de la loi pénale, fait partie de l'ordre public matériel. Il convient de rappeler, sur un plan plus général, qu'en matière de sanctions disciplinaires prononcées par des associations de droit privé, telles les fédérations sportives, l'application automatique des notions de droit pénal comme la présomption d'innocence et le principe *in dubio pro reo* ne va pas de soi (arrêts 4A_600/2016 du 29 juin 2017 consid. 3.3.4.2; 4A_488/2011 du 18 juin 2012 consid. 6.2 et les précédents cités). Point n'est toutefois besoin de pousser plus avant l'examen de cette question puisque le grief se révèle de toute manière infondé.

Lorsqu'il s'agit d'interpréter des statuts, les méthodes d'interprétation peuvent varier en fonction du type de société. Pour l'interprétation des statuts de grandes sociétés, on recourt plutôt aux méthodes d'interprétation de la loi. Pour l'interprétation des statuts de petites sociétés, on se réfère plutôt aux méthodes d'interprétation des contrats, à savoir une interprétation selon le principe de la confiance (arrêt 4A_600/2016, précité, consid. 3.3.4.1). Le Tribunal fédéral a appliqué les règles

d'interprétation de la loi lorsqu'il s'est agi, pour lui, d'interpréter les clauses statutaires relatives à des questions de compétence adoptées par une association sportive majeure, telle l'intimée (arrêt 4A_392/2008 du 22 décembre 2008 consid. 4.2.1 et les références). Il en a fait de même pour découvrir le sens de règles d'un niveau inférieur aux statuts édictées par une association sportive de cette importance (arrêts 4A_314/2017 du 28 mai 2018 consid. 2.3.1; 4A_490/2017 du 2 février 2018 consid. 3.3.2; 4A_600/2016, précité, consid. 3.3.4.1).

En l'occurrence, l'interprétation faite par la Formation porte sur des règles d'une association sportive d'un niveau inférieur aux statuts. Celles-ci ont été édictées par l'intimée, laquelle est une association sportive majeure qui régit le football au niveau européen. Aussi y a-t-il lieu de les interpréter conformément aux méthodes d'interprétation des lois (dans le même sens, arrêts 4A_314/2017, précité, consid. 2.3.2.1; 4A_600/2016, précité, consid. 3.3.4.1).

Toute interprétation débute par la lettre de la loi (interprétation littérale), mais celle-ci n'est pas déterminante: encore faut-il qu'elle restitue la véritable portée de la norme, qui découle également de sa relation avec d'autres dispositions légales et de son contexte (interprétation systématique), du but poursuivi, singulièrement de l'intérêt protégé (interprétation téléologique), ainsi que de la volonté du législateur telle qu'elle résulte notamment des travaux préparatoires (interprétation historique). Le juge s'écartera d'un texte légal clair dans la mesure où les autres méthodes d'interprétation précitées montrent que ce texte ne correspond pas en tous points au sens véritable de la disposition visée et conduit à des résultats que le législateur ne peut avoir

voulus, qui heurtent le sentiment de la justice ou le principe de l'égalité de traitement. En bref, le Tribunal fédéral ne privilégie aucune méthode d'interprétation et n'institue pas de hiérarchie, s'inspirant d'un pluralisme pragmatique pour rechercher le sens véritable de la norme (ATF 142 III 402 consid. 2.5.1 et les arrêts cités). Quant à l'interprétation de la loi pénale par le juge, elle est dominée par le principe *nulla poena sine lege*. Le juge peut toutefois, sans violer ce principe, donner du texte légal une interprétation même extensive afin d'en dégager le sens véritable, celui qui est seul conforme à la logique interne et au but de la disposition en cause. Si une interprétation conforme à l'esprit de la loi peut s'écarter de la lettre du texte légal, le cas échéant au détriment de l'accusé, il reste que le susdit principe interdit au juge de se fonder sur des éléments que la loi ne contient pas, c'est-à-dire de créer de nouveaux états de fait punissables (ATF 1371V 99 consid. 1.2).

Dans la sentence attaquée, la Formation commence par citer les art. 8 et 12 du Règlement disciplinaire (RD) édicté par l'intimée, dans sa version applicable en l'espèce, lesquels ont notamment la teneur suivante:

“Art. 8 Responsabilité

Une association membre ou un club qui est lié par une règle de comportement figurant dans les statuts ou les règlements de l'UEFA est passible de mesures et de directives disciplinaires si la violation de cette règle résulte du comportement de l'un de ses membres, joueurs, officiels ou supporters, ou de toute autre personne exerçant une fonction au nom de l'association membre ou du club concerné, même si l'association membre ou le club concerné peut prouver l'absence de toute forme de faute ou de négligence.

Art. 12 Intégrité des matchs et des compétitions et trucage de matchs

1. Les personnes soumises à la réglementation de l'UEFA doivent s'abstenir de tout comportement

portant ou susceptible de porter atteinte à l'intégrité des matchs et des compétitions, et collaborer pleinement avec l'UEFA en tout temps dans sa lutte contre de tels comportements.

2. L'intégrité des matchs et des compétitions est violée notamment par toute personne :

a) qui agit de façon à influencer illégalement ou illégitimement le déroulement et/ou le résultat d'un match ou d'une compétition en vue d'obtenir un avantage pour lui-même ou pour un tiers (...).”

Selon la Formation, l'application de l'art. 8 précité n'exige pas qu'un individu spécifique soit identifié mais simplement qu'il soit établi que des membres, des officiels, des supporters ou des joueurs du club ont commis les actes répréhensibles reprochés, à l'exclusion de tiers étrangers au club, tels des arbitres. Une telle interprétation est compatible avec le texte de la disposition et se justifie car les comportements sanctionnés, soit le trucage de matchs et la corruption, sont par essence dissimulés. En outre, les instances sportives, en raison de leur pouvoir de coercition limité, ne disposent pas des mêmes moyens d'investigation que les autorités étatiques leur permettant de faire toute la lumière sur de tels agissements. Ces considérations faites, la Formation retient, compte tenu du nombre de matchs suspects et des rapports faisant référence aux “erreurs” commises par les joueurs du recourant, que des personnes liées exclusivement à ce dernier sont impliquées dans la manipulation des rencontres sportives. Partant, le club doit être tenu pour responsable en vertu de l'art. 8 RD.

En ce qui concerne la violation alléguée du principe de la fidélité contractuelle, outre le fait que ledit principe ne trouve pas à s'appliquer en l'espèce, le recourant se contente de critiquer, de manière inadmissible dans le cadre d'un

tel moyen, l'interprétation faite par la Formation de la réglementation de l'intimée. Il s'ensuit l'irrecevabilité du grief.

En tout état de cause, l'approche préconisée par le recourant est par trop restrictive et n'emporte pas la conviction de la Cour de céans. En effet, quoi que soutienne l'intéressé, il ne ressort pas du texte réglementaire qu'une personne physique ayant adopté un comportement portant atteinte à l'intégrité des matchs devrait nécessairement être identifiée afin de pouvoir sanctionner un club. Au regard de l'une des finalités principales des art. 8 et 12 RD, qui est de lutter contre le fléau que constitue la manipulation de rencontres de football, conditionner le prononcé d'une sanction à l'encontre d'un club à la condition de pouvoir identifier précisément la personne physique ayant commis les actes en question reviendrait à réduire considérablement la portée des art. 8 et 12 RD et irait à l'encontre des objectifs qui sous-tendent ces dispositions. C'est le

lieu de rappeler qu'il est possible, sans violer le principe *nulle poena sine lege*, de donner du texte d'une norme une interprétation même extensive afin d'en dégager le sens véritable, celui qui est seul conforme à la logique interne et au but de la disposition en cause. Il apparaît ainsi, en tenant en particulier compte de l'interprétation téléologique des dispositions litigieuses, que la Formation n'a pas rendu une sentence contraire à l'ordre public.

L'identification d'une personne physique déterminée, impliquée dans un cas de *match-fixing*, n'est pas une condition préalable au prononcé d'une sanction à l'encontre d'un club.

Il appert des remarques précédentes que le grief doit être écarté.

Décision

Sur le vu de ce qui précède, le recours doit être rejeté dans la mesure de sa recevabilité.

4A_548/2019 and 4A_550/2019

29 April 2020

Federation A., B., C. v. Confederation D.

*Appeal against the arbitral decision by the Court of Arbitration for Sport of 4 October 2019 (CAS 2019/A/6348)*¹

Extract of the facts

The A. Federation (Appellant 1) is the national Federation of the Republic of M., whose registered office is at [address omitted]. It is a member of the D. Confederation (D.; Respondent). D. is the umbrella organization of the national football federations on the African continent, with its headquarters in [name of country omitted]. It is also the organizer of the African Cup of Nations U17 (CAN U17).

The CAN U17 is an African football tournament organized at continental level for players under the age of 17, the final phase of which is the qualifying tournament for the U17 World Cup (U17 WC) organised by the Fédération Internationale de Football Association (FIFA).

The final phase of the CAN U17 took place in April 2019 in Tanzania, with eight teams competing in two groups of four. The first and second-placed teams from the two groups qualified for the semi-finals of the CAF U-17 Championship and, at the same time, for the FIFA U-17 World Cup. The M. U17 national football team finished second in Group B and thus qualified for the 2019 FIFA U17 World Cup. The N. team finished third in the same group. B. and C. (runners-

up 2 and 3) are two football players of M. nationality. As members of the M. U17 national football team, they participated in the said CAN U17 in Tanzania.

The group match between the M. and N. teams was played on April 18, 2019. On April 19, 2019, the E. Federation made a “claim” to D. regarding the participation of B. and C., arguing that they were not eligible to play in this U17 CAN because of their age. Subsequently, D. initiated an investigation to determine if the dates of birth on the passports of the two players had been falsified.

By decision dated May 12, 2019, the Disciplinary Jury of D. decided:

1. THAT players B. and C. were not eligible to participate with M. in the CAN U17 Final Tournament played in Tanzania. As a result of their participation, the team is excluded from the competition and all results and completions during the competition must be cancelled.
2. THAT the A. Federation, as a result of its disqualification, is prevented from representing D. at the FIFA U17 World Cup to be held in 2019.
3. THAT in accordance with the regulations of the CAN U17, the A. Federation be banned from the next two (2) editions of the CAN U17 of D.

¹ Federation A., 2. B., and 3. C., v. Confederation D., 4A_548/2019 and 4A_550/2019. The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch. For the full English translations & introductory notes on the Federal Tribunal judgments in both sports- and

commercial arbitration cases, you can visit the website www.swissarbitrationdecisions.com (operated jointly by Dr. Charles Poncet and Dr. Despina Mavromati) as a service to the international arbitration community.

4. THAT players B. and C. be banned from all football related activities for a period of two (2) years.
5. THAT all medals [received] as “finalists” must be returned to D. within twenty-one (21) days, failing which a financial penalty of 20,000 USD (twenty thousand dollars [US]) will be imposed.
6. THAT the Organizing Committee restore N. and request the Executive Committee approve the participation of N. as the 4th representative of D. at the FIFA U17 World Cup to be played in 2019.
7. THAT the person responsible for entering the date of birth of the players concerned in the final tournament of the CAN U17 be sanctioned in accordance with article 135.2 and banned from all football related activities for a period of two (2) years.
8. THAT the Federation A. shall be sanctioned with a fine of 100,000 USD (one hundred thousand US dollars) for falsifying communicated information concerning the participation of players in the [CAN U17] tournament organized in Tanzania. Half of this fine, in particular 50,000 USD (fifty thousand US dollars), shall be suspended for a period of four (4) years provided that the A. Association is not guilty of a similar offence during this period.

After having examined the file relating to the disqualification of the M. U 17 national football team from the 2019 edition of the CAN U 17 in Tanzania, the Executive Committee of D., by decision of June 20, 2019, “confirmed” the above-mentioned decision of the Disciplinary Jury of D. with the exception of point 6. Furthermore, the Executive Committee of D. decided the following:

Consequently, we hereby inform you that the Executive Committee has approved the reinstatement of N., the team ranked 3rd in Group

B after the M. , which becomes the 4th team to represent D. at the FIFA U17 World Cup to be played in Brazil in 2019.

By decision of June 23, 2019, the D. Appeal Jury confirmed the decision of the Disciplinary Jury of May 12, 2019.

The A., B and C. the decision of the Executive Committee of June 20, 2019 as well as the decision of the Appeals Jury of June 23, 2019, before the Court of Arbitration for Sport (CAS), with appeals against D.

A hearing was held on September 6, 2019, at the CAS headquarters.

By arbitral awards of October 4, 2019, the CAS dismissed both appeals on the grounds that they should have been directed not only against D., but also against the E. Federation.

Federations A., B. and C. filed civil law appeals against the two CAS awards before the Federal Tribunal. They requested a consolidation of the two cases and the annulment of the arbitral awards.

In case 4A_548/2019 (concerning the decision of the Executive Committee), the Respondent concluded that the appeal was inadmissible. In case 4A_550/2019 (concerning the decision of the Appeals Jury), the Respondent concluded that the appeal was partially inadmissible. For the remainder and in the alternative, it concluded in both proceedings that the appeals were dismissed.

In its position papers, the CAS concluded that the appeals were dismissed. The Appellants replied, following which the Respondent communicated that it persisted “in full” in the conclusions of its answer briefs.

Extracts of the legal considerations

The Federal Tribunal only considers an appeal when the appellant is particularly affected by the contested decision and has a legitimate interest in its annulment or amendment (Art. 76(1)(b) LTF).

The Respondent denies that the Appellants have an interest worthy of protection, insofar as the appeals aim to annul the exclusion of Appellant 1 from the CAN U17 and the WC U17 of the year 2019, while it is established that these tournaments have already taken place. For this reason, the appeal in procedure 4A_548/2019 (concerning the decision of the Executive Committee) should be inadmissible. Even if the decision of the Disciplinary Jury to sanction the Appellants was “confirmed” expressly by the decision of the Executive Committee, the latter is not competent, within the association, to examine the disciplinary sanctions imposed on the Appellants. The Executive Committee could only have validly decided on the admission of the E. Federation to the U17 WC in 2019. As this tournament has already been played, the challenge of the arbitral award confirming the decision of the Executive Committee, would thus be devoid of any interest.

It is true that, according to the jurisprudence of the Federal Tribunal, there is in principle no interest worthy of protection in the examination of an arbitral award in which a decision has been taken on the non-admission of an athlete or sports team to a competition which has already been played in the meantime (Judgment 4A_134/2012 of July 16, 2012, at 2.2; cf. also decision 4A_110/2012² of 9 October 2012, at 3.3.1). The situation is different if and to the extent that the

² The English translation of this decision is available here:

disputed arbitral awards confirm financial and (other) disciplinary sanctions, the effects of which continue (cf. judgment 4A_470/2016 of April 3, 2017, at 2.2).

The parties disagree about the meaning of the decision of the Executive Committee of June 20, 2019, in particular as it “confirms” the decision of the Disciplinary Board. The Respondent itself admits that the Executive Committee may have expressed itself in an unfortunate manner (*“Much as the choice of certain terms used in the letters was not the most appropriate one [...]”*). On this point, the Arbitral Tribunal considered that the decision of the Executive Committee gave at least the impression that it was a disciplinary decision. Indeed, assuming that the Appellants are successful in the parallel proceedings to overturn the decision of the Appeals Jury confirming the initial decision of the Disciplinary Jury, they cannot be certain that the disciplinary sanctions contained in the decision of the Executive Committee will be lifted. In view of this uncertainty, the Arbitral Tribunal has recognized that the Appellants have an interest worthy of protection also in contesting the decision of the Executive Committee. Whether these considerations are also relevant to the proceedings before the Federal Tribunal may remain undecided, since the appeals for the reasons that will be set out below — must in any case be dismissed, insofar as they are admissible.

The Appellants claim a violation of their right to be heard within the meaning of Art. 190(2)(d) PILA³.

The ground for appeal under Article 190(2)(d) PILA sanctions only the

<https://meiv.swissarbitrationdecisions.comeounds-challenge-arbitrator-must-be-raised-immediately-after-one-becomes-aware-them>

³ PILA is the English abbreviation of the Swiss Private International Law Act.

mandatory procedural principles reserved by Article 182(3) PILA, in particular the right to be heard proper, the content of which is, with the exception of the right to a reasoned decision, no different from that enshrined in Article 29(2) of the Constitution. According to the case law, this provision confers on each party, among other rights, the right to express its views on the facts essential to the judgment, to present its legal arguments, to offer, provided he does so in due time and in the prescribed manner, evidence on relevant facts, to take part in the hearings and to have access to the documents in the file (ATF 142 III 360⁴, at 4.1.1; 130 III 35, at 5, pp. 37 et seq.; 127 III 576, at 2c; all with the references cited).

According to settled case law, the right to be heard in adversarial proceedings, as enshrined in Art. 182(3) and 190(2)(d) PILA, does not require that reasons be given for an international arbitral award (ATF 142 III 360 at 4.1.2 p. 361 et seq.; 134 III 186, para. 6.1 and the references cited). The case law, however, infers from this a minimum duty of the arbitral tribunal to examine and deal with the relevant issues. This duty is breached when, by oversight or misunderstanding, the arbitral tribunal fails to take into consideration allegations, arguments, evidence and offers of evidence presented by one of the parties and relevant to the award to be made (ATF 142 III 360 at 4.1.1; 133 III 235 at 5.2 and the references cited). It should be remembered that the right to be heard does not guarantee a materially accurate decision. In particular, it is excluded that the complaint of violation of the right to be heard may be used to obtain a material, appellate examination of the award (ATF _____ 142 III 360 at 4.1.2 p. 362).

In disregard of these principles, the Appellants, by their complaints of violation of the right to be heard, raise inadmissible criticisms of the disputed awards. In this connection, the following observations should be made:

After having rightly or wrongly rejected the appeals because the Appellants had not also directed them against the E. Federation, it was not necessary for the Arbitral Tribunal to examine the additional grievances of the Appellants, by which they respectively attacked on the merits the decisions of the Appeals Jury and of the Executive Committee. Therefore, no violation of the right to be heard can be inferred from this way of proceeding, as the CAS rightly points out in its observations.

Even if the Appellants are of the opinion that the Arbitral Tribunal misinterpreted the statements made during the hearing and thus drew erroneous conclusions from them, a violation of the right to be heard has not been demonstrated (cf. in this respect judgment 4A_580/2017 of April 4, 2018 at 2.9 and 3.1). It is not for the Federal Tribunal to examine how the parties' pleadings are to be correctly understood and assessed (see also ATF 127111576 at 2b p. 578). The Appellants do not complain that the Arbitral Tribunal failed to take into account relevant legal arguments, but in fact aim at a review of the merits of the Awards and want to examine whether, in view of the factual circumstances of the case and in particular the statements made at the hearing (as taken into account by the arbitral tribunal), a complete dismissal of the appeals for lack of "passive legitimization" was justified. They disregard the fact that, in view of the applicable legal provisions, the material examination by the Federal

⁴ The English translation of this decision is available here:

<http://www.swissarbitrationdecisions.com/aoreea-upon-ruies-procedure-do-bind-parties>

Tribunal of an international arbitral award is limited to the question of its compatibility with public policy (Art. 190(2)(e); ATF 127 Ill 576 at 2b p.578; 121 111331 at 3a).

Finally, the same applies when the Appellants argue that the E. not directly affected by their requests, which the Panel “inadvertently” had not taken into account. The opposite is in fact true: the Panel expressly stated that the E. Federation was directly affected by point 6 and indirectly by points 1 and 2 of the decision of the Disciplinary Jury and the decision of the Executive Committee, by which the E. Federation was awarded a place at the U17 WC for the year 2019. Consequently, the Arbitral Tribunal came to the conclusion that it was imperative that the E. Federation have taken part in the procedure. Here too, the Appellants criticize, under the guise of a violation of the right to be heard, a misapplication of the law. Such criticism is inadmissible.

In the light of the foregoing, there is no reason to believe that the Appellants’ right to be heard has been violated.

The Appellants also claim that the Arbitral Tribunal violated procedural public policy within the meaning of Article 190(2)(e) PILA.

They argue that the arbitral tribunal “de facto” introduced a “necessary passive joinder” or proceedings, even though this was not based on any substantive or procedural rules.

In particular, they point out that neither the D. Procedural Rules contain specific rules on the standing to be sued. In this respect, it should be taken into account that under Swiss law, the necessary passive joinder of proceedings within the meaning of Art. 70 CCP⁵ would be an exception. In principle, a plaintiff would have the choice, according to

Art. 71 CCP, to bring an action against one or more consorts. It would be “aberrant” for the CAS to substitute itself for the Claimants in their choice by imposing on them an opposing party, for the sole reason that the Arbitral Tribunal considered it appropriate for the third party to take a position. Furthermore, it is important to note that the Appellants have not made any claim against the E. Federation. The various claims they have made would arise exclusively from their legal relationship with the Respondent. The Arbitral Tribunal allegedly confused two issues: on the one hand, that of preserving the right to be heard of a third party who is not a party to the proceedings but who would be affected by the forthcoming decision and, on the other hand, that of the duty of a claimant to jointly attract a plurality of consorts when the latter form a necessary joinder of proceedings.

With regard to the E. Federation’s right to be heard, the Appellants point out that this right could also have been observed in the event of an expulsion decision. Moreover, they argue that both the Respondent (through an “appeal in issue”) and the Panel had procedural means to bring the E. Federation into the CAS proceedings. The latter would also have had the opportunity to participate in the proceedings by means of an “intervention”. On the other hand, these different possibilities would not have been available to the Appellants: as they had not directed their claims against the E. Federation, it was not possible for them to bring the E. Federation into the proceedings.

However, by dismissing the appeals in this way, the Arbitral Tribunal would have chosen precisely “the only solution that definitively penalized the Appellants”.

The Arbitral Tribunal would thus have violated a fundamental procedural principle,

⁵ Swiss Code of Civil Procedure.

namely the right to a fair hearing within the meaning of Art. 29 para. 1 Cst.

Public policy, within the meaning of Article 190(2)(e) of the PILA, contains two elements: substantive public policy and procedural public policy. Procedural public policy is breached when fundamental and generally recognized principles have been violated, leading to an unbearable contradiction with the sense of justice, such that the decision appears incompatible with the values recognized in a state governed by the rule of law (ATF 141 III 229 at 3.2.1 and the references cited).

In the light of the Appellants' explanations concerning joinder of proceedings, legal standing, and their procedural significance, they do not seem to discern that an erroneous or even arbitrary application of the applicable procedural provisions does not in itself constitute a breach of public policy (cf. ATF 129 III 445, at 4.2.1; 126 III 249, at 3b). Likewise, by claiming that the Arbitral Tribunal's arguments were contradictory in themselves, the Appellants do not establish any incompatibility of the disputed awards with public policy. The ground for appeal provided for in Art. 190(2)(e) PILA is not intended to sanction internal contradictions contained in the grounds of an arbitral award (cf. judgment 4A_362/2013 of March 27, 2014 at 3.2.2 and the cited references). In any event, the Appellants do not point to any violation of

fundamental procedural principles when they refer to the provisions of Swiss procedural law, draw attention to alleged inconsistencies in the contested awards and refer to the procedural means offered by the applicable arbitration rules, which would have allowed the other parties to the proceedings to bring a third party to the CAS proceedings, concluding that it would be "unbearable" to "sanction" them for an omission (for not having directed their appeals also against the E. Federation), even though they could not be held responsible for it. Contrary to what the Appellants seem to believe, it is not for the Federal Tribunal to define rules concerning the standing to be sued or the possibility of bringing a third party before the CAS and to examine the conformity of the arbitration procedure in the light of these rules (cf. ATE 126 III 249 at 3b). This finding is in no way altered by the Appellants, when they repeatedly complain before the Federal Tribunal that the Respondent acted in bad faith by claiming that the E. Federation did not participate in the proceedings, even though it did not itself call it into question.

The grievance that the disputed awards are incompatible with public policy is thus unfounded.

Decision

The appeals shall be dismissed in so far as they are admissible.

4A_318/2020

22 December 2020

Sun Yang v. World Anti-Doping Agency (WADA), International Swimming Federation (FINA)

*Application for review of the Court of Arbitration (CAS) award rendered on 28 February 2020 (CAS 2019/A/6148).*¹

Extract of the facts

Sun Yang (the Swimmer, the Athlete) is a Chinese international-level swimmer who has won several Olympic medals and world championship titles in various swimming events.

The World Anti-Doping Agency (WADA) is a foundation under Swiss law, with its headquarters in Lausanne. One of its aims is to promote the fight against doping in sport at the international level. The International Swimming Federation (FINA), an association under Swiss law with its headquarters in Lausanne, is the governing body of swimming at the world level.

During the night of 4 September 2018, the athlete was subject to an out-of-competition doping control ordered by FINA, as the testing authority, the implementation of which was delegated to International Doping Tests and Management (IDTM), acting as sample collection authority.

On September 4, 2018, between 22:00 and 23:00, the sample collection party,

consisting of an officer in charge of the doping control (“Doping Control Officer,” the DCO), an assistant in charge of blood collection (“Blood Collection Assistant,” the BCA), and another, male, assistant (“the Doping Control Assistant,” the DCA), went to the athlete’s home in Hangzhou, China to collect blood and urine samples from the swimmer.

The DCO presented him with a copy of her ID card issued by IDTM and a FINA document for IDTM entitled “Letter of Authority,”

The DCA presented the athlete with his national ID card and the BCA submitted a copy of her Junior Nurses Certificate.

The athlete signed the Doping Control Form and cooperated by providing two blood samples. The samples were sealed in glass containers and stored in a storage box.

Shortly thereafter, the athlete saw that the DCA was taking photographs of him. Finding this behavior inappropriate, he asked to re-examine more carefully the documents presented by the sample collection personnel, in particular the references from the DCA. The swimmer felt that the information provided by the DCA was insufficient. At the initiative of the DCO, or at least with her agreement,

¹ Quote as Sun Yang v. AMA (WADA) and FINA, 4A_318/2020

The original decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch

For the full English translations & introductory notes on the Federal Tribunal judgments in both sports- and

commercial arbitration cases, you can visit the website www.swissarbitrationdecisions.com (operated jointly by Dr. Charles Poncet and Dr. Despina Mavromati) as a service to the international arbitration community.

the DCA, whose task was exclusively to supervise the urine sample collection process, was excluded from the control mission. No urine samples could be collected, as the DCA was the only male member of the collection team.

Displaying some concern about the documents submitted by the DCO and the BCA, the athlete sought advice by telephone from his entourage who informed the athlete and the DCO that the documents presented did not meet the required requirements. The athlete therefore wanted to retrieve the samples. The DCO warned the swimmer that this could be considered a possible failure to comply with doping control with potentially serious consequences. After intense discussion and under pressure from the athlete, the DCO or BCA removed a glass container from the storage box and gave it to the swimmer.

The DCO requested the athlete return the material belonging to IDTM. The glass container could not be opened manually, so the athlete instructed a security officer to break it open. The security guard destroyed the glass container with a hammer, with the athlete assisting him by projecting light from his cell phone. The athlete then retrieved the blood samples, which remained intact, and returned the broken container to the DCO. He also tore up the doping control form he had previously signed.

The swimmer was found guilty of an anti-doping rule violation based on these facts and was cleared by the FINA Anti-Doping Commission on January 3, 2019.

In substance, the Commission considered that the documents presented to the swimmer by the agents in charge of conducting the test did not in fact meet required standard. The athlete's notification process was considered

irregular. Therefore, the disputed doping control was invalid and void.

On February 14, 2019, WADA submitted a statement of appeal to the Court of Arbitration for Sport (CAS), in which it requested the athlete's suspension for a period of eight years.

The appellant amended its statement of appeal dated February 18, 2019, joining FINA as a second respondent.

On November 15, 2019, the Panel held a hearing in Montreux, broadcast live on the Internet with the agreement of the parties, during which it heard the Athlete and eight other persons.

On February 28, 2020, the Panel rendered an arbitral award in which it found the Athlete guilty of a violation of Art. 2.5 of the FINA Doping Control Rules ("FINA Doping Control Rules", 2017 version) and suspended him for a period of eight years from the date of the award.

In short, the Panel, after setting aside the procedural objections raised by the athlete, considered that the rules on notification of the doping test had been complied with, as the documentation presented to the swimmer was sufficient to proceed with the doping test. Furthermore, there was no justification for the swimmer's conduct in ordering the destruction of the container with the blood samples, tearing up the doping control form, and preventing the DCO from leaving the premises with the already collected blood samples. The arbitrators further found that the DCO had sufficiently made the athlete aware of the consequences of his actions. Noting that the athlete already had a first violation of the anti-doping rules from June 2014, they considered that the duration of the athlete's suspension should be doubled to eight years.

On June 15, 2020, the Athlete (the Appellant) filed an application for revision of the Award of February 28, 2020. He made submissions for the annulment of the award and for the disqualification of the Chairman of the Panel, F..

In support of its application for revision, based on Art. 121(a) of the Federal Tribunal Act (FTA) the Appellant submits that he learned of the existence of the award when an article was published on the [redacted] website dated May 15, 2020, that arbitrator F. had published, on his Twitter account, repeated in 2018 and 2019, unacceptable comments with respect to Chinese nationals, which, in his opinion, is likely to raise legitimate doubts as to the impartiality of the said arbitrator in the context of the present dispute involving a Chinese athlete.

Extracts of the legal considerations

The Federal Tribunal is seized of a motion for annulment and an application for revision in respect of the same arbitral award. In such a case, the motion for annulment is in principle given priority (ATF 129 III 727² at 1 p. 729; Judgment 4A_231/2014³ of September 23, 2014 at 2). In the present case, the application for revision relates to only one question, as the Appellant only calls into question the impartiality of the Chair of the Panel who rendered the contested award. For reasons of procedural economy, it is therefore appropriate to depart from the rule and to examine the application for revision first as, if it were admitted, this would result in

² The English translation of this decision can be found here: <https://www.swissarbitrationdecisions.com/extension-arbitration-clause-non-signatory>

³ The English translation of this decision can be found here: <https://www.swissarbitrationdecisions.com/suspicion-bribery-does-not-justify-stay-arbitration-indefinite-time>

the annulment of the award and would exempt the Federal Tribunal from having to rule on the numerous issues raised by the Appellant in his motion.

The seat of the CAS is in Lausanne. At least one of the parties was not domiciled in Switzerland at the relevant time. The provisions of Chapter 12 of the Law on Private International Law (PILA; SR 291) are therefore applicable (Art. 176(1) PILA).

The PILA does not contain any provision on the revision of arbitral awards within the meaning of Art. 176 PILA. The Federal Tribunal has filled this gap through case law. The Federal Tribunal is the competent judicial authority to hear applications for the revision of any international arbitral award, whether final, partial, or interlocutory. If it grants an application for revision, the Federal Tribunal does not decide on the merits itself but refers the case back to the arbitral tribunal that made the decision or to a new arbitral tribunal to be constituted (ATF 142 III 521⁴ at 2.1 p. 525; 134 III 286⁵ at 2 p. 287 and references).

In its request for revision, the Appellant submits that it discovered, in May 2020, the existence of circumstances that could seriously call into question the impartiality of the president of the Panel that rendered the contested award. Therefore, he alleges that he can invoke, in relation to these circumstances, the specific ground for disqualification provided by law (Art. 121(a) Federal Tribunal Act (FTA)).

⁴ The English translation of this decision can be found here: <http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network>

⁵ The English translation of this decision can be found here: <https://www.swissarbitrationdecisions.com/requestor-revision-of-an-arbitral-award>

In several judgments, the Federal Tribunal has considered the question of whether a revision should be initiated when a ground comparable to the one at issue here is only discovered after the expiry of the time limit for appeal. However, it has left the question open (ATF 143 III 589 at 3.1 p. 597; 142 III 521⁶ at 2.3.5 p. 535; judgments 4A_234/2008⁷ of August 14, 2008 at 2.1; 4A_528/2007⁸ of April 4, 2008 at 2.5).

In a landmark judgment, the Federal Tribunal noted, in particular, that there was nothing to prevent the Federal Tribunal from filling a loophole in the FTA or the PILA. At the end of its review, the Federal Tribunal referred to the need to allow that the discovery, after the expiry of the time limit for appeal against an international arbitral award, of a ground for challenging the sole arbitrator or one of the members of the arbitral tribunal may give rise to an application to the Federal Tribunal for revision of the award, provided that the requesting party could not have discovered the ground for challenge during the arbitral proceedings with the attention required by the circumstances. However, it left the issue undecided (ATF 142 III 521 at 2.3.5).

Since then, the situation has evolved, from a legislative point of view. In its message of October 24, 2018 on the amendment of the PILA Chapter 12: International Arbitration, the Federal Council proposed to open the way for a revision when a

⁶ The English translation of this decision can be found here:

<http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network>

⁷ The English translation of this decision can be found here:

<https://www.swissarbitrationdecisions.com/renunciation-to-appeal-revision-of-award-within-time-limit-to-ap>

⁸ The English translation of this decision can be found here:

ground for challenge is only discovered after the end of the arbitration proceedings (FF 2018 p. 7184).

The new Art. 190(a) PILA, which came into force on January 1, 2021 (AS 2020 p. 4184), provides, in (1)(c), that a party may apply for the revision of an award if, although it has exercised due diligence, a ground for challenge is only discovered after the arbitral proceedings have been terminated and no other legal remedy is available.

The Appellant declares that he has been informed of the existence of the ground for challenge on May 15, 2020, at the earliest.

In accordance with the violation of the rules on challenge, the application for revision must be filed with the Federal Tribunal, in order to be valid, within 30 days following the discovery of the ground for revision (Art. 124(1)(a) FTA). This is a question of admissibility, not of the merits. It is up to the Appellant to establish the determining circumstances for verifying compliance with the time limit (judgments 4A_247/2014⁹ of September 23, 2014 at 2.3; 4A_570/2011¹⁰ of July 23, 2012 at 4.1).

In this case, the contested award was notified to the Appellant on 2 March 2020. The 30-day period for appeal, laid down in Art. 100 FTA, suspended from March 21 to April 19, 2020 inclusively by virtue of the Federal Council Ordinance of March 20, 2020 on the suspension of time limits

<https://www.swissarbitrationdecisions.com/arbitrators-independence-not-affected-by-his-membership-of-a-spe>

⁹ The English translation of this decision can be found here:

<https://www.swissarbitrationdecisions.com/alleged-new-facts-must-be-urgent-justify-revision>

¹⁰ The English translation of this decision can be found here:

<https://www.swissarbitrationdecisions.com/federal-tribunal-rejects-request-for-revision-facts-that-were-kn>

in civil and administrative proceedings to ensure the maintenance of justice in connection with the coronavirus, expired on May 1, 2020. The Appellant states that he learned of the existence of the ground for challenge on May 15, 2020, at the earliest. By submitting his application for revision to the Federal Tribunal on June 15, 2020, the Appellant acted in good time. The question whether the Appellant could and should have discovered the ground for challenge during the arbitration proceedings with the due care required by the circumstances will be examined below.

In support of his application for revision, the Appellant alleges that an article entitled [redacted], written by a person named E., published on May 15, 2020, on the [redacted] website, reported various messages published by arbitrator F. on his Twitter account between May 28, 2018 and June 9, 2019, i.e., before and during the arbitral proceedings before the CAS.

As a preliminary point, the Respondent Foundation submits that the application for revision is based on new evidence, namely the article published on May 15, 2020, aimed at establishing old facts, i.e. the tweets published between 2018 and 2019 by the incriminated arbitrator. In the Respondent Foundation's view, such a process would be inadmissible. The application for revision should therefore be dismissed, as the Appellant is not in a position to demonstrate the content of the tweets without the post-award evidence.

Indeed, the Appellant bases his request for revision on the various tweets published by the arbitrator in 2018 and 2019, which he has also annexed separately to his writing, and not on the article published on the Internet on May 15, 2020. The Respondent Foundation therefore wrongly claims that the Petitioner would not be able to establish the tweets and their content without the new evidence. Insofar as the

Appellant produces said article, it is only to establish the date on which he claims to have discovered the tweets that form the basis for his request for revision. However, the submission of new facts and new documents subsequent to the contested decision, which make it possible to determine the admissibility of an act submitted to the Federal Tribunal, is admissible (ATF 136 III 123 at 4.4.3; judgments 4F_6/2019 of March 18, 2020, at 2.1; 4A_705/2014 of May 8, 2015, at 2.1). The grievance is therefore unfounded.

The Respondent Foundation and the CAS argue that, with the utmost diligence, the Appellant could have discovered the facts upon which he bases his request for revision during the arbitral proceedings.

A party that intends to challenge an arbitrator must invoke the reason for the challenge as soon as the party becomes aware of it. This jurisprudential rule, expressly stated in Art. R34 of the Code of Sports-related Arbitration (the Code), applies both to grounds for challenge that a party actually knew and to those that it could have known with due care (ATF 129 III 445 at 4.2.2.1 p. 465 and references); while choosing to remain in ignorance can be considered, depending on the case, as an abusive maneuver comparable to deferring the request for challenge (ATF 136 III 605 at 3.2.2 p. 609; judgments 4A_110/2012 of October 9, 2012 at 2.1.2; 4A_506/2007 of March 20, 2008 at 3.1.2). The rule in question is an application of the principle of good faith in the field of arbitral proceedings. According to this principle, the right to raise a plea based on the irregular composition of the arbitral tribunal lapses if the party does not immediately raise it, as the party cannot keep it in reserve and invoke it only in the event of an unfavourable outcome of the arbitral proceedings (judgment 4A_506/2007, cited above, at 3.1.2 and

references). An application for revision based on an arbitrator's alleged bias can thus only be considered in respect of a ground for challenge that the party could not discover during the arbitration proceedings with the attention required by the circumstances (judgments 4A_234/2008, cited above, at 2.2.1; 4A_528/2007, cited above, at 2.5.1).

The Appellant claims to have discovered the incriminated tweets when the article from E. was put online on May 15, 2020. He states that one of his counsel carried out research to ensure the impartiality of arbitrator F. when he was appointed Chairman of the Panel of Arbitrators on May 1, 2019. According to his explanations, no disputed tweets appeared when the said counsel entered the words “[first name of the arbitrator] + [surname of the arbitrator]”, “[first name of the arbitrator] + [surname of the arbitrator] + sport”, or “[first name of the arbitrator] + [surname of the arbitrator] + Court of Arbitration for Sport” into the Google search engine. Therefore, he cannot be blamed for not having been able to identify the said tweets, which are objectively difficult to find.

In the present case, the Appellant declares having discovered the existence of the ground for disqualification on May 15, 2020, at the earliest — the date of the publication of the article in E. This being the case, it is not established, on the basis of the elements provided by the parties to the Court, that the Appellant was aware of the elements upon which he bases his challenge request before the publication of the said article before the award was rendered or before the deadline for appeal to the Federal Tribunal had expired, respectively.

Contrary to the Respondent Foundation's contention, the issue at this stage is not whether or not the Appellant could have had access to the disputed tweets during the arbitration proceedings, but only whether or

not the Appellant can be accused of not having exercised due care in seeking out the elements that may call into question the arbitrator's impartiality. In this respect, whatever the CAS may think, the circumstance in which the journalist E. was able to access the offending tweets in 2020 is not, in itself, decisive.

Case law imposes upon the parties a duty of curiosity as to the existence of possible grounds for challenge that could affect the composition of the arbitral tribunal (ATF 136 Ill 605 at 3.4.2 p. 618; judgments 4A_110/2012, cited above, at 2.2.2; 4A_763/2011 of April 30, 2012, at 3.3.2; 4A_234/2008, cited above, at 2.2.2; 4A_528/2007, cited above, at 2.5.3; 4A_506/2007, cited above, at 3.2). A party may therefore not be satisfied with the general declaration of independence made by each arbitrator but must instead make certain investigations to ensure that the arbitrator offers sufficient guarantees of independence and impartiality. The Federal Tribunal thus found an inexcusable lack of curiosity on the part of a party who had ignored certain data, accessible at all times on the CAS website (judgments 4A_234/2008, cited above, paragraph 2.2.2; 4A_506/2007, cited above, at 3.2). On the other hand, it has never delimited the exact scope of the duty of curiosity. It is, in fact, difficult to define the contours of this duty, which depend on the concrete circumstances of each case. In any case, the duty of curiosity is not unlimited.

The parties are certainly obliged to carry out certain investigations, in particular on the Internet (Mavromati/Reeb, *The Code of the Court of Arbitration for Sport*, 2015, no. 68 ad Art. R34 of the Code; Kaufmann-Kohler/Rigozzi, *International Arbitration - Law and Practice in Switzerland*, 2015, n. 8.138 ff). While they can certainly be required to use the main computer search engines and to consult sources likely to provide, *a priori*, elements revealing a

possible risk of bias on the part of an arbitrator, such as the websites of the main arbitral institutions, of the parties, of their counsel and of the law firms in which they practice, the law firms in which certain arbitrators work, and — in the field of sports arbitration — those of the Respondent Foundation and of the sports institutions concerned, one cannot, however, expect them to systematically and thoroughly scrutinize all the sources relating to a given arbitrator (*cf.* in this sense, Karim El Chazli, *L'impartialité de l'arbitre, étude de la mise en oeuvre de l'exigence d'impartialité de l'arbitre*, 2020, p. 325 and 330 ff, which refers to French case law). Moreover, while it is true that it is possible to easily access the data appearing on open access websites with a single click, this does not mean that the information in question is always easily identifiable.

Indeed, as one author points out, if all information can be presumed to be freely accessible from a material point of view, it is not necessarily easily accessible from an intellectual point of view (El Chazli, *op. cit.*, p. 329). Depending on the circumstances, a party may need clues alerting it to the existence of a possible conflict of interest, requiring such party to carry out further research, particularly when the reason for the risk of bias is *a priori* unsuspected (El Chazli, *op. cit.*, p. 329). Thus, the mere fact that information is freely accessible on the Internet does not *ipso facto* mean that the party, who would not have been aware of it notwithstanding his or her research, would necessarily have failed in his or her duty of curiosity. In this respect, the specific circumstances of the case will always remain decisive.

Admittedly, it does not appear to be excluded, *prima facie*, that a party may be required, depending on the circumstances, to verify, by virtue of its duty of curiosity, the existence of possible grounds for challenge by examining, at least within

certain limits, various social networks. However this also poses specific problems, as the universe of social networks is fluctuating and evolving rapidly. In addition, social networks have tended to multiply in recent years. Even if some of them could be described, once and for all, as “flagship social networks”, the scope of the duty of curiosity would still need to be redefined over time. At a time when some people frequently use or even abuse certain social networks, in particular by publishing countless messages on their Twitter account, it would be advisable, if need be, not to be too demanding with regard to the parties, otherwise the duty of curiosity would be transformed into an obligation to carry out very extensive, if not almost unlimited, investigations requiring considerable time. There is, however, no need to examine this question further since the circumstances of the present case must lead to the denial of an inexcusable lack of curiosity on the part of the Appellant.

In this case, the respondent arbitrator was appointed on May 1, 2019. In accordance with Art. R34 of the Code, the parties had a period of seven days to request his challenge. The Appellant claims to have carried out certain investigations on the internet and consulted the CAS award database to verify the cases in which the challenged arbitrator had sat. While perhaps the Appellant should have consulted, even if only briefly, the Twitter account of the arbitrator in question, one cannot — in the absence of any other circumstances — consider that the Appellant failed in his duty of curiosity by not having found the tweets published nearly ten months (May 28, 2018 and July 3, 2018) before the appointment of the arbitrator (May 1, 2019), that were drowned in the mass of messages from an arbitrator’s Twitter account, who is apparently very active on the social network in question. In any event, and assuming that the Appellant could and should have discovered the first

three disputed tweets published by the arbitrator, all prior to the arbitrator's appointment, such a conclusion would not be necessary with respect to the other messages posted by the arbitrator. Indeed, a party cannot be required to continue its internet searches throughout the arbitration proceedings, nor, *a fortiori*, to scan the messages published on social networks by the arbitrators during the arbitration proceedings.

The objection raised by the Respondent Foundation and the CAS must therefore be rejected.

The Respondent Foundation and the CAS contest that the facts alleged by the Appellant are likely to call into question the impartiality of the challenged arbitrator and may justify his challenge.

An arbitrator must, like a state judge, present sufficient guarantees of independence and impartiality. Failure to comply with this rule leads to an irregular appointment falling under Art. 190(2)(a) PILA in matters of international arbitration. To determine whether an arbitrator presents such guarantees, reference must be made to the constitutional principles developed in relation to state courts whilst also having regard to the specificities of arbitration — especially in the field of international arbitration — when examining the circumstances of the specific case (ATF 142 Ill 521¹¹ at 3.1.1; 136 III 605¹² at 3.2.1 p. 608 and the precedents cited; judgments 4A_292/2019¹³ of October 16, 2019 at 3.1;

4A_236/2017¹⁴ of November 24, 2017, at 3.1.1).

The guarantee of an independent and impartial tribunal deriving from Art. 30(1) Cst. allows the challenge of a judge whose situation or behaviour is such as to raise doubts as to his impartiality. It is intended to prevent circumstances external to the case from influencing the judgment in favor or to the detriment of a party. It does not require disqualification only when bias of the judge is established, as a provision of the domestic forum can hardly be proven; it is sufficient that the circumstances give the appearance of bias and give rise to an apprehension of biased activity on the part of the judge. However, only objectively established circumstances must be taken into account; the purely subjective impressions of one of the parties to the proceedings are not decisive (ATF 144 1159, at 4.3; 142 III 521, at 3.1.1; 140 Ill 221, at 4.1 and the judgments cited).

In *Mutu and Pechstein v. Switzerland* (judgment of October 2, 2018), the European Court of Human Rights (ECtHR) had to rule on the alleged lack of independence and impartiality of two CAS arbitrators. On this occasion, it emphasized that impartiality is usually defined by the absence of prejudice or bias (§ 141). It also recalled that impartiality must be assessed not only from a subjective point of view but also by following an objective approach, consisting in asking whether the court offered, independently of a judge's personal conduct, sufficient guarantees to exclude

¹¹ The English translation of this decision can be found here: <http://wm.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network>

¹² The English translation of this decision can be found here: <http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in>

¹³ The English translation of this decision can be found here: <https://www.swissarbitrationdecisions.com/atf-4a-292-2019>

¹⁴ The English translation of this decision can be found here: <https://www.swissarbitrationdecisions.com/atf-4a-236-2017>

any legitimate doubt as to his or her impartiality (§ 141).

In this respect, the decisive factor is whether a party's apprehensions about the lack of impartiality of an arbitrator can be considered objectively justifiable. In this respect, the ECtHR likes to quote the English adage "*justice must not only be done: it must also be seen to be done*" (§ 143), which emphasizes the importance that appearances themselves can have.

To verify the independence of the sole arbitrator or the members of an arbitral panel, the parties may also refer to the IBA Guidelines on Conflicts of Interest in International Arbitration. There are justifiable doubts as to the arbitrator's impartiality or independence (section 2(b) of the Guidelines) if a reasonable third party, having knowledge of the relevant facts and circumstances, would consider it likely that the arbitrator's decision would be influenced by factors other than the merits of the case as presented in the parties' submissions (section 2(c) of the Guidelines).

In support of its request for revision, the Appellant submits that the tweets published by the arbitrator in question between May 28, 2018 and June 9, 2019, even if they were disseminated in a context other than that of the arbitration proceedings concerning him, reveal manifest prejudice against Chinese nationals and objectively raise doubts as to the impartiality of arbitrator F..

In his written statement of September 3, 2020, annexed to the CAS Answer, the arbitrator in question insists on the fact that he has taken up the defense of animals for many years. He points out that he published the incriminating tweets in a very specific context, in reaction to the "*massacre of animals committed each year in the city of Yulin in China on the occasion of the disastrous traditional Dog Meat Festival,*" the purpose of which was "*the*

massacre of dogs and cats, which are then roasted and sold at a fair". He admits that he reacted in a very emotional way, having found certain videos where dogs are "*sadistically tortured by a few people*" and concedes that his words sometimes exceeded his thoughts.

With respect to the ground for challenge based on the allegedly derogatory and inappropriate remarks made in the contested award, it should be noted at the outset that the Appellant should have invoked it within thirty days of the notification of the award, which he did not do. Therefore, the Appellant is precluded from basing his request for revision on certain passages of the challenged award, highlighted by him, which cannot, in any case, justify the challenge of the challenged arbitrator.

Considered in the abstract, the fact that the arbitrator severely criticized the consumption of dog meat during the annual Yulin festival and denounced certain Chinese nationals who, according to him, were guilty of torturing animals, cannot, in itself, constitute a circumstance that would make it possible to infer the existence of a bias on the part of the arbitrator in question against any Chinese national.

This being the case, it must be clearly seen that it is not so much the cause defended by the arbitrator that appears problematic in this case but rather certain terms used by him. Indeed, the arbitrator did not hesitate to use extremely violent terms, repeatedly, and several messages were published while the present case was being heard before the CAS. In particular, he used the following terms:

"those bastard sadic chinese who brutally killed dogs and cats in Yulin",

"This yellow face chinese monster smiling while torturing a small dog, deserves the worst of the hell",
"those horrible sadics are CHINESE!";

“Old yellow-face sadic trying to kill and torture a small dog”,

“Torturing innocent animal is a flag of chinese! Sadics, inbumans”.

Among these, the words “*yellow face*”, used twice by the arbitrator after his appointment as President of the Panel, are undoubtedly the most questionable. Certainly, the arbitrator himself concedes that certain words have sometimes gone beyond his thoughts. However, to say that the words “*yellow face*” are “clumsy”, as the Respondent Foundation maintains, is an understatement. These terms obviously refer to the skin color of certain Chinese individuals and are not directed toward their behavior, unlike other cutting or even hurtful terms used by the arbitrator, such as “sadist”. Such qualifiers, even if they were used in a particular context, have absolutely nothing to do with the acts of cruelty alleged against certain Chinese nationals and are, whatever the context, unacceptable. If one adds to this the fact that the arbitrator made such remarks, not only on two occasions, but also after his appointment as Chairman of a Panel called upon to rule on the appeal lodged by a Chinese national, even though the proceedings were pending, it must be conceded that the apprehensions of the Appellant as to the possible bias of the arbitrator in question may be considered as objectively justified. In this respect, it is irrelevant whether or not the accused arbitrator is subjectively aware of the fact that his statements appear to be objectively flawed. Only the objective assessment of the circumstances alleged in support of a challenge is decisive. In the present case, however, the above-mentioned circumstances, considered from the point of view of a reasonable third party who is aware of them, are such as to give rise to doubts as to the impartiality of the arbitrator challenged and to create an appearance of bias.

On the basis of the foregoing, the ground for challenge put forward by the Appellant is well-founded. It is therefore appropriate to admit the application for revision and, consequently, to annul the contested Award. Furthermore, the arbitrator F. should be challenged.

The Appellant is successful and the contested judgment is annulled. The Respondent Foundation, which is unsuccessful in its request to reject the application for revision, shall bear the costs of the federal proceedings (Art. 66(1) FSCA). It will also pay the Appellant compensation for his legal costs (Art. 68(2) FSCA). As for the Respondent Association, having declared that it is going to court, it cannot be considered as the unsuccessful party. Moreover, the decision taken has not been annulled to its detriment. Under these conditions, the legal costs could not be levelled against to the Respondent Association, nor could it claim compensation for costs. Finally, the security for costs paid by the Appellant must be returned to him.

Decision

The application for revision is admitted and the contested award is annulled.

The application for challenge against the arbitrator F. is admitted.

4A_416/2020

4 novembre 2020

Santos Futebol Clube c. Huachipat SADP

Recours en matière civile contre le “Termination order” prononcé le 15 juin 2020 par la Présidente suppléante de la Chambre d’appel du Tribunal Arbitral du Sport (CAS 2020/A/7021)

Le même jour, l’intimé a fait valoir que son adverse partie avait agi tardivement et que l’appel devait dès lors être considéré comme retiré.

Extrait des faits

Santos Futebol Clube est une équipe de football brésilienne, Huachipat SADP est un club de football chilien.

Le 28 avril 2020, Santos Futebol Clube a saisi le Tribunal Arbitral du Sport (TAS) d’un appel dirigé contre la décision rendue le 11 février 2020 par un Juge unique de la Commission du Statut du Joueur de la Fédération Internationale de Football Association (FIFA) dans le cadre d’un litige divisant l’appelant d’avec le club chilien.

Dans sa déclaration d’appel, l’appelant a présenté une requête tendant à la désignation d’un arbitre unique.

En date du 4 mai 2020, l’intimé s’est opposé à ce que la cause soit confiée à un arbitre unique.

Le 7 mai 2020, le TAS a avisé les parties que le litige les opposant serait tranché par une formation composée de trois arbitres. Il a dès lors fixé à l’appelant un délai échéant le 14 mai 2020 pour nommer un arbitre, en le rendant attentif au fait que, s’il ne s’exécutait pas dans le délai imparti, son appel serait considéré comme retiré, conformément à l’art. R36 du Code de l’arbitrage en matière de sport (dans sa version de 2019; le Code).

Le 15 mai 2020, l’appelant a désigné son arbitre.

Par décision du 15 juin 2020, intitulée “Termination Order”, la Présidente suppléante de la Chambre d’appel du TAS (la Présidente suppléante) a clos la procédure arbitrale, au motif que l’appelant n’avait pas désigné son arbitre dans le délai qui lui avait été imparti à cet effet.

Le 17 août 2020, Santos Futebol Clube (le recourant) a formé un recours en matière civile au Tribunal fédéral aux fins d’obtenir l’annulation de ladite décision.

Extrait des considérant

Le recours en matière civile visé par l’art. 77 al. 1 let. a de la loi sur le Tribunal Fédéral (LTF) en liaison avec les art. 190 à 192 de la loi fédérale sur le Droit International Privé (LDIP) n’est recevable qu’à l’encontre d’une sentence, qui peut être finale (lorsqu’elle met un terme à l’instance arbitrale pour un motif de fond ou de procédure), partielle, voire préjudicielle ou incidente. En revanche, une simple ordonnance de procédure pouvant être modifiée ou rapportée en cours d’instance n’est pas susceptible de recours. Est déterminant le contenu de la décision, et non pas sa dénomination (ATE 143 Ill 462 consid. 2.1).

En l’occurrence, la décision attaquée (*Termination Order*) n’est pas une simple ordonnance de procédure susceptible d’être modifiée ou rapportée en cours d’instance. En effet, le TAS ne se contente pas d’y fixer la suite de la procédure, mais, constatant que le recourant n’a pas désigné d’arbitre dans le

délai imparti, ordonne la clôture de la procédure. Son prononcé s'apparente ainsi à une décision d'irrecevabilité qui clôt l'affaire pour un motif tiré des règles de la procédure. Qu'il émane de la Présidente suppléante plutôt que d'une Formation arbitrale, laquelle n'était du reste pas encore constituée, n'empêche pas qu'il s'agit bien d'une décision susceptible de recours au Tribunal fédéral (arrêt 4A_692/2016 du 20 avril 2017 consid. 2.3).

Dans un unique moyen, divisé en deux branches, le recourant soutient que la décision attaquée est contraire à l'ordre public procédural (art, 190 al. 2 let. e LDIP).

Il y a violation de l'ordre public procédural lorsque des principes fondamentaux et généralement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de la justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit (ATF 141 III 229 consid. 3.2,1; 140 III 278 consid. 3.1). Il faut cependant préciser que toute violation, même arbitraire, d'une règle procédurale ne constitue pas une violation de l'ordre public procédural. Seule peut entrer en considération ici la violation d'une règle essentielle pour assurer la loyauté de la procédure (ATF 129 III 445 consid. 4.2.1; arrêt 4A_232/2013 du 30 septembre 2013 consid. 5.1.1).

Dans la première branche du moyen considéré, le recourant dénonce une application arbitraire de l'art. R36 du Code, lequel a la teneur suivante:

“En cas de démission, décès, récusation ou révocation d'un(e) arbitre, celui/celle-ci est remplacé(e) selon les modalités applicables à sa désignation. Si, dans le délai fixé par le Greffe du TAS, la partie demanderesse/appelante ne nomme aucun arbitre pour remplacer l'arbitre initialement désigné, l'arbitrage ne sera pas mis en œuvre ou, s'il a déjà été mis en œuvre, sera clôturé. Sauf convention contraire des parties ou décision contraire de la Formation, la procédure se poursuit sans

répétition des actes de procédure antérieurs au remplacement”.

Selon le recourant, le TAS, en appliquant l'art. R36 du Code à la présente espèce, aurait sombré dans l'arbitraire, puisque la disposition précitée ne vise que les cas dans lesquels un arbitre démissionne, décède, est récusé ou révoque. En appliquant de façon arbitraire son propre règlement de procédure, le TAS aurait ainsi violé une règle essentielle pour assurer la loyauté de la procédure et privé l'intéressé de son droit à un procès équitable.

Semblable argumentation n'emporte pas la conviction de la Cour de céans. Il sied d'emblée de relever que l'application erronée, voire arbitraire, d'un règlement d'arbitrage ne constitue pas en soi une violation de l'ordre public (ATF 126 III 249 consid. 3b et les arrêts cités). Aussi, l'interprétation de l'art. R36 du Code et son application aux circonstances de la cause, telles qu'elles ont été faites par la Présidente suppléante, échappent-elles à l'examen de la Cour de céans. Au demeurant, bien que le recourant prétende le contraire, il est très douteux que l'art. R36 du Code puisse être considéré comme une règle essentielle visant à assurer la loyauté de la procédure dont la violation pourrait révéler une contrariété à l'ordre public. On se contentera de relever, en passant, que l'art. R36 du Code vise diverses situations dans lesquelles une partie est tenue de désigner un arbitre et ne le fait pas. Il est vrai que l'art. R36 du Code, selon sa lettre, ne vise pas expressément la situation à l'origine du présent litige. Cela étant, la décision d'appliquer la disposition précitée dans la présente espèce où le recourant était tenu, à l'instar des autres situations visées par l'art. R36 du Code, de désigner un arbitre dans un certain délai, n'apparaît pas critiquable, ce d'autant moins que le TAS a rendu le recourant attentif au fait qu'il ordonnerait la clôture de la procédure conformément à l'art. R36 du

Code, si l'intéressé ne désignait pas d'arbitre dans le délai imparti à cet effet.

Dans la seconde branche du moyen considéré, le recourant reproche au TAS d'avoir versé dans le formalisme excessif en ordonnant la clôture de la procédure arbitrale. Selon lui, le TAS aurait dû lui octroyer un bref délai de grâce, conformément à l'art. R48 du Code, afin de désigner son arbitre. Le recourant expose en outre que la nomination tardive de son arbitre n'a eu aucune incidence sur le bon déroulement de la procédure et que la décision attaquée a des conséquences particulièrement graves pour lui. Enfin, il insiste sur le fait que la crise du coronavirus était à son paroxysme au moment des faits et qu'il n'était pas représenté par un avocat mais par son propre service juridique.

Dans plusieurs arrêts, le Tribunal fédéral s'est demandé dans quelle mesure le formalisme excessif pouvait être assimilé à une violation de l'ordre public au sens de l'art. 190 al. 2 let. e LDIP et, singulièrement, de l'ordre public procédural. Il a évoqué la possibilité de ne prendre en considération, sous l'angle de la contrariété à l'ordre public, que les violations caractérisées de l'interdiction du formalisme excessif, sans toutefois pousser plus avant l'examen de cette question dès lors que dans le cas concret, le TAS n'avait nullement fait preuve de formalisme excessif (arrêts 4A_556/2018 du 5 mars 2019 consid. 6,2; 4A_238/2018 du 12 septembre 2018 consid. 5.2; 4A_692/2016, précité, consid. 6.1).

La même conclusion s'impose ici, pour les motifs exposés ci-dessous.

Selon la jurisprudence relative à l'art. 29 al. 1 Cst., il y a excès de formalisme lorsque des règles de procédure sont conçues ou appliquées avec une rigueur que ne justifie aucun intérêt digne de protection, au point que la procédure devient une fin en soi et empêche ou complique de manière insoutenable l'application du droit (ATF 142(10) consid. 2.4.2; 132 1249 consid. 5 p. 263).

Les formes procédurales sont nécessaires à la mise en oeuvre des voies de droit, pour assurer le déroulement de la procédure conformément au principe de l'égalité de traitement et pour garantir l'application du droit matériel (arrêt 4A_238/2018, précité, consid. 5.3).

A titre d'exemples, on peut relever que, d'après la jurisprudence, la sanction de l'irrecevabilité du recours pour défaut de paiement à temps de l'avance de frais ne procède pas d'un formalisme excessif ou d'un déni de justice, pour autant que les parties aient été averties de façon appropriée du montant à verser, du délai imparti pour le versement et des conséquences de l'inobservation de ce délai (ATF 133 V 402 consid. 3.3 p. 405; 104 la 105 consid. 5 p. 112; 96 I 521 consid. 4 p. 523),

Le Tribunal fédéral a déjà eu l'occasion de préciser que le TAS ne faisait pas montre d'un formalisme excessif en sanctionnant par une irrecevabilité le vice de forme que constituait l'envoi d'une déclaration d'appel par simple télécopie (arrêts 4A_238/2018, précité, consid. 5.6; 4A_690/2016 du 9 février 2017 consid. 4.2). Il a confirmé, dans un arrêt récent, que la jurisprudence précitée valait *mutatis mutandis* pour la transmission du mémoire d'appel par simple fax (arrêt 4A_556/2018, précité, consid. 6.5).

Appliqués aux circonstances du cas concret, ces principes permettent d'écarter le reproche de formalisme excessif formulé par le recourant.

En l'espèce, l'intéressé ne conteste pas avoir désigné son arbitre tardivement. On ne saurait suivre le recourant lorsque celui-ci tente de démontrer qu'il aurait dû, selon l'art. R48 du Code, se voir impartir un bref délai supplémentaire "pour désigner son arbitre". En effet, la disposition précitée vise les cas dans lesquels l'appelant soumet au TAS une déclaration d'appel ne comprenant pas tous les éléments énumérés par le Code.

En l'occurrence, le recourant n'a pas déposé de déclaration d'appel incomplète. Il a au contraire transmis au TAS une déclaration d'appel comprenant tous les éléments requis, dans laquelle il a sollicité la nomination d'un arbitre unique, comme le permet l'art. R48 du Code. Le TAS, après avoir écarté cette demande, a imparti au recourant un délai pour désigner son arbitre, en le rendant attentif aux conséquences de l'inobservation dudit délai. Aussi est-ce en vain que le recourant soutient qu'il aurait dû bénéficier d'un bref délai de grâce.

On ne saurait suivre le recourant lorsqu'il fait valoir qu'il a remédié rapidement à son erreur, que le non-respect du délai imparti pour désigner son expert n'a nullement nui au bon déroulement de la procédure, et que les conséquences de l'inobservation dudit délai sont particulièrement graves pour lui. En raisonnant ainsi, il perd de vue que les règles procédurales sont nécessaires pour assurer le déroulement de la procédure conformément au principe de l'égalité de traitement. Il n'est dès lors pas envisageable de sanctionner plus ou moins sévèrement le non-respect d'un délai suivant les incidences concrètes sur le bon déroulement de la procédure ou les conséquences dommageables pour la partie défaillante.

S'agissant enfin des difficultés que le recourant dit avoir rencontrées en raison de la crise du coronavirus, on se bornera à observer que cette situation particulière ne l'a pas empêché de désigner son arbitre un jour après l'échéance du délai imparti. On lui rappellera aussi qu'il avait la possibilité de solliciter, au besoin, une brève prolongation de délai (cf. art. R32 du Code).

Le moyen pris d'une violation de l'ordre public procédural se révèle dès lors infondé.

Décision

Le recours est rejeté.

Informations diverses
Miscellaneous
Información miscelánea



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