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Message du Président du CIAS

La saison estivale a été particulièrement chargée cette année avec un nombre important d'affaires remarquables et d'affaires urgentes traitées par le Tribunal Arbitral du Sport. Je suis heureux de relever que, en deux occasions, le TAS a été à même de résoudre un litige urgent relatif à une affaire de dopage dans un délai de deux semaines. Au mois de juillet, l'appel de la Fédération Internationale de Natation (FINA) contre quatre nageurs brésiliens (Cielo et consorts) a pu être résolu par une Formation du TAS quelques jours avant l'ouverture des Championnats du monde de natation à Shanghai/ Chine. En août, ce fut l'appel du joueur de tennis américain Robert Kendrick contre la Fédération Internationale de Tennis (ITF) qui a été tranché par une autre Formation quelques jours avant le début de l'US Open. Dans les deux affaires, les parties ont convenu de mener une procédure accélérée et de réduire les délais habituels. Il est important de noter que, en deux semaines, les parties ont pu (1) échanger des mémoires, (2) être entendues en personne par la Formation lors d'une audience et (3) obtenir une décision finale.

Une telle procédure accélérée peut être appliquée uniquement avec l'accord de toutes les parties concernées. En l'absence d'accord, les délais fixés par le Code de l'arbitrage en matière de sport sont applicables. Les affaires UCI et WADA contre Alberto Contador et RFEC, ainsi que les appels contre des décisions de la FIFA relatives à des comportements présumés contraires à l'étique n'ont malheureusement pas pu être résolus par le biais d'une procédure accélérée. Au contraire, la durée de ces procédures a été prolongée à la demande et avec l'accord des parties. Ces exemples démontrent que la procédure d'arbitrage reste très flexible et que les parties jouissent d'une forte influence sur le calendrier de la procédure.

Dans la première moitié de 2011, le CIAS a débattu au sujet de son plan stratégique concernant l'organisation et les procédures du TAS. Tous les acteurs et utilisateurs majeurs du TAS ont été consultés et ont fourni des commentaires fort utiles. Ceci entrainera très certainement de nouvelles modifications du Code de l'arbitrage en matière de sport afin de faciliter le règlement des litiges traités en appel par le TAS dans un délai aussi court que 3 à 4 mois. La pratique du TAS concernant les audiences est également susceptible de changer (avec la possibilité de renoncer à des audiences ou d'entendre les parties par vidéo conférence), de nouveau afin de limiter les retards.

Vingt nouveaux arbitres seront nommés avant la fin de cette année afin de renforcer l'effectif actuel des arbitres du TAS au vu de la lourde charge de travail existante et du nombre important d'arbitrages cette année (probablement plus de 300).

En 2012, le CIAS va créer une nouvelle chambre ad hoc du TAS à l'occasion des Jeux Olympiques à Londres. La délégation du TAS sera dirigée par un président et composée de douze arbitres basés dans la Ville Olympique. Il s'agira de la neuvième chambre ad hoc du TAS depuis 1996 et les Jeux Olympiques d'Atlanta.

Je vous souhaite une lecture agréable de ce nouveau numéro du Bulletin TAS.

John Coates

Message from the ICAS President

The summer season has been particularly busy this year with a significant number of high profile cases and urgent matters handled by the Court of Arbitration for Sport. I am pleased to mention that, on two occasions, the CAS was able to solve urgent disputes relating to doping matters within two weeks. In July, the appeal of the International Swimming Federation (FINA) versus four Brazilian swimmers (Cielo et al.) could be solved by a CAS Panel a few days before the Swimming World Championships in Shanghai/China. In August, it was the appeal of the US tennis player Robert Kendrick versus the International Tennis Federation (ITF) which was settled by another Panel some days before the beginning of the US Open. In both cases, the parties agreed to proceed in an expedited manner and to reduce all usual time limits. It is worth noting that in two weeks, the parties could 1) exchange written submissions, 2) be heard in person by the Panel and 3) obtain a final decision.

Such expedited procedure can be applied only with the agreement of all parties concerned. In the absence of an agreement, the time limits fixed by the Code of Sports-related Arbitration are applicable. The cases of UCI & WADA v. Alberto Contador and RFEC, as well as appeals against FIFA decisions related to alleged unethical behaviours could unfortunately not be solved through an expedited procedure. On the contrary, the duration of these procedures has been extended at the request and consent of the parties. These examples show that the arbitration procedure remains very flexible and the parties have a strong influence on the procedural calendar.

In the first half of 2011, the ICAS discussed its strategic plan relating to the CAS organisation and procedures. All major stakeholders and users of CAS have been consulted and provided most useful feedback. This is very likely to lead to further amendments to the Code of Sports-related Arbitration in order to facilitate the settlement of appeals at the CAS within the shorter time-frame of 3-4 months. The CAS practice with respect to hearings is also likely to change (with the possibility to waive hearings or hear the parties by video-conference) again to reduce delays.

Twenty new arbitrators will be appointed before the end of the year in order to strengthen the current group of CAS arbitrators in view of the heavy workload placed on them and significant number of arbitrations this year (likely to be more than 300).

In 2012, the ICAS will create a new CAS ad hoc Division on the occasion of the Olympic Games in London. The CAS delegation will be headed by a President and composed of 12 arbitrators based in the Olympic City. It will be the ninth CAS ad hoc Division since the 1996 Olympic Games in Atlanta.

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

John Coates

The "Time Limit for Appeal" in Arbitration Proceedings before the Court of Arbitration for Sport (CAS)*

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I. Introduction

The majority of cases before the Court of Arbitration for Sport are so-called "appeal arbitration procedures". This is rather impressively supported by the statistics. Of the 1957 requests for arbitration filed from 1995 to the end of 2009, 1647 were appeal arbitration procedures. Appeal arbitration procedures are characterised by the fact that the dispute concerns the "challenge" of a sports-related legal measure taken by a sports organisation (e.g. a disciplinary measure,[1] a nomination decision, the fixing of a claim for reimbursement or compensation for training, etc.)[2]. The parties in these proceedings are usually national or international sports organisations on the one side and athletes or clubs on the other side. However, this is not necessarily so.

The Code of Sports-related Arbitration (thereinafter referred to as the CAS Code) includes special rules applicable to the appeal arbitration procedure in Arts. R47 *et seq.* CAS Code. The designation "appeal arbitration procedure" for this type of dispute is somewhat misleading[3]. Even if the focus of this type of procedure is on reviewing the legality of a decision by a sports organisation, the CAS is not thereby acting as a further component of an association's internal legal process. Rather, even in so-called "appeal arbitration procedures", the CAS carries out first-instance arbitration proceedings in which the legality of the federation's or association's decision is reviewed by an independent instance that is comparable to the state courts.

The CAS Code stipulates a "time limit for appeal" against the decision of a sports tribunal. In this regard Art. R49 CAS Code reads as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. …"

Art. 49 CAS Code thus provides that judicial relief against a measure taken by a federation or association can only be sought within certain time limits. Like many other rules concerning time limits in other procedural codes, this provision constitutes a stumbling block for the person seeking relief because it poses a number of questions which will be discussed in more detail below.

II. The legal classification of the "time limit for appeal"

A. The distinction from other time limits

The time limit in Art. R49 CAS Code must be distinguished from the one in Art. R51 CAS Code. Art. R49 CAS Code only governs the time limit for filing the "appeal". However, only a Statement of Appeal, complying with the (minimum) requirements of Art. R48 CAS Code, has to be filed within the time limit of Art. R49 CAS Code, whereas the time limit of Art. R51 CAS Code applies for filing the grounds (for the "appeal"). The latter begins with (or rather: after) expiry of the time limit for appeal *("following the expiry of the time limit for the appeal")*. If the time limit for filing the grounds for the request for arbitration is not complied with, the request for arbitration is deemed to have been withdrawn (Art. R51 CAS Code).

B. Legal nature of the time limit ("for appeal")

1. The possible options

If parties agree on a time limit within which arbitration proceedings are to be instituted, such provision can have various implications[4]. Firstly, the purpose of specifying a time limit can be to restrict the jurisdiction of the arbitration court to make decisions. Upon expiry of the time limit, the arbitration court no longer has jurisdiction to decide the case, and the request for arbitration thereby becomes inadmissible[5].

Another effect of specifying a time limit is to exclude the possibility of the claim being actionable. In that case, although the arbitration court still has jurisdiction to decide the case even after expiry of the time limit, the parties lose the possibility of asserting the merits of their claim, with the consequence that the request for arbitration becomes unfounded. Paulsson succinctly distinguished the two options as follows: *"is the objecting party taking aim at the tribunal or at the claim"*[6].

1. Rightly against any limitation to solely disciplinary disputes, see Kaufmann-Kohler/Bärtsch, in: Blackshaw/Siekmann/Soek (editors), The Court of Arbitration for Sport 1984-2004, 2006, pp. 73 *et seq.*

2. As regards the particularities of this type of procedure, see Krähe, in: Blackshaw/Siekmann/Soek (editors), The Court of Arbitration for Sport 1984-2004, 2006, pp. 99 *et seq.*; Simon, Rev. Arb. 1995, 185, 194 *et seq.*

3. Simon, Rev. Arb. 1995, 185, 195; Loquin, Clunet 2004, 289, 294.

4. See CAS [18.6.2009 – 2008/A/1705] *Grasshopper v/ Club Alianza de Lima*, margin no. 8.2.1; Kaufmann-Kohler/Rigozzi, Arbitrage international, 2nd ed. 2010, margin no. 276 fn. 178; Rigozzi, L'arbitrage international en matière de sport, 2005, margin no. 1037 *et seq.*; *Id.*, Die Berufungsfrist vor dem Tribunal Arbitral du Sport (TAS), causa sport (forthcoming issue); Haas, in: Weigand (editor), Practitioner's Handbook on International Arbitration, 2002, Part 3 Art. 2 margin no. 74; cf. also *BGH* RIW 1976, 449, 450; Schwab/Walter, Schiedsgerichtsbarkeit, 7th ed. 2005, Chapter 6 margin no. 6.

5. Thus for example in one case, *Swiss Federal Tribunal*, Bull. ASA 1996, 673, 676.

6. Paulsson, in: Liber Amicorum Robert Briner, 2005, p. 616.

2. The intended effect of the "time limit for appeal"

What kind of effect the rule stipulating a time limit possesses needs to be determined by interpretation[7]. Sometimes, the case law of the CAS tends to classify rules which stipulate time limits as admissibility problems (and thus as problems regarding the jurisdiction of the arbitral tribunal)[8]. Thus, for example, a decision by a CAS Panel states the following in this regard[9]:

"*The jurisdiction of an arbitral tribunal is an evident procedural prerequisite of the admissibility of a claim … It is also widely recognized that an agreement to arbitrate may, like other agreements, be limited in time: i.e. the parties may agree in advance to a certain time period, the elapse of which leads to the lapsing of the agreement to arbitrate … The Panel is of the view that after the lapse of the time period provided for in Art. 60 of the FIFA Statutes, and accepted hereby and agreed by the parties, there would be no valid agreement to arbitrate between the parties and the appeal would not be admissible, respectively. In such a case, the CAS would have to decline jurisdiction to rule on the merits of this case and to declare the appeal not admissible*".

Another decision states the following in this regard[10]:

"The Panel is of the view that after the lapse of the time period of ten days provided for in art. 60 of the FIFA Statutes, and accepted and hereby agreed by the parties, there would be no valid agreement to arbitrate between the parties and the appeal would not be admissible, respectively. In such a case, CAS would have to decline jurisdiction to rule on the merits of this case and to declare the appeal not admissible".

Whether this qualification corresponds to the will of the parties is rather doubtful[11].

An argument against is that the parties, by specifying a time limit, usually wish that the lawfulness or unlawfulness of a measure taken by a federation or association be clarified speedily and, above all, bindingly. However, this objective can only be achieved with the help of a time limit that precludes the claim from remaining actionable. In that case, any "challenge" of the measure taken by the federation or association is quite simply precluded following expiry of the time limit.

If, on the other hand, upon expiry of the time limit, the arbitral tribunal were only to cease having jurisdiction to decide the case, the parties would be at liberty to have the lawfulness of the measure taken by the federation or association reviewed elsewhere – for example by a state court. Usually this will hardly be in the parties' interests[12]. A glance at the national legal systems also supports the opinion argued here, since, insofar as those systems stipulate any time limits for challenging decisions taken by federations or associations – e.g. in Art. 75 Swiss Civil Code *(ZGB)*[13]–, the aim of said time limits consists in precluding the actionability of the claim, with the consequence that a belated action is unfounded, not inadmissible[14].

3. The legal nature of the effect of preclusion

Even if the time limit in question takes aim of the claim, the question remains whether the barring of the claim as a result of the preclusion period under Art. R49 CAS Code qualifies as a matter of substantive or procedural law. When one examines how other legal systems categorise preclusion, the result is by no means uniform[15]. While some legal systems derive preclusion from the prohibition of an unlawful exercise of a right, other legal systems consider the exclusion of actionability to be a tacit waiver of the right to assert, or a procedural prohibition of asserting, the claim in question[16]. Notwithstanding these legal differences, the general rule should be that the exclusion of actionability, or the preclusion – due to its close connection with the underlying claim – ought to be subsumed under the lex causae and, hence, under the law applicable pursuant to Art. 58 CAS Code (but see also below).

7. CAS [18.6.2009 – 2008/A/1705] *Grasshopper v/ Club Alianza de Lima*, margin no. 8.2.3; Haas, in: Weigand (editor), Practitioner's Handbook on International Arbitration, 2002, Part 3 Art. 2 margin no. 74.

8. Also similar CAS [25.7.2007 – 2006/A/1166] *FC Aarau AG v/ Swiss Football League,* margin no. 49; [24.1.2007 - 2006/A/1153] *WADA v/ Assis & FPF*, margin no. 38; [20.12.2006 – 2006/A/1120] *UCI v/ Gonzalez & RFEC*, margin no. 57 *et seq.*

9. CAS [15.9.2004 – 2004/A/674] *Association P v/ FC V*, margin nos. 47 *et seq.*

10. CAS [15.9.2004 – 2004/A/574] *Associação Portuguesa de Desportos v/ Club Valencia C.F. S.A.D.*, margin no. 56.

11. Rigozzi, L'arbitrage international en matière de sport, 2005, margin no. 1039 ; Haas, in: Weigand (editor), Practitioner's Handbook on International Arbitration, 2002, Part 3 Art. 2 margin no. 74; see also *OLG [Regional Court of Appeals] Düsseldorf*, NJW-RR 1988, 1271, 1272 *et seq.*; Haas, in: Haas/Haug/Reschke (editors), Handbuch des Sportrechts, Part B Chapter 2, margin no. 130.

12. CAS [18.6.2009 – 2008/A/1705] *Grasshopper v/ Club Alianza de Lima*, margin no. 8.2.3; *Rigozzi*, L'arbitrage international en matière de sport, 2005, margin no. 1039; *id.*, Die Berufungsfrist vor dem Tribunal Arbitral du Sport (TAS), causa sport (forthcoming issue); Haas, in: Weigand (editor), Practitioner's Handbook on International Arbitration, 2002, Part 3 Art. 2 margin no. 74; dissenting opinion Reichert, Handbuch Vereins- und Verbandsrecht, 11th ed. 2007, margin no. 2912.

13. BGE [Decisions of the Swiss Federal Tribunal] 85 II 525, 536; Riemer in: Berner Kommentar zum schweizerischen Privatrecht (Berner Kommentar-Riemer) (1990), Die Vereine: systematischer Teil und Kommentar zu Art. 75, margin no. 62; Fenners, Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport, 2006, margin no. 353.

14. The legal situation under German law is similar, cf. *OLG [Regional Court of Appeals] Düsseldorf*, NJW-RR 1988, 1271, 1272 *et seq.*; cf. also RGZ 85, 355, 356 *et seq.*; Haas, in: Haas/Haug/Reschke (editors), Handbuch des Sportrechts, Part B Chapter 2 margin no. 130.

15. Kegel/Schurig, Internationales Privatrecht, 9th ed. 2004,para. 17 VI 1; Nagel/Gottwald, Internationales Zivilprozessrecht, 6th ed. 2007, para. 5 margin nos. 42 *et seq.*

16. On this see, MünchKommBGB-Spellenberger, 4th ed. 2006, Art. 32 EGBGB margin no. 125.

C. Consideration of the time-limit *ex officio* or when pleaded

It is not clear whether the arbitral tribunal has to consider any failure to meet the time limit in the arbitral proceedings *ex officio* or only if pleaded by one of the parties[17]. While the (Swiss) state courts, for example, review compliance with the time limit in Art. 75 Swiss Civil Code *(ZGB)* – which is comparable to Art. R49 – *ex officio*[18], the CAS tends to consider any failure to comply with the time limit only when pleaded. Thus, for example, a decision of 27 May 2003 states the following:[19] *"The appeal is admissible. … Having no evidence of the date when the FINA Doping Panel decision was sent to the Appellant and as the Respondent did not challenge the admissibility of the appeal, the Panel considers that the Statement of Appeal was filed within the deadline of one month set by … the FINA Constitution*".

This is difficult to reconcile with the nature of the time limit as one of substantive law, because the consequence of the preclusion is that the claim has no validity, not that it is prevented from being enforceable. If, therefore, one of the parties submits facts in the course of litigation which establish that a deadline has been missed, the arbitral tribunal must –[20] as with other objections – consider this *ex officio*[21]. Accordingly, the other side does not have to invoke the failure to meet the deadline in its arguments to the arbitral tribunal.

Another issue, to be distinguished from the question of review *ex officio*, is the question of whose duty it is to submit the facts that are relevant for the legal subsumption. In principle, this is incumbent upon the parties. There is, therefore, no principle whereby the arbitral tribunal has to ascertain the facts *ex officio*. However, it is not quite clear who bears the burden of submitting the facts and the burden of proving compliance with the time limit. The prevailing opinion is, at least in the context of Art. 75 Swiss Civil Code *(ZGB)*, that the burden of submitting the facts and the burden of proof lie with the party who raises the challenge[22].

III. The parties' autonomy with regard to the "time limit for appeal"

The time limit of 21 days for appeal in Art. R49 CAS Code applies only subsidiarily, i.e. in case the parties have not stipulated any other time limit. Such other time limit may be stipulated in the regulations of the federation or association whose decision forms the subject of the "appeal", or in a separate agreement between the parties. Some federations or associations have adopted the 21-day CAS Code limit in their own regulations (see e.g. Art. 61(1) FIFA statutes). In practice, however, many sports organisations make use of the possibility of providing for a time limit for appeal that differs from the one under the CAS Code[23]. For example, there are differing time limits in Art. 62(3) UEFA statutes (10 days), Art. 15(2) IAAF Constitution (60 days), Art. 59(3) AIBA statutes (30 days), or Art. L1.9 FIBA Internal Regulations (30 days). Sometimes, the federations' or associations' regulations also deviate from those of the CAS Code with regard to the way in which the time limit is calculated, or concerning the question of where the request for arbitration must be filed (as regards this see below)[24].

A. The limits of autonomy

1. Due to the law applicable to the merits

If one agrees with the view held here, i.e. subsumes the "time limit for appeal" pursuant to Art. R49 CAS Code under substantive law, the limits of the parties' autonomy could particularly ensue from the law applicable to the merits (Art. R58 CAS Code). If Swiss law applies to the merits, this would[25] – at least at first glance – appear to limit the parties' autonomy because Swiss law stipulates a time limit (in Art. 75 Swiss Civil Code *(ZGB)*) within which any appeal against a measure taken by a federation or association must be filed[26]. The said regulation reads:

17. Rigozzi, L'arbitrage international en matière de sport, 2005, margin no. 1043.

18. CAS [15.9.2004 - 2004/A/574] *Associação Portuguesa de Desportos v/ Club Valencia C.F. S.A.D.*, margin no. 75; BezG Zürich, causa sport 2005, 254, 258; Berner Kommentar-Riemer, supra at Art. 75, margin no. 62 *et seq.*; Heini and Scherrer in: Basler Kommentar ZGB I (BSK-Heini/Scherrer), 4th ed. 2010, Art. 75 margin no. 22; see also CAS [15.9.2004 – 2004/A/674] *Association P v/ FC V*, margin no. 76.

19. CAS [27.5.2003 – 2002/A/432] *Demetis v/ FINA*, in: Reeb (editor), Digest of CAS Awards III 2001-2003, 2004, p. 419, 422; [31.1.2006 – 2005/A/971] *RBF v/ IBF*, margin no. 6.2.1: *"The Respondent has raised no objection regarding the timeliness of the Appellant's Statement of Appeal"*.

20. As regards Swiss law only, see Schaller, Einwendungen und Einreden im schweizerischen Schuldrecht, 2010, margin nos. 163 *et seq.*

21. See also Rigozzi, L'arbitrage international en matière de sport, 2005, margin no. 1043; cf. likewise Zen-Ruffinen, causa sport 2007, 67, 81 *et seq.*

22. Berner Kommentar-Riemer, supra at Art. 75 margin no. 75.

23. Rigozzi, L'arbitrage international en matière de sport, 2005, margin no. 1032; *id.*, Die Berufungsfrist vor dem Tribunal Arbitral du Sport (TAS), causa sport (forthcoming issue); see for example CAS [4.7.2005 – 2005/A/831] *IAAF v/ Hellebuyck* (Preliminary Decision); [27.5.2003 – 2002/A/432] *Demetis v/ FINA*, in: Reeb (editor), Digest of CAS Awards III 2001-2003, 2004, p. 419, 422; [28.7.2000 – 2000/A/262] *Roberts v/ FIBA*, in: Reeb (editor), Digest of CAS Awards II 1998-2000, 2002, p. 377, 380; [20.6.2006 – 2006/A/1065] *Williams v/ FEI*.

24. Cf. with regard to this as well as with regard to the question of whether such deviations are admissible, CAS [20.6.2006 – 2006/A/1065] *Williams v/ FEI*.

25. As regards this, cf. CAS [15.9.2004 – 2004/A/574] *Associação Portuguesa de Desportos v/ Club Valencia C.F. S.A.D.*, margin nos. 75 *et seq.*; Nater SpuRt 2006, 139 *et seq.*; Rigozzi, L'arbitrage international en matière de sport, 2005, margin nos. 1040 *et seq.*; *id.*, Die Berufungsfrist vor dem Tribunal Arbitral du Sport (TAS), causa sport (forthcoming issue).

26. The provision is interpreted broadly and – contrary to its wording

"Beschlüsse, die das Gesetz oder Statuten verletzen, kann jedes Mitglied, das nicht zugestimmt hat, von Gesetzes wegen binnen Monatsfrist, nachdem es von ihnen Kenntnis erhalten hat, beim Gericht anfechten".

In translation:

"Any member who has not assented can by law file an action with a court to set aside resolutions which breach the law or statutes, within a period of one month after said member has received knowledge of such resolutions".

The time limit of Art. 75 Swiss Civil Code *(ZGB)* is mandatory[27]. This raises the question to which extent the CAS Code or an association can deviate at all from the one-month's deadline under Art. 75 Swiss Civil Code *(ZGB)* (if Swiss law applies to the merits). However, correctly seen there is no potential conflict between Art. R49 CAS Code (or the corresponding regulations of a federation) and Art. 75 Swiss Civil Code *(ZGB)* as the applicable law is determined by Art. R58 CAS Code. According to this provision, the regulations of the federation or association apply primarily, and national legal systems (e.g. Swiss law) only apply subsidiarily, or additionally, if the legal question is not (exhaustively) dealt with in the federation's statutes and regulations. Consequently, the federation's regulations (or the deadline in Art. R49 CAS Code) take precedence over national law (i.e., here, over Art. 75 Swiss Civil Code *(ZGB)*) – at any rate in international arbitration proceedings[28]. This applies even if the federation's regulations are in conflict with mandatory provisions of the (subsidiarily) applicable law. Art. 75 Swiss Civil Code *(ZGB)*, therefore, does not limit the parties in their freedom to determine a preclusion period even if Swiss law applies to the dispute in addition[29].

2. Due to the public policy ("ordre public") proviso

The parties' freedom to determine the length of the time limit for appeal is limited by public policy *("ordre public")*[30]. Public policy is the "hard core" of every legal system and opposes the application of foreign regulations that are incompatible with the legal system's own law[31]. A breach of public policy constitutes a ground for setting aside an arbitral award pursuant to Art. 190(2)(e) of Switzerland's Federal Code on Private International Law *(IPRG)*. Accordingly, arbitral tribunals must render their decision such that they stand up to the scrutiny of the Bundesgericht [Swiss Federal Tribunal] and ensure that they do not apply any rules that breach public policy.

2.1 Specification of the public policy ("ordre public") proviso

If, therefore, the public policy *("ordre public")*, which the arbitral tribunal must observe, meets the standard[32] stipulated in Art. 190(2)(e) Switzerland's Federal Code on Private International Law *(IPRG)*, then its content is determined not by Swiss public policy under Art. 17 of Switzerland's Federal Code on Private International Law *(IPRG)* nor by the public policy of any other country,[33] but – according to the case law of the Bundesgericht [Swiss Federal Tribunal] – by a universal or international public policy[34]. Public policy is ultimately a universal, international or transnational concept stripped of any purely Swiss character[35]. The definitions which the Bundesgericht [Swiss Federal Tribunal] has provided so far are manifold and stretch from "*the fundamental legal system and system of values recognised in every civilised state*"[36] to principles that "*prevail in a state in which the rule of law prevails*"[37] or "*essential principles of the legal system as they*

– applies to all decisions adopted by the organ of an association within the ambit of its competence whether prescribed by law or by its statutes, cf. BGE [Decisions of the Swiss Federal Tribunal] 118 II 12, E. 3b; 108 II 15, E. 2; Handkommentar zum Schweizerischen Recht/Niggli, 2007, Art. 75 ZGB margin nos. 6 *et seq.*; Heini/Portmann, in: Tercier (editor), Das Schweizerische Vereinsrecht, Volume II/5, 3rd ed. 2005, margin no. 281; BSK-Heini/Scherrer, supra at Art. 75 margin nos. 3 *et seq.*

27. CAS [15.9.2004 – 2004/A/574] *Associação Portuguesa de Desportos v/ Club Valencia C.F. S.A.D.*, margin no. 75; Berner Kommentar-Riemer, supra at Art. 63 margin no. 13; Nater, SpuRt 2006, 139; Fenners, Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport, 2006, margin no. 98, 248; Zen-Ruffinen, causa sport 2007, 67, 71; Riemer, causa sport 2005, 359, 360; Heini/Portmann, in: Tercier (editor), Das Schweizerische Vereinsrecht, Volume II/5, 3rd ed. 2005, margin no. 281.

28. CAS [18.6.2009 – 2008/A/1705] *Grasshopper v/ Club Alianza de Lima*, margin no. 8.2.7; Rigozzi, L'arbitrage en matière de sport, 2005, margin no. 1042.

29. CAS [18.6.2009 – 2008/A/1705] *Grasshopper v/ Club Alianza de Lima*, margin no. 8.2.7; in its conclusion also CAS [20.6.2008 – 2007/A/1413] *WADA v/ FIG & Vysotskaya*, margin no. 56; Bernasconi/Huber SpuRt 2004, 268, 270; Nater, SpuRt 2006, 139, 143 *et seq.*; Rigozzi, L'arbitrage international en matière de sport, 2005, margin no. 1041; *id.*, Die Berufungsfrist vor dem Tribunal Arbitral du Sport (TAS), causa sport (forthcoming issue).

30. CAS [18.6.2009 – 2008/A/1705] *Grasshopper v/ Club Alianza de Lima*, margin no. 8.2.8; Heini, in: Zürcher Kommentar zum IPRG (ZK-*Heini*), 2nd ed. 2004, Art. 187 margin no. 18; see also Kaufmann-Kohler/Rigozzi, Arbitrage International, 2nd ed. 2010, margin no. 657.

31. Kaufmann-Kohler/Rigozzi, Arbitrage international, 2nd ed. 2010, margin no. 655.

32. Karrer, in: Basler Kommentar Internationales Privatrecht (BSK IPRG-Karrer)/, 2nd ed. 2007, Art. 187 margin no. 204.

33. ZK- Heini, supra at Art. 187 margin no. 18; BGE [Decisions of the Swiss Federal Tribunal] 120 II 155, E. 6a.

34. BGer [Swiss Federal Tribunal] 05.01.07 [4P.210/2006], E. 4.1; BGer [Swiss Federal Tribunal] 08.03.06 [4P.278/2005], E. 2.2.2; BGE [Decisions of the Swiss Federal Tribunal] 120 II 155, E. 6a, where the Bundesgericht [Swiss Federal Tribunal] lists, inter alia, «pacta sunt sevanda», the principle of trust and the prohibition of the abuse of rights as examples of this universal public policy *("ordre public")*; BSK-IPRG-Karrer, supra at Art. 187 margin no. 219 with further authorities; ZK-Heini, supra at Art. 187 margin no. 4 (referring to the ECHR as transnational public policy *("ordre public")*.

35. Kaufmann-Kohler/Rigozzi, Arbitrage International, 2nd ed. 2010, margin no. 666; ZK-Heini, supra at Art. 187 margin no. 18; cf. also Portmann, causa sport 2006, 200, 203 and 205.

36. BGE [Decisions of the Swiss Federal Tribunal] 128 III 234, E 4c.

37. BGE [Decisions of the Swiss Federal Tribunal] 128 III 191, E 4a.

exist in Switzerland"[38]. Since not every country has the same values, one might call it an international public policy *("ordre public")* with a Swiss finish. One should, therefore, always examine whether the chosen legal system is compatible with this international public policy[39]. In particular, the right of access to the administration of justice, which is laid down not only in Art. 29 Swiss Federal Constitution *(Bundesverfassung - "BV")*, is to be understood as a necessary component of public policy *("ordre public")*. If, therefore, the regulations of the federation or association stipulate a time limit for appeal that deprives the party concerned of effective legal protection or makes legal protection unreasonably difficult, the corresponding regulation is void.

2.2 The consequences of the public policy ("ordre public") proviso for the present case

As a starting point, it is largely agreed that the length of the time limit stipulated in Art. 75 Swiss Civil Code *(ZGB)* is not to be considered the absolute minimum for legal protection provided by the public policy *("ordre public")* proviso[40]. One must also bear in mind that the latter time limit of Art. 75 Swiss Civil Code *(ZGB)* applies to the submission of the entire Statement of Claim (including the reasons), whereas Art. R49 CAS Code only stipulates the time limit for filing the request for arbitration ("Statement of Appeal", Art. R48), a document that is comparatively simple to draft, and that a further time limit of 10 days is provided for filing the reasons for the claim ("Appeal Brief") (Art. R51(1) CAS Code, cf. above). Adding up the time limits of Art. R49 CAS Code and Art. 51 CAS Code, the total time limit surely does not constitute any deficiency in the legal protection (in breach of public policy) as compared to Art. 75 Swiss Civil Code *(ZGB)*[41].

2.2.1 Unreasonable shortening of the time limit

The temptation for federations or associations to protect their decisions from review by means of (too) short time limits for appeal is great. Under what conditions a deadline for filing an appeal against the decision of a Sports federation must be considered a breach of public policy is debatable. However, it should not be overlooked that even the European Court of Human Rights ("ECtHR") allows certain restrictions of the right of access to the (state) courts, which is enshrined in Art. 6(1) ECHR, *"in the interests of good administration of justice"*[42]. In this connection, the ECtHR has repeatedly pointed out that time limits for instituting legal action are lawful in the interests of legal certainty[43]. Whether a specific time limit for appeal meets the public policy *("ordre public")* standard, therefore, ultimately depends on the circumstances of each individual case[44]. Accordingly, one will, for example, have to accept shorter time limits for instituting legal action in the case of decisions made during sports competitions, where certainty about the legal validity of the decision must be established quickly and absolutely because of the ongoing competition, than in the case of other federation or association decisions where there is no comparable urgency.

When weighing up the right of access to justice on the one hand and the *"interests of good administration of justice"* on the other hand, it should, furthermore, be borne in mind that the time limits that apply to legal protection against decisions by federations or associations are not usually the result of any "voluntary" agreement between the sports federation and the athlete but are, rather, ultimately law enacted by the federations unilaterally. As regards the question of whether the time limit for instituting legal action is reasonable or not, the standard applied should, in the interests of the "weaker party", not be too lax. The correct view is, therefore, that the general interest of federations in obtaining a quick resolution to a dispute cannot from the outset justify unreasonably short "*time limits for instituting legal action*". Rather, the shorter the time limit stipulated by a federation, the stronger the federation's justification must be.

In the light of these rules, a time limit of 10 days for filing the Statement of Appeal (even in cases that do not involve any sports-related urgency) will in general

38. BGer [Swiss Federal Tribunal] 08.04.05 [4P.253/2004], E 3.1.

39. BGer [Swiss Federal Tribunal] 05.01.07 [4P.210/2006], E 4.1.

40. Rigozzi, L'arbitrage en matière de sport, 2005, margin no. 1041; *ders*, Die Berufungsfrist vor dem Tribunal Arbitral du Sport (TAS), causa sport (forthcoming issue); dissenting opinion Riemer, causa sport 2005, 359, 360.

41. CAS [18.6.2009 – 2008/A/1705] *Grasshopper v/ Club Alianza de Lima*, margin no. 8.2.8 ; see also Rigozzi, L'arbitrage en matière de sport, 2005, margin no. 1041; *id.*, Die Berufungsfrist vor dem Tribunal Arbitral du Sport (TAS), causa sport (forthcoming issue).

42. Cf. EuCtHR (8.7.1986) *Lithgow and Others v/ The United Kingdom* (Application no. 9006/80; 9262/81; 9265/81; 9266/81; 9405/81) margin no. 194; cf. also EuCtHR (27.2.1980) *Deweer v/ Belgium* (Application no. 6903/75) margin no. 49; (18.2.1999) *Waite & Kennedy v/ Deutschland*, NJW 1999, 1173, 1174, margin no. 59; ECHR (13.7.1990) *Axelsson and Others v/ Sweden* (Application no. 11960/86); see also Briner/von Schlabrendorff, in: Liber amicorum Böckstiegel, 2001, pp. 89, 91.

43. Cf. references in Villiger, Handbuch der Europäischen Menschenrechtskonvention, 2nd ed. 1999, para. 19 margin nos. 432 *et seq.*

44. See also EuCtHR (8.7.1986) *Lithgow and Others v/ The United Kingdom* (Application no. 9006/80; 9262/81; 9265/81; 9266/81; 9405/81) margin no. 194: "The right of access to the courts secured by Article 6 para. 1 is not absolute but may be subjected to limitations; these are permitted by implication since the right of access, by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals. In laying down such regulation, the Contracting States enjoy a certain margin of appreciation, but the final decision as to observance of the Conventions' requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired".

be considered admissible[45]. Likewise, a regulation is admissible where the claimant first needs to request a decision with reasons within a time limit of 10 days following service of the operative part of said decision and only then must file the Statement of Appeal within another time limit of 10 days following service of the full decision[46]. The limits of public policy *("ordre public")* are, however, doubtlessly exceeded if the federation's regulations provide for a time limit of only one or two days for filing an action with CAS without any specific sports-related justification.

The legal situation is also problematic if, although the federation's statutes provide for a reasonable time limit for filing an action with the CAS, they stipulate mandatory internal proceedings that first need to be instituted within an unreasonably short period of time. In this connection it is frequently pointed out that many national procedural codes also provide for very short time limits for filing appeals against decisions by state courts.

However, these comparisons are unsatisfactory from several points of view: Firstly, the time limit in Art. R49 CAS Code is a substantive preclusion period. However, before state courts, preclusion periods are generally much longer than the procedural time limits. Secondly, one must not overlook the fact that in proceedings before state courts – even if the time limits for appeal are only short – the case has usually already been decided beforehand by a state judge. By contrast, the CAS is the first – genuine – instance. Even though the case in which the CAS is invoked is called an "appeals arbitration procedure", it is nevertheless really a (genuine) first-instance procedure. After all, a decision by an organ of a sports federation cannot simply be equated with the decision of a court of first instance. To summarise, therefore, time limits for instituting an action that are shorter than 10 days – without any specific justification – are to be considered legally problematic in light of the public policy *("ordre public")* proviso.

2.2.2. Scope of the time limit

Basically, Swiss law recognises two different types of action that can be taken against an unlawful decision issued by a federation or association: Firstly, an action for annulment of the decision under Art. 75 Swiss Civil Code *(ZGB)*. This is a legal action for a change of legal status or legal rights *(Gestaltungsklage)*[47]. Secondly, the party concerned can also, by way of an action for a declaratory judgement, obtain a declaratory judgement from the court that the measure is null and void. There is no time limit for the latter – unlike for an action for annulment of the decision under Art. 75 Swiss Civil Code *(ZGB)*[48]. However, a general action for a declaratory judgement will only succeed if the decision in question suffers from a qualified contravention of the law or statutes. It is not always easy to determine whether this is the case or not[49]. To avoid legal uncertainty in case of doubt, Swiss law assumes that the measure is not null and void but only that it is voidable. In practice, therefore, the party concerned usually only files an action for annulment of the decision pursuant to Art. 75 Swiss Civil Code *(ZGB)* because any nullity can also be asserted by such action[50].

The said Swiss (substantive) legal situation raises the question as to the scope of Art. R49 CAS Code, in other words, whether or not the "time limit for appeal" applies to all actions directed against a measure taken by a federation or association. This question is of considerable importance because, if answered in the affirmative, the party concerned cannot even invoke the severest and most serious irregularities as objections to the decision after expiry of the "time limit for appeal"– apart from breaches of public policy *("ordre public")*.

3. Due to the wording of Art. R49 CAS Code

The autonomy granted to the parties in Art. R49 CAS Code relates first and foremost to the length of the "time limit for appeal". A matter of debate is whether the proviso intended for the benefit of party autonomy also includes questions that are directly connected with the length of the time limit, for example the commencement of the time limit, methods of service, or the question of whether the principle of dispatch or the principle of receipt applies for observance of the time limit[51]. Since these questions have an – indirect – influence on the length of the time limit, the correct view is that they are likewise reserved to the autonomy of the parties in Art. R49 CAS Code, with the consequence that deviating provisions in the regulations of the federation basically take precedence in this regard over Art. R47 CAS Code[52].

45. CAS [18.6.2009 – 2008/A/1705] *Grasshopper v/ Club Alianza de Lima*, margin no. 8.2.8; see also *Oswald*, in: *Zen-Ruffinen* (editor), Le temps et le droit, 2008, pp. 238, 250.

46. CAS [18.6.2009 – 2008/A/1705] *Grasshopper v/ Club Alianza de Lima*, margin no. 8.2.8.

47. Heini/Portmann/Seemann, Grundriss des Vereinsrechts, 2009, margin no. 228.

48. Berner Kommentar-Riemer, supra at Art. 75 margin no. 91; Heini/Portmann/Seemann, Grundriss des Vereinsrechts, 2009, margin no. 229.

49. Berner Kommentar-Riemer, supra at Art. 75 margin nos. 92 *et seq.*

50. Heini/Portmann/Seemann, Grundriss des Vereinsrechts, 2009, margin no. 229.

51. See also Rigozzi, Die Berufungsfrist vor dem Tribunal Arbitral du Sport (TAS), causa sport (forthcoming issue).

52. In this sense also CAS [20.6.2008 – 2007/A/1413] *WADA v/ FIG & Vysotskaya*, margin no. 56.

B. Exercising the autonomy

Art. R49 CAS Code stipulates that this autonomy can be exercised by the federation's regulations (to which the other party has submitted) providing for a "time limit for appeal". However, it is also possible to stipulate the length of the time limit for appeal in an agreement. If the time limit for appeal is included in the federation's regulations, the federation must, of course, comply with the (formal and substantive) legal principles that apply for changing those regulations. In particular, the stipulation of the time limit must have been passed by the competent body of the federation and the hierarchy of the federation's rules must have been observed, i.e. the stipulation of the time limit may, in particular, not violate any higher-ranking law governing federations[53].

An open question is whether an agreement regarding the "time limit for appeal" can only be concluded before expiry of the preclusion period of Art. 49 CAS Code, or whether it can also be concluded afterwards. A subsequent agreement is problematic where the time limit is also intended to protect the interests of third parties[54], i.e. is supposed to create legal certainty beyond the circle of the parties to the action. In such a case the time limit for appeal is probably no longer at the parties' discretion and can therefore also no longer be changed retroactively. In the other cases this seems to be prevented – at least at first glance – by the wording of Art. R49 CAS Code, according to which a "previous agreement" is needed in order to be able to deviate from the 21-day time limit. Nevertheless, there is no apparent reason why the parties cannot – a priori – by mutual agreement extend the substantive preclusion period even after an action has been filed[55].

IV. Calculation of the time limit

A. The law (subsidiarily) applicable to the calculation of the time limit

As has already been explained above, the preclusion or exclusion of actionability is – in principle – subject to the law applicable to the merits (Art. R58 CAS Code)[56]. The same, of course, also applies to all questions in connection with calculating the time limit. If, therefore, the applicable regulations contain gaps regarding the calculation of the time limit, then – unless otherwise provided in the federation's regulations or in the agreement between the parties – the law of the country in which the federation is domiciled shall apply subsidiarily to fill the gaps (see Art. R58 CAS Code). A matter that is open to question is whether the same also applies if the "time limit for appeal" follows not from the federation's regulations, but directly from Art. R49 CAS Code. In this case it seems to make little sense to refer subsidiarily to the law of the state where the federation is domiciled because the applicable regulation was created not by the federation, but by the arbitral institution CAS, which has its seat in Switzerland, for arbitral proceedings before the CAS. In accordance with the legal principle of Art. R58 CAS Code, the law of the country in which the institution that issued the regulation (on the time limit) is domiciled should then apply subsidiarily in this regard. In this case, however, Swiss law as the law of the place of arbitration applies to the calculation of the time limit, unless otherwise provided in the federation's regulations[57].

B. Commencement and end of the time limit

According to Art. R49 CAS Code, the time limit begins upon receipt of the decision appealed against ("*twenty-one days from the receipt of the decision appealed against*").

1. The event that triggers the running of time

According to Art. R49 CAS Code, the event that triggers the running of time is receipt of the decision appealed against.

1.1. The term "decision"

The term "decision" for the purposes of Art. R49 CAS Code is – basically – understood to mean the complete decision:

- **Reasons for the Decision**. The complete decision particularly includes the reasons for the decision. Only if the person affected is in possession of the complete decision can he estimate the litigation risk involved in the appeal proceedings. If he receives the reasons for the decision at a delay after having been notified of the operative part, he is only able to review his chances of succeeding at that later point in time, with the consequence that only then can he be expected to make his

53. CAS [18.6.2009 – 2008/A/1705] *Grasshopper v/ Club Alianza de Lima*, margin nos. 8.2.10 *et seq.*

54. In this sense for the time limit in Art. 75 Swiss Civil Code *(ZGB)*, Riemer, causa sport 2005, 359, 360.

55. According to CAS [8.9.2005 – 2004/A/727] *De Lima BOC v/ IAAF,* margin no. 21 and CAS [18.3.2005 – 2004/A/769] *Bouyer v/ UCI & AMA*, margin nos. 32 *et seq.*, the preclusion period is quite simply discretionary.

56. In this sense probably CAS [25.11.2005 – 2004/A/953] *Dorthe c/ IIHF*, margin no. 50; [21.12.2007 – 2007/A/1364] *WADA v/FAW and James*, margin no. 6.2.; [18.6.2009 – 2008/A/1705] *Grasshopper v/ Club Alianza de Lima*, margin no. 8.3.4; dissenting opinion, i.e. always in favour of a presumption of Swiss law Rigozzi, Die Berufungsfrist vor dem Tribunal Arbitral du Sport (TAS), causa sport (forthcoming issue).

57. Rigozzi also comes to this conclusion, Die Berufungsfrist vor dem Tribunal Arbitral du Sport (TAS), causa sport (forthcoming issue).

review[58]. A question to be distinguished from the question of when time begins to run is whether the Appellant can already file the appeal with the CAS after he has been notified of (only) the operative part and, thus, before the time limit for appeal begins to run[59]. This must be answered in the affirmative because the operative part of the decision is, so to speak, "out there in the world" when it is pronounced, i.e., it is no longer a matter that is internal to the court and therefore it can, in principle, also be appealed against. Applicable rules can provide otherwise by stipulating that only a decision with reasons can be appealed against. In that case the appeal cannot – in principle –[60] be filed before the reasons for the decision have been issued.

- **Partial decisions**. If a measure taken by an internal tribunal of the federation decides on only part of the dispute and if an appeal can be independently filed against this partial decision with the CAS, said partial decision starts the running of time for the purposes of the time limit for appeal.

- **Notice on the right to appeal**. Unless otherwise provided by the federation's regulations, the notice on the right to appeal does not constitute part of the "complete" decision. The correct view is that such a notice does not, therefore, need to be attached to the decision in order to trigger the running of time (but also see below).

- **Case file**. In derogation from Art. R49 CAS Code, the federation's regulations can also provide that the time limit does not begin to run until receipt of the complete case file rather than upon service of the decision[61].

1.2. The "receipt"

Receipt of the decision for the purposes of Art. R49 CAS Code means that the decision must have come into the sphere of control of the party concerned (or of his/her representative or agent authorised to take receipt). A matter for debate is whether it can further be inferred from the term that the party concerned must also have had the possibility to take note of the decision. This can be relevant if the decision is faxed to the party concerned at so late a time that, under normal circumstances, such party cannot be expected to take note of the decision on the same day. To resolve this question, the law applicable to the merits, or Swiss law, needs to be consulted[62]. The latter provides that for the service of declarations of will (but also of decisions) to become effective, they must not only come within the sphere of control of the party concerned but the party concerned must also have a (reasonable) possibility of taking note of the declaration of will or decision[63]. This principle will, probably, also apply *mutatis mutandis* for interpreting Art. R49 CAS Code[64]. However, it does not matter whether the party concerned actually did take note of the content of the declaration[65].

If the regulations of the federation or association stipulate a certain manner or form in which the decision must be communicated to the party concerned (e.g. by registered letter, registered letter with acknowledgement of receipt, fax, etc.), then those regulations must in principle be complied with[66]. Of course it is questionable how one should proceed if these regulations were not complied with but the party concerned nevertheless received the (complete) decision. The consequences will ultimately depend on whether – according to the will of the parties – the agreed form of service is constitutive *(konstitutiv)* or only declaratory *(deklaratorisch)* in nature. A requirement of form is constitutive in nature if the legal effectiveness of the decision or declaration or the running of time depends on compliance with the form[67]. By contrast, the requirement of form is said to be declaratory in nature if compliance with the form is intended merely for the purposes of documentation or evidence[68]. In the event of doubt, it is correct to assume that any agreement of a specific form of transmission has only declaratory effect. If, therefore, the federation's regulations provide for a decision "by registered letter", then the written form is, of course, constitutive for the decision itself, whereas the agreed form of transmission ("registered"), in the event of

58. Cf. CAS [15.4.2008 – 2007A/1322] *Giuseppe Giannini et al v/ S.C. Fotebal Club SA*, margin no. 7.2.

59. Cf. on this CAS [15.4.2008 – 2007A/1322] *Giuseppe Giannini et al v/ S.C. Fotebal Club SA*, margin no. 7.3.

60. However, something different applies if the decision already has an adverse effect on the person concerned before the reasons for the decision are issued.

61. For such a case cf., for example, CAS [7.4.2009 – 2008/A/1675] *UCI v/ Ariel M. Richeze et UCRA*, margin no. 51.

62. Cf. also Rigozzi, Die Berufungsfrist vor dem Tribunal Arbitral du Sport (TAS), causa sport (forthcoming issue).

63. BGE [Decisions of the Swiss Federal Tribunal] 118 II 42, E. 3b; see also CAS [15.9.2004 – 2004/A/574] *Associação Portuguesa de Desportos v/ Club Valencia C.F. S.A.D.*, margin no. 60.

64. CAS [24.1.2007 – 2006/A/1153] *WADA v/ Assis & FPD*, margin no. 40 (where the principles are, however, interpreted very strictly).

65. CAS [24.1.2007 – 2006/A/1153] *WADA v/ Assis & FPD*, margin no. 40; see also CAS [15.9.2004 – 2004/A/574] *Associação Portuguesa de Desportos v/ Club Valencia C.F. S.A.D.*, margin no. 60.

66. CAS [5.5.2008 – 2007A/1362& 1393] *CONI v/ Petacchi& FCI, WADA v/ Petacchi & FCI*, margin no. 5.6; Rigozzi, Die Berufungsfrist vor dem Tribunal Arbitral du Sport (TAS), causa sport (forthcoming issue).

67. In this sense probably CAS [5.5.2008 – 2007A/1362& 1393] *CONI v/ Petacchi& FCI, WADA v/ Petacchi & FCI*, margin no. 5.6 (ultimately left open).

68. As is the case, for example, under German law, Einsele, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, 5th ed. 2006, para. 127 margin nos. 4 *et seq.*

any doubt, is merely declaratory. As a consequence, the federation's decision has been effectively received (thereby triggering the running of time) even if it was sent to the recipient by some other means (e.g. by fax)[69].

2. Calculating the time limit

2.1 Calculating the 21 day time limit under Art. R49 CAS Code

How the time limit under Art. R49 CAS Code is to be calculated is a matter of debate because the wording of the rule is not entirely clear[70]. Unfortunately, the revised CAS Code that has recently entered into force has not clarified this controversial issue. The CAS case law on this (important) issue is not entirely clear, either[71]. The issues mainly centre on whether the time limit can be calculated by analogy to Art. R32 CAS Code or not. This rule stipulates that

"*[t]he time limits fixed under the present Code shall begin from the day after that on which notification by the CAS is received*".

This rule does not directly relate to the time limit in Art. R49 CAS Code but, nevertheless, there is a general idea underlying Art. R32 CAS Code, which also extends to Art. R49 CAS Code[72]. Accordingly, the "full" 21 days are available to the "Appellant". If, for example, the decision is served on 2 October, the time limit expires on 23 October. The running of the time limit, therefore, does not begin on 2 October already (the date of service), but on 3 October. This method of calculation also complies with the legal principle of Swiss law under Art. 132 Swiss Code of Obligations *(OR)*[73] in conjunction with Art. 77(1) no.1 Swiss Code of Obligations *(OR)*[74].

By analogous application of Art. 32(1) CAS Code, the last day of the time limit (the end of the deadline) falls completely – i.e. until the expiry of that day – within the time limit[75]. Moreover, by analogous application of Art. R32 CAS Code, Sundays and official holidays which fall within the time limit are not taken into account separately and do not extend the time. If, however, the end of the time limit falls on a non-working day or on an official holiday, then the time limit is extended, by analogous application of Art. R32 CAS Code, until the end of the subsequent business day[76]. To this extent Art. R32 CAS Code corresponds to Art. 78(1) Swiss Code of Obligations *(OR)*, which is in turn supplemented by the *Bundesgesetz über den Fristenlauf an Samstagen* (Federal Act on the Expiry of Deadlines on Saturdays [S 173.110.3]). Whether it is the place of delivery or the place of dispatch that should determine if a particular day is a non-working day or an official holiday is a matter of debate. In any case one will also have to take into account the legal situation at the place of delivery[77]. Under Swiss law, if the end of a time limit falls on a Saturday, that Saturday does not count as a working day[78].

2.2. Calculating the Time Limit in the Other Cases

If the regulations of the federation or association derogate from the 21-day time limit of Art. R49 CAS Code, the time limit is – in principle – calculated according to the law applicable to the merits (see above). If this law is Swiss law, Art. 77 Swiss Code of Obligations *(OR)*[79] applies. The calculation of a time limit that is based on days thereby follows the principles for the time limit under Art. R49 CAS Code[80]. If the time limit in the federation's rules is calculated on the basis of months or years, it expires – by analogous application of Art. 77 Swiss Code of Obligations *(OR)* – on such day of the last week as bears the same name as the day on which the time limit began. In other words, if service was effected on a Wednesday the time limit also expires on a

69. This is – generally – the case for agreements relating to the manner of transmission in the case of declarations of will under German law, for example *BGH* [Federal Supreme Court], NJW 2004, 1320; Einsele, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, 5th ed. 2006, para. 127 margin no. 5; Bamberger/Roth/Wendtland, BGB, 2nd ed. 2007, para. 125 margin no. no. 13.

70. See Rigozzi, L'arbitrage en matière de sport, 2005, margin no. 1052.

71. In support of the time limit beginning on the day of (due and proper) service CAS [2002/A/399 – 31.1.2003] *P. v/ FINA*, in: Reeb (editor), Digest of CAS Awards III 2001-2003, pp. 382, 385; by contrast, in support of the time limit beginning on the day following the day of service CAS [2008/A/1705 – 18.6.2009] *Grasshopper v/ Club Alianza de Lima*, margin no. 8.3.3; [2006/A/1176 – 12.3.2007] *Belarus Football Federation v/ UEFA & FAI*, margin no. 7.2; [2008/A/1583&1584 – 15.9.2008] *Sport Lisboa e Benfica Futebol SAD v/ UEFA,& FC Porto Futebol SAD*, margin no. 7; [2007/A/1364 – 21.12.2007] *WADA v/FAW and James*, margin nos. 6.1 *et seq*.

72. In this sense also CAS [15.9.2004 – 2004/A/574] *Associação Portuguesa de Desportos v/ Club Valencia C.F. S.A.D.*, margin no. 69; see also CAS [18.6.2009 – 2008/A/1705] *Grasshopper v/ Club Alianza de Lima*, margin nos. 8.3.3 *et seq*.

73. The regulation applies *mutatis mutandis* to preclusion periods, Riemer, Anfechtungs- und Nichtigkeitsklagen im schweizerischen Gesellschaftsrecht, 1998, margin no. 195; Fenners, Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport, 2006, margin no. 357.

74. In this sense also CAS [2007A/1364 – 21.12.2007] *WADA v/FAW and James*, margin no. 6.1 *et seq*.; [24.1.2007 – 2006/A/1153] *WADA v/ Assis & FPF*, margin no. 41.

75. CAS [18.6.2009 – 2008/A/1705] *Grasshopper v/ Club Alianza de Lima*, margin no. 8.3.5.

76. CAS [15.9.2004 – 2004/A/574] *Associação Portuguesa de Desportos v/ Club Valencia C.F. S.A.D.*, margin no. 69.

77. CAS [15.9.2004 – 2004/A/574] *Associação Portuguesa de Desportos v/ Club Valencia C.F. S.A.D.*, margin no. 70.

78. CAS [15.9.2004 – 2004/A/574] *Associação Portuguesa de Desportos v/ Club Valencia C.F. S.A.D.*, margin no. 69.

79. In principle, this regulation corresponds to the European Convention on the Calculation of Time Limits of 16.5.1972.

80. For a 10-day time limit see, for example, CAS [18.6.2009 – 2008/A/1705] *Grasshopper v/ Club Alianza de Lima*, margin nos. 8.3.3 *et seq*.; [2007/A/1364 – 21.12.2007] *WADA v/FAW and James*, margin no. 6.3.

Wednesday. If the time limit is determined on the basis of months or a period comprising several months (years, half-year, quarter), the time limit expires upon the expiry of such day of the last month as has the same number as the date upon which the time limit began[81]. For example, if the decision was served on 15 October, a time limit of one month expires on 15 November[82]. If the end of the time limit falls on a non-working day or on an official holiday, the above applies likewise *mutatis mutandis*.

Quite often, the regulations of a federation or association make the running of time regarding a "time limit for appeal" (at least for individual "appellants") dependent on certain conditions being met (e.g. receipt of the entire procedural file). This can – under certain circumstances – delay the end of the time limit for a long time[83] and, in turn, be a heavy burden on other parties involved if they have already prepared themselves for the federation's measure (supposedly) to be final and absolute. It is, therefore, questionable whether the "possibility of appeal" can be precluded for other reasons to the detriment of one of the parties even though the "time limit for appeal" has not yet expired[84]. It will hardly be possible to lay down an absolute (upper) time limit for filing the "appeal". Instead, this will always depend on the circumstances of the individual case. However, the line must probably be drawn where the other parties involved were legitimately able to rely on the (federation's) measure in question no longer being appealed against. If, for example, an "appellant" has taken note of a decision (in some other way) he can be expected to make enquiries within certain limits as far as is reasonable and within his realms of possibility[85]. If he fails to do so it would be in bad faith if he were to argue that the time limit had not yet begun to run. However, the requirement that the "party entitled to appeal" is making enquiries may not be overstretched[86].

C. Extension of the time limit

1. Discretion of the Arbitral Tribunal

Irrespective of whether the time limit follows directly from the CAS Code or from the federation's or association's regulations, the arbitral tribunal cannot extend it[87]. This explicitly follows from Art. R32 CAS Code[88], which reads as follows:

"Upon application on justified grounds, either the President of the Panel or, if he has not yet been appointed, the President of the relevant Division, may extend the time limits provided in these Procedural Rules, with the exception of the time limit for the filing of the statement of appeal, if the circumstances so warrant and provided that the initial time limit has not already expired. With the exception of the time limit for the statement of appeal, any request for a first extension of time of a maximum of five days can be decided by the CAS Secretary General".

2. The principle of good faith

One question is whether certain circumstances can affect the running of time after the decision has been issued. This must be answered in the affirmative (even if there is no basis in the CAS Code) in view of the principle of good faith, which must be observed both in procedural and substantive law[89].

2.1. Filing a request for reconsideration ("Wiedererwägungsgesuch")

A measure taken by a sports-related body cannot be appealed against under Art. R47 CAS Code unless the body's internal legal remedies have been exhausted. Apart from the ordinary legal remedies against a measure taken by a federation or association, the party concerned is always free to file a request for reconsideration *("Wiedererwägungsgesuch")* (without any requirements as to form or time limit). If the party concerned files a request for such an extraordinary legal remedy the question arises as to what influence this has on the running of time under the "time limit for appeal". The correct view is that it does not have any effect on the running of time for the purposes of the preclusion period[90]. The request for reconsideration *("Wiedererwägungsgesuch")*, therefore, neither effects whether the time limit recommences nor whether it is suspended. This follows from the principle of good faith; otherwise it would be easy for the "Appellant" to simply extend the "time limit for appeal" for as he or she wished[91].

81. As regards this entire issue see also CAS [26.6.2007 – 2006/A/1175] *Daniute v/ IDSF*, margin no. 52.

82. For such a calculation see, CAS [5.5.2008 – 2007A/1362& 1393] *CONI v/ Petacchi& FCI, WADA v/ Petacchi & FCI*, margin nos. 5.6 *et seq.*

83. For such a case see, CAS [20.6.2008 – 2007/A/1413] *WADA v/ FIG & Vysotskaya*, margin nos. 48 *et seq.*; [24.1.2007 – 2006/A/1153] *WADA v/ Assis & FPF*, margin nos. 42 *et seq.*; [5.5.2008 – 2007A/1362&1393] *CONI v/ Petacchi& FCI, WADA v/ Petacchi & FCI*, margin nos. 5.8 *et seq.*

84. This question arises in CAS [24.1.2007 – 2006/A/1153] *WADA v/ Assis & FPF*, margin no. 44, but in the end the question is left open.

85. In this sense for example CAS [20.6.2008 – 2007/A/1413] *WADA v/ FIG & Vysotskaya*, margin nos. 54 *et seq.*

86. In this regard see also CAS [23.6.2009 – 2008/A/1564] *WADA v/ IIHF & Busch*, margin no. 63.

87. Under Swiss law a state judge cannot – in principle – extend or reinstate a preclusion period if it has been missed, BGE [Decisions of the Swiss Federal Tribunal] 101 II 86 E. 2.

88. Rigozzi, L'arbitrage international en matière de sport, 2005, margin nos. 1044 *et seq.*

89. In support of this also Rigozzi, Die Berufungsfrist vor dem Tribunal Arbitral du Sport (TAS), causa sport (forthcoming issue).

90. This is the case for Swiss law, Riemer, Anfechtungs- und Nichtigkeitsklagen im schweizerischen Gesellschaftsrecht, 1998, margin no. 196; Berner Kommentar-Riemer, supra at Art. 75 margin no. 74.

91. This is the opinion correctly held in Berner Kommentar-Riemer,

2.2. "Inducement" to miss a deadline or time limit

If, by reason of the "Respondent's" conduct, the "Appellant" has missed the "time limit for appeal", this cannot be to the detriment of the "Appellant" according to the principle of good faith. The question is, of course, what legal doctrine forms the basis for this legal consequence? At a first glance, the possibilities are either an analogous application of the limitation rules in Art. 135 *et seq.* Swiss Code of Obligations *(OR)*[92], reinstatement of the deadline because of a failure to meet the deadline for no fault of the party concerned, or that the "Respondent" is barred from arguing that there has been a failure to meet the deadline because this resulted from his acting in bad faith (Art. 2(2) Swiss Civil Code *(ZGB)*). For the other preclusion periods, Swiss legal authorities and case law tend to apply Art. 2(2) Swiss Civil Code *(ZGB)*, with the consequence that any failure to meet a deadline or time limit caused by the "Respondent" is to be considered as being of no relevance[93]. In more detail, the question of whether a deadline has been missed because of a third party can arise in, inter alia, the following scenarios:

- **If it has been indicated that the measure taken by the federation will be revoked**: If the federation or association concretely suggests that there is a prospect that the measure taken by the federation or association will be set aside, for example in (out-of-court) negotiations with the Appellant, but does not do so after the deadline has expired, this constitutes a case of "inducement", which ultimately leads to the extension of the deadline by operation of law[94].

- **Lack of clarity with regard to the (federation's internal) instance**: In practice, the "time limit for appeal" is frequently missed because, inter alia, there is a lack of clarity regarding the federation's internal instance. Under Art. R47 CAS Code, only final decisions (by a federation or association) can be challenged with an "appeal" to the CAS. In other words, the Appellant must have exhausted the federation's internal legal remedies before he can institute a legal action before the CAS. It is not clear whether it constitutes a case of "inducement" in the above-mentioned sense if there is a lack of clarity (that is attributable to the federation or association) regarding the federation's internal instance, due to which the party concerned challenges the decision in the wrong instance and thereby fails to meet the "time limit for appeal"[95]. This will probably have to be answered in the affirmative.

- **Notice on the right to appeal**. Whether the measure taken by the federation or association must include a notice on the right to appeal depends on the law applicable (to the merits)[96]. If said law requires such a notice but no such notice was given, then one will have to assume that the failure to meet the deadline was caused by the federation, so that consequently the federation cannot invoke preclusion. In some circumstances an obligation to provide a notice on the right to appeal may also arise – under the viewpoint of giving the person subjected to the regulations care and assistance – out of the fact that the federation's regulations are complex and the "time limit for appeal" is very short. Irrespective of whether the federation has to give a notice on the right to appeal under the applicable law, there is "inducement" in the above-mentioned sense if the notice on the right to appeal is wrong or ambiguous[97], since the "Respondent" may not gain any advantage from a deficient notice on the right to appeal[98]. The standard of certainty and transparency of the notice on the right to appeal will, therefore, be stricter the shorter the "time limit for appeal" and the less time the Appellant has for checking the notice on the right to appeal on the basis of the legal situation[99].

2.3. Dilemma as to the legal recourse

The (substantive) preclusion periods provided in the regulations of the federations or associations or in Art. R49 CAS Code can cause a person seeking redress great difficulty if it is unclear whether there

supra at Art. 75 margin no. 74.

92. Direct application is not possible because the provisions are designed to apply to the limitation of actions, not preclusion by laches, see Riemer, Anfechtungs- und Nichtigkeitsklagen im schweizerischen Gesellschaftsrecht, 1998, margin no. 192; Fenners, Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport, 2006, margin no. 355.

93. BGE [Decisions of the Swiss Federal Tribunal] 101 II 86 E. 2; BGE [Decisions of the Swiss Federal Tribunal] 113 II 264, E. 2e; Riemer, Anfechtungs- und Nichtigkeitsklagen im schweizerischen Gesellschaftsrecht, 1998, margin no.194.

94. Riemer, Anfechtungs- und Nichtigkeitsklagen im schweizerischen Gesellschaftsrecht, 1998, margin no. 194; Fenners, Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport, 2006, margin no. 380.

95. For a case in which this question arose (but was answered in the negative) see CAS [11.6.2009 – 2008/A/1658] *SC Fotbal Club Timisoara SA v/ FIFA & RFF*, margin nos. 100 *et seq.*; see also CAS [13.7.2009 – 2009/A/1759& 1778] *FINA v/ Jaben & ISA, WADA v/ Jaben & ISA*, margin nos. 1.6 *et seq.*

96. For German law, see Haas, in: Haas/Haug/Reschke (editors), Handbuch des Sportrechts, Part B 2nd Chapter margin nos. 131 *et seq.*

97. For such a case see, CAS [25.9.2009 – 2009/A/1795] *Obreja v/ AIBA*, margin nos. 80 *et seq.*; CAS [18.6.2009 – 2008/A/1705] *Grasshopper v/ Club Alianza de Lima*, margin no. 8.2.15.

98. This is also the principle under Swiss law for state jurisdiction, see BGer [Swiss Federal Tribunal] 13.7.2007 [1C_89/2007], E. 2.3 referring to Art. 197 IIIa Swiss Federal Statute on the Organisation of the Judiciary *(OG)* and Art. 49 Federal Act on the Swiss Federal Tribunal *(BGG)*, where this principle of procedural law is expressly enshrined.

99. CAS [25.9.2009 – 2009/A/1795] *Obreja v/ AIBA*, margin nos. 80 *et seq.*

even is a valid arbitration agreement. There are many reasons why an arbitration agreement may be void. Such reasons may exist due to deficiencies in the will of the parties or the formal requirements, or because the parties lack subjective arbitrability, or if the matter in dispute lacks objective arbitrability.

2.3.1. The dilemma for the person seeking redress

In principle, the question of whether or not the arbitration agreement is valid can be raised before a state court as well as before the arbitral tribunal. The former is the case if one of the parties brings the main issue before a state court and the other party objects to said court's jurisdiction because of the arbitration agreement. The state court must then examine whether a valid arbitration agreement exists and, if so, whether it covers the specific matter in dispute. This is, at any rate, what Art. II(3) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 *(NYC)* provides for the courts of the contracting states to the NYC:

"The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed".

If one of the parties brings an action before it, the arbitral tribunal can, generally, also rule on its own jurisdiction in an interim or final decision. The CAS's possibility of issuing an interim arbitral award does not derive directly from the CAS Code but from Art. 186(3) of Switzerland's Federal Code on Private International Law *(IPRG)*. In practice, the CAS makes frequent use of this possibility[100]. Of course, insofar as the arbitral tribunal decides on the validity of the arbitration agreement, any such decision is not binding on the state courts. Rather, the state courts have the "power to make the final decision" as to whether or not the arbitration agreement is valid.

For the person seeking legal redress regarding the validity of an arbitration agreement, the consequences of any misjudgement can be considerable because of the preclusion periods. After all, he runs the risk of losing all relief. This can be illustrated with a case decided by the CAS[101]:

The International Ice Hockey Federations imposed an internal measure on the Appellant. A form was attached to the federation's decision which read, inter-alia, as follows: "*the player is entitled to lodge an appeal against this decision at the following court: Court of Arbitration for Sport (CAS). … The time limit for the appeal is twenty-one days after receipt of this decision".* The claimant initially filed an action against the federation's measure before the state courts at the federation's seat in Zürich because, in his opinion, no valid arbitration agreement had come about. As a defence in the action the federation – the defendant – raised the argument that an arbitration agreement existed, whereupon the court dismissed the action. Immediately after this – but necessarily after expiry of the time limit – the claimant submitted a statement of appeal to the CAS. The CAS panel appointed to decide the case dismissed the action because of a failure to comply with the time limit.

2.3.2. Ways out of the dilemma

In such a case how can one prevent the party concerned from having his/her relief unlawfully curtailed? At first glance there would appear to be various possible options:

- **The institution of parallel proceedings.** Under some circumstances and if one disregards the costs, one way out of the dilemma would be to institute parallel proceedings before both the state court and the arbitration court. If the arbitration proceedings are instituted later and the matter in dispute in the parallel proceedings is identical, then the arbitration proceedings may be prevented by the doctrine of *lis alibi pendens* under Art. 186(1bis) Switzerland's Federal Code on Private International Law *(IPRG)*, with the consequence that the action must be stayed[102]. However, since there are also exceptions from the doctrine of *lis alibi pendens*, the Appellant has no guarantee that the proceedings will indeed be stayed[103]. This is so even if, together with his "Statement of Appeal", he combines[104] an application to stay the arbitration proceedings until the state court has decided on its competence.

- **Referral instead of dismissal.** Another way out of the dilemma consists in obliging the state court not to dismiss the action following the raising of

100. See Rigozzi, L'arbitrage international en matière de sport, 2005, margin no. 1019; but cf., for example, CAS [27.7.2006 – 2006/A/1024 *FC Metallurg Donetsk v/ Lerinc* (order); [4.7.2005 – 2005/A/831] *IAAF v/ Hellebuyck* (Preliminary Decision); [28.7.2000 – 2000/A/262] *Roberts v/ FIBA*, in: Reeb (editor), Digest of CAS Awards II 1998-2000, 2002, p. 377.

101. CAS [25.11.2005 – 2004/A/953] *Dorthe v/ IIHF*; see also CAS [14.3.2007 – 2006/A/1176] *Belarus Football Federation v/ UEFA*, margin no. 7.9.

102. Generally on the doctrine of *lis alibi pendens* in the relation between state proceedings and arbitration proceedings, cf. Haas, in: FS Rechberger, 2005, p. 187, 195 *et seq.*; for the (old) Swiss law see also BGE [Decisions of the Swiss Federal Tribunal] 127 III 279, E. 2.

103. Rigozzi, Die Berufungsfrist vor dem Tribunal Arbitral du Sport (TAS), causa sport (forthcoming issue).

104. For such a case see, CAS [1.6.2010 – 2009/A/1880&1881] *FC Sion v/ FIFA & Al-Ahly Sporting Club, Essam El Haddary v/ FIFA & Al-Ahly Sporting Club*, margin no. 45.

a defence that an arbitration agreement exists but instead to refer the case to the (competent) arbitral tribunal. The action would then remain pending and the preclusion period would be maintained. At first glance, Art. II(3) NYC appears to express this consequence. This provision stipulates that, if the arbitration agreement is valid, the state court *"shall refer the parties to arbitration"*. However, according to the prevailing opinion the phrase "refer the parties to arbitration" in Art. II(3) NYC is to be understood in a non-legal manner[105]. It only says that the state court is prevented from deciding on the merits. Otherwise, the NYC leaves the legal consequences to the national law[106]. As regards this, mainly two models can be found in the individual legal systems. In the event that the defence of an existing arbitration agreement has been admissibly raised, national law either stipulates that the action be dismissed or that it be stayed[107]. However, unlike between state courts, no legal system provides for a transferal of actions between arbitration courts and state courts in the technical sense[108]. One reason for this is that such a referral would be pointless if the arbitration court is not yet constituted or if a mediation or conciliation mechanism precedes the arbitration proceedings[109].

- **Extension of the time limit.** Another solution could be to grant the arbitration court – contrary to the express wording in Art. R32 CAS Code – the authority to extend the preclusion period upon request or to grant *"restitution in integrum"* if the party concerned was prevented from complying with the time limit for no fault of his/her own[110]. Another alternative is to analogously apply the statutory provisions on the suspension of the limitation period (Art. 139 Swiss Code of Obligations *(OR)*) to this case when an action is filed[111].

105. Schwab/Walter, Schiedsgerichtsbarkeit, 7th ed. 2005, Chapter 45 margin no. 1.

106. Schwab/Walter, Schiedsgerichtsbarkeit, 7th ed. 2005, Chapter 45 margin no. 1; Haas, in: Weigand (editor), Practitioner's Handbook on International Arbitration, 2002, Part 3 Art. 2 margin no. 114.

107. Haas, in: Weigand (editor), Practitioner's Handbook on International Arbitration, 2002, Part 3 Art. 2 margin no. 114; *id*., in: FS Rechberger, 2005, pp. 187, 191.

108. For German law see for example, Stein and Jonas (eds.), Kommentar zur Zivilprozessordnung, 22nd ed., para. 281 margin no. 3; Schwab/Walter, Schiedsgerichtsbarkeit, 7th ed. 2005, Chapter 45 margin no. 1; comparing laws see Haas, in: FS Rechberger, 2005, pp. 187, 191; Grunsky, in: FS Röhricht, 2005, pp. 1137 *et seq*.; for a different view (for an analogous application of the referral rule between the courts para. 281 ZPO) see PHBSportR/Summerer, Part 2 margin no. 283; for (cantonal) Swiss procedural law, see Gerichtspräsident 2 des Gerichtskreises Thun, causa sport 2004, 44, 51 *et seq.*

109. P. Huber, SchiedsVZ 2003, 73, 74; *Haas*, in: FS Rechberger, 2005, pp. 187, 191.

110. On this see Rigozzi, L'arbitrage international en matière de sport, 2005, margin no. 1045.

111. *BezG Zürich*, causa sport 2005, 254, 258; see also CAS [14.3.2007 – 2006/A/1176] *Belarus Football Federation v/ UEFA*, margin no. 7.9; Gerichtspräsident 2 des Gerichtskreises X Thun, causa sport 2004, 44, 51; cf. on the applicability of Art. 139 Swiss Code of Obligations *(OR)* on the preclusion period under Art. 75 ZGB, Fenners, Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport, 2008, margin no. 379; Berner Kommentar-Riemer, supra at Art. 75 margin no. 65; BSK-Heini/Scherrer, supra at Art. 75 margin no. 22.

2.4. Missing the deadline or time limit without fault

If the party concerned is prevented from complying with the "time limit for appeal" without being at fault, the question arises as to whether he/she is to be granted extra time by way of an exception. The correct view is that this must be answered in the affirmative[112]. However, it must be noted that, if the "Appellant" is legally represented, his/her lawyer's fault is to be attributed to the Appellant as his/her own fault[113]. As regards the question of fault on the part of the lawyer it must be noted that a lawyer's duties under Swiss law for proceedings before the state courts are very broad. Accordingly, the lawyer has extensive monitoring and organisational duties[114]. As a consequence of these duties, if the lawyer misses a time limit due to illness, it is only in very exceptional cases that the lawyer is not at fault. Only if the illness is such that the lawyer is prevented from acting himself or even instructing a third party within the time limit will he not be at fault[115]. Whether and to what extent this (strict Swiss) case law can be applied to missing the "time limit for appeal" is questionable. In any event one needs to orientate oneself along these lines with caution[116]; firstly, because these previous decisions have been rendered in relation to procedural time limits but not in relation to substantive preclusion periods. Secondly, the consequence of missing the "time limit for appeal" before the CAS – unlike in cases where procedural time limits are missed – is the loss of the opportunity to have the federation's measure reviewed by an independent instance (at all).

2.5. The Prohibition of Exaggerated Formalism

As is the case with drafting the very rules which determine the "time limit for appeal" and how it is calculated, the application of the rule itself is subject to certain limits (that are part of public policy *("ordre public")*) imposed by the right of access to justice enshrined in Art. 29 Swiss Federal Constitution *(Bundesverfassung – "BV")*. The Bundesgericht (Swiss Federal Tribunal) particularly derives a "prohibition of exaggerated formalism" from Art. 29 Swiss Federal

112. Rigozzi, Die Berufungsfrist vor dem Tribunal Arbitral du Sport (TAS), causa sport (forthcoming issue).

113. CAS [25.9.2009 – 2009/A/1795] *Obreja v/ AIBA*, margin no. 72 with a reference to Swiss law (BGE [Decisions of the Swiss Federal Tribunal] 119 II 86, E. 2a; 112 V 255, E. 2a; 106 II 173).

114. See the overview in CAS [25.9.2009 – 2009/A/1795] *Obreja v/ AIBA*, margin no. 72.

115. BGE [Decisions of the Swiss Federal Tribunal] 112 V 255, E. 2a.

116. CAS [25.9.2009 – 2009/A/1795] *Obreja v/ AIBA*, margin no. 73.

Constitution *(Bundesverfassung – "BV")*[117]. This is a general procedural principle, but one which has only partly been positively drafted in the procedural statutes (e.g. Art. 42(5) Federal Act on the Swiss Federal Tribunal *(BGG)*)[118].

2.5.1 Content of the principle

The principle prohibits the formal application of (procedural) rules that prevent the party concerned from taking legal action although this is not at all appropriate or justified by the interests concerned. This is the case if the procedural irregularity is easily apparent to the court and could have been rectified within a short period of time following appropriate notification of the party concerned. A breach of this "prohibition of exaggerated formalism" on the part of the arbitral tribunal can give rise to a possible challenge of the arbitral award under Art. 190 Switzerland's Federal Code on Private International Law *(IPRG)*[119].

As repeatedly emphasised by the Bundesgericht (Swiss Federal Tribunal), not every instance of procedural strictness of form constitutes exaggerated formalism, but only strictness that is not justified by any interests worthy of protection and thereby becomes a mere end in itself. Procedural formalities are essential for guaranteeing that the case is properly handled and that the substantive right can be enforced[120]. This is why all written submissions to administrative agencies, especially appeal briefs, must satisfy certain formal requirements: They should show that, and why, the party seeking legal redress challenges a decision and the extent to which that decision is to be amended or set aside. If, therefore, the validity of an appeal is expressly subjected to the condition that said appeal must contain a minimum of grounds, then this does neither constitute a denial of the right to a fair hearing nor can it be considered to be exaggerated formalism[121].

2.5.2 Examples

Under certain circumstances, it is considered a case of exaggerated formalism if, although the "Appellant" has filed his Statement of Appeal in due time, he has omitted to file the Statement with the necessary number of copies (Art. 31(3)), to pay the fee under Art. R65.2 CAS Code, or if the Statement of Appeal within the meaning of Art. R48 CAS Code is incomplete. In all of these cases the CAS will – as a general rule – grant the Appellant a short period of extra time to rectify the irregularity, but will not dismiss the "appeal" because it is "manifestly late" pursuant to Art. R49 sentence 2 CAS Code. If the irregularity is rectified within the (extra) time, the "time limit for appeal" is deemed to have been complied with[122].

2.6 The Consequences of extending the time limit

In the exceptional case that there is a statutory ground for extending the preclusion period then the question arises how long this extra time may be. Without doubt the extra time cannot be extended ad infinitum. It is difficult to stipulate an absolute upper limit. Rather, this will depend on the circumstances of the individual case. Legal scholars consider five days, calculated from the day on which the reason for the hindrance ceases to apply, to be a reasonable extra period of time[123].

V. The Court's Decision

A. Jurisdiction

In principle, the arbitrators decide on whether the appeal has been filed in due time. For cases where the arbitration court has not yet been seized of the matter, Art. R49 sentence 2 CAS Code provides that the "Division President" can also decide whether the time limit for appeal has been complied with. The said provision reads:

"After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late".

However, according to the wording of the regulation, the authority of the "Division President" to decide must be limited to those cases where the appeal was filed manifestly late. The "Division President" does not have to claim this authority to decide for himself but can instead leave it to the Panel (yet to be appointed).

If, however, the "Division President" claims the competence to decide for himself he must first give the parties a fair hearing regarding the failure to meet the time limit. In practice, the "Division President" claims competence not only to dismiss the appeal

117. On this see BGE [Decisions of the Swiss Federal Tribunal] 125 I 166, E. 3a-c.

118. BGE [Decisions of the Swiss Federal Tribunal] 120 V 413, E. 6a; BGer [Swiss Federal Tribunal] 30.8.2005 [1P.254/2005], E. 2.5.

119. Rigozzi, Die Berufungsfrist vor dem Tribunal Arbitral du Sport (TAS), causa sport (forthcoming issue).

120. BGE [Decisions of the Swiss Federal Tribunal] 118 V 311, E. 4; 114 Ia 34, E. 3.

121. BGE [Decisions of the Swiss Federal Tribunal] 116 II 745, E. 2b; 113 Ia 225 E. 1b; BGer [Swiss Federal Tribunal] 13.7.2007 [1C_89/2007], E. 3.1; BGer [Swiss Federal Tribunal] 8.2.2001 [5P.405/2000], E. 3c.

122. For such a case see, CAS [12.3.2007 – 2006/A/1176] *Belarus Football Federation v/ UEFA & FAI*, margin no. 7.2.

123. Rigozzi, L'arbitrage international en matière de sport, 2005 margin no. 1045.

for being late but also – contrary to the wording of Art. R49 CAS Code – to positively determine that the appeal is in due time[124]. The question, then, is whether, and to what extent, such a decision by the "Division President" is binding on the Panel.

B. Form of the Decision

The Panel can decide whether the "time limit for appeal" has been complied with either in a final award or in a partial award.

C. Content of the Decision

If a party has missed the "time limit for appeal" and there is no statutory ground for extending the time limit, the Panel is obliged to dismiss the Statement of Appeal as unfounded (not as inadmissible)[125]. The Panel has no discretion in this respect. Art. R49 CAS Code does not, however, regulate whether – in order to comply with the time limit – the appeal brief must have been dispatched to the CAS within the time limit (principle of dispossession) or whether it must have been received by the CAS before the time limit has expired (principle of receipt). Here, too, the correct answer is probably to be found in the analogous application of Art. R32 CAS Code[126]. According to this provision, a time limit is complied with if the Statement of Appeal is sent before midnight on the last day on which such time limit expires, whereas it does not depend upon the receipt of the Statement of Appeal by the CAS Court Office. For cases where the Statement of Appeal is incomplete, see above. It is not sufficient for the "Appellant" to merely indicate that he will file a Statement of Appeal, without actually filing it[127].

124. "Order" in the case CAS [24.3.2006 – 2006/A/1041] *Vassilev v/ FIBT & BBTF.*

125. See Rigozzi, Die Berufungsfrist vor dem Tribunal Arbitral du Sport (TAS), in causa sport (forthcoming issue).

126. CAS [15.9.2004 – 2004/A/574] *Associação Portuguesa de Desportos v/ Club Valencia C.F. S.A.D.*, margin no. 64; Rigozzi, Die Berufungsfrist vor dem Tribunal Arbitral du Sport (TAS), causa sport (forthcoming issue).

127. This was the case in CAS [20.6.2006 – 2006/A/1065] *Williams v/ FEI.*

Appeals against Arbitral Awards by the CAS*

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Ever since the decision by the Schweizerisches Bundesgericht [Swiss Federal Tribunal] in the Cañas case in 2007 the number of appeals against arbitral awards has increased rapidly. However, the chances of succeeding are low. The following article explains the conditions under which a CAS arbitral award can be appealed against at all.

I. The increasing popularity of appealing against CAS arbitral awards

Arbitral awards by the CAS are final[1]. Nevertheless, more and more of them are being appealed against with an appeal to the Schweizerisches Bundesgericht [Swiss Federal Tribunal][2]. In 2009 the CAS delivered 190 awards (including partial awards), of which 21 were appealed against. In 2010 the number of awards pronounced up until the beginning of December amounted to 159. The number of appeals already amounted to 18 and will still increase. Nowadays the CAS assumes that an appeal will be filed against approximately 10% of its arbitral awards. However, the success rate of these appeals is low. Since the CAS was established in 1984 only five appeals against CAS arbitral awards have succeeded[3]. On average only

1. The 12th Chapter of Switzerland's Federal Code on Private International Law *(IPRG)* forms the basis for proceedings before arbitral tribunals, which have their seat in Switzerland provided that at the time the arbitration agreement was concluded at least one of the parties was neither domiciled nor habitually resident in Switzerland (Art. 176(1) Switzerland's Federal Code on Private International Law *(IPRG)*). Pursuant to Art. 190(1) Switzerlands Federal Code on Private International Law *(IPRG)* decisions by international arbitral tribunals which have their seat in Switzerland are final. The CAS has its seat in Switzerland and, more particularly, even if an ad hoc division of the CAS sits at the venue of Olympic Games, football World Cups or other sports events (Art. 7 of the Arbitration Rules for the Olympic Games). If the CAS judges a dispute between two Swiss parties the provisions on arbitral jurisdiction in the Swiss Code of Civil Procedure *(ZPO)*, which entered into force on 1 January 2011, apply (Art. 353 *et seq.* Code of Civil Procedure *(ZPO)*).

2. Felix Dasser, International Arbitration and Setting Aside Proceedings in Switzerland – An Updated Statistical Analysis, in: ASA Bulletin Vol. 28, no. 1 2010, pp. 82 *et seq.*. Between 1984 and now, a total of 80 appeals have been filed against CAS arbitral awards. 61 appeals have been instituted since the first judgment by the Swiss Federal Tribunal to set aside a CAS arbitral award (BGE [Decisions of the Swiss Federal Tribunal] 133 II 235 of 22 March 2007, Cañas).

3. The judgments BGE [Decisions of the Swiss Federal Tribunal] 133

1% of all appeals against CAS arbitral awards were successful in 2009 and 2010[4]. If one expresses the number of successful appeals as a percentage of all of the arbitral awards that have so far been delivered by the CAS (1984 – 2010), the success rate is 0.3%.

However, even appeals which are dismissed are not without impact on the development of proceedings before the CAS. Thus, for example, the Swiss Federal Tribunal's gentle criticism of the CAS's structure in its decision Gundel[5] resulted in a comprehensive reform of the CAS, to the list of arbitrators being extended and to a formal separation of the CAS from the International Olympic Committee (IOC).

The increasing number of appeals conflicts with the original idea of the CAS to have disputes in sport decided competently and quickly by a single judicial instance. International competitive sport is characterised by its seasonal nature and the short duration of the athletes' careers. Under these circumstances the speed with which disputes in sport are settled becomes a matter of particular importance. A lawyer would then object, "*But in so doing one must not forget the fundamental procedural rights of the party concerned!*" That is true, but as will be demonstrated below, the CAS scores highly as regards safeguarding fundamental procedural rights. By contrast, an appeal to the Swiss Federal Tribunal is often considered to be the last straw and is not infrequently misused to appeal against the arbitral award on substantive issues for lack of any ordinary appeal.

II. The Statutory Right of Appeal

The parties can appeal against an international arbitral award on the grounds set out in Art. 190(2) Switzerland's Federal Code on Private International Law *(IPRG)*. This is intended to ensure that the arbitral proceedings fulfil the minimum requirements of the state legal system so that an arbitral award can be recognised and enforced like a state court judgment. Said minimum requirements are the independence of the arbitrators (Art. 180 Switzerland's Federal Code on Private International Law *(IPRG)*), the equal treatment of the parties and their right to a fair hearing and adversarial proceedings (Art. 182(3) Switzerland's Federal Code on Private International Law *(IPRG)*).

III 235 of 22 March 2007, Cañas; 4A_400/2008 of 9 February 2009, a surprising application of the law; 4A_358/2009 of 6 November 2009, Busch; 4A_490/2009 of 13 April 2010, res iudicata; and 4A-456/2009 of 3 May 2010, Marathon Runner.

4. The success rate of appeals against CAS arbitral awards is therefore even lower than that of all appeals against international arbitral tribunals in Switzerland, which currently lies at 6.5% (cf. Dasser, footnote 2, p. 85).

5. BGE [Decisions of the Swiss Federal Tribunal] 119 II 271 of 15 March 1993.

III. The Appeal Proceedings

The only appeal instance is the Swiss Federal Tribunal (Art. 191 Switzerland's Federal Code on Private International Law *(IPRG)*). The appeal proceedings are governed by Art. 77 of the Federal Act on the Swiss Federal Tribunal *(Bundesgerichtsgesetz - "BGG")* of 17 June 2005. The appeal is a so-called *"Beschwerde"* in civil matters pursuant to Art. 72 *et seq.* Federal Act on the Swiss Federal Tribunal *(BGG)*. This is limited to the five grounds for appeal set out in Art. 190(2) Switzerland's Federal Code on Private International Law *(IPRG)*. A request to appeal against an arbitral award on a point of law *(Revision)* is also admissible, even if no such appeal is expressly mentioned in Switzerland's Federal Code on Private International Law *(IPRG)* or in the Federal Act on the Swiss Federal Tribunal *(BGG)*[6].

The subject matter of the appeal *(Beschwerde)* are the decisions by the CAS in ordinary proceedings and in appeal proceedings, which also include the decisions of the ad hoc divisions of the CAS at Olympic Games and other sports events[7]. Interlocutory decisions by the CAS, e.g. regarding its own jurisdiction, can, of course, be appealed against (Art. 190(3) Switzerland›s Federal Code on Private International Law *(IPRG)*). A decision by ICAS[8] cannot be independently appealed against if a party challenges an arbitrator[9]. An arbitrator's lack of independence can, however, be appealed against together with the final award[10].

The proceedings are instituted with a fully substantiated Notice of Appeal. The time limit for filing an appeal is 30 days as of receipt of the substantiated CAS arbitral award (Art. 100(1) Federal Act on the Swiss Federal Tribunal *(BGG)*)[11]. The time limit is met if the complete appeal is filed with the Swiss Federal Tribunal or delivered to the Swiss Postal Service on the last day of the time limit (Art. 48 Federal Act on the Swiss Federal Tribunal *(BGG)*)[12]. The appeal can be drawn up in any of Switzerland's official languages, and therefore also in German, even if the CAS arbitral award being appealed

6. Judgment of 28 September 2010, 4A_144/2010 E.2, Pechstein; Katrin Klett, BSK-BGG, Art. 77 N 3.

7. Judgments of 4 December 2000, 5P.427/2000, Raducan, and of 22 January 2008, 4A_424/2008, Azerbaijan Field Hockey Federation.

8. The International Council of Arbitration for Sport (ICAS) is the supervisory body of the CAS, which also decides on motions challenging CAS arbitrators.

9. Art. R34 of the CAS Procedural Rules (2010). Cf. BGE [Decisions of the Swiss Federal Tribunal] 118 II 359, E. 3 b.

10. Cf. Chapter 5(a) below.

11. The running of time is suspended during the following periods: 7 days before Easter up to and 7 days after Easter, from 15 July until 15 August and from 18 December until 2 January.

12. The appeal can also be filed electronically. In order to do so the Swiss Federal Tribunal's own platform must be used, which requires an electronic signature.

against has been delivered in English[13]. The appeal is served on the opposing party and the CAS for their comments within 20 days. The period for filing a reply can be extended. There are no other prescribed written submissions[14]. The Swiss Federal Tribunal usually pronounces its judgment without hearing the parties any further. Often the parties are initially only notified of the actual decision[15]; the reasons are then delivered subsequently within a further period of 6 to 8 weeks. On average, the Swiss Federal Tribunal requires approximately 4 months until the reasoned decision is delivered[16].

There is no legal requirement that the parties be represented by legal counsel. If, however, the parties are represented, their representatives must be authorised to represent parties before a Swiss court under the Swiss Act governing Attorneys *(Anwaltsgesetz - "AnwG")* or under an international treaty (Art. 40(1) Federal Act on the Swiss Federal Tribunal *(BGG)*).

An appeal against an arbitral award does not usually have suspensive effect. However, this can be conferred ex officio or upon request by one of the parties (Art. 103 Federal Act on the Swiss Federal Tribunal *(BGG)*) as it was, for example, in the case where Adrian Mutu was ordered to pay the sum of EUR 17,173,990 to Chelsea FC; this obligation was suspended by the Swiss Federal Tribunal for the duration of the appeal proceedings[17]. The Swiss Federal Tribunal can additionally take precautionary measures, either ex officio or upon request by one of the parties, in order to maintain the status quo or to provisionally secure interests which are at risk (Art. 104 Federal Act on the Swiss Federal Tribunal *(BGG)*). Thus, for example, Claudia Pechstein was permitted, by means of a super-provisional measure by the Swiss Federal Tribunal and despite a contrary CAS arbitral award, to take part in training and in a competition in preparation for the Winter Olympic Games 2010[18].

If the Swiss Federal Tribunal *(BGG)* upholds an appeal it sets aside the decision being appealed against (quashing effect, Art. 77(2) Federal Act on the Swiss Federal Tribunal *(BGG)*)[19]. In that case the same arbitral tribunal with the same composition must deliver a new arbitral award in accordance with the deliberations stated in the appeal ruling[20]. This possibility does not apply if the Swiss Federal Tribunal has ruled that the arbitral tribunal does not have jurisdiction.

IV . Waiver of the Possibility of Appealing

Art. 192(1) Switzerland›s Federal Code on Private International Law *(IPRG)* allows the parties, by an express declaration in the arbitration agreement itself or in a subsequent written agreement, to exclude the right to appeal against the arbitral award either in full or with regard to individual grounds of appeal. However, this possibility is only available to parties, who have no domicile or place of habitual residence or place of business in Switzerland; such parties also have an inalienable right to, inter alia, extraordinary appeals. The Swiss Federal Tribunal does, however, place very high demands on any waiver of the right to appeal and, even so, considered such a waiver to be void in the case of the tennis player Cañas[21]. A declaration of waiver in one of the ATP's regulations, to which the player had submitted by signing an athlete's declaration, was at any rate rejected as not corresponding to the actual or presumed will of the player[22].

V. The Grounds for Appeal

Art. 190(2) Switzerland's Federal Code on Private International Law *(IPRG)* lists the five grounds for appeal, which can be asserted against an arbitral award. The only objections that are admissible are those, which are exhaustively set out in Art. 190(2) Switzerland's Federal Code on Private International Law *(IPRG)*[23]. In its judgments, the Swiss Federal Tribunal *(BGG)* has repeatedly reiterated that it only reviews complaints, which have been pleaded and which have been substantiated in the appeal

13. The Swiss Federal Tribunal accepts it if the CAS arbitral award being appealed against is filed in its original language without being translated into an official language.

14. Additional unsolicited written pleadings that are submitted (e.g. a Reply by the appellant to the statement by the respondent) are not rejected but are served on the opposing party for their information.

15. In Switzerland this operative part is called the *"Dispositiv"*; in Germany it is called the *"Tenor"*.

16. According to Dasser's research (footnote 3) the length to time the proceedings take increases with the number of grounds for an appeal (p. 89).

17. Order by the Swiss Federal Tribunal of 19 October 2009; 4A_458/2009 regarding a surprising application of the law.

18. Orders by the Swiss Federal Tribunal of 7 and 10 December 2009; 4A_612/2009.

19. Cf. e.g. Judgment of 9 February 2009, 4A_400/2008.

20. Berger/Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, Bern 2006, N. 162 *et seq.*. Cf. also BGE [Decisions of the Swiss Federal Tribunal] 133 II 235, Cañas, which gave rise to a second CAS arbitral award with the same result.

21. BGE [Decisions of the Swiss Federal Tribunal] 133 II 235, especially E. 4, reproduced in translation in SpuRt 2007, p. 113 and annotated in Frank Oschütz, *Zur Überprüfung von Schiedssprüchen des TAS/CAS durch das schweizerische BGer*, in SpuRt 2007, pp. 177 *et seq.*.

22. On the other hand, in the same decision the Swiss Federal Tribunal based the validity of an arbitration agreement in favour of the CAS, which comes about due to a reference contained in an athlete's declaration, on an arbitration clause contained in a regulation of a sports association (BGE [Decisions of the Swiss Federal Tribunal] 133 III 235, E. 4.3.2.2 at the end, with further authorities).

23. BGE [Decisions of the Swiss Federal Tribunal] 124 III 186 E.5; 128 III 50 E.1a; 127 III 279 E.1a. See also the judgment of 10 February 2010, 4A_612/2009, Pechstein, E.2.1 und 2.2.

(Beschwerde)[24]. It bases its judgment on the facts established by the arbitration court (Art. 105(1) Federal Act on the Swiss Federal Tribunal *(BGG)*). It can neither correct nor supplement facts established by the arbitral tribunal, even if said facts are obviously incorrect or are based on a violation. New facts and evidence may only be presented to the extent that the award by the arbitral tribunal gives cause to all new facts and evidence to be presented (Art. 99(1) Federal Act on the Swiss Federal Tribunal *(BGG)*).

The decision can only be appealed against:

a. If a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly;

b. If the arbitral tribunal erroneously held that it had or did not have jurisdiction;

c. If the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims;

d. If the principle of equal treatment of the parties or the principle of a fair hearing was violated;

e. If the award is incompatible with Swiss public policy *("ordre public")*.

It cannot be repeated often enough that there is no possibility of an appeal *(Beschwerde)* if a party complains about the substantive correctness of the arbitral award[25]. Time and time again, the Swiss Federal Tribunal has expressly voiced its protest against so-called "appellatory criticism" of arbitral awards. Even arbitral awards that are objectively erroneous cannot be corrected by the Swiss Federal Tribunal. That is the consequence of the parties' decision to have their dispute settled not by the state courts but by arbitrators they have chosen. The state legal system only oversees that the proceedings are conducted correctly. However, what decision the arbitrators arrive at does not interest the state judge.

The admissible grounds for appeal are explained in further detail below.

24. Cf. e.g. Judgment of 10 February 2010, 4A-458/2009, Mutu, E. 2.3.

25. In the Mutu decision (footnote 31 cf. E. 4.4.2) the Swiss Federal Tribunal made it clear that: "The appellant appears to mistake the Swiss Federal Tribunal for an appeal instance, which must supervise the CAS and is free to review the decisions of said private institution. This is, of course, not the role of the highest judicial body of a state, which has been entrusted with an appeal *(Beschwerde)* within the meaning of Art. 77(1) Federal Act on the Swiss Federal Tribunal *(BGG)* (…)".

A. Irregular constitution of the arbitral tribunal (Art. 190(2)(a) Switzerland's Federal Code on Private International Law (IPRG))

Pursuant to Art. R34 of the CAS Code (2010) any irregular constitution of the arbitral tribunal must be complained about within seven days after the ground giving rise to doubts about the independence to the ICAS, the supervisory body that oversees the CAS. The ICAS' decision cannot be independently appealed against, though the final decision by the CAS, in which the arbitrator being challenged was involved, probably can[26]. The short time limit for filing a challenge is in line with the case law of the Swiss Federal Tribunal. When assessing the independence, reference is often made to the IBA Guidelines[27], which include situations may give rise to doubts as to the arbitrator's impartiality or independence. However, these Guidelines of a private professional association do not constitute binding law[28]. Anyhow, in really disputed cases said Guidelines provide for a duty to disclose situations where there may be a conflict of interest (the "Orange List") and leave it up to the parties whether they nevertheless wish to retain the arbitrator. On several occasions the objection has been raised that the opposing party was represented by a lawyer, who was also a member of the CAS, and that one or more arbitrators had worked together with that lawyer in other arbitral tribunals[29]. The Swiss Federal Tribunal has never upheld a complaint about the partiality of a CAS arbitrator and has especially not considered the particular closeness of an arbitrator to a party's lawyer as an indication of irregular composition.

In the 2010 version of the CAS Code the CAS has itself stipulated additional requirements that need to be met in order for an arbitrator to be independent, but has at the same time maintained the controversial concept of a closed list of arbitrators[30]. CAS arbitrators may no longer act as counsel for a party before the

26. See Chapter 3 above.

27. IBA Guidelines on Conflicts of Interest in International Arbitration (2004).

28. Judgment of 10 June 2010; 4A_458/2009, Mutu, E. 3.3.1. In that case the Swiss Federal Tribunal had to rule on a rather abstruse request for recusal: The Russian branch office of the Italian law firm, in which one of the arbitrators was a partner, had carried out a mandate for a company in which the owner of Chelsea F.C. had an interest. The appellant was not notified of this fact until after the CAS arbitral award, and then by anonymous e-mail.

29. The Swiss Federal Tribunal has repeatedly reviewed the question of the independence of the CAS arbitrators, whether in BGE [Decisions of the Swiss Federal Tribunal] 119 II 271, Gundel, in the decision of 31 October 1996, Nagel (reproduced in the Digest of CAS Awards 1986-1998, 585) and in great detail in BGE 129 III 445, Latsutina, reproduced in the Digest of CAS Awards 2001-2003).

30. This concept means that the parties must choose an arbitrator from the list provided by the CAS (Arts. R38, R39, R48 and R55 of the CAS Code). The undersigned has criticised this concept time and again (as regards this see also BGE [Decisions of the Swiss Federal Tribunal] 129 III 445, Latsutina, E.3.3.3.2).

CAS[31]. This is supposed to rule out any appearance that a lawyer has a particularly close connection with the adjudicating arbitral body. The Swiss Federal Tribunal will have to take this tightening up of the rules into account.

B. The arbitral tribunal erroneously held that it had or did not have jurisdiction (Art. 190(2) (b) Switzerland's Federal Code on Private International Law (IPRG))

Pursuant to Art. 186(1) Switzerland's Federal Code on Private International Law *(IPRG)* the arbitral tribunal rules on its own jurisdiction. This ruling can be challenged irrespective of whether it was rendered as a preliminary ruling or in the course of the arbitral award. When determining the validity of arbitration agreements by means of references, the Swiss Federal Tribunal is liberal[32]. It has, for example, repeatedly considered a global reference to an arbitration clause contained in the statutes of an association to be valid[33]. An appeal on the grounds that the athlete had no alternative but to submit to the arbitration agreement in favour of the CAS and that therefore there was a lack of free will on the part of the athlete when he entered into the corresponding agreement making the arbitration agreement void will therefore probably have little prospect of succeeding.

However, at the end of 2009 the German ice hockey player, Florian Busch, who refused to participate in a doping control during training, did succeed with his objection that the arbitral tribunal did not have jurisdiction. An arbitral tribunal of the DOSB [the German Olympic Sports Confederation] had found that the DEB [the German Ice Hockey Federation] had not yet adopted the WADA Code and that Busch's conduct was to be judged according to the rudimentary doping provisions of the DEB, which still applied and which, moreover, did not provide for any possibility of appeal to the CAS. WADA nevertheless instituted its own proceedings against the player and thereby invoked the registration form, which the player had signed as a participant in the ice hockey World Championships, and which provided for an arbitration Clause in favour of the CAS. However, the Swiss Federal Tribunal did not see any connection between the registration form for the ice hockey World Championships and the case to be decided: *"The player did not in good faith have to assume that by signing the registration form on 1 May 2008 he was entering into an arbitration agreement, which covered the sanctioning of his conduct because of the doping control of 6 March 2008, which had already given rise to disciplinary proceedings being opened at the national federation"*[34]. The appeal against the decision by the CAS was upheld and the CAS's award was quashed.

By judgment 4A-456/2009 of 3 May 2010[35], the Swiss Federal Tribunal again quashed a CAS award on the basis of a plea of lack of jurisdiction. A marathon runner filed an appeal with the CAS against his national federation, which had sanctioned him because of a violation of the anti-doping provisions. In the CAS's opinion the arbitration agreement did not ensue from the statutes of the federation but from a faxed letter from the international athletics federation (the IAAF) to the athlete's legal representative, which contained an express reference to the CAS Procedural Rules. The athlete had not resisted this. The Swiss Federal Tribunal interpreted the parties' expressions of will according to good faith but came to the conclusion that the IAAF had merely described a possible course of proceedings, but had not made any offer to the athlete to submit the legal dispute to an arbitral tribunal. Furthermore, in the absence of any such offer, the athlete had not accepted any request with his appeal to the CAS. The arbitral award was quashed on the ground that the CAS lacked jurisdiction.

C. The arbitral tribunal ruled on matters beyond the claims submitted to it or it failed to rule on one of the claims (Art. 190(2)(c) Switzerland's Federal Code on Private International Law (IPRG))

The principle of *"ne eat judex ultra petita"* is a particular aspect of the right to a fair hearing. The arbitral tribunal is not allowed to include any claims in the arbitral award, which the parties have been unable to comment on, either as regards the facts or as regards the law of said claims[36]. The principle is violated if the arbitral tribunal awards one of the parties more than, or something different from, that which the party requested in its motions, or if it fails to rule on any motion. On the other hand, the principle is not violated if the arbitral award is based on a different legal assessment than the legal assessment pleaded by the parties[37]. So far no CAS arbitral award has ever

31. Art. S18 paragraph 3 of the CAS Procedural Rules.

32. BGE [Decisions of the Swiss Federal Tribunal] 133 III 235, E.4.3.2.3; 129 III 727, E.5.3.1. This is by contrast to the athlete›s indirect declaration to waive the possibility of appealing against the arbitral award, cf. Chapter 4 above.

33. BGE [Decisions of the Swiss Federal Tribunal] 4A_358/2009 of 6 November 2009, Busch, with further references.

34. BGE [Decisions of the Swiss Federal Tribunal] 4A_358/2009 vom 6. 11.2009, E.3.2.3. Cf. also SpuRt 2/2010, pp. 66 *et seq.*.

35. Cf. also SpuRt 5/2010, p. 198.

36. Berger/Kellerhals, footnote 21, N 1570.

37. This follows from the principle of *"arbiter novit iura"*. However, an unexpected legal assessment by the arbitral tribunal can violate Art. 190(2)(d) IPRG, as was held in the case in the decision 4A_400/2008 of 9 February 2009, in which an arbitral award by the CAS was quashed

been quashed because of a violation of this principle.

However, scholars recommend that the "catch-all clauses"[38], which are also often found in CAS arbitral awards, should not be accepted unseen, but rather that such findings should either be specified more precisely by the arbitral tribunal or should be challenged invoking Art. 190(2)(c) Switzerland's Federal Code on Private International Law *(IPRG)*[39]. However, an argument against this is that CAS arbitral tribunals are frequently confronted with a large number of legal claims and reasons, which from the outset appear bizarre, and the arbitral tribunal must be permitted to generalise to a certain extent provided that it follows from the reasons for the arbitral award that the arbitral tribunal did at least take note of the argument.

D. Violation of the Right to a Fair Hearing (Art. 190(2)(d) Switzerland's Federal Code on Private International Law (IPRG))

By contrast, one of the more successful grounds for appeal is the complaint that the right to a fair hearing has been violated. The corresponding claim derives directly from Art. 182(2) Switzerland's Federal Code on Private International Law *(IPRG)* and concerns not only the right of the parties to be heard by the arbitral tribunal but goes considerably further. Partial aspects of the right to a fair hearing are the requirement of equal treatment or the principle of a level playing field and the right to adversarial proceedings. The parties are to have the right to comment on all of the facts that are essential for the judgment, to advocate their legal viewpoint, to submit motions to admit relevant evidence, to participate in the taking of evidence and to participate in the hearings. The adversarial proceedings are supposed to ensure that each party can verify the submissions made by the opposing party, comment thereon and try to rebut said submissions with its own submissions and evidence[40].

By judgment of 22 March 2007[41] the Swiss Federal Tribunal quashed an arbitral award by the CAS for the first time on the ground that the Claimant's right to a fair hearing had been violated. The CAS was accused of not having dealt with all of the Claimant's essential arguments, particularly the argument that the two-year doping suspension was not compatible with the law of Delaware that was relevant for the ATP, the principle of proportionality and European and American competition laws.

A "surprising application of the law" by the arbitral tribunal also constitutes a violation of the right to a fair hearing[42]. Although the principle of *"curia novit iura"* or *"arbiter novit iura"* also applies to arbitration proceedings, if the arbitral tribunal makes its ruling on the basis of a rule of law which was not invoked by either party and with which the parties were, moreover, not confronted during the course of the proceedings there is the risk that the Swiss Federal Tribunal will quash the arbitral award[43], at least if the arbitral tribunal wrongly applied surprising rule. This was the case in the decision 4A_400/2008 of 9 February 2009. A player's agent resident in Spain had demanded commission from a Brazilian football player for having arranged his transfer to a Portuguese club. FIFA had dismissed the claim because the agent was unable to provide sufficient proof of his involvement in the transfer in question. The agent referred the matter to the CAS, which, however, dismissed the claim invoking a provision in the Swiss Act governing Employment Agency Services *(Arbeitsvermittlungsgesetz)*. Said Act was, apparently, never discussed in the arbitration proceedings. Furthermore, the Swiss Federal Tribunal held that the provision applied by the CAS was not applicable to the case in question anyway because there was no connection whatsoever to Switzerland. The arbitral tribunal ought, at least, to have confronted the parties with this provision before rendering its arbitral award.

E. Violation of Public Policy ("Ordre Public") (Art. 190(2)(e) Switzerland's Federal Code on Private International Law (IPRG)

Art. 190(2)(e) Switzerland›s Federal Code on Private International Law *(IPRG)* is the only ground for challenge, which allows the arbitral award to be reviewed substantively. However, said review is confined to cases where the award violates fundamental legal principles so obviously that it is contrary to public policy *("ordre public")*. This also corresponds to with Art. V (2)(b) of the New York Convention, according to which an arbitral award, which is impaired by such an obvious error, cannot be recognised or enforced. The Swiss Federal Tribunal describes the prerequisites for a challenge on the basis of a violation of public policy *("ordre public")* as follows: "*The substantive review of an international arbitral award by the Swiss Federal Tribunal is confined to the question of whether the arbitral award is compatible with public policy*

with a reference to its "surprising application of the law". As regards this cf. Chapter 5(e) below.

38. "All further or further-reaching motions are dismissed".

39. Berger/Kellerhals, footnote 21, N 1097.

40. Berger/Kellerhals, footnote 21, N 1581 with references to BGE 117 II 346 E. 1b aa.

41. BGE [Decisions of the Swiss Federal Tribunal] 133 III 235, Cañas. Cf. also SpuRt 3/2007, pp. 113 *et seq.*.

42. Cf. also Chapter 5(d) above.

43. BGE [Decisions of the Swiss Federal Tribunal] 130 III 35, E. 5 with further references.

("ordre public")" (BGE [Decisions of the Swiss Federal Tribunal] 121 III 331 E. 333 p. 333). The substantive assessment of a disputed claim is contrary to public policy *("ordre public")* only if it ignores fundamental legal principles and is therefore simply incompatible with the essential and largely recognized system of values, which, according to the prevailing opinion, is supposed to form the basis of any legal system. These principles include the sanctity of contracts (*"pacta sunt servanda"*), the prohibition of the abuse of rights, the principle of good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of persons who are incapable of acting. The challenged arbitral award will only be quashed if not only the reasons but also the result is contrary to public policy *("ordre public")* (BGE [Decisions of the Swiss Federal Tribunal] 132 III 389 E. 2.2 pp. 392 *et seq.*; 128 III 191 E. 6b p. 198; 120 II 155 E. 6a pp. 166 *et seq.*)[44].

Even an obviously wrong or arbitrary application of the law or an incorrect assessment of the evidence does not constitute a violation of public policy *("ordre public")*[45]. A violation of public policy *("ordre public")* also cannot be achieved by the appellant complaining that the arbitral award is "untenable", "incomprehensible", "scandalous", "absurd" or anything similar. The arbitral award also cannot be challenged because the arbitral tribunal based its award on facts which are obviously contrary to the record. To date the Swiss Federal Tribunal has never quashed an arbitral award because it violated substantive public policy *("ordre public")*.

However, public policy *("ordre public")* also has a procedural side. Fundamental procedural irregularities, which are not covered by Art. 90(2) (a)-(d) Switzerland's Federal Code on Private International Law *(IPRG)*, can also be challenged as a violation of (e). The Claimants in the case 4A-490/2009 succeeded with this when they complained that in its award the CAS had failed to take into account the defence that the matter had been finally and absolutely disposed of (res judicata) although the same facts had already been ruled on by the *Handelsgericht* [Commercial Court] of the Canton of Zürich[46].

F. Appeal on a Point of Law (Revision)

Even if not expressly mentioned in the Code, an appeal against arbitral awards in international cases on a point of law *(Revision)* is admissible. In the case of purely domestic proceedings, appeals against arbitral awards on a point of law *(Revision)* are governed by Arts. 396 *et seq.* Swiss Code of Civil Procedure *(ZPO)*. If the Swiss Federal Tribunal admits a petition for appeal on a point of law *(Revision)*, it does not decide the matter itself, rather it refers it back to the arbitration court that decided it or to an arbitration court that is to be newly formed[47].

The Swiss Federal Tribunal sets tight limits as it did, for example, in the Pechstein decision: An appeal on a point of law *(Revision)* can be demanded if the petitioning party subsequently learns of material facts or discovers crucial evidence which it was unable to produce in earlier proceedings to the exclusion of facts and evidence which did not arise until after the decision. The new facts must be material, that is to say they must be likely to change the factual basis of the judgment being appealed against so that, if they are correctly legally assessed, they may lead to a different decision. However, there is no ground for an appeal on a point of law *(Revision)* if the arbitral tribunal already had knowledge thereof in the main proceedings. The decisive factor is that the evidence serves to not only assess the facts but also to establish the facts. There is no ground for appeal on a point of law *(Revision)* just because the arbitral tribunal incorrectly assessed facts that were already known in the main proceedings. Rather, what is necessary is that the incorrect assessment was made because facts that were essential for the decision remained unproven[48]. In the Pechtstein case, for instance, this caused the Swiss Federal Tribunal to refuse to take into account a diagnostic method that was allegedly discovered after the arbitral award. There was a lack of proof that said diagnostic method could not already have been introduced into the arbitration proceedings. In addition, the Swiss Federal Tribunal questioned whether the newly introduced evidence was even of substantial relevance[49]. In the Ahlmann case the Swiss Federal Tribunal refused to quash the CAS arbitral award because of a press article about the team's veterinary surgeon. The latter had appeared in the arbitration proceedings as a witness

44. Cf. e.g. judgment of 24 November 2009, 4A_284/2009, Ahlmann, E. 3.1.

45. However, it is possible to challenge Swiss arbitral awards on the ground of arbitrariness in purely domestic proceedings on the basis of Art. 393 E Swiss Code of Civil Procedure *(ZPO)*.

46. Judgment of 13 April 2010, 4A_490/2009, Athletico Madrid, Cf. also SpuRt 5/2010, pp. 197 *et seq.*

47. Judgment of 28 September 2010 , 4A_144/2010, Pechstein, E. 2 with further references.

48. Judgment of 28 September 2010, 4A_144/2010, Pechstein, E2.1.2. Cf. also judgment of 24 November 2008, 4A_284/2009, Ahlmann, E. 3.4.

49. In the Pechstein decision the Swiss Federal Tribunal stated the following: "An appeal on a point of law *(Revision)* is an extraordinary appeal and does not simply have the purpose of further pursuing the proceedings. It is incumbent upon the parties to the action to contribute towards the clarification of the facts in a timely manner, in accordance with the procedure and in accordance with their burden of proof. It should only be reticently assumed that it was impossible for them to produce facts and evidence already at the earlier stage of the proceedings". (E. 2.3).

and was incriminated by the press article, albeit in another matter[50].

G. Summary

There has been a noticeable increase in the number of appeals against CAS arbitral awards. Nowadays every tenth award is appealed against. However, the chances of succeeding with any such appeal are very low. There is, unquestionably, a need for supervision by the highest courts to oversee that the proceedings before the CAS are conducted correctly and according to the rule of law. However, parties must also recognise that the Swiss Federal Tribunal is not an additional judicial instance, to which the substantive results of the arbitration proceedings can once again be submitted for review. This fact is not altered even if criticism of the content of the arbitral award is artificially packaged as one of the grounds for appeal provided for in Art. 190(2) Switzerland's Federal Code on Private International Law *(IPRG)* and is appealed against as a violation of the right to a fair hearing or of public policy *("ordre public")*.

It is difficult to accept that CAS arbitral awards are final from the point of view of substantive law whenever doping suspensions stretching over several years or incisive payment obligations by football clubs or players who are in breach of contract are concerned, which the party concerned cannot accept lightly. On the other hand, the parties concerned must acknowledge that the current system for the resolution of disputes, in which the final decision rests with a single, independent judicial body, the CAS, best serves sport, which is short lived, and those involved in international sport. Appeals which appear futile from the very outset cause delay and uncertainty in the world of sport. However, the CAS itself must also be reminded of the negative consequences of proceedings taking a long time. Nevertheless, during the Olympic Games the CAS does prove that it is possible to render quick, and nevertheless good quality, arbitral awards, even in complicated matters.

50. Judgment of 24 November 2009, 4A_284/2009, Ahlmann, E. 3.4.

L'indépendance des arbitres devant le TAS

Mme Estelle de La Rochefoucauld, Conseiller auprès du TAS

I. Le principe d'indépendance de l'arbitre

A. Fondement: les principes constitutionnels développés au sujet des tribunaux étatiques sont applicables aux tribunaux arbitraux

Un arbitre doit, au même titre qu'un juge étatique, présenter des garanties suffisantes d'indépendance et d'impartialité[1].

Selon la doctrine suisse, la mission juridictionnelle de l'arbitre implique que celui-ci ne soit pas lié à l'une des parties et n'ait aucun intérêt au sort de la cause[2]. Cependant, la loi comme la doctrine ne donnent pas de définition formelle de l'indépendance des arbitres.

Pour le Tribunal Fédéral suisse (Tribunal fédéral), une véritable sentence, assimilable au jugement d'un tribunal étatique, suppose que le tribunal arbitral qui la rend offre des garanties suffisantes d'impartialité et d'indépendance, conformément à l'article 30 al. 1 de la Constitution fédérale suisse (Cst)[3]. A défaut, la sentence ne saurait constituer un jugement civil exécutoire dans toute la Suisse[4].

Par ailleurs, le non-respect de cette règle conduit à une désignation irrégulière relevant de l'Art. 190 al. 2 let. a de la loi sur le droit international privé (LDIP)[5], qui, en application de l'Art. 180 al. 1 let. c LDIP, permet la récusation du juge lorsque les circonstances permettent de douter de son indépendance[6].

C'est ainsi les principes constitutionnels développés au sujet des tribunaux étatiques[7] qui constituent la référence en la matière. Selon l'Art. 30 al. 1 Cst., toute personne dont la cause doit être jugée dans une procédure judiciaire a droit à ce que sa cause soit portée devant un tribunal établi par la loi, compétent, indépendant et impartial. Cette garantie tend notamment à éviter que des circonstances extérieures

1. ATF 4A_234/2010 consid. 3.2.1; ATF 125 I 389 consid. 4a; 119 II 271 consid. 3b; ATF 118 II 359 consid. 3c; et les arrêts cités.

2. DUTOIT B., Commentaire de la loi fédérale du 18 décembre 1987, Ed. Helbing & Lichtenhahn, 1996, p. 480.

3. ATF 117 Ia 168 consid. 5a, ATF 107 Ia 158 consid 2b.

4. Art. 61 Cst.; ATF 97 I 489 condid. 1.

5. ATF 118 II 359, *op. cit.* nbp n°1, consid. 3b.

6. ATF 129 III 445 consid. 4.2.2.2; ATF 126 I 68 consid. 3a p. 73.

7. ATF 125 I 389, *op. cit.* nbp n°1, consid. 4a; 118 II 359, *op. cit.* nbp n°1, consid. 3c p. 361.

à la cause ne puissent influencer le jugement en faveur ou au détriment d'une partie.

B. Appréciation de l'indépendance des arbitres au regard des circonstances

L'article 180 al. 1 let c LDIP dispose que l'indépendance des arbitres doit être appréciée au regard des circonstances. Il n'y a pas de motifs absolus de récusation[8]. C'est au regard des circonstances de chaque cas d'espèce que l'indépendance doit être examinée[9]. Seules les circonstances constatées objectivement doivent être prises en considération en ce sens que les impressions purement individuelles et subjectives d'une des parties au procès ne sont pas décisives[10]. La jurisprudence souligne, à et égard, que l'existence de faits justifiant objectivement la méfiance doit être établie:

"*Celle-ci* [la méfiance] *ne saurait reposer sur le seul sentiment subjectif d'une des parties; un tel sentiment subjectif ne peut être pris en considération que s'il est fondé sur des faits concrets, et si ces faits sont, en eux-mêmes, propres à justifier objectivement et raisonnablement un tel sentiment chez une personne réagissant normalement*" [11].

Si l'affirmation de partialité doit reposer sur des faits objectifs, il n'est pas nécessaire de démontrer la prévention effective du juge, car une disposition interne de sa part ne peut guère être prouvée. Il suffit que les circonstances donnent l'apparence de la prévention et fassent redouter une activité partiale du magistrat.

D'une manière générale, il y a lieu de présumer la capacité des arbitres à s'élever au-dessus des contingences liées à leur désignation lorsqu'ils sont appelés à rendre des décisions concrètes dans l'exercice de leur mission[12]. Ainsi, l'impartialité subjective est présumée jusqu'à preuve du contraire[13]. Cette présomption cesse s'il existe une relation de subordination ou une relation économique ou affective de nature à entraver la liberté de décision de l'arbitre.

En tout état de cause, lors de l'examen des circonstances du cas concret, il convient de tenir compte des spécificités de l'arbitrage, et en particulier de l'arbitrage international qui suppose l'existence d'un cercle restreint d'arbitres actifs dans ce domaine, le fait que ceux-ci doivent être au bénéfice d'une formation juridique et qu'ils sont tenus d'avoir une compétence reconnue dans la matière. Le contexte des relations entre un juge d'un tribunal étatique ou un arbitre, d'une part, et les parties, respectivement leurs avocats, d'autres part est en effet différent. Le Tribunal fédéral a ainsi admis dans une décision de principe, que l'on ne peut ignorer les spécificités de l'arbitrage devant le TAS et que ces particularités ne peuvent être considérées en tant que telles comme un motif de récusation[14] (voir *Infra* sous III & IV).

L'arbitre doit non seulement être indépendant à l'égard des parties et de leurs conseils, mais aussi, dans une certaine mesure, des autres acteurs de la procédure d'arbitrage, à savoir des témoins et experts dont les déclarations peuvent être importantes pour l'issue du litige[15].

C. La distinction entre indépendance et impartialité: notion, définition

Il n'est apparemment pas aisé de distinguer clairement l'indépendance de l'impartialité. Selon la majorité des auteurs, la première notion viserait une situation objective interdisant certains liens, en particulier financiers, entre l'arbitre et l'une des parties ou un autre intervenant dans la procédure arbitrale. L'impartialité serait une notion plutôt subjective définit comme une attitude ou un état d'esprit faisant référence à l'absence de préjugés de l'arbitre découlant d'un lien "privilégié" avec la cause à juger[16]. En réalité, l'impartialité est généralement la conséquence de l'indépendance et bien que la partialité ait été éliminée comme motif de contestation depuis l'entrée

8. ATF 129 III *op. cit.* nbp n°6, 445 [446]; Kaufmann-Kholer/Rigozzi, Arbitrage international p. 130; Lalive/Poudret/Reymond, Le droit de l'arbitrage interne et international en Suisse, Ed. Payot, *1989, ad* art. 180 n. 5; Jolidon P., Commentaire du Concordat suisse sur l'arbitrage, Ed. Staempfli, 1984, p. 268; Pattochi/Geisinger, Internationales Privatrecht, 2000, p. 455; rüede/hadenfeldt, Schweizerisches Schiedsgerichtsrecht, Schuthess, 1993, p. 176.

9. Lalive/Poudret/Reymond, *op. cit.* nbp n°8, ad art. 180 n. 5; Pattochi/Geisinger, *op. cit.* nbp n°8, p. 455; Rüede/Hadenfeldt, *op. cit.* nbp n°8, p. 176; ATF 4P.105/2006.

10. ATF128 V 82, consid. 2a p. 84; ATF 127 I 198 consid. 2b; ATF 125 I 122, *op. cit.* nbp n°1, consid. 3a; ATF 124 I 261 et les arrêts cités.

11. ATF 111 II 263.

12. ATF 126 I 235, 239.

13. 4A 586/2008 du 12 juin 2009, consid. 3.1.1, Bull ASA.

14. ATF 129 III 445 445, 447 nbp n°6: "Ces rapports sont plus fréquents et impliqués par les nécessités économiques ou professionnelles dans le domaine de l'arbitrage privé. Cependant, ces particularités ne doivent pas être considérés en tant que telles comme un motif de récusation. (ATF 129 III 445 consid. 3.3.3 p. 454). D'une manière générale, un juge ne peut pas être récusé pour le simple motif que, dans une procédure antérieure, il s'était déjà occupé de la partie qui comparaît devant lui, même s'il avait tranché en défaveur de celle-ci (ATF 114 Ia 278 consid. 1; ATF 113 Ia 407 consid. 2a p. 409 in fine; ATF 105 Ib 301 consid. 1c). Il ne saurait en aller autrement en matière d'arbitrage et plus particulièrement dans le domaine de l'arbitrage international (cf., parmi d'autres: LALIVE/POUDRET/REYMOND, op. cit., n. 8 ad art. 180 LDIP, p. 343; JERMINI, op. cit., n. 327). Il a même été jugé qu'un rapport amical (tutoiement et recommandations mutuelles) entre un arbitre et l'avocat d'une des parties ne suffisait pas, en principe, à fonder un motif de récusation (arrêt 4P. 292/1993 du 30 juin 1994, consid. 4a)...".

15. Arrêt du 16 septembre 1988, Rev. Arb. 1989 p. 505, 507.

16. Poudret/Besson, Droit comparé de l'arbitrage international, Genève, para. 416, pp. 369-370; de witt wijnen o., The independance and impartiality of the arbitrator, especially in the light of the ICAS-Recommendation of October 2006, Bernasconi/Rigozzi, Sport governance, football Disputes, Doping & CAS Arbitration, 2nd CAS & SAV/FSA Conf. Lausanne 2008.

en vigueur de la LDIP en 1989, le concept jouera vraisemblablement un rôle dans l'interprétation du concept d'indépendance.

Concrètement, l'arbitre ne peut avoir de liens privilégiés ou d'une certaine intensité avec une partie.

S'agissant d'abord de la notion d'indépendance, les liens entre l'arbitre et un autre intervenant à la procédure comprennent le lien de dépendance économique (rapports de travail, administrateurs d'une société, etc.), mais également l'existence de liens personnels étroits, familiaux ou d'amitié avec une partie. Ce type de liens doit conduire à la récusation de l'arbitre. En revanche, l'indépendance de l'arbitre n'est en principe pas mise en cause si l'arbitre a agi dans le passé comme conseil pour l'une des parties ou contre l'autre. De même, il est en principe admissible qu'une personne siège dans plusieurs tribunaux arbitraux impliquant une même partie. L'existence de relations d'affaires ordinaires entre l'arbitre et l'une des parties à l'arbitrage ne suffit en principe pas non plus à entraîner sa récusation, en particulier dans le cadre des arbitrages associatifs impliquant des personnes actives dans un même secteur économique[17]. Ce qui vient d'être exposé au sujet des liens avec une partie s'applique *mutatis mutandis* en cas de relation étroite entre un arbitre et le conseil de l'une des parties[18]. Le lien avec le conseil d'une partie est indirect, ce qui justifie de se montrer plus exigeant pour admettre un risque de prévention. A nouveau, il convient de tenir compte du contexte dans lequel évoluent les gens du barreau et professionnels actifs sur la scène internationale. Les rencontres étant fréquentes dans le "cercle restreint" de l'arbitrage international, des liens peuvent se créer sans pour autant remettre en cause l'indépendance et l'impartialité d'un confrère ou d'un collègue envers un autre. Comme indiqué précédemment, le Tribunal fédéral a expressément reconnu la spécificité de la situation de l'arbitre par rapport à celle du juge en raison des rapports "plus fréquents" entre les "personnes actives dans le domaine de l'arbitrage privé"[19].

En ce qui concerne la notion de l'impartialité, c'est-à-dire des liens entre l'arbitre et la cause à juger, l'arbitre ne doit avoir aucun intérêt au sort de l'arbitrage. Il pourra ainsi exister un risque de préjugé lorsque l'arbitre est confronté à une question de fait identique à celle déjà appréhendée dans une autre procédure d'arbitrage ou à une question de droit dont la solution découle logiquement de sa prise de position dans une autre affaire[20]. La jurisprudence distingue l'impartialité subjective de l'impartialité objective. L'impartialité subjective - qui est présumée jusqu'à preuve du contraire - assure à chacun que sa cause sera jugée sans acception de personne[21] tandis que l'impartialité objective tend à empêcher la participation du même magistrat à des titres divers dans une même cause[22] et à garantir l'indépendance du juge à l'égard de chacun des plaideurs[23] .

Le Tribunal fédéral a établi que l'absence de mention de la notion d'impartialité à l'Art. 180 al. 1 let. c LDIP n'apparaît pas déterminante. Dans sa jurisprudence, ce dernier ne fait pas de distinction stricte entre les notions d'indépendance et d'impartialité[24].

D. Les arbitres nommés par les parties et le Président du Tribunal arbitral: différences en matière d'indépendance ?

La doctrine est divisée sur cette question. Une partie de la doctrine, que l'on pourrait qualifier de réaliste, considère qu'il serait illusoire, surtout en matière d'arbitrage international, de vouloir exiger d'un arbitre désigné par une partie le même degré d'indépendance et d'impartialité que celui qui est requis du président d'un tribunal arbitral ou d'un arbitre unique[25]. La condition d'impartialité ne devrait s'appliquer ainsi qu'à l'arbitre unique ou au président du tribunal arbitral et non aux arbitres désignés par les parties étant donné que l'impartialité du tribunal arbitral est garantie dès lors que l'arbitre ayant une voie prépondérante dans le délibéré arbitral est impartial. Cette conception a, en particulier, été défendue aux Etats-Unis.

Celle-ci est cependant largement minoritaire au plan international, où l'opinion prédominante exige que tous les arbitres soient soumis aux mêmes critères d'indépendance[26] et en fait une question de crédibilité de l'arbitrage en tant qu'institution[27]. Cette dernière

17. POUDRET/BESSON, *op. cit.* nbp n°16, para. 418, pp. 370 à 372.

18. POUDRET/BESSON, *op. cit.* nbp n°16, para. 419, p. 373.

19. POUDRET/BESSON, *op. cit.* nbp n°16, para. 419 p. 372.

20. POUDRET/BESSON, *op. cit.* nbp n°16, para. 421, p. 374.

21. ATF 129 III 445, *op. cit.*nbp n°6, consid. 3.3.3 p. 454; 128 V 82, *op. cit.,* consid. 2a p. 84 et les arrêts cités et arrêts cités au consid. 3.2.1 in fine.

22. ATF 131 I 113 consid. 3.4 p. 117.

23. Arrêt 4P.187/2006 du 1er novembre 2006 consid. 3.2.2.

24. Arrêt 4A 234/2010, 29 octobre 2010, consid. 3.3.1.

25. Parmi d'autres: LALIVE P., Sur l'impartialité de l'arbitre international en Suisse, in SJ 1990 p. 362 ss, 368 à 371, POUDRET/BESSON, *op. cit.* nbp n°16, nn°414 et 415, pp. 367 et 369; LALIVE/POUDRET/REYMOND, *op. cit.* nbp n°8 , SCHILLIG M., *op. cit.* nbp n°8, n° 4 ad art. 180 LDIP; BUCHER A., Le nouvel arbitrage international en Suisse, 1988, nos 168 à 170; VISCHER F., in Zürcher Kommentar zum IPRG, 2e éd. 2004, n° 8 ad art. 180 LDIP; PATOCCHI/GEISINGER, Internationales Privatrecht, 2000, n° 5.5 ad art. 180 LDIP; PETER/BESSON, in Commentaire bâlois, Internationales Privatrecht, 2e éd. 2007, nos 13/14 ad art. 180 LDIP; OSCHÜTZ F., Sportschiedsgerichtsbarkeit, 2004, p. 125 ss.

26. POUDRET/BESSON, *op. cit.* nbp n°16, para. 413, pp. 366-367.

27. Cf. Parmi d'autres: KAUFMANN-KOHLER/RIGOZZI, *op. cit* nbp n°8., nos 362 s.; BERGER/KELLERHALS, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, 2006, n° 738; RÜEDE/HADENFELDT, op. cit. nbp n°8 , p. 173 s.; DUTOIT B., Droit international privé suisse, 4e éd. 2005, n° 4 ad art. 180 LDIP, p. 635; KNOEPFLER/SCHWEIZER, in Arbitrage international, 2003, p. 613 s.; jenspeter lachmann, Handbuch

conception a d'ailleurs été suivie par les directives de l'International Bar Association (IBA) sur les conflits d'intérêts en matière d'arbitrage[28] .

La jurisprudence du Tribunal Fédéral a évolué sur ce point. Dans sa jurisprudence antérieure à l'entrée en vigueur de la LDIP, le 1er janvier 1989, le tribunal fédéral avait jugé que l'impartialité requise des membres d'un tribunal arbitral s'imposait aussi bien à ceux qui sont désignés par les parties qu'au surarbitre[29]. Sous l'empire de la nouvelle loi, notamment au vu de l'Art. 180 al. 1 let. c LDIP et des travaux préparatoires de la loi qui indiquent que le législateur a délibérément renoncé aux critères de l'impartialité, le Tribunal fédéral a d'abord laissé la question ouverte[30]. Dans deux décisions ultérieures non publiées, il a tiré argument de l'absence de mention de la notion d'impartialité à l'Art. 180 al. 1 let. c LDIP pour en déduire que l'abandon de ce critère atténue l'assimilation que faisait la jurisprudence entre les statuts d'arbitre de partie et de président du tribunal arbitral ou d'arbitre unique[31]. Par la suite, le Tribunal fédéral a laissé la question indécise[32], affirmant que savoir s'il faut se montrer moins exigeant à l'égard de l'arbitre choisi par l'une des parties est une question qui n'a pas été tranchée[33]. Puis, le Tribunal fédéral n'a plus fait de différence entre la situation d'un membre du tribunal arbitral et celle du président du tribunal arbitral[34], rejetant implicitement l'idée d'une telle distinction. Enfin, le Tribunal Fédéral a expressément rejeté cette distinction, admettant que l'indépendance et l'impartialité requises des membres d'un tribunal arbitral s'imposent aussi bien aux arbitres désignés par les parties qu'au président du tribunal arbitral. Une réserve a toutefois été émise, car une indépendance absolue de tous les arbitres constitue un idéal qui ne correspondra que rarement à la réalité. Le mode de désignation des membres du tribunal arbitral crée en effet un lien objectif, si ténu soit-il, entre l'arbitre et la partie qui l'a désigné, puisque celui-là, à l'inverse du juge étatique, ne tient son pouvoir et sa place que de la volonté de celle-ci[35].

für die Schiedsgerichtspraxis, 3e éd. 2008, nos 974 ss; FOUCHARD/GAILLARD/GOLDMAN, op.cit nbp n°26, n° 1046 i.f.; CLAY T, L'arbitre, 2001, nos 343 ss.

28. KAUFMAN-NKOHLER/RIGOZZI, *op. cit.* nbp n°8, n° 363.

29. ATF 105 Ia 247; voir aussi: ATF 113 Ia 407 consid. 2a p. 409.

30. ATF 118 II 359, *op. cit.*, consid. 3c.

31. Arrêts 4P.224/1997 du 9 février 1998 consid. 3a et 4P.292/1993 du 30 juin 1994 consid. 4.

32. Arrêt 4P.188/2001 du 15 octobre 2001 consid. 2b.

33. ATF 129 III 445, *op. cit.,* consid. 3.3.3 p. 454; cf. CORBOZ, op. cit., n° 91 i.f. ad art. 77 LTF qui y voit peut-être un rejet implicite de l'idée.

34. Parmi d'autres, 4A_458/2009 du 10 juin 2010 consid. 3.2 et 3.3.

35. 4A_234/2010, arrêt du 29 octobre 2010, consid. 3.3.1.

II. La mise en œuvre des moyens visant à assurer concrètement l'indépendance des arbitres

A. L'obligation d'information de l'arbitre

Une personne choisie pour exercer la fonction d'arbitre doit spontanément faire connaître aux parties tous les faits et circonstances qui seraient de nature, dans l'esprit des parties, à affecter son indépendance ou son impartialité. Il s'agit de l'obligation d'information qui pèse sur l'arbitre qui constitue un moyen préventif permettant d'assurer le respect de la garantie d'indépendance.

Cette obligation d'information est admise de manière quasiment universelle. Ainsi, les règlements d'arbitrage internationaux, notamment ceux de la Chambre de Commerce Internationale (CCI), de l'Association Américaine d'Arbitrage (AAA), de la Cour d'Arbitrage international à Londres (LCIA), de la Commission des Nations Unies pour le Droit Commercial International (CNUDCI), prévoient cette obligation de révélation. Cette règle n'est contestée par personne[36] et constitue un véritable usage international.

En particulier, en application de l'Art. R33 du Code de l'Arbitrage en matière de Sport ("le Code"), tout arbitre a l'obligation de révéler immédiatement toute circonstance susceptible de compromettre son indépendance à l'égard des parties ou de l'une d'entre elle. Cette obligation de révélation est permanente en ce sens qu'elle est applicable pendant toute la procédure car l'indépendance de l'arbitre est requise jusqu'à la fin de sa mission c'est-à-dire jusqu'au prononcé de la sentence.

C'est à l'arbitre désigné d'apprécier ce qui peut être révélé en se mettant à la place des parties. Aussi, les faits qui n'ont pas à être révélés doivent, d'une part, être de notoriété publique, ce qui rend la divulgation inutile, et d'autre part, ne susciter aucun doute raisonnable sur l'indépendance de l'arbitre[37]. Il va sans dire que la révélation d'une circonstance ne saurait être considérée comme une admission de l'existence d'un conflit d'intérêt, ni même une présomption automatique d'absence d'indépendance[38]. En conséquence, la violation de l'obligation de révélation ne présente pas en soi un motif d'annulation de la sentence, "*à moins que les faits non révélés aient été de nature à fonder une apparence de partialité ou de dépendance*" [39].

36. LALIVE P., La procédure arbitrale et l'indépendance des arbitres, p. 134.

37. FOUCHARD/GAILLARD/GOLDMAN, Traité de l'Arbitrage Commercial International, Litec, 1996, p.599.

38. RIGOZZI A., L'arbitrage international en matière de sport, Bâle [etc.], 2005, n° 976 in fine et les références cités.

39. 4P.188/2001 du 15 octobre 2001, consid. 2f, Bull ASA 2002, p. 321,

D'une manière générale, l'arbitre est considéré comme exerçant une mission privée basée sur un contrat soumis au droit privé[40] dont le droit applicable est celui du siège de l'arbitrage[41]. Le droit suisse sera ainsi toujours applicable aux arbitres du TAS. La relation contractuelle liant l'arbitre aux parties implique que l'arbitre est en principe responsable à leur égard des manquements à ses obligations contractuelles. Il pourrait ainsi engager sa responsabilité contractuelle s'il omet de révéler un fait justifiant sa récusation[42].

B. La récusation

Selon l'Art. R34 al. 2 du Code, la récusation d'un arbitre du TAS est de la compétence exclusive du CIAS. Un arbitre peut être récusé lorsque les circonstances permettent de douter légitimement de son indépendance. Ainsi, la récusation constitue la sanction du défaut d'indépendance d'un arbitre.

Les règles de la bonne foi, dont l'Art. R34 du Code est l'expression, exigent de la partie qui entend récuser un arbitre qu'elle invoque le motif de récusation aussitôt qu'elle en apprend l'existence ou qu'elle aurait pu l'apprendre en faisant preuve de l'attention voulue[43]. Ainsi, le droit d'invoquer le moyen se périme si la partie ne le fait pas valoir immédiatement. Cette règle jurisprudentielle est reprise expressément par le Code qui prévoit un délai de sept jours suivant la connaissance de la cause de récusation. Choisir de rester dans l'ignorance peut être regardé, suivant les cas, comme une manœuvre abusive comparable au fait de différer l'annonce d'une demande de récusation.

III. L'appréciation du critère d'indépendance au regard des spécificités de l'arbitrage sportif

A. Le principe de la liste d'arbitres obligatoire pour les parties

En application des Art. S13 et R33 du Code, les arbitres du TAS sont tenus de figurer sur une liste officielle établie par le Conseil International de l'Arbitrage en matière de Sport (CIAS). Au surplus, les arbitres figurant sur la liste établie par le CIAS doivent être au bénéfice d'une formation juridique et avoir une compétence reconnue en matière de sport[44]. Ces exigences constituent l'ensemble des spécificités liées à l'arbitrage sportif devant le TAS. Elles offrent plusieurs avantages aux parties qui pourront notamment désigner des professionnels ayant les connaissances à la fois juridiques et sportives nécessaires et bénéficier d'une justice rapide, souple et peu onéreuse. En outre, le système de la liste d'arbitres pratiquée par le TAS favorise la cohérence de la jurisprudence du TAS, condition essentielle à la crédibilité du système, puisque les arbitres figurant sur la liste du TAS sont régulièrement informés de l'évolution du droit du sport et de la jurisprudence du TAS.

Ces exigences, ajoutées au caractère technique des affaires soumises au TAS, ont pour conséquence la possibilité qu'un arbitre y satisfaisant, ait eu, à l'occasion, des contacts avec une ou plusieurs fédérations sportives, voire qu'il ait exercé des activités pour l'une de celles-ci.

En application de l'article S16 du Code, le TAS veille, autant que possible, à une représentation équitable des continents et des cultures juridiques dans la compilation de la liste d'arbitres. De fait, la liste établie par le CIAS n'est pas à proprement parler "fermée", puisque celle-ci est régulièrement modifiée. En application de l'art. S13 du Code, le CIAS procède à la révision générale de la liste d'arbitres du TAS tous les quatre ans, mais peut également nommer de nouveaux arbitres du TAS à tout moment.

La règle prévoyant que seuls des arbitres figurant sur la liste constituée par le CIAS peuvent siéger dans une Formation arbitrale a néanmoins fait naître une controverse[45]. Certains auteurs ont estimé que ce système avait pour effet de restreindre le choix des parties et pouvait porter atteinte au principe de l'égalité de celles-ci, le cas échéant, en cas d'influence d'une partie sur la composition de la liste d'arbitres[46]. Une partie de la doctrine a ainsi considéré que la restriction liée à la liste fermée cumulée à l'absence de choix des athlètes quant au principe du

327. Les tribunaux anglais et français ont également répondu à cette question par la négative (voir à cet égard POUDRET/BESSON, *op. cit.* nbp n°16, n°429 et les références citées).

40. POUDRET/ BESSON, *op. cit.* nbp n°16, n°437.

41. POUDRET/ BESSON, *op. cit.* nbp n°16, n° 439 et les références citées.

42. ROCHAT/CUENDET, Ce que les parties devraient savoir lorsqu'elles procèdent devant le TAS: questions pratiques choisies, RIGOZZI/ BERNASCONI (Ed.), The proceedings before the Court of Arbitration for Sport, CAS & FSA/SAV Conference Lausanne 2006:"Il bénéficie cependant d'une certaine immunité pour les actes relevant de l'exercice de ses tâches juridictionnelles. En revanche, l'arbitre assume une responsabilité entière en dehors de ses fonctions juridictionnelles: il pourrait ainsi engager sa responsabilité au sens de l'art. 41 du Code suisse des obligations (CO) s'il viole son devoir de révéler un fait propre à entraîner sa récusation".

43. ATF 129 III 445, *op. cit.* nbp n°6, consid. 4.2.2.1 & 4A_234/2010 consid. 3.4.4.

44. ATF 129 III 445, *op. cit* nbp n°6., consid. 4.2.2.2 p. 467.

45. REEB M., Revue, p. 10; sur un plan plus général, voir aussi: RÜEDE/ HADENFELDT, op. cit. nbp n°8, p. 129 ch. 1 et 149 ch. 4; BADDELEY M., L'Association Sportive Face au Droit, p. 267; SCHILLIG M., Schidsgerichtsbarkeit von sportverbänden in der Schweiz,., p. 157 ss; FOUCHARD/GAILLARD/GOLDMAN, *op.cit.* nbp n°26, n. 1004

46. FOUCHARD/GAILLARD/GOLDMAN, *op. cit.* nbp n°26,. Ainsi, une partie de la doctrine considère que *« le droit d'accès à la justice des athlètes est restreint, plus restreint que celui des parties à un arbitrage commercial. Tout d'abord, les athlètes n'ont pas le choix quant au principe du recours à l'arbitrage. Ensuite, ils sont limités dans la sélection d'un arbitre par la liste fermée du TAS »* KAUFMANN/ KOHLER/RIGOZZI, Arbitrage International, Droit et pratique à la lumière de la LDIP.

recours à l'arbitrage imposait un examen strict de l'indépendance des arbitres.

Cependant, le Tribunal fédéral a toujours considéré que le système de la liste d'arbitres établie par le CIAS était justifié par les objectifs poursuivis.

B. La jurisprudence spécifique du Tribunal fédéral

En tout état de cause, même s'il met en garde contre l'influence éventuelle d'une partie sur la composition de la liste d'arbitres, le Tribunal fédéral n'a jamais rejeté l'utilisation de la liste dite "fermée" en tant que telle[47]. Ce dernier a ainsi souligné l'existence de "*rapports plus fréquents et impliqués par les nécessités économiques ou professionnelles, en ce qui concerne les personnes actives dans le domaine de l'arbitrage privé, de sorte qu'ils ne doivent pas sans autre être considérés comme un motif de récusation*"[48].

Dans un arrêt de principe, le Tribunal fédéral a reconnu que tel qu'il a été aménagé depuis la réforme de 1994, le système de la liste d'arbitres satisfait aux exigences constitutionnelles d'indépendance et d'impartialité applicables aux tribunaux arbitraux. D'une part, le grief tiré du caractère trop restreint de la liste peut être exclu compte tenu de l'augmentation du nombre d'arbitres figurant sur la liste du TAS, de sorte que la possibilité de choix offerte aux parties est bien réelle[49]. Les arbitres figurant sur la liste doivent être au nombre de 150 au moins. Ils sont au nombre de 268 à l'heure actuelle. D'autre part, le système mis en place pour la constitution de la liste d'arbitres, caractérisé par l'institution d'un organisme autonome - le CIAS - à qui il incombe d'établir cette liste, permet de garantir une composition équillibrée de celle-ci. La même remarque peut être faite en ce qui concerne le choix des arbitres appelés à figurer sur la liste, étant donné que les fédérations internationales, par exemple, ne peuvent en proposer qu'un cinquième. Pour un autre cinquième, les arbitres doivent être choisis en vue de sauvegarder les intérêts des athlètes, ce qui permet à l'athlète impliqué dans une procédure devant le TAS de puiser dans un réservoir de trente arbitres au moins ayant été sélectionnés dans ce but-là.

La nécessité de garantir une spécialisation des arbitres auxquels il est demandé de trancher un litige dans un contexte bien précis, d'assurer la rapidité de la procédure ainsi que la cohérence des décisions sont jugés par le Tribunal fédéral comme des motifs valables justifiant le maintien de la liste "fermée"[50]. En outre, le Tribunal fédéral considère incertain que le système dit de la liste ouverte qui a les faveurs de certains auteurs[51] et qui offre aux parties la possibilité de choisir un arbitre en dehors de la liste, constitue "la panacée". Sous l'angle de l'efficacité du tribunal arbitral, ce système comporterait le risque qu'il y ait, au sein du tribunal, un ou plusieurs arbitres non spécialisés et enclins à agir comme s'ils étaient les avocats des parties qui les ont désignés[52].

IV. La réforme du Code de l'Arbitrage en matière de Sport et l'interdiction du cumul des mandats arbitre/conseil

La question de l'indépendance des arbitres et du cumul des mandats d'arbitre et de conseil dans différentes procédures a longtemps fait polémique. Jusqu'à la réforme du Code en 2009, les membres de la liste d'arbitres pouvaient agir en tant que conseil d'une partie devant une formation arbitrale. Or, une partie de la doctrine considérait que le besoin de spécialisation des arbitres ne pouvait justifier que les membres de la liste d'arbitres puissent agir en tant que conseil, soulignant qu'en raison de la liste fermée d'arbitres, une approche plus stricte qu'en matière commerciale était adéquate pour apprécier l'indépendance d'un arbitre dans le domaine du sport (voir *Supra*). Ce courant affirmait que contrairement à une partie dans un arbitrage commercial classique, l'athlète, dans un arbitrage sportif, n'a pas un choix véritable quant au principe de recourir à l'arbitrage, ni quant à la personne de l'arbitre (voir *Supra*). Afin de pallier ce grief, cette doctrine préconisait par exemple qu'un arbitre n'ait pas représenté, au cours des deux années précédant sa désignation, une partie ou une fédération sportive dans une procédure ayant été soumise au tribunal[53].

47. voir les ATF 107 Ia 155 consid. 3b p. 161; ATF 93 I 265 consid. 3c; ATF 84 I 39 consid. 6a, qui font toutefois la différence entre les tribunaux arbitraux des chambres de commerce, visés par eux, et les tribunaux arbitraux créés par des associations; sur cette jurisprudence, cf. CLAY T., L'arbitre, Dalloz 2001, n. 477.

48. ATF 129 III 445, *op. cit.* nbp n°6, 446-447; 4P.224/1997 du 9 février 1998; dans le même sens POUDRET/BESSON op.cit. nbp n°16, n. 419 p. 372.

49. ATF 129 II 445, *op. cit.* nbp n°6, 457.

50. ATF 129 II 445, *op. cit.* nbp n°6, 447.
"Il s'agit là effectivement d'une raison valable, qui milite en faveur du statu quo. Dans le sport de compétition, en particulier aux Jeux Olympiques, un règlement rapide, simple, souple et peu onéreux des litiges, par des spécialistes au bénéfice de connaissances à la fois juridiques et sportives, est indispensable tant pour les athlètes que pour le bon déroulement des compétitions. Le système de la liste d'arbitres, pratiqué par le TAS, est propre à favoriser la poursuite de ces objectifs. Grâce, notamment, à la constitution de Chambres ad hoc, il permet aux parties intéressées d'obtenir à bref délai une décision de justice prise en connaissance de cause par des personnes ayant une formation juridique et une compétence reconnue en matière de sport, tout en sauvegardant leur droit d'être entendues. Les arbitres du TAS étant régulièrement informés de l'évolution du droit du sport et de la jurisprudence de ce tribunal arbitral, le système en question, qui remédie aussi aux inconvénients liés au caractère fréquemment international des litiges sportifs, a encore le mérite d'assurer une certaine unité de doctrine dans les décisions rendue". Pour plus de détails sur les avantages prêtés à l'arbitrage judiciaire et appliqués au domaine sportif, cf. ZEN-RUFFINEN, op. cit., n. 1420.

51. BADDELEY M., *op. cit.* nbp n°34, p. 274; NETZLE S., Das Internationale Sport-Schiedsgericht in Lausanne. Zusammensetzung, Zuständigkeit und Verfahren, in Sportgerichtsbarkeit, in Recht und Sport, vol. 22, p. 9 ss, 12).

52. à ce sujet: SCHILLIG M., *op. cit* nbp n°34., p. 160.

53. voir notamment RIGOZZI A., *op. cit.* nbp n°27, n° 950 p. 490.

Cette question a été soulevée sans succès devant le Tribunal Fédéral qui n'a jamais considéré que le cumul des mandats constituait en soi une circonstance propre à éveiller objectivement un doute légitime au sujet de l'indépendance des arbitres. Seules des circonstances additionnelles permettraient de justifier la récusation des arbitres[54]. Le Tribunal fédéral a ainsi précisé que deux personnes pouvaient être en même temps arbitre et avocat dans une procédure TAS et toutes deux arbitres dans une autre[55]. L'existence de contacts réguliers entre arbitres et conseils découlant de la "*force des choses*" expliqueraient ce cumul des mandats[56].

Le CIAS a cependant considéré que le fait pour une partie apparaissant devant le TAS dans le cadre d'un arbitrage d'être représentée par un conseil se trouvant également être un membre du TAS, c'est-à-dire un arbitre figurant sur la liste du TAS, tandis que l'autre partie est représentée par un conseil qui n'est pas membre du TAS, pouvait donner l'impression d'un déséquilibre entre les parties qui n'était pas souhaitable.

En conséquence, le CIAS a, dans un premier temps, émis une recommandation en 2006 afin que la représentation des parties devant le TAS ne soit plus exercée par des membres actifs du TAS ou par leurs collègues appartenant à la même étude[57].

En 2009, le CIAS a mis un point final à la discussion en décidant de mettre fin à la double casquette arbitre/avocat. A compter du 1er janvier 2010, en application de l'Art. S18 al.3 du Code, les arbitres du TAS ne peuvent pas agir comme conseil d'une partie devant le TAS.

V. Les circonstances justifiant la récusation d'un arbitre à l'aune des lignes directrices de l'IBA

Les lignes directrices sur les conflits d'intérêts dans l'arbitrage international, édictées par l'International Bar Association (IBA)[58] sont un outil utile auquel il est de plus en plus souvent fait référence par les parties afin de vérifier l'indépendance de leurs arbitres.

Ces lignes directrices n'ont pas valeur de loi mais n'en constituent pas moins un instrument de travail utile, susceptible de contribuer à l'harmonisation et à l'unification des standards appliqués dans le domaine de l'arbitrage international pour le règlement des conflits d'intérêts, lequel instrument ne devrait pas manquer d'avoir une influence sur la pratique des institutions d'arbitrage et des tribunaux[59]. Ces directives jouent en réalité un rôle croissant en ayant une influence sur la pratique des institutions d'arbitrage et des tribunaux. Le Tribunal fédéral a d'ailleurs eu l'occasion de se fonder sur les lignes directrices IBA au stade du recours contre une sentence arbitrale rendue par le TAS[60].

Ces lignes directrices énoncent des principes généraux. Elles contiennent aussi une énumération, sous forme de listes non exhaustives, de circonstances particulières: une liste rouge (situations dans lesquelles il existe un doute légitime quant à l'indépendance et l'impartialité); une liste orange (situations intermédiaires qui doivent être révélées, mais ne justifient pas nécessairement une récusation); une liste verte (situations spécifiques n'engendrant objectivement pas de conflit d'intérêts et que les arbitres ne sont pas tenus de révéler). Dans tous les cas, nonobstant l'existence de semblables listes, les circonstances du cas concret resteront toujours décisives pour trancher la question du conflit d'intérêts[61].

Le premier critère mis en avant par les lignes directrices est un critère subjectif: un arbitre ne doit pas douter de son indépendance et de son impartialité. S'il en doute, il ne doit pas accepter sa désignation en qualité d'arbitre. Le deuxième critère est objectif. Si un arbitre se considère indépendant et impartial alors que l'une des parties nourrit des doutes au sujet de son indépendance, ces doutes sont insuffisants à eux seuls pour révoquer l'arbitre en question. Ils devront être considérés à l'aune d'une personne tierce raisonnable et bien informée.

54. ATF 126 I 235*, op. cit.,* consid. 2c p. 239; ATF 119 I a 81*, op. cit.,* consid. 4a p. 85.

55. arrêt 4P. 105/2006 du 4 août 2006, consid. 4, Bull. ASA 2007, p. 105 110-111.

56. 4P. 105/2006, o*p. cit.* n°46.

57. 1. *De l'avis du Conseil International de l'Arbitrage en matière de Sport (CIAS), un membre du TAS nommé en qualité d'arbitre au sein d'une formation du TAS ne doit pas agir comme conseil dans le cadre d'une autre procédure devant le TAS au cours de la même période.*

2. *Au cas où un membre du TAS est nommé en tant qu'arbitre dans une formation du TAS, il/elle doit révéler tout mandat de conseil qu'il/elle ou son cabinet d'avocats a devant le TAS. Si, après une nomination dans une formation du TAS, un membre du TAS accepte néanmoins d'agir comme conseil dans le cadre d'une autre procédure du TAS, il/elle doit immédiatement révéler cette information au TAS.*

3. *Dans le cadre de la procédure d'appel, le président d'une formation est nommé uniquement parmi les membres du TAS qui ne représentent pas ou dont le cabinet d'avocats ne représente pas une partie devant le TAS au moment de cette nomination.*

58. IBA Guidelines on Conflicts of Interest in International Arbitration, approuvées le 22 mai 2004; "http://www.ibanet.org/publications/Publications_home.cfm"; au sujet de ces lignes directrices, cf. Bernhard Berger/Kellerhals, op. cit. nbp n°51, n. 734; kaufmann-kohler/rigozzi, *op. cit.* nbp n°8, n. 373 s.; peter/besson, Commentaire bâlois, Internationales Privatrecht, 2e éd., n. 15 in fine ad art. 180 LDIP; rochat/cuendet, *op. cit.* nbp n°31, Lausanne 2006, p. 45 ss., 57 s.

59. kaufmann-kohler/rigozzi, *op. cit.* nbp n°8, n. 374.

60. arrêt 4A-506/2007 du 20 mars 2008, consid. 3.3.2.2, Bull. ASA 2008, p. 575-576.

61. kaufmann-kohler/rigozzi, *op. cit* nbp n°8., n. 374 in fine.

En pratique, le motif de récusation le plus important est celui qui découle de l'existence de circonstances qui sont de nature à donner aux arbitres l'apparence de prévention dans le procès. Il n'est pas nécessaire que la prévention se soit manifestée. Il suffit d'un soupçon objectivement justifié[62]. L'existence de rapports de l'arbitre soit avec l'objet du litige, soit avec les personnes qui y participent à un titre quelconque, constituent un motif de récusation fondé sur l'apparence de prévention, à la condition, nécessaire mais suffisante, qu'il apparaisse à un observateur objectif et raisonnable de nature à justifier la possibilité que la sentence en soit affectée au détriment de la partie qui demande la récusation[63].

Saisi d'une demande en récusation concernant un arbitre ayant été désigné quatre fois en moins de deux ans par la même organisation et une douzaine de fois depuis l'entrée en vigueur du Code Mondial Antidopage (CMA) 2003 pour arbitrer des affaires de dopage, le CIAS, dans une décision non publiée du 4 mai 2011, a considéré que ce fait ne constituait pas à lui seul un motif valable de récusation. En effet, alors que tous les arbitres figurant sur la liste du TAS sont spécialisés dans le domaine du sport, seulement un petit nombre d'entre eux est familier et a une expertise pour arbitrer les cas de dopage soumis au TAS. Le CIAS a souligné, à cet égard, que la plupart des tribunaux sont organisés de telle sorte que les affaires présentant des similarités sont jugées par les mêmes magistrats. Ainsi le CIAS a considéré que la note de bas de page 5 figurant sous l'article 3.1.3 de la liste orange des lignes directrices IBA est transposable à l'arbitrage sportif. Cette note précise que dans certains types d'arbitrages spécifiques, le fait de désigner des arbitres parmi une liste restreinte et spécialisée peut constituer la pratique. Si dans ces domaines, les parties ont pour coutume de désigner fréquemment le même arbitre dans différentes affaires, il n'y a pas d'obligation de révélation. Le CIAS a considéré que les affaires de dopage sont une catégorie spécifique de l'arbitrage sportif supposant une compétence reconnue. Ces spécificités ont pour conséquence que les arbitres du TAS sont souvent désignés par les mêmes parties dans les affaires de dopage sans pour autant signifier que ces désignations compromettent leur indépendance.

Par ailleurs, les organisations anti-dopage telles que l'UCI et l'AMA, toutes deux appelantes dans la procédure susvisée, ne font pas appel au TAS pour servir un intérêt privé mais afin de servir l'intérêt général de la communauté sportive à un sport sans dopage. En conséquence, il serait inapproprié de suggérer un lien entre le nombre de nominations d'un même arbitre par la même organisation anti-dopage et l'indépendance ou l'impartialité de l'arbitre concerné.

62. Genève, arrêt n.p. du 22 juin 1973 en la cause N.c.A.P., consid. E.

63. Jolidon P. , *op. cit.*,, droit suisse, ss art. 18.

The Athlete's Biological Passport (ABP) Program

Legal Issues arising out of the Application of the ABP in the light of the case law of the Court of Arbitration for Sport (CAS)

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I. Introduction

The Athlete's Biological Passport Program (ABP) is a new method employed by certain International Federations (IF, IFs) for the detection of antidoping rule violations, based on the longitudinal profiling of an athlete's biological markers. The present manuscript unfolds certain legal issues related to the Athlete's Biological Passport (ABP) in the light of the case law rendered by CAS Panels up to the present. It also juxtaposes the ABP to other detection methods and considers the issue of retroactive application of the provisions contained in the Guidelines on the ABP; the application of the principle of *Lex Mitior*; and the particularities related to the method used as well as the degree of evidence required compared to other "traditional" detection methods.

A. Meaning of the biological passport and delimitation from other methods of detection of an anti-doping rule violation

Under Art. 2.2 of the World Anti-Doping Agency (WADA) Code (WADC), the "*Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method*" constitutes an anti-doping rule violation. The Comment to Art. 2.2 further provides that the Use or Attempted Use of a Method may be established by "*any reliable means*". As noted in the Comment to Art. 3.2 (*Methods of Establishing Facts and Presumptions*), unlike the proof required to establish an anti-doping rule violation under Art. 2.1, the violation of Art. 2.2 can also be established by other reliable means, among which figure the "*conclusions drawn from longitudinal profiling*", or "*other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Art. 2.1*". In other words, the conclusions drawn from longitudinal profiling constitute a doping detection method and, more particularly, a "reliable means" in order to successfully establish an anti-doping rule violation.

It is within this framework that we shall examine the meaning of the Athlete's Biological Passport (ABP) as well as the legal issues arising out of its application. An ABP is an individual electronic record for

professional athletes, where biological markers of doping are been profiled and results collated over a period of time[1]. It is an instrument aiming at the discovery of potential anti-doping rule violations, based on the longitudinal monitoring of relevant individual values and markers[2]. The most important characteristic of ABP is the longitudinal profiling which can reveal either the effects of doping or pathology. Traditionally, doping detection was based on "direct" methods, i.e. detecting the presence of a prohibited substance (as this is defined in the WADA Prohibited List, which is updated at a regular basis). The particularity of the ABP as a doping detection method lies in the fact that doping violations can be detected by noting variances from an athlete's established levels outside permissible limits, rather than by establishing the presence of any prohibited substance[3]. ABP is an indirect detection method, as opposed to the so-called direct detection methods[4].

Although the expression "athlete passport" is recent (it was introduced in 2002 by WADA)[5], the use of biological markers in doping is quite old and dates from the early 1980s[6]. The athlete passport as such was established at the beginning of the 2008 racing season by UCI where UCI, within the framework of the ABP, conducted numerous tests on riders who were suspected for doping[7]. Up to the present, a number of International Federations (IFs) have adopted the ABP and employ it as a doping detection method (apart from the International Cycling Union (UCI), the International Association of Athletics Federations (IAAF), the International Triathlon Union (ITU), the International Skating Union (ISU) and the International Biathlon Union (IBU), most recently also the International Swimming Federation (FINA)[8].

The principal advantage of the athlete passport is that it is based on the physiology of the human being, which remains unchanged, while new drugs are produced at a rapid pace and the application of an effective detection method can only be available many years afterwards. Unlike other "traditional" detection methods, the new approach of ABP is an indirect detection method and uses sophisticated statistical tools to interpret results[9].

Another important characteristic of the ABP is that an abnormal outcome of the ABP does not automatically mean doping, because the decision is not based on a true probability of doping, but rather on "*how the profile differs from what is expected in clean athletes*". Secondly, doping is not the only possible reason when abnormal values are detected, and one has to exclude the existence of a pathological condition first[10]. In case of abnormalities detected in the ABP, the ABP is reviewed by a panel of experts to determine the different possible causes. The panel of experts is composed of specialists (e.g. haematologists and endocrinologists) with view to protecting the athlete's right to a qualified review of his case and in order to take all possible factors into consideration.

It is noteworthy that CAS had already issued an award suspending an athlete based on the longitudinal profiling of the biological markers before the adoption of the ABP by the IFs: in CAS 2009/A/1912 & 1913, the Panel suspended an Olympic athlete after the biological data showed irregular blood values. According to CAS, those abnormal values were not caused by an error occurred in a laboratory, as the athlete asserted, but due to the banned manipulation of the athlete's blood. The essential difference between ABP judgments and the CAS 2009/A/1912 & 1913 consists in that in the latter case the athlete's blood data was drawn from a sample the athlete gave at the federations championships and therefore not from data gathered by an official systematic program run by the athlete's union[11].

B. Meaning of the longitudinal profiling according to the WADA Operating Guidelines on the ABP

The WADA Guidelines, which took effect in December 2009, provide the scientific principles behind the blood module of the ABP and some practical advice to Anti-Doping Organizations (ADOs) on the implementation of the ABP[12]. They also contain compulsory requirements for collection, transportation, analysis of blood samples and results management that anti-doping organizations wishing

1. See also TAS 2010/A/2178 para. 5 and CAS 2010/A/2235, para. 8.

2. See CAS 2010/A/2174, para. 2.1.

3. See the website of the Swiss laboratory for doping analyses *http://www.doping.chuv.ch/en/lad_home/lad-prestations-laboratoire/lad-prestations-laboratoire-passeport.htm.*

4. See the analytical table at the end of this paper.

5. See WADA, Athlete Biological Passport – Operating Guidelines and compilation of required elements, January 2010, available under *http://www.wada-ama.org/en/Science-Medicine/Athlete-Biological-Passport/* (WADA Guidelines, the Guidelines), p. 3.

6. See for instance the so-called testosterone over epitestosterone ratio (T/E), used already since the early 1980s ; this method detects a prohibited substance not based on its presence in urine or blood, but through the induced deviations in biological parameters; see the WADA website for more details *www.wada.org.*

7. *http://www.guardian.co.uk/sport/2008/may/03/cycling.*

8. *http://espn.go.com/olympics/swimming/story/_/id/6817836/fina-adopts-biological-passports-fight-doping.*

9. See the website of the Swiss laboratory for doping analyses (supra fn.3).

10. Ibid.

11. See also *http://www.nytimes.com/2011/03/09/sports/cycling/09cycling.html?_r=1.*

12. See the WADA Guidelines available online under *http://www.wada-ama.org/en/Science-Medicine/Athlete-Biological-Passport/Operating-Guidelines*, p. 3.

to adopt WADA's model will have to follow. The primary aim is to ensure consistency in application of the ABP among the IFs and comply with the WADA Code (WADC) and the related International Standards (IS). WADA's ABP model seeks to provide ADOs with a harmonized framework in order to pursue anti-doping rule violations according to Art. 2.2. WADC through targeted testing. The Guidelines have thus been established to harmonize the results and ensure legal and scientific reliability and do not question the reliability of other, already existing, longitudinal profiling program of other ADOs[13].

Under the WADA Guidelines, "*In order to establish a systematic and robust longitudinal monitoring program, the list of relevant and significant variables for a specific class of substance (e.g. substances enhancing oxygen transfer, such as EPO) must be identified and then monitored on a regular basis for any given Athlete. The collection and monitoring of values corresponding to these identified variables will constitute an individual and longitudinal profile. Such profiles are the cornerstones of the Athlete Biological Passport with a subject becoming his/her own reference. This contrasts the traditional approach of the Athlete's variables being measured against norms in the Athlete population at large. The variables to be monitored will vary, according to the purpose of the detection. For instance, haematological variables in the blood will be taken into consideration to confirm blood manipulation or aerobic performance enhancement*"[14].

At present the ABP is based on a blood matrix only, but through scientific evolvement this can evolve. The abnormal blood profile score is then submitted for interpretation by a group of independent scientific experts; this group then recommends the action to be taken by the UCI.

The first section of the Guidelines explains how the ABP works and how to establish it. It does not contain any mandatory requirements. The second section consists of annexes which are "*a compilation of the mandatory protocols which must be followed by the Anti-Doping Organizations choosing to use the Athlete Biological Passport to ensure consistency in application, the sharing of information and the standardization of procedures.*" Those annexes "*must be rigorously applied to ensure the validity of the Athlete Biological passport*"[15].

Each collected sample is analysed by a WADA accredited laboratory following the appropriate analytical protocol and the biological results are incorporated into ADAMS, a "*Web-based database management tool for data entry, storage, sharing, and reporting designed to assist stakeholders and WADA in their anti-doping operations in conjunction with data protection legislation*"[16]. The statistical model developed for the ABP program will then be applied to the results of analysis to determine an abnormal profile score.

According to The Guidelines, the Adaptive Model is the "*Model developed in which evidence or observations are used to update or to newly infer the probability that a hypothesis may be true or to discriminate between conflicting hypotheses. It was designed to identify unusual longitudinal results from Athletes*"[17]. What is more, "*(…) A profile in which the Adaptive Model has identified the Hb or Off-hr score abnormal with a 99.9% probability or more shall be reviewed by a panel of three experts. However, individual Anti-Doping Organizations may choose a lower probability score to identify Samples for further results management. Other profiles not flagged by the Adaptive Model should be reviewed by one expert on a systematic basis*"[18].

In any event, the statistical result for the athlete does not *per se* mean that an anti-doping rule violation has occurred but rather the athlete has to explain the result's cause. For the evaluation of the explanations given by the athlete all factors related to the sport as well as to the athlete in question are taken into consideration[19].

II. Legal issues related to the ABP

A. Procedural issues related to the longitudinal profiling in appeals before the CAS: starting point to file a claim

If the athlete wishes to appeal to CAS against a decision rendered by his Federation, Art. R49 of the CAS Code defines a time limit of twenty-one (21) days from the receipt of the decision appealed against. However, this general provision may be disregarded in case of a *lex specialis* contained in the anti-doping regulations of the sports federation in question. The time limits for brining an appeal to CAS are the same irrespective of the detection method used (e.g. a "typical" case related to Art. 2.1 (adverse analytical finding) or a case based on longitudinal profiling).

However, a procedural particularity of the longitudinal profiling cases relates to the starting point of the time-limit to lodge a claim against an athlete at internal level: doping charges on the basis of longitudinal profiling entail a series of tests along with the evaluation of the results by the ADO's experts[20]. This is why an IF can only establish the

13. Idem.

14. See the WADA Guidelines, Introduction and Scope.

15. See also CAS 2010/A/2235, para. 10.

16. See the WADA Guidelines, page 5.

17. See the WADA Guidelines, page 7 and CAS 2010/A/2235 para. 12.

18. See the WADA Guidelines, page 28 (Annex D.2).

19. See CAS 2010/A/2235, paras. 13-14.

20. See CAS 2009/A/1912 & 1913 para. 91.

offence and raise charges once the panel of medical experts have determined that the athlete's blood profile constitutes sufficient proof of the recourse to a prohibited method. In CAS 2009/A/1912 & 1913, the Panel held that the thirty-day time period for the federation to lodge a claim against the athlete (according to the federation's anti-doping rules) started on the date of "*learning about the alleged offence*", which to the Panel's view corresponds to the moment at which the international federation had reasonable suspicion of the alleged offense[21].

B. The reliability of ABP as a means to prove an antidoping rule violation according to the WADC

In cases related to the application of the ABP, the ADO examines numerous blood samples belonging to an athlete for a longer period of time (approximately one year). From the fact that the detection method of ABP is not based on the finding of a prohibited substance arise certain well-worth mentioning legal issues.

One of the first issues that have to be determined is whether the strict application of the ABP from an ADO constitutes a "reliable means" of detecting indirect doping methods, since the application of the ABP is only indirectly regulated in the WADC (see e.g. Art. 3.2 WADC); according to the definitions provided in the WADC (2009 version) Prohibited Method is any method so described on the prohibited list. Under the WADA Prohibited List (2010 version), *"M1- 'Enhancement of Oxygen Transfer', the following are prohibited: 1. Blood doping, including the use of autologous, homologous or heterologous blood or red blood cell products of any origin. 2. Artificially enhancing the uptake, transport or delivery of oxygen, including but not limited to perfluorochemicals, efaproxiral (RSR13) and modified haemoglobin products (e.g. haemoglobin-based blood substitutes, microencapsulated haemoglobin products), excluding supplemental oxygen*".

Art. 3.2 WADC ("*Methods of Establishing Facts and Presumptions*") states that "*Facts related to anti-doping rule violations may be established by any reliable means, including (...) conclusions drawn from longitudinal profiling*". In other words, the reliability of conclusions drawn from longitudinal profiling as an evidentiary method is established prima facie in the WADC itself. In TAS 2010/A/2178 the Panel held that the new method of detection of blood doping is a new scientific method and as such can be used even if the rules of the WADC do not expressively mention it. The only limitation would then be the scope of use of the samples (limited to the detection of doping) and the beginning of a disciplinary procedure within eight years from the doping control[22].

In CAS 2010/A/2235 the Athlete (a professional rider) contested the validity of the ABP as a reliable means to establish an anti-doping rule violation and submitted that it is merely a "*useful screening test"* and that the *"single analysis of red blood cells and reticulocytes parameters is not sufficient to affirm a scenario of doping"*. Furthermore, the athlete submitted that *"from a statistical point of view, the data of the ABP cannot be used simultaneously both to trigger the Expert Panel review and as "statistical evidence" to ascertain the use of a prohibited method or substance*."

The Panel rejected the criticisms as to the current functioning of the ABP, by simply stating that the CAS Panels are not called to adjudicate on whether some other or better system of longitudinal profiling could be created: since WADA has approved the use of ABP and this has been transposed to the rules of the IF, he CAS Panel must respect and apply the rules as they are and not as they might have been or might become. In this way, the Panel clearly established that it applies the ABP as it is set forth in the Federation's Anti-Doping Rules (ADR) and does have to question its validity or efficacy[23].

In CAS 2010/A/2174 the Panel did examine whether the ABP method provided a satisfactory level of reliability (and, thus, had to be considered as "reliable means" in the sense of Art. 23 UCI ADR and Art. 3.2 WADC: it notably stated that the variation registered by the software providing for a probability of 99.9% or more was further evaluated by a panel of experts in an autonomous and anonymous way and was thus a reliable means of evidence[24].

Furthermore, in CAS 2010/A/2174, the Athlete questioned the admissibility of the ABP because the system only formulated probabilities in relation to a possible anti-doping violation, and therefore the method used cannot be relied upon (because it is neither "*infallible*" nor "*undisputable*"). The athlete argued that the only admissible techniques should provide proof "*beyond reasonable doubt*"[25]. The Panel repeated that according to Art. 22 UCI ADR and Art. 3.1 WADC an ADO discharges its duty of establishing an anti-doping rule violation if the Panel is "*comfortably satisfied*" that an anti-doping rule violation has occurred ("*bearing in mind the seriousness*

21. *Idem.*

22. See TAS 2010/A/2178 para. 33; see also CAS 2009/A/1912 & 1913, para. 110; CAS 2000/A/274 *Susin v. FINA*, paras. 73, 75 and 78, in *Digest of CAS Awards II*, M. Reeb ed., pp. 405-406; CAS 2005/C/841, paras. 80-81.

23. See CAS 2010/A/2235, para. 80.

24. See CAS 2010/A/2174, para. 9.7.

25. See CAS 2010/A/2174, para. 9.7.

of the allegation which is made)". Since the standard "*comfortable satisfaction*" is defined as a standard that "*is greater than a mere balance of probability but less than proof beyond a reasonable doubt*", there is no room for the "*infallity*" standard invoked by the athlete[26].

C. Applicable law / applicable rules in case of an antidoping rule violation detected through the ABP system

According to well-established CAS case law, CAS Panels do not directly apply the provisions of the WADC but rather the provisions as they have been transposed in the ADR of the federation in question. By means of example, in a case involving a rider and his National Federation (NF), the Panel is called to apply the ADR of the NF along with the UCI ADR, and the WADC, to the extent that there are references thereto in the NF's regulations[27].

What version of the regulations is applicable in a case involving the ABP system? In general, the legal principle of *tempus regit actum* applies, i.e. the Panel shall apply the regulations in force at the moment that the violation occurred[28]. In a case related to the ABP (since the ABP is based on the longitudinal profiling of the athlete's sample) should coincide with the first sample taken. However, specifically for cases related to anti-doping rule violations, the rules that entered into force after the facts can also retroactively apply if they lead to a more favourable result for the athlete according to the principle of *lex mitior*, also established in CAS case law.[29] However, as we are going to see in the following pages, this principle does not apply to cases related to ABP since the ABP is not a legal provision established by law but rather a doping detection method.

1. The retroactivity issue

In some cases brought before the CAS related to the ABP, the athletes claimed that the ABP should not be applied because of the prohibition of the retroactive application of the anti-doping rules. In TAS 2010/A/2178, the Athlete asserted that the alleged violations occurred prior to the introduction of the ABP and its retroactive application should not be permitted. The Panel rejected this argument and stressed out that the ABP is not a new rule or category of doping/anti-doping, but merely a new detection method that enters into the scope of "*any reliable means of proving doping*".

Therefore, the only pertinent element is that the rule prohibiting e.g. the blood doping under the form of the method M1 (of the WADC) has to be included in the ADR of the NF (and the IF ADR and WADC) for all the period covered by the ABP of the Athlete (i.e. from the period that the NF started to collect the blood samples from the athlete). In TAS 2010/A/2178, the first sample dated from October 2008, so the Panel applied the version of ADR applicable at that time.

In this respect, and since the ABP does not introduce a new prohibition but only a detecting method of blood doping, which is already prohibited, there is no problem regarding the retroactive application of the ABP: new scientific methods, even if they are not explicitly provided for in the ADR, can be used at any time in order to prove occurred violations; the sole limitation is that samples should be only be used for the fight against doping (up to eight years) and that the beginning of the disciplinary procedures should be done within this timeframe.[30]

Consequently, the recourse to new methods of detection does not constitute a case of retroactive application of norms, as long as the ADR prohibiting a specific antidoping rule violation already existed before the detection method. In TAS 2010/A/2178 the Panel held that this is the only way to benefit from the technological developments in order to detect antidoping rule violations that could not be detected due to the limits of the previous methods.

In CAS 2010/A/2174 the Panel repeated the arguments raised in TAS 2010/A/2178 in a case related to "*enhancement of oxygen transport*". The Panel held that the use of the newest and most advanced scientific methods in order to uncover anti-doping rule violations is perfectly legitimated, provided that they do not violate essential human rights; as stated above, the decisive criterion for their admissibility is whether they constitute "reliable means" by virtue of the WADC and the respective provisions of the ADR of each federation[31].

In another case, albeit not directly related to the ABP, the Panel held that "*the laboratories must always use the most recent state of the art technology and knowledge to identify prohibited substances and methods. The ISL is intended also to ensure that the accredited laboratories achieve uniform and harmonized results and reporting thereon. Therefore, the ISL ought to indicate that the use of the most recent state of the art technology and knowledge will be used in testing, particularly in a transitional period between use of an existing and effective*

26. Idem.

27. See *inter alia* TAS 2010/A/2178, para. 28.

28. See also 2000/A/274, para. 72 et seq., and CAS 2008/A/1563, para. 56; see TAS 2010/2308, para. 29 f.

29. See *inter alia* TAS 2001/A/318.

30. See TAS 2010/A/2178, para. 34.

31. See CAS 2010/A/2174, para. 9.4.

TD and a replacing one"[32].

Finally, in a case brought before the CAS related to the athlete's longitudinal profiling[33] the Panel held that new scientifically sound evidentiary methods does not constitute a case of "*retrospective application of the law*". As such, it can be used at any time in order to investigate and discover anti-doping rule violations that went undetected, provided that the eight-year time limitation is respected and the disciplinary proceedings are initiated in a timely manner. What is important is to see whether a substantive rule prohibiting an anti-doping rule violation is in force prior to the conduct. The Panel characterized the athlete's longitudinal profiling as a mere evidentiary method which, on the basis of scientifically accepted evaluations, constitutes one of the available means for finding doping offences, even if it occurred before such method was mentioned in the anti-doping rules or in the official comments thereto[34].

2. Application of the principle of the *lex mitior* in cases related to the ABP

Another interesting issue is that the principle of *lex mitior* finds no application in cases related to the ABP, but also in cases of new scientific methods for the discovery of doping violations in general. As mentioned above, the principle of *lex mitior* is generally understood to mean that, if the law relevant to the offence of the accused has been amended, the less severe law should be applied[35]. It has been generally acknowledged in CAS case law that the principle of *lex mitior* finds application in doping cases, albeit only for the substantial rules sanctioning doping conduct (established through specific legal provisions) and thus not for detection methods[36].

In TAS 2010/A/2178 the athlete invoked the application of the principle of *lex mitior* because he asserted the "*Operational Guidelines for the ABP*" should not be applied for analysing the athlete's sample since they were not in force before the 1st of January. The Panel rejected this argument and held that the principle of *lex mitior* is not applicable in cases related to ABP since the principle refers to the application of the more favourable sanction and thus not to the technical rules allowing the proof of an antidoping rule violation[37]. In CAS 2010/A/2174 the Panel repeated the above, in a case concerning the "*enhancement of oxygen transfer*" which constituted an anti-doping rule violation already before the taking of the sample by the athlete[38].

The same argument had already been raised (albeit in a slightly different context) in CAS 2009/A/1931[39]. Although the case did not concern the application of the ABP but the International Standards for Laboratories (ISLs), the Panel found that the principle of *lex mitior* does not apply in those cases, since it relates more specifically to the applicable sanction and not the technical rules underlying the scientific basis of the evidence. In all the above cases (as well as in CAS 2009/A/1912 & 1913) the Panel held that there was no problem for the Panel to use the ABP as long as the athletes did not object to the use of the sample collected for the purposes of the ABP[40].

In CAS 2010/A/2235, the Athlete raised another issue and submitted that based on the 2009 version of the UCI Cycling Regulations ("Part 13 UCR"), it "*would be highly illogical and contrary to the "lex mitior" principle if atypical values found in ABP program, which even are not atypical in according to Part XIII of UCR would lead to higher sanctions than an atypical value under Art. 13.1.063 or 13.1.063 bis. Lex mitior principle should apply not only if the later law is more favourable for the alleged offender, but also in case that the same facts lead to punishment under two different laws, protecting the same value – fair competition*"[41].

The Panel held that Art. 13.1.063 or 13.1.063 *bis* are included in the chapter of PART 13 UCR which imposes the obligation on riders to submit to blood tests organised by the UCI to check specific blood levels. The control is not of disciplinary nature and is not designed to sanction riders. Art. 13.1.063 provides for the provisional suspension of the rider whose *"blood analysis shows an atypical blood value",* while Art. 13.1.063 *bis* states that "*If the blood values determined by the analysis, without being atypical following Art. 13.1.063, denote a situation where a follow-up can be justified, the rider and his team can be informed.*"

The Panel rejected d the Athlete's argument that identical facts lead to punishment under two different laws (i.e. Art. 13.1.063 and 13.1.063 *bis*) by concluding that the two provisions merely put in place provisional measures until further steps are taken by UCI and that they are complementary and

32. See CAS 2010/A/1931.

33. CAS 2009/A/1912 & 1913 para. 109.

34. *Ibid*., para. 110; see also CAS 2000/A/274, paras. 73, 75 and 78, in *Digest of CAS Awards II*, M. Reeb ed., at 405-406; CAS 2005/C/841, paras. 80-81.

35. See CAS 2009/A/1931, para. 8.10.

36. See *inter alia* CAS 2003/A/507, CAS 2005/C/841, CAS 2008/A/1471; 2008/A/1494, CAS 2008/A/1585 & 1586, CAS 1632 & 1659, CAS 2008/A/1744, CAS 2009/A/1817 & 1844; CAS 2009/A/1931, CAS 2004/A/549, TAS 2010/A/2178.

37. See TAS 2010/A/2178, para. 57; see also TAS 2010/A/2308, paras. 36 ff.

38. See CAS 2010/A/2174, para. 9.5.

39. See CAS 2009/A/1931 para. 8.10.

40. See CAS 2010/A/2174 para. 9.5.

41. See CAS 2010/A/2235, paras. 107-115.

not mutually exclusive. Therefore there is no basis in the UCI regulations for the application of the *lex mitior* principle[42].

D. Weighing of evidence in cases related to the ABP

1. Burden and degree of proof

It has been argued that with the introduction of the ABP, the question of proof has been shifted back to anti-doping authorities, in the sense that any procedural detail can result in sanctions being dropped[43].

As stated above, in cases related to the application of the ABP the federation wishing to establish an anti-doping rule violation committed by the athlete should bring to the comfortable satisfaction of the hearing Panel the violation by using a standard greater than a mere balance of probability but less than proof beyond a reasonable doubt, in accordance with Art. 3.1 WADC[44]. According to Art. 3.2 WADC (and the provisions of the ADR that transpose the WADC), facts can be established by any reliable means. In particular, for indirect detection methods, and due to the absence of any positive test, the antidoping authority does not benefit from any presumptions[45].

The above was already held by a CAS Panel in CAS 2005/C/841[46], according to which for anti-doping rules violations, which do not derive from positive testing, it is more difficult for sports authorities to discharge the burden of proving that an anti-doping rule violation has occurred, because no presumption applies. According to the WADC and all sports regulations implementing it, the standard of proof shall be whether the concerned sports authority "*has established an anti-doping rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt*"[47]. Furthermore, the Panel held that sports authorities should use any available method of investigation in order to establish that an anti-doping rule violation occurred, since at the end it will be up to the adjudicating body to determine – on a case by case basis – whether the standard of proof of Art. 3.1 of the WADC has been met and the burden of proof has been discharged, or not, by the prosecuting sports authority.

However, for cases related to the ABP, the ADO is bound by the IST (Art. 4.3 of the Guidelines). Therefore, the burden and degree of proof in cases related to the ABP does not differ from other cases which do not derive from positive testing i.e. the presence of a prohibited substance in the Athlete's sample.

2. Method used in CAS Awards related to the ABP

More specifically and in more technical terms, the ADO of an IF (e.g. UCI) has to examine the haematological profile based on the results of blood samples allowing to establish the individual limits of each athlete for three haematological parameters, namely haemoglobin (HGB), reticulocytes (RET) and the report between the two values ("off-score")[48].

The HGB concentration is a value relatively stable for each individual unless there are pathological circumstances, even if – specifically for cyclists – there are certain variations with regard to the rest of the population, where HGB is higher during rest periods and lower during courses, due to long and intense physical effort ("hyper volémie").

The RET are young red blood cells whose level in the blood expresses the activity of production of red cells from the bone marrow (bone marrow erythropoiesis): the RET percentage is higher when the bone marrow tries to regenerate, as in cases of acute haemorrhage.

The "Off Score" Value is calculated on the basis of the HGB and RET values. Very high Off Score values indicate that the RET is too low with respect to the HGB (e.g. after a blood transfusion); too low Off Score value indicate that RET is too high compared to HGB, what happens e.g. when extracting blood (or in other pathological situations with haemorrhage or haemolysis).

Based on the analysis results, a statistical programme establishes the range of values considered as physiological for each athlete, and in case of significant change compared to the established values, ABP of an athlete is selected as being non physiological and submitted to a panel of experts appointed by UCI[49].

An independent panel of scientists monitors the riders' information for any extraordinary irregularities in those profiles. Any strange changes in blood values could mean a rider used a prohibited substance or

42. CAS 2010/A/2235, para. 114.

43. See interview of M. Saugy to S. Jaberg, *www.swissinfo.ch*.

44. See CAS 2010/A/2235, in accordance with Art. 3 NSA ; see also TAS 2010/A/2308, paras. 41 (art. 22 UCI ADR).

45. See CAS 2009/A/1912 & 1913 para 114.

46. CAS 2005/C/841, para. 84.

47. Art. 3.1 of the WADC.

48. See TAS 2010/A/2178, para. 38.

49. TAS 2010/A/2178, paras. 39-42.

underwent a banned blood transfusion. However, the Panel of experts first tries to find the possible causes to explain abnormal results[50]. The questions that are raised are "*how likely is it that a cyclist can produce an Off-score outside the 99.9% probability limit if they are not doping?*" or "*What kind of conditions would explain the biological profiles that we're being presented with?*"[51].

When the experts decide unanimously and based on a complete file that the cause for these results is a prohibited substance or method, they suggest UCI the measures that it should undertake. Therefore the statistical programme of ABP is examined and thoroughly evaluated by a panel of experts[52].

3. Alleged irregularities and reliability of results

In TAS 2010/A/2178[53] and in TAS 2010/A/2308 the riders contested the reliability of the results through their experts due to a number of irregularities occurred prior and during the analysis of samples. The hearing Panels held that according to Art. 3 WADC "*If the Athlete or other Person rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, then the Anti-Doping Organization shall have the burden to establish that such departure did not cause the Adverse Analytical Finding*" (Art. 3.2.1 of the WADC). The Panel finally held that although certain irregularities did occur, they were not capable of producing the abnormal values of the ABP and the athlete could not establish that such departures caused the adverse analytical finding[54].

More precisely, in TAS 2010/A/2178 the Panel found that the irregularities could not cause the AAF for numerous reasons: first, the instruments used did not reveal errors in the analytical phase; second, the machines used analyse the samples based on their barcodes and in this case there was no indication that the process was not respected; third, even if the use of the machines required a slight correction of the values, the experts confirmed that the fluctuation in the ABP of the Athlete was in any case too important to be caused by instrumental differences.

In TAS 2010/A/2308, the Panel dealt with the argument of inadequate conservation of the samples and found that the different values of the samples remained stable for a long period, even if the samples were examined in different laboratories situated in different countries. This would not be possible in case of an inadequate or too long conservation of the samples. The observed stability was therefore enough in order to exclude the argument of inappropriate conditions of conservation and management raised by the Athlete[55].

E. Essential rights of an athlete and limitations in the use of the ABP

In CAS 2010/A/2174 the Athlete argued that he should be granted the essential right to establish a new ABP on the basis of his blood values taken upon his initiative and analysed by private laboratories: such ABP could establish that his values are completely normal. The Panel rejected such request by stating that the good functioning of the doping controls presupposes that such controls be effectuated exclusively by ADOs and that athletes cannot be the "controlled" and the "controllers" at the same time. The essential rights of athletes consisted in that the athletes could request and check that the testing procedure (sample collection, transportation, sample analysis, etc.) follows the required standards and therefore the athlete is guaranteed a high quality of the procedure[56].

What is the scope of collection and analysis of samples and where are the limits of the athlete's consent as to the use of an athlete's samples for different purposes? In CAS 2010/A/2174, the athlete contested the federation's (UCI) right to use his sample for different ends such as the analysis for prohibited substances like CERA: the athlete had merely consented to the use of his blood for the purpose of the ABP and thus the results of such analysis should not be used in the proceedings against him[57]. The hearing Panel clarified this issue and delimited the scope of such consent (within the framework of Art. 120 of the UCI ADR), according to which samples may be collected and analyzed in order "*1) to detect the presence and / or use of a prohibited substance or prohibited method, 2) for profiling relevant parameters in a Rider's urine, blood or other matrix, including DNA or genome profiling, for anti-doping purposes ('athlete passport') (...), 3) to detect substances as may be directed by WADA pursuant to the Monitoring Program described in Art. 4.5 of the Code; 4) for screening purposes*". Furthermore, the provision states that no sample "*may be used for any other purpose without the Rider's written consent*".

The Panel interpreted the aforementioned provision

50. See also *http://www.nytimes.com/2011/03/09/sports/cycling/09cycling.html?_r=1.*

51. *http://www.sportsscientists.com/2011/03/biological-passport-legal-scientific.html.*

52. TAS 2010/A/2178, para. 44.

53. See TAS 2010/A/2178 para. 48.

54. See TAS 2010/A/2178, para. 55.

55. TAS 2010/A/2308, para. 57.

56. See CAS 2010/A/2174, para. 9.14.

57. CAS 2010/A/2174, para. 9.17.

as granting to the ADO the right to carry out any of the activities listed in art. 120, without the need to get a separate consent of the athlete for any of the actions enumerated therein. The Panel equally referred to Art. 200 UCI ADR providing that any sample may be reanalyzed for the purpose of Art. 120 at any time exclusively at the direction of UCI or WADA. It found that the possibility to reanalyze a sample was given a broader meaning, in order to include a case in which the first analysis has been carried out for a different purpose[58].

Another issue related to the athlete's rights in a ABP case concerns the examination of the B' sample: while in "traditional" anti-doping rule violations in the form of "presence of a prohibited substance" the analysis of B' sample is considered as one of the basic rights of the athlete, in the absence of which the entire procedure is invalidated[59], this is not necessarily the case with violations established on the basis of the ABP, and thus the non-examination of the B' sample[60].

F. Interpretation of results by CAS Panels and experts' independence

In TAS 2010/A/2178, the athlete asserted that the results were normal for a professional cyclist as the athlete. CONI and UCI asserted that the blood values of the ABP of the Athlete were irregular, and this was also enforced by the panel of experts. The Panel thus interpreted the results and considered that CONI and UCI could prove the recourse to a prohibited method by the athlete and that the variations of the HGB values from April to October could not be considered as normal, but typical of a blood transfusion (prélèvement de sang)[61].

In CAS 2010/A/2174 the Panel held that, contrary to the position raised by the athlete, it is in a position to evaluate and assess the weight of a (party-appointed) expert opinion submitted to it[62]. This is done through evaluation of the facts, on which the expert opinion is based and by assessing the correctness and logic of the conclusions drawn by the experts. The Panel has thus the prerogative to take into account the statements and opinions of all the parties, and based on that it will form its own opinion on the facts and consequences that follow thereof. The Panel's evaluation is therefore not a pure referral to the Experts' opinion[63].

Furthermore, in CAS 2010/A/2235 the CAS Panel acknowledged that it lacks the proficiency of the Expert Panel (of either side), and that any Panel faced with a conflict of expert evidence must be careful and aware of its own lack of expertise in the area under examination. However, it also stressed that experts' reports are fundamental for the Panel to come to a judgment (as the Panel put it in a very eloquent way referring to Roman Law "*iudex peritus peritorum*" – "*the judge is the expert on the experts*")[64]. The Panel held that its role with regard to the experts' report is the one of an appellate body called to determine whether the Experts' evaluation is soundly based in primary facts. In this respect, it has to take into consideration the expert witnesses in terms of their status, experience, and coherence of their evidence as well as the consistency of such evidence with any published research[65].

Both in TAS 2010/A/2178 and in TAS 2010/A/2308[66] the riders contested the independence of experts because of the fact that they are paid by UCI and they do not sign an agreement as to the conflict of interest. In both cases the hearing Panel held that the fact that experts are engaged by UCI is not sufficient to question their independence, since they only do a *prima facie* estimate, they are engaged anonymously and only recommend the actions to be undertaken. The Panel in CAS 2010/A/2235 further rejected the assertion usually made that UCI experts act as advocates or athletes' accusers, by eloquently stating that UCI has nothing to gain "*from exaggerating the extent to which its sport is troubled by the scourge of doping*"[67].

III. Concluding remarks

The legal issues discussed in the previous pages were viewed through the scope of the CAS Awards rendered so far on the application of longitudinal profiling methods and, in particular, the ABP. The latter is an individual electronic record for professional athletes, where biological markers of doping are been profiled and analysed over a period of time. It is used as an indirect means of detection for prohibited methods (as opposed to prohibited substances). The most important characteristic of ABP is the longitudinal profiling which can unveil

58. See also CAS 2009/A/1912 & 1913, para. 101.

59. See CAS 2008/A/1607, paras. 109, 121. The Panel held that an athlete's right to be given a reasonable opportunity to observe the opening and testing of a "B" sample is very important even in situations where all of the other evidence available indicates that the Appellant committed an anti-doping rule violation.

60. CAS 2010/A/2174, para. 9.18.

61. See TAS 2010/A/2178 para. 63.

62. CAS 2010/A/2174, para. 9.4.

63. See CAS 2010/A/2174, para. 9.4.

64. CAS 2010/A/2235 para. 79 and the reference to US Supreme Court judgment *Kumho Tire Co. Ltd v Patrick Cormichael*, judgement of 23 March 1994.

65. *Idem.*

66. TAS 2010/A/2308, paras. 51 f.

67. CAS 2010/A/2235 para. 80.

either the effects of doping or pathology. While ABP normally denotes an official systematic program run by the athlete's federation, federations can also draw blood data from their athletes over a longer period of time without the specifications of the ABP (see also CAS 2009/A/1912 & 1913).

The (indirect) legal basis of the ABP can be found in Art. 2.2 and 3.2 WADC; according to the Official Commentary to Art. 2.2 WADC, the use or attempted use of a prohibited method may be established by any "*reliable means*", among which the "*conclusions drawn from longitudinal profiling*". CAS Panels have already "accepted" the application of the ABP as a "*reliable means*" to establish an anti-doping rule violation although it has often been contested by athletes that the *"single analysis of red blood cells and reticulocytes parameters is not sufficient to affirm a scenario of doping":* as long as WADA approved the use of ABP and this has been transposed to the rules of an IF, a CAS Panel must respect and apply the rules as they are and not as they should be or might become. In this way, CAS Panels apply the ABP as it is set forth in the Federation's Anti-Doping Rules and does have to question its validity or efficacy.

According to the principle of *tempus regit actum*, CAS Panels apply the regulations in force at the moment that the alleged ADR violation occurred. Specifically for ADR violations, under the principle of *lex mitior*, the rules that entered into force after the facts can also retroactively apply if they lead to a more favourable result for the athlete, also established in CAS case law. However, this principle does not apply to cases related to ABP and there is no problem regarding the retroactive application of the ABP, since the ABP does not introduce a new prohibition but only a detecting method of blood doping. As was repeatedly stated in CAS Awards, this is the only way to benefit from the technological developments in order to detect antidoping rule violations that could not be detected due to the limits of the previous methods. The sole limitation in the application of the ABP is that samples should be only used for the fight against doping (up to eight years) and that the beginning of the disciplinary procedures should be done within this timeframe.

In cases related to the application of the ABP the federation wishing to establish an anti-doping rule violation committed by the athlete should bring to the comfortable satisfaction of the hearing Panel the violation by using a standard greater than a mere balance of probability but less than proof beyond a reasonable doubt, in accordance with Art. 3.1 WADC. Other than for violations in accordance with Art. 2.1 WADC, for violations based on Art. 2.2 WADC no presumption applies and therefore the anti-doping authority has the burden to establish that it did not violate the standards and anti-doping rules protecting the rights of the athlete. Once this is done, the burden is shifted to the athlete who must establish that there was an irregularity in the procedure/a departure from standards likely to have caused the violation. However, under Art. 4.3 of the WADA Guidelines, the ADO is bound by the IST and is presumed to have respected the applicable standards.

One further particularity of the ABP relates to the examination of the B' sample: unlike violations occurred on the basis of Art. 2.1 WADC, the analysis of B' sample is not a condition for the validity of the entire procedure. Another issue concerns the scope of collection and analysis of samples and the possibility of a federation to use the athlete's consent in order to examine the athlete's samples for different purposes (i.e. not only within the framework of ABP but also in order to detect a prohibited substance). CAS clarified this issue and held that such use is possible, upon the condition that the federation respects the respective conditions set for each procedure.

As we saw in the previous pages, the role of experts is crucial in an ABP procedure: in cases brought before CAS, athletes have often contested the independence of experts because of the fact that they are paid by their federation and they do not sign an agreement as to the conflict of interest. CAS has so far rejected such arguments because this is not sufficient to question their independence, since they only do a *prima facie* estimate, they are engaged anonymously and only recommend the actions to be undertaken. In the same case the Panel noted that their role is not limited in the mere referral to the experts' opinion, but that they have the freedom to assess the correctness and logic of the experts' conclusions.

All in all, the ABP has been established as a "reliable means" and an indirect method of detection of an anti-doping rule violation. Although there are some procedural particularities that apply in the case of the ABP, these particularities mostly arise from the fact that the ABP is an indirect method of detection and therefore one could argue that, from a legal standpoint, there are very few procedural differences before CAS between the ABP and other methods of detection of an anti-doping rule violation (in this respect see also the explicative table that follows).

Method of Detection	"Direct Method"	"Indirect Method"
Legal Provision in WADC	Art. 2.1 WADC "*Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample*"	Art. 2.2 WADC "*Use or attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method*"
Caracteristics	Direct method of detection, based on the finding of a prohibited substance	Indirect method of detection, based on a the finding of a prohibited method (and not a specific prohibited substance)
Establishment of the Anti-Doping Rule (ADR) Violation	Art. 2.1.2 WADC Anti-Doping Organization (ADO): Presence of the prohibited substance in A & B samples or only in A sample (upon waiver of the athlete for the examination of the B sample)	Comment to Art. 2.2 Establishment possible "*by any reliable means: admissions, witness statements, documentary evidence, conclusions drawn from longitudinal profiling or other analytical information*"
Burden of Proof	- Burden to establish the ADR violation: **ADO** - Presumption in favour of the ADO that there was no departure from the International Standards for Laboratories (ISL) (art. 3.2.1 WADC) - ADO is mandated to follow the WADA IST and WADA ISL in order to prove the presence of a prohibited substance - Rebut the presumption - there was a departure from the ISL that could reasonably have caused the Adverse Analytical Finding (AAF): **Athlete** - Departure from the ISL did not cause the AAF: **ADO**	- Burden to establish the ADR violation: **ADO** - No presumption applies (unless analyses performed by WADA-accredited Labs under the ISL or cases related to ABP under Art. 4.3 Guidelines): ADO has the burden to prove the reliable chain of custody, the reliable analysing machine, the reliable transmission and storage of samples (2009/A/1912 & 1913) - ADO not mandated to follow the WADA IST and WADA ISL in order to prove the Athlete's use of a prohibited method - Errors in establishing the prohibited method: **Athlete** - Such errors did not cause the AAF: **ADO**

Standard of Proof	- ADO establishment of the ADR violation*: Comfortable satisfaction* of the hearing panel > mere balance of probability < proof beyond a reasonable doubt - Athlete (to rebut the presumption): in general: *balance of probability* (Art. 3.1 WADC) - ADO: Departure from the ISL did not cause the AAF: *comfortable satisfaction*	- ADO establishment of the ADR violation: *Comfortable satisfaction* of the hearing panel > mere balance of probability < proof beyond a reasonable doubt - Athlete (to show ADO's errors): *balance of probability* (Art. 3.1 WADC) - ADO: Departure from other standards ADR or policy did not cause the AAF: *comfortable satisfaction*
Presumptions	Presumptions apply (art. 3.2.1) Presumption that there was no departure from the International Standards for Laboratories (ISL)	No presumptions apply (*e contrario* from art. 3.2.1 and CAS 2005/C/841 para. 84, CAS 2009/A/1912 & 1913). Presumptions apply for ABP under Art. 4.3 Guidelines.
Substances detected / prohibited Methods	- Prohibited substances as listed in the categories of the WADA Prohibited List (S1 – S9 and P1-P2) and - "*substances with similar chemical structure or similar biological effect(s)*" (for S1, S2, S5, S6)	M1: Enhancement of Oxygen Transfer (blood doping & artificial enhancement of uptake, transport or delivery of oxygen) M2: Chemical and physical manipulation (tampering / attempting to tamper) M3: Gene Doping (transfer of cells or genetic elements, use of pharmacological or biological agents that alter gene expression).

Arbitration CAS 2009/A/1817
World Anti-Doping Agency (WADA) & Fédération Internationale de Football Association (FIFA) v. Cyprus Football Association (CFA), C. Marques, L. Medeiros, E. Eranosian, A. Efthymiou, Y. Sfakianakis, D. Mykhailenko, S. Bengeloun & B. Vasconcelos
&
Arbitration CAS 2009/A/1844
FIFA v. CFA & E. Eranosian
26 October 2010

Football; doping; general reference to CAS in the Statutes of the International Federation and CAS jurisdiction; De novo review and limit of the Panel's review to the evidence adduced in the arbitration; no direct applicability of the WADA Code; principle of non-retroactivity and application of the lex mitior principle in anti-doping rule violations; interpretation of FIFA provisions according to the WADA Code; interpretation of the FIFA Cooperation Rule and WADA Code; significant negligence and administration of mislabelled food supplements; revision of the sanction imposed by a disciplinary body by CAS and principle of proportionality; conditions for the application of Article 65.4 of the FIFA DC

Panel:
Prof. Luigi Fumagalli (Italy), President
Prof. Richard H. McLaren (Canada)
Mr. Michele Bernasconi (Switzerland)

Relevant facts

The World Anti-Doping Agency (WADA) is a Swiss private-law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. The WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms. WADA is the appellant in CAS 2009/A/1817.

The Fédération Internationale de Football Association (FIFA) is the world governing body of football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players, worldwide. FIFA is an association under Swiss law and has its headquarters in Zurich (Switzerland). FIFA is the appellant in CAS 2009/A/1844 and an intervener in CAS 2009/A/1817.

The Cyprus Football Association (CFA) is the national football association for Cyprus and is a member of FIFA. CFA is a respondent both in CAS 2009/A/1817 and in CAS 2009/A/1844.

E. Eranosian ("Mr Eranosian") is a professional football coach of Bulgarian nationality, at the relevant time employed by APOP Kinyras Peyeia F.C. ("APOP Kinyras"), a Cypriot football club affiliated to the CFA. Eranosian is a respondent both in CAS 2009/A/1817 and in CAS 2009/A/1844.

Carlos Marques, Leonel Medeiros, Angelos Efthymiou, Yiannis Sfakianakis, Dmytro Mykhailenko, Samir Bengeloun, Bernardo Vasconcelos (also collectively referred to as the "APOP Kinyras Respondents") are professional football players of various nationalities at the relevant time registered with APOP Kinyras (Mr Carlo Marques is referred to as "Mr Marques"; Mr Leonel Medeiros is referred to as "Mr Medeiros"; Mr Angelos Efthymiou, Mr Yiannis Sfakianakis, Mr Dmytro Mykhailenko, Mr Samir Bengeloun and Mr Bernardo Vasconcelos are also collectively referred to as the "Other Players"). The APOP Kinyras Respondents are respondents in CAS 2009/A/1817.

On 31 October 2008, Mr Marques took part in a football match between APOP Kinyras and Anorthosis. After the football match, Mr Marques underwent a doping control.

On 9 November 2008, Mr Medeiros took part in a football match between APOP Kinyras and APEP Pitsilias. After such football match, Mr Medeiros underwent a doping control.

On 31 October 2008, 9 November 2008, and 24 November 2008 doping controls were carried out

also on other players of APOP Kinyras.

The laboratory analysis performed on the "A" sample collected from Mr Marques and Mr Medeiros indicated the presence of Oxymesterone, a prohibited substance under the applicable anti-doping regulations. The "B" samples confirmed the adverse analytical finding of the "A" samples. The other samples collected from different players of APOP Kinyras tested negative.

As a result of the above, the Executive Committee of the CFA appointed on 28 November 2008, Mr George A. Michanikos (referred to as "Mr Michanikos") as investigator in charge of carrying out an official inquiry with respect to the adverse analytical findings concerning Mr Marques and Mr Medeiros.

On 31 December 2008, Mr Michanikos issued a report (referred to, in the English translation provided by the APOP Kinyras Respondents, as the "Investigation Report") setting forth his findings "*after carefully listening to the 26 witnesses and conducting an in depth analysis of their depositions and … (often voluminous) exhibits*", to conclude that Mr Eranosian, Mr Marques, Mr Medeiros, Mr Angelos Efthymiou, Mr Yiannis Sfakianakis, Mr Dmytro Mykhailenko, Mr Samir Bengeloun, Mr Bernardo Vasconcelos, Mr Charalambos Vargas, Mr Georgos Polyviou, Mr Andreas Menelaou, Mr Georgos Nikolaou and Mr Vangelis Demetriou "*have violated specific articles of applicable Regulations and therefore are guilty of disciplinary misdemeanours*".

On the basis of the Investigation Report, disciplinary proceedings were started against Mr Eranosian, Mr Marques and Mr Medeiros before the competent Cypriot authorities for anti-doping rule violations.

On the other hand, the CFA decided not to open disciplinary proceedings against Mr Angelos Efthymiou, Mr Yiannis Sfakianakis, Mr Dmytro Mykhailenko, Mr Samir Bengeloun, Mr Bernardo Vasconcelos, Mr Charalambos Vargas, Mr Georgos Polyviou, Mr Andreas Menelaou, Mr Georgos Nikolaou and Mr Vangelis Demetriou (such decision is "Decision concerning the Other Players").

On 26 February 2009, a hearing was held before the Judicial Committee of the CFA ("Judicial Committee") with respect to the case of Mr Medeiros and Mr Marques. At the hearing, the Judicial Committee adopted the decision that was formally issued on 24 April 2009.

In an email to WADA dated 9 March 2009, Mr Michael Petrou of the Cyprus National Anti-Doping Organization referred to the adverse analytical findings concerning Mr Marques and Mr Medeiros and to the conclusions of the Investigation Report to advise WADA inter alia that:

i. a disciplinary committee of the CFA had held a hearing, deciding to impose on the two players who had tested positive a one year suspension as having provided a substantial assistance in discovering or establishing anti-doping rule violations*: "however, to our knowledge, the players did not submit any signed written statement with related information to the Police or the Cyprus National Anti-Doping Organization or the Disciplinary Committee of the CFA. (…)";*

ii. the disciplinary committee of the CFA had decided "*to stop the Hearing and impose no sanctions for the remaining 10 (except the coach)*" players and officers of APOP Kinyras: however*, "we don't understand why the CFA asked from the Disciplinary Committee to stop the Hearing! For us, it is obvious that they violated the anti-doping Rules and they should have been sanctioned";*

iii. "no provisional suspension has been imposed to the coach".

On 2 April 2009, the Judicial Committee issued a decision concerning Mr Eranosian (referred to, in the English translation provided by WADA, as the "Decision of 2 April 2009"), sanctioning Mr Eranosian with "*two years ineligibility from any coaching activity*".

In the Decision of 2 April 2009, the Judicial Committee underlined that "*the immediate cooperation and willingness of Mr. Eranosian for the detection of this sad case, with unpleasant results for him, which would possibly not been achieved without his contribution, justifies the application of the relevant provisions on the imposition of reduced sentence*". Therefore, on the basis of the applicable provisions of the FIFA Disciplinary Code (FIFA DC) and of the World Anti-Doping Code (WADC) in force at the time of the doping offence, the Judicial Committee decided that "*the appropriate sanction without the benefit of its reduction is 4 years ineligibility. Given, however, that we have been convinced that it is fair to grant Mr. Eranosian with this benefit, we decide the reduction thereof by half*".

At the same time, the Judicial Committee indicated that the period of ineligibility was to start from the date of its decision, i.e. on 2 April 2009.

The Decision of 2 April 2009 was received by FIFA on 15 April 2009 under cover letter of the CFA dated 13 April 2009.

On 24 April 2009, a decision concerning Mr Medeiros and Mr Marques (referred to, in the English translation provided by WADA, as the "Decision of 24 April 2009"; the Decision concerning the Other Players, the Decision of 2 April 2009 and the Decision of 24 April 2009 are jointly referred to as the "Decisions") was issued by the Judicial Committee, holding as follows:

i. *"the two players are … disqualified for one year and are not allowed to participate in any match, including friendly matches";*

ii. *"the imposed sanction begins from the date the samples were received from the two players and more specifically for Mr. Medeiros from 9.11.2008 and for Mr. Marques from 31.10.2008".*

In the Decision of 24 April 2009, the Judicial Committee considered the submission of Mr Medeiros and Mr Marques that they bore no negligence or no significant negligence in respect to the imputed anti-doping rule violations, but noted "*without any doubt*" that Articles 10.5.1 and 10.5.3 of the WADC (corresponding to similar provision in the FIFA DC) could not be applied, and therefore the "*accused … cannot benefit of any elimination of the disciplinary sanction due to 'no significant fault or negligence'*", for the "*following reasons:*

A. *The two football players admitted the charge which is infringement of Strict Liability and the proof of intention is not required.*

B. *The football players had to be aware of the substances used before the football games. They didn't examine or tried to learn about the contain [sic] of the pills supplied to them.*

C. *The fact that their coach assured them that the substance of the pills was caffeine does not exempt them from their personal obligation to take their own measures to ensure the substance the pills were containing.*

D. *The football players were taking these pills and were not aware of the substance of the pills".*

The Judicial Committee, on the other hand, "*accepted*" the submission that the two players were entitled to a "*reduction of their sentence due to their assistance in revealing the offence of drug abuse by another person*", since they provided "*substantial evidence for the prosecution of their coach Mr. Eranosian before the Disciplinary Committee with the charges of violating several doping regulations*". As a result, the Judicial Committee held that the "*provided sanction of disqualification for two years*" was to be "*decreased by half*".

The Decision of 24 April 2009 was communicated to FIFA by the CFA on 27 April 2009.

On 30 March 2009, WADA filed a statement of appeal with the Court of Arbitration for Sport (CAS), pursuant to the Code of Sports-related Arbitration ("Code"), to challenge the decisions rendered by the CFA with respect to the players and officers of APOP Kinyras. The statement of appeal named the CFA, Carlos Marques, Leonel Medeiros, Edward Eranosian, Angelos Efthymiou, Yiannis Sfakianakis, Dmytro Mykhailenko, Samir Bengeloun, Bernardo Vasconcelos, Charalambos Vargas, George Polyviou, Andreas Menelaou, George Nikolaou and Vangelis Demetriou as respondents. It had attached 7 exhibits. The arbitration proceedings so started by WADA were registered by the CAS Court Office as CAS 2009/A/1817.

On 5 May 2009, FIFA filed a statement of appeal with the CAS, pursuant to the Code, challenging the Decision of 2 April 2009 rendered by the CFA with respect to Mr Eranosian. The statement of appeal named the CFA and Mr Eranosian as respondents and attached 2 exhibits. The arbitration proceedings so started by FIFA were registered by the CAS Court Office as CAS 2009/A/1844.

In a letter dated 14 May 2009 the CFA, upon receipt of the appeal brought by FIFA, informed the CAS Court Office *inter alia* of its opinion that the Decision of 2 April 2009 "*was correct because Mr. Eranosian had opened a case against the Cyprus FA in the civil courts with a good chance to win, according to our Lawyers, setting up a precedent for Cyprus. If he did, our courts would pronounce a stoppage leaving the case on the shelf for at least 5 years. He was persuaded to abandon the case in the civil courts in exchange for a lesser penalty with full knowledge that FIFA had the right to appeal. We think that we have acted in good faith protecting the sport and of course FIFA regulations*".

On 8 September 2009, WADA filed its appeal brief. In this brief, WADA withdrew its appeal against Mr Charalambos Vargas, Mr George Polyviou, Mr Andreas Menelaou, Mr George Nikolaou and Mr Vangelis Demetriou, as "*there is no conclusive evidence against them*". For the rest, WADA specified its requests for relief against the remaining respondents, i.e. CFA, Mr Eranosian and the APOP Kinyras Respondents, seeking the setting aside of the Decisions, and the imposition of sanctions on all of them.

On 1 October 2009, the CFA filed its answer to the appeals brought against it, seeking their dismissal.

On 26 October 2009, within the extended deadline,

the APOP Kinyras Respondents filed their answer to the appeal brought against them, seeking their dismissal. Together with the answer, the APOP Kinyras Respondents filed 19 exhibits.

On 26 October 2009, Mr Eranosian filed his answer to the appeals brought against him, seeking their dismissal.

A hearing was held in Lausanne on 10 June 2010.

Extracts from the legal findings

A. Jurisdiction

The jurisdiction of CAS to decide the present appeals is not disputed by the CFA and the APOP Kinyras Respondents, but is challenged by Mr Eranosian, who submits that no provision, within the meaning of Article R47 of the Code, is contained in the regulations of the CFA providing for an appeal to the CAS against the decisions of the CFA's disciplinary bodies.

The Panel notes that WADA and FIFA based their respective statements of appeal, for the purposes of Article R47 of the Code, on Articles 62 and 63 of the FIFA Statutes.

According to Article R47 of the Code,

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".

In light of this provision, the question is whether "*the statutes or regulations of the said body* [i.e. of the CFA, whose decisions are challenged in these proceedings] … *provide*" for an appeal to the CAS.

The Panel notes that Mr Eranosian, being the coach of APOP Kinyras, was registered with the CFA and that, by his act of registering, he agreed to abide by the statutes and regulations (including the anti-doping regulations) of the CFA.

In addition, the Panel finds that Mr Eranosian, being subject to the statutes and regulations of the CFA, is also bound by the FIFA rules. In fact

i. pursuant to Article 13.1(d) of the FIFA Statutes, CFA is obliged "to ensure that their own members comply with the Statutes, regulations, directives and decisions of FIFA bodies";

ii. under Article 11.7 of the CFA's Statutes, the anti-doping regulations of the CFA need to comply inter alia with the regulations of FIFA;

iii. Article 21 of the CFA's Statutes provides for the application of the FIFA rules in the event of ambiguous or missing provisions in the CFA's internal rules;

iv. pursuant to Article 22.5 of the CFA's Statutes, in case of disputes between members of the CFA and foreign subjects, the provisions of the FIFA Statutes apply.

As a result of the above, the rules set in Articles 62 and 63 (more particularly Article 63 para. 5 of the FIFA Statutes) are binding for Mr Eranosian: therefore, to the extent they provide for an appeal to the CAS, they constitute the basis for the jurisdiction of a CAS panel to hear an appeal against a decision of a body of the CFA issued with respect to Mr Eranosian.

In light of the foregoing, and as a consequence of the general reference to the FIFA rules contained in the CFA's Statutes, the CAS has jurisdiction to hear WADA's and FIFA's appeals against Mr Eranosian in accordance with Article R47 of the Code.

B. The merits of the dispute

The Decisions challenged in these proceedings concern Mr Medeiros and Mr Marques (the Decision of 24 April 2009), Mr Eranosian (the Decision of 2 April 2009) and the Other Players (the Decision concerning the Other Players). In respect of such Decisions, WADA and FIFA submit that the CFA bodies wrongly applied the relevant provisions: in essence, it is alleged that Mr Medeiros, Mr Marques and Mr Eranosian could not benefit from a reduction in the sanction, since they did not satisfy the conditions for the application of the rule on cooperation, and that the Other Players had to be sanctioned for an anti-doping rule violation.

The Panel, in order to assess the claims of WADA and FIFA, needs to answer the following questions with respect to Mr Medeiros, Mr Marques, Mr Eranosian and the Other Players:

1. Have doping offences been committed? In the event that the Panel finds that doping offences have been committed, it needs to further respond to the following questions: are the conditions met for the cancellation or reduction of the sanction

2. under Article 65.2 or 65.3 of the FIFA DC?

3. under Article 65.4 of the FIFA DC?

4. What are, in light of the above, the appropriate sanctions?

The Panel shall consider each of said questions separately for Mr Medeiros and Mr Marques, Mr Eranosian and the Other Players.

Before doing that, however, the Panel finds it convenient, in order to avoid unnecessary repetitions, to clarify in general terms some issues, raised by the above questions, that are possibly common to the positions of all the Respondents.

The first issue refers to the conditions for the reduction or elimination, pursuant to Article 65.2 or 65.3 of the FIFA DC, of the otherwise applicable ineligibility period.

The Panel underlines in this respect, that the mentioned FIFA provisions, to the extent they make reference to the concepts of "*No Fault or Negligence*" or of "*No Significant Fault or Negligence*", correspond to the rules contained in the WADC (in its 2003 and 2009 editions: Articles 10.5.1 and 10.5.2). As a result, the Panel submits that the understanding and interpretation of the FIFA rules can be informed in such respect by the text and the interpretative notes included in the WADC. Indeed, the CAS case law has already followed this approach and held that the expressions "*No Fault or Negligence*" or "*No Significant Fault or Negligence*" should be considered as having the same meaning in the FIFA regulations and in the WADC (see the award of 3 June 2008, CAS 2006/A/1385, para. 54).

Under the definitions included in the WADC, an athlete bears "*No Fault or Negligence*" when he establishes that "*he … did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he … had used or been administered the Prohibited Substance*", and he bears "*No Significant Fault or Negligence*" when he establishes "*that his … fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to an anti-doping rule violation*".

According to the Comment to Articles 10.5.1 and 10.5.2 of the WADC (2009 edition), "*Articles 10.5.1 and 10.5.2 are meant to have an impact only in cases where the circumstances are truly exceptional …. . To illustrate the operation of Article 10.5.1, an example where No Fault or Negligence would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances: (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink)*".

According to the same Comment, "*however, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a) if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements)*".

The issue whether an athlete's negligence is "significant" has been much discussed in the CAS jurisprudence (e.g., in the awards of 20 July 2005, CAS 2005/A/847, CAS 2008/A/1489, CAS 2008/A/1510, CAS 2006/A/1025, CAS 2005/A/830, CAS 2004/A/690, CAS OG 04/003). According to such precedents, a period of ineligibility can be reduced, based on no significant fault or negligence, only in cases where the circumstances are truly exceptional and not in the vast majority of cases.

The second issue refers to the interpretation of Article 65.4 of the FIFA DC.

Such provision, indeed, sets a rule ("FIFA Cooperation Rule") allowing for an additional ground for the reduction of the otherwise applicable ineligibility period, in the event "*help* [is] *given by a suspect* [which] *leads to the exposure or proof of a doping offence by another person*". The intention of such provision is to grant preferential treatment to those athletes and players who, by furnishing information, contribute to the fight against doping. As mentioned in a CAS precedent (award of 20 July 2005, CAS 2005/A/847, at para. 7.4.5), "*the motive for this preferential treatment is the recognition that the instruments for combating and eliminating the acts of trafficking, possession or the administration of prohibited substances are extremely limited. This is due primarily to the inherently clandestine nature of these activities and, secondly, the personal relationships which the athlete usually has developed to the people and athletes in his immediate proximity. The athlete will generally not want to expose these persons to the risk of a sanction.* [The rule]

is intended to create an incentive for the athlete to provide the information which is urgently required for the fight against doping" (see also the TAS 2007/A/1368, at para. 91, and the CAS 2008/A/1698, at para. 61).

The Panel notes that rules sharing the same aim as the FIFA Cooperation Rules have been the object of interpretation by other CAS panels. More specifically, the Award TAS 2007/A/1368 better defined the conditions for the application of Article 10.5.3 of the WADC (2003 edition), which provided that a sanction could be reduced "… *where the Athlete has provided substantial assistance to the Anti-Doping Organization which results in the Anti-Doping Organization discovering or establishing an anti-doping rule violation by another Person involving Possession under Article 2.6.2 (Possession by Athlete Support Personnel), Article 2.7 (Trafficking), or Article 2.8 (Administration to an Athlete)* …".

At the same time, however, the Panel remarks that the FIFA Cooperation Rule, while sharing the same aim, does not have the same content as Article 10.5.3 of the WADC (2003 edition). As remarked by the APOP Kinyras Respondents, in fact, Article 65.4 of the FIFA DC does not require that "substantial assistance" be provided in the discovery or establishment of an anti-doping rule violation; it simply requires that "help" be given which leads to the exposure or proof of a doping offence. If "help" appears as having the same meaning as "assistance" and "exposure" can be equated to "discovery", it is clear that the WADC requires a condition (that the assistance be "substantial") not contemplated by the FIFA DC.

As a result, for the purposes of the application of the FIFA Cooperation Rule, contrary to what other panels had to do while applying the WADC or rules of sport federations exactly corresponding to the WADC provisions, it is not necessary for this Panel to consider whether the assistance provided by the relevant subject was "substantial" or not. This Panel has simply to verify whether "help" was provided which led to the exposure of the doping offence by another person.

Of course, the above does not mean that all the clarifications offered by the CAS precedents with respect to the WADC are irrelevant: to the extent they refer to points corresponding to the FIFA Cooperation Rule, they offer pertinent guidance to this Panel.

In this respect, more specifically, this Panel agrees with the Award TAS 2007/A/1368 where (at para. 93) it underlined that "*il faut … un élément objectif, à savoir que l'aide fournie permette d'impliquer une autre personne. Ainsi des aveux fournis par l'athlète, mais portant sur ses propres infractions et ne permettant pas la poursuite d'un tiers n'ouvrent pas droit aux mesures de clémence* …". The point is indeed reflected in Article 65.4 of the FIFA DC, where it indicates that the help given has to lead to "*the exposure or proof of the doping offence by another person*" (emphasis added).

The third issue refers to the rules on the proof of doping.

In such respect, the Panel notes that the burden of proof is initially on the party asserting that an anti-doping rule violation has occurred (Article 106 of the FIFA DC and Article III.1 of the FIFA ADR). However, according to Article III.2 of the FIFA ADR, the party asserting that an anti-doping rule violation occurred is not called to give evidence of the application of the relevant rules concerning the conduct of the analysis and the custodial procedures. The player, nevertheless, may rebut this presumption by establishing that a departure from the International Standard for Laboratories has occurred; in this case, the party asserting that an anti-doping rule violation has occurred has the burden of establishing that such departure did not undermine the validity of the adverse analytical finding.

As to the standard of proof (as confirmed also with respect to the application of the FIFA DC and the FIFA DCR by the CAS award of 3 June 2008, CAS 2006/A/1385, para. 55), evidence has to be given that an anti-doping rule violation has occurred "*to the comfortable satisfaction of the hearing body, bearing in mind the seriousness of the allegation which is made*". This standard of proof is greater than "*a mere balance of probability*" but less than "*proof beyond reasonable doubt.*" On the other hand, when the burden of proof is upon the player to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a "*balance of probability.*" The balance of probability means that the athlete alleged to have committed a doping violation bears the burden of persuading the judging body that the occurrence of a specified circumstance is more probable than its non-occurrence.

In light of the foregoing, the Panel can turn to the questions mentioned above.

Mr Medeiros and Mr Marques

1. Have doping offences been committed by Mr Medeiros and Mr Marques?

It is undisputed that the doping controls that took place on 31 October 2008 and on 9 November

2008 showed the presence of Oxymesterone in the samples provided by Mr Marques and Mr Medeiros respectively.

Oxymesterone was (and still is) a prohibited substance at the time when the doping controls took place. Appendix A to the FIFA DCR, indeed, mentions Oxymesterone as an anabolic agent (an anabolic androgenic steroid), prohibited, as such, at all times (in- and out-of-competition).

Pursuant to Article II.1 of the FIFA DCR the presence of a prohibited substance in a player's bodily sample constitutes an anti-doping rule violation.

The Panel therefore concludes that the presence of Oxymesterone in the bodily samples of Mr Marques and of Mr Medeiros constitutes a doping offence: They did not dispute in the first instance or in the appeal the adverse analytical finding of the laboratory and, therefore, accepted that they had committed a doping offence. Mr Medeiros and Mr Marques committed the doping offence contemplated by Article II.1 of the FIFA DCR, for which Article 65.1 of the FIFA DC provides the sanction of a two-year suspension.

2. Are the conditions met for the cancellation or reduction of the sanction under Article 65.2 or 65.3 of the FIFA DC?

Having established that Mr Medeiros and Mr Marques committed anti-doping rule violations, the question that the Panel has now to consider, refers to the possibility to eliminate or reduce pursuant to Article 65.2 or 65.3 of the FIFA DC the otherwise applicable ineligibility periods.

Comment to Articles 10.5.1 and 10.5.2 of the WADC alone, however, suggests that the application of the *No Fault or Negligence*-principle in the case at hand is to be excluded. As expressly made clear therein, fault or negligence cannot be excluded because of the simple fact that the prohibited substance had been administered without disclosure to the players by the trainer. Mr Marques and Mr Medeiros are therefore not entitled to the elimination of the sanction pursuant to Article 65.3 of the FIFA DC.

In the same way, the Panel notes that it cannot find that the behaviour of Mr Marques and of Mr Medeiros was not significantly negligent.

In the case at hand, in fact, Mr Marques and Mr Medeiros blindly accepted the pills administered by Mr Eranosian: they did not refuse, they did not ask questions or make any enquiry, and they did not conduct further investigations with a doctor or another reliable specialist. Those circumstances show that Mr Marques and Mr Medeiros were indeed very negligent under the alleged circumstances, also considering that the risks associated with contamination of products should be well known among athletes, years after the first cases of anti-doping rule violations caused by contamination or mislabelled food supplements were detected and considered in the CAS jurisprudence. Mr Marques and Mr Medeiros are therefore not entitled to the reduction of the sanction pursuant to Article 65.2 of the FIFA DC.

3. Are the conditions met for the reduction of the sanction under Article 65.4 of the FIFA DC?

The main question that has to be examined by the Panel with respect to the position of Mr Marques and Mr Medeiros, concerns the satisfaction of the conditions set by Article 65.4 of the FIFA DC for the reduction of the sanction otherwise applicable: WADA denies that the conditions of Article 65.4 are satisfied and therefore challenges the Decision of 24 April 2009 that held otherwise.

As already mentioned above, for the purposes of the application of the FIFA Cooperation Rule, this Panel has simply to verify whether "help" was provided and whether this help led to the exposure of the doping offence by another person.

In such respect, the Panel notes, also on the basis of the declarations rendered by Mr Michanikos while heard as a witness at the hearing, that it is undisputed that Mr Marques and Mr Medeiros were the first individuals to expose the actions of Mr Eranosian, i.e. that pills had been administered to the players by Mr Eranosian before the matches of APOP Kinyras. Only after Mr Marques and Mr Medeiros had described Mr Eranosian's practice, could further investigation be conducted with respect to the pills administered by Mr Eranosian. Only following the declarations of Mr Marques and Mr Medeiros could Mr Eranosian be requested to give explanations and disciplinary proceedings were started against him.

The Panel, therefore, finds that Mr Marques and Mr Medeiros provided "help" by way of assistance and information to Mr Michanikos with regard to the implication of Mr Eranosian in their anti-doping rule violation. Mr. Michanikos did not have the legal authority to compel them to disclose or testify before him. Therefore, under the circumstances, the Panel cannot understand how they could have cooperated more with the investigation of Mr Michanikos concerning Mr Eranosian. In the opinion of the Panel, in conclusion, Mr Marques and Mr Medeiros

satisfied the conditions for the application of the FIFA Cooperation Rule. The argument of WADA, that the doping offence committed by Mr Eranosian would have been discovered even without the information provided by Mr Marques and Mr Medeiros is in this context totally immaterial.

Mr Marques and Mr Medeiros are therefore entitled to a reduction of the sanction pursuant to Article 65.4 of the FIFA DC. This Panel agrees on the point with the Decision of 24 April 2009.

4. What is, in light of the above, the appropriate sanction for Mr Medeiros and Mr Marques?

Pursuant to Article 65.4 of the FIFA DC, if help is given (leading to the exposure or proof of a doping offence by another person), the sanction may be reduced, but only by up to half of the sanction applicable; a lifelong ban may not be reduced to less than eight years. As a result, since the sanction contemplated by Article 65.1 of the FIFA DC for the offence of Mr Marques and Mr Medeiros is a two-year suspension, Mr Marques and Mr Medeiros can benefit of a maximum reduction to one year of suspension. Indeed, the Judicial Committee, in the Decision of 24 April 2009, applied the reduction to its maximum extent.

Preliminarily, the Panel notes that WADA in its submissions, challenged the application to Mr Marques and Mr Medeiros of the FIFA Cooperation Rule. WADA, however, did not specifically challenge the Decision of 24 April 2009 with respect to the measure of the reduction applied. As a result, the Panel, having found that the Mr Marques and Mr Medeiros were entitled to the benefits under the FIFA Cooperation Rule, could not review the extent in which such benefits were granted, failing a request by WADA. The Panel, however, finds that the Decision of 24 April 2009 can be confirmed on this point also for other reasons.

The Panel holds in fact that, for the determination of the measure (of the reduction) of the sanction, some elements are relevant: in deciding the period of ineligibility in a range between one and two years, the Panel has to review the degree of assistance provided, i.e. the type of information shared, the manner in which it was shared, and its impact on the discovery of the involvement of another subject in a doping offence, as well as the doping offence the individual claiming the reduction is involved in (it is in fact conceded that the offence committed by the athlete could appear so serious that it would not be conceivable to grant this athlete a measure of mercy). In the determination of such reduction, the disciplinary body enjoys a discretionary power (TAS 2007/A/1368, at para. 98).

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, para. 86; 15 July 2007, CAS 2005/A/830, paras. 10.26; 26 June 2007, 2006/A/1175, para. 90; and the advisory opinion of 21 April 2006, CAS 2005/C/976 & 986, para. 143).

In this case, the Panel holds that in the specific case, the sanction imposed by the Judicial Committee is not evidently and grossly disproportionate, with a view to the elements that had to be considered in the exercise of such discretion: Mr Marques and Mr Medeiros voluntarily provided as much help as they could; they were open and frank; their offences (however caused by a negligent behaviour) cannot be described as intentional.

The Panel concludes therefore that the period of the ineligibility of one year imposed by the Judicial Committee is proper under to Article 65.4 of the FIFA DC for the anti-doping rule violation committed by Mr Marques and Mr Medeiros.

Mr Eranosian

1. Has a doping offence been committed by Mr Eranosian?

It is undisputed that Mr Marques and Mr Medeiros tested positive on 31 October 2008 and on 9 November 2008 for Oxymesterone following the ingestion of pills given to them by Mr Eranosian before the match.

During the investigation of Mr Michanikos, as confirmed in the Investigation Report, it was held that the pills administered by Mr Eranosian were contaminated with Oxymesterone. The point, set in the Decision of 2 April 2009 and in the Decision of 24 April 2009, is unchallenged.

As already mentioned above, Oxymesterone was (and still is) a prohibited substance at the time the doping controls took place.

Pursuant to Article II.8 of the FIFA DCR the administration of a prohibited substance constitutes an anti-doping rule violation.

The Panel therefore concludes that the administration of Oxymesterone by Mr Eranosian to Mr Marques and Mr Medeiros constitutes a doping offence: Mr Eranosian committed the doping offence contemplated by Article II.8 of the FIFA DCR, for which Article 65.1 of the FIFA DC provides the sanction of a four-year suspension.

2. Are the conditions met for the cancellation or reduction of the sanction under Article 65.2 or 65.3 of the FIFA DC?

Having established that Mr Eranosian committed an anti-doping rule violation, the question that the Panel has now to consider refers to the possibility to eliminate or reduce pursuant to Article 65.2 or 65.3 of the FIFA DC the otherwise applicable ineligibility period.

The Panel denies this possibility, taking into consideration, the conditions to which it is subject: Mr Eranosian administered pills he had obtained from a source unrelated to the producer; he did not ask questions or conduct further investigations with a doctor or another reliable specialist; he did not have the pills tested by an official laboratory. Those circumstances show that Mr Eranosian was extremely negligent under the alleged circumstances.

In this context, the Panel finds that the elements invoked by Mr Eranosian have not been substantiated and are not relevant: the fact that he did not administer the pills secretly, but in full view of all the players and other coaching staff in the dressing room before the game, or that he did not force anyone to take the pills, do not contradict or exclude his significant negligence.

Mr Eranosian is therefore not entitled to a reduction of the sanction pursuant to Articles 65.2 or 65.3 of the FIFA DC.

3. Are the conditions met for the reduction of the sanction under Article 65.4 of the FIFA DC?

Also, with respect to the position of Mr Eranosian, the main question that has to be examined by the Panel concerns the application of the FIFA Cooperation Rule: WADA and FIFA deny its application and therefore challenge the Decision of 2 April 2009 that held otherwise.

In this respect, the Panel notes that according to the Decision of 2 April 2010, the Judicial Committee appears to have imposed on Mr Eranosian, a reduced sanction in light of "*the immediate cooperation and willingness of Mr Eranosian for the detection of this sad case, with unpleasant results for him, which would possibly not been achieved without his contribution*".

At the same time, the Panel has noted the letter dated 14 May 2009 whereby the CFA explained that "*Mr. Eranosian had opened a case against the Cyprus FA in the civil courts*" and that "*he was persuaded to abandon the case in the civil courts in exchange for a lesser penalty*".

In the opinion of the Panel, however, the elements considered by the Judicial Committee or mentioned in the CFA's letter of 14 May 2009 are not relevant under the FIFA Cooperation Rule.

Under Article 65.4 of the FIFA DC, it is necessary that the help is given leading to the exposure or proof of the doping offence by another person. The fact that Mr Eranosian admitted his doping offence, provided for testing the pills he had distributed, apologized for his actions and explained all the elements surrounding them, or that he withdrew an action brought before Cyprus courts against the CFA does not trigger the application of the FIFA Cooperation Rule. In essence, he only provided a confession of his actions, but did not provide help leading to the exposure or proof of the doping offence by another person: for instance, he did not disclose the name of the supplier of the pills containing Oxymesterone.

Mr Eranosian is therefore not entitled to a reduction of the sanction pursuant to Article 65.4 of the FIFA DC.

4. What is, in light of the above, the appropriate sanction for Mr Eranosian?

In light of the foregoing, the Panel finds that Mr Eranosian has committed an anti-doping rule violation and is not entitled to any reduction of the period of ineligibility to be imposed for the offence for which he is responsible. The Decision of 2 April 2009, to the extent it otherwise held, is to be set aside.

The reduction of the sanction to be imposed is not justified, in addition, by any of the other reasons suggested by Mr Eranosian. No reduction can be granted on the basis of the fact that "*he is a first offender*": indeed, should this not be the case, Mr Eranosian would be subject to a much harsher sanction; no reduction can be applied on the basis of the equality of treatment principle, since, in any case, no comparable infringement has been committed in this case by other subjects.

As a result, the Panel imposes on Mr Eranosian, pursuant to Article 65.1 of the FIFA DC, the sanction of a four-year suspension, to be calculated

from 2 April 2009, the date on which Mr Eranosian was originally suspended.

The Other Players

1. Have doping offences been committed by the Other Players?

WADA also challenges in the arbitration, the Decision concerning the Other Players, whereby the CFA decided not to start disciplinary proceedings against them. Contrary to the CFA's decision, WADA requests this Panel to find the Other Players responsible for the anti-doping rule violation contemplated by Article II.2 of the FIFA DCR, as having used the prohibited substance administered by Mr Eranosian. As a result, the sanction provided by Article 65.1.a of the FIFA DC should apply and the Other Players should be suspended for two years.

WADA, being the party asserting that an anti-doping rule violation has occurred, has the burden of establishing the infringement committed by the Other Players. In other words, WADA has to prove that the Other Players used a prohibited substance.

The Panel notes that WADA offers, in support of its claim against the Other Players, a line of reasoning based on logic as follows: Mr Eranosian administered some pills to Mr Marques and Mr Medeiros containing a prohibited substance; Mr Eranosian administered the same pills to the Other Players; therefore the Other Players used a prohibited substance. In other words, WADA is basing its allegation on a presumption: starting from two established facts, it infers a conclusion with regard to a third, uncertain fact.

The Panel is not convinced to its "*comfortable satisfaction*" that such conclusion – failing additional corroborating evidence – can be accepted.

The Panel notes, in fact, that there is no evidence that the actual pills individually used by each of the Other Players contained a prohibited substance. Indeed some players took the pills, were subsequently tested and there was no adverse analytical finding.

No clear-cut evidence was brought to show that – contrary to a common assumption in the CFA disciplinary proceedings concerning Mr Medeiros, Mr Marques and Mr Eranosian – the pills administered by Mr Eranosian were "plain steroids" and not "caffeine pills" contaminated by steroids. WADA itself refers in its submissions to the dangers of "nutritional supplements"; and the concrete possibility that the pills were a contaminated product can be shown by the fact that the players of APOP Kinyras who underwent doping controls did not produce adverse analytical results (except Mr Marques and Mr Medeiros).

The supposition that the pills administered by Mr Eranosian were "caffeine pills" contaminated by steroids excludes the possibility to follow the mentioned WADA's line of reasoning, since it is possible that, even though Mr Eranosian administered some pills to Mr Marques and Mr Medeiros containing a prohibited substance and Mr Eranosian administered the same pills to the Other Players, the Other Players did not use a prohibited substance.

In light of the above, the Panel holds that there is insufficient evidence that the Other Players used a prohibited substance. The decision not to open disciplinary proceedings against them was correct: the WADA appeal against the Other Players must be dismissed.

D. Conclusion

The Panel holds that the appeals brought by WADA (CAS 2009/A/1817) and FIFA (CAS 2009/A/1844) against the Decision of 2 April 2009 are upheld.

The Decision of 2 April 2009 is set aside and Mr Eranosian is declared ineligible for a period of four years, commencing on 2 April 2009, the date of his suspension according to the Decision of 2 April 2009.

The appeals filed by WADA against the Decision of 24 April 2009 and against the Decision concerning the Other Players are dismissed.

In the same way, all other prayers for relief submitted by the parties are to be dismissed.

Arbitration CAS 2010/A/2090
Aino-Kaisa Saarinen & Finnish Ski Association (FSA) v. Fédération Internationale de Ski (FIS)
7 February 2011

Cross-country skiing; disqualification for intentional obstruction during a race; self-restraint of CAS to rule on field of play decisions; exception upon proof of bias, malice, bad faith, arbitrariness or legal error; CAS power of review; application of the field of play doctrine to sanctions; discretionary powers of the adjudicating body in determining the appropriate sanction

Panel:
Mr. Michael J. Beloff QC (United Kingdom), President
Mr. Olli Rauste (Finland)
Mr. John Faylor (USA)

Relevant facts

The First Appellant is a cross-country skier who competes internationally for Finland ("Ms Saarinen"). The Second Appellant is the governing body for skiing in Finland (Finnish Ski Association, FSA).

On 20 December 2009, the international federation and worldwide governing body for the sport of skiing, the Fédération Internationale de Ski (FIS), disqualified Ms Saarinen after a World Cup 15km race at Rogla, Slovenia for a violation of the ICR Article 392.5 (intentional obstruction during a race).

On 22 December 2009, the Appeals Commission of the FIS dismissed her appeal.

On 5 March 2010, the FIS Court dismissed her further appeal against the decision of the Appeals Commission.

As to substance, the FIS Court rejected the Jury finding that Ms Saarinen *"had direct intention to obstruct Ms Majdic",* but applied the doctrine of *dolus eventualis, i.e.*, that where someone knows that obstruction may occur and she acts in spite of it, she must be taken to accept that this result, even if not desired by her, may occur, which qualifies in law as intention. Such finding can be made by reference to such factors as the gravity of the risk, whether or not the obstruction is in violation of a duty, and the experience of the person charged. The FIS Court considered that all the relevant criteria were satisfied and concluded that *"somebody who does not look backward or to the side before changing tracks (as Ms Saarinen did) violates elementary rules".* As to jeopardy, the FIS Court noted that Ms Saarinen hit the binding of Ms Majdic with one toe which caused the fall and could have caused her an injury. As to violation of the rules of responsibility for competitors or unsportsmanlike behaviour, the FIS Court referred to the fact that, when overtaking, competitors must not obstruct each other (see rule 340).

As to sanctions, the FIS Court noted in company with the Appeals' Commission that: (i) the events took place at a World Cup race; (ii) Ms Saarinen's skis crossed the skis of Ms Majdic, causing a clear obstruction and the fall of Ms Majdic; (iii) the obstruction destroyed the race of Ms Majdic; (iv) there was no emergency; (v) no doubt the will of Ms Saarinen was to gain an advantage; (vi) three rules had been violated by Ms Saarinen; (vii) they assumed in Ms Saarinen's favour that she wanted to pass Ms Kowalczyk, to gain 15 WC points, but also knew, and took into account, the possibility that she might obstruct Ms Majdic; (viii) evaluating all those factors, the FIS Court considered that the sanction was not disproportionate.

Paragraph 5 of the FIS Court Decision states:

"Summary

To sum up there may have been some failures in the procedure, but they have been cured during the procedure.

The Appeals Commission did not violate any rule when they decided to disqualify the Appellant 2 for having violated art. 392.5 ICR (intentional obstruction), art. 391.7 ICR (unsportsmanlike behaviour) and art. 392.2 ICR (jeopardy). The Court concludes that the Appellant 2 acted with dolus eventualis and that she therefore intentionally obstructed Ms Majdic.

Even if the intentional obstruction would not have been proven (and the obstruction had therefore to be qualified as grossly negligent) the disqualification is justified due to the

other violations of the rules (jeopardy, violation of the rules of responsibility of competitor/unsportsmanlike behaviour)".

On 1 April 2010, Ms Saarinen and the FSA filed an appeal with the CAS against the FIS Court Decision.

Extracts from the legal findings

Counsel for Respondent submitted that the Panel was seized of essentially a field of play decision. There were two issues, both arising in the context of the particular competition, (i) was there a breach of any rule? (ii) if so, what was the appropriate sanction?

Whether what Ms Saarinen did constituted a breach of those rules (so properly interpreted), was, Counsel for Respondent submitted, axiomatic for the internal machinery of the sport. The essence of the field of play doctrine is that it is for sporting bodies via their appropriate officials to take decisions relevant to the conduct of particular events. They only lose their immunity from review by CAS in circumstances of arbitrariness and bad faith, (meaning fraud, corruption or malice), or some equivalent vice. This proposition, he asserted, is supported by a long and consistent line of authority [see CAS OG 96/006 (low blow in boxing); CAS OG 02/007 (collision in skating); CAS 2004/A/727 (spectator inference with race); CAS 2004/A/704 (judges' admitted mismarking); CAS 2008/A/1641 (running out of lane in athletics); see further, Lewis/Taylor, Sports Law and Practice, 2nd ed, paras. 4.80-6, Beloff/Beloff, Halsbury Laws Centenary Edition, "The Field of Play", pp 147-151]. The doctrine concerns not only the evaluation of the conduct of an event but whether a protest has been properly filed (see CAS 2008/A/1641, para. 89).

The same reasoning, Counsel for Respondent further asserted, must apply to the sanction imposed. CAS jurisprudence is alert to distinguish between sanctions referable to a particular competition and sanctions arising out of a competition but with more protracted implications, *i.e.*, a disciplinary ban (see CAS OG 00/011). In this instance, the disqualification was purely competition-specific.

In short according to Counsel for Respondent, liability and sanction are two sides of the same coin. It is not for CAS to deal in a different currency.

Counsel for Respondent accepted that the FIS Court had to correctly apply the law, since it is a Swiss body and Swiss law applied. However Swiss law recognises the concept of *dolus eventualis* applicable to the obstruction offence: and neither of the other two offences that were relied upon – unsportsmanlike behaviour, or putting another competitor in jeopardy – require equivalent proof of intention actual or deemed, but merely proof of the objective facts said to constitute those offences. Hence there was no legal error which could be said to flaw the FIS Court's decision.

This overarching analysis would have compelling force if the appeal had been brought against the decision of the initial decision maker *i.e.* the competition jury direct to CAS, but is obviously more problematic where, as here, the decision appealed is that of a second tier appellate body. It requires the CAS Panel to view the entire process, in this instance Jury, Appeals' Commission and FIS Court, as a continuum, and to draw no distinction between the three tiers, notwithstanding that the last of those bodies adjudicated in a location and at a date far removed from the original competition and with a restricted scope of review – see Statutes Art. 52.2.2.

Whether the field of play doctrine, whose existence is well established, enjoys such elasticity depends on whether it is the subject matter of the decision or the mode of its resolution which determines its ambit, but CAS jurisprudence has hitherto marked out no precise guidelines (see CAS 2006/A/1176, para. 7.7). The explanation may lie in the facts that the procedures (including any appeals) for resolving disputes arising out of competition vary between different sports, and the disputes themselves occur in markedly different contexts (see CAS 2009/A/1783 where the panel overruled a disqualification of a rider in a duathlon for dangerous riding causing a collision – a set of circumstances not materially distinct from those in the present appeal and found that the wrong body took the decision complained of, and noted that in any event field of play decisions can be reviewed if *"they are made in an illegal manner or in violation of the defined process or of fundamental rules"* (para 138)).

From the CAS jurisprudence that serve to illuminate this sometimes obscure pathway the Panel distils the following unnuanced propositions:

1) Abstinence by CAS from ruling on field of play decisions is not a matter of jurisdiction, but of arbitral self-restraint (CAS 2004/A/727; CAS 2006/A/1176).

2) The rationale for such self-restraint includes supporting the autonomy of officials; avoidance of the interruption to matches in progress; seeking to ensure the certainty of outcome of competition; the relative lack of perspective and/or experience of appellate bodies compared with that of match officials (CAS 2004/A/704).

3) Subject to 4), the doctrine at any rate applies to prevent rewriting the results of the game or of sanctions imposed in the course of competition.

4) The doctrine is disapplied upon proof that decisions otherwise falling within its ambit were vitiated by bias, malice, bad faith, arbitrariness or legal error (CAS 2004/A/727, CAS 2004/A/704, CAS 2006/A/1176).

5) Within those limits the doctrine is compatible with Swiss law (CAS 2006/A/1176).

6) If the decision of an official is subject to unrestricted appeal to an appellate body, which will be seized of it during, immediately after, or even proximate to the competition *prima facie* the same doctrine applies (CAS 2008/A/1641).

7) Where by contrast the decision under appeal is of an appellate body within the sport whose determination in respect of the field of play decision is detached in point of location and time from that decision, and has its jurisdiction defined by its own rules, then the doctrine has no application. CAS can review the appellate decision to see whether the appellate body made, within terms of its own jurisdiction, a relevant error (CAS 2008/O/1483).

8) The above principles apply *mutatis mutandis* to competition specific sanctions although not inflexibly, if interests of person or property are involved (CAS 2005/A/991).

It is the Panel's view that respect must be paid to the rules of the respondent body here the FIS. It allocated the roles of the three bodies thus. The Competition Juries decide whether there have been breaches against the competition rules (Statutes Article 41). The Appeals Commission decides appeals against decisions of Competition Juries (Statutes Article 42.1 (with it seems restriction)). The FIS Court decides appeals against the decision of the Appeal Commission "only" "*on a point of procedure or on the application of the rules*" (Statutes Article 52.2.2). The second stage of appeal is clearly envisaged to be narrower than the first stage.

Two grounds for appeal to the FIS Court are identified. The first ground entitles a competitor to appeal where there has been a departure from the stipulated procedure imperilling its fairness. The second ground could, as a matter of language, entitle the competitor to appeal where he (or she) simply disagrees with the decision against which the appeal is brought. The Panel, however, does not consider that the phrase "on the application of the rules" can be given so wide a meaning: it identifies, in its view, an error of law, i.e., misconstruction: otherwise it would not, as was presumably intended, limit at this level, as distinct from at the level of the Appeal Commission the breadth of a competitors complaint: the word "only" introducing the grounds of appeal must be given appropriate weight.

Against that background the Panel reaches the following conclusions as to approach. The Competition Jury makes what are quintessentially field of play decisions. If there were no internal mechanisms for appeal, but an appeal was direct to CAS, CAS would not interfere other than if bias or other equivalent mischief or error of law were identified. The Appeals Commission (again on the same hypothesis that an appeal from its decisions was direct to CAS) would enjoy the same qualified immunity from CAS review. Appeals to the Commission are at large: it determines appeals proximately to the competition. Its decisions could therefore also be classified as field of play decisions.

The FIS Court is an altogether different animal. Appeals to it are restricted in Art. 52.2.2 of the FIS Statutes to two grounds only. It has specified procedures. While it is itself concerned in a case such as the present with a field of play decision, its decision is not itself fairly characterised as a field of play decision. CAS can therefore review the FIS Court's decision *de novo* under Article R57 of the Code.

The consequential question is what is meant by *de novo* in this context. Where the rules of a governing body, (there the IAAF) acknowledged the jurisdiction of a CAS *ad hoc* panel but purported to restrict the grounds upon which an appeal to such panel – there in relation to a doping conviction – could be brought before it, the *ad hoc* panel's rules allowing for unrestricted review trumped those of the governing body (see CAS OG/04 003, para 8). However this does not mean that CAS can ignore the particular incidents of the decision against which the appeal is brought. Its scope of review in this context cannot be wider than that of the FIS Court, *i.e.*, was the FIS Court correct to conclude that proper procedures were followed and that the relevant rules, properly construed, were applied. If CAS were simply to construe its *de novo* powers of review to put itself in the shoes of the Competition Jury (or Appeals Commission) and reconsider all the evidence about Ms Saarinen's actions during the Rogla race, it would indeed be reviewing a field of play decision contrary to clear authority.

The Panel therefore addresses the two questions. As to procedure, any deviation from that prescribed by the rules occurred before the Competition Jury had no adverse effect. Even if, to paraphrase, a hallowed dictum of the common law, fairness would not only be done, but be seen to be done, this was in any way violated by the Jury, the Appeals Commission cured it. The FIS Court pertinently observed at paragraph 4.3.5: *"it is the nature of sports competitions that decisions have to be made quickly. In particular the jury on the site is under high time pressure. It can be expected the jury works as carefully as possible and that hearings are conducted seriously. On the other hand, the requirements regarding the right to be heard cannot be set too high. The Court cannot expect perfection from the Jury. If a party cannot bring in the relevant arguments, an appeal to the Appeals' Commission may bring relief".*

The very purpose of such appeal is to correct flaws both in substance and procedure at the hearing of first instance; indeed the appeals process will be futile if it were otherwise. The Panel cannot ignore CAS's view of the remedial power of its own procedures. It has been frequently said that the *de novo* hearing before CAS relegates procedural deficiencies in the hearing conducted by the body appealed against to the margins (see TAS 98/208). The Panel must logically apply to other appellate bodies with equivalent power, the principles which applies to itself (see analogously in common law Calvin v. Carr [1980] (AC 574)).

The Panel equally finds that the FIS Court correctly determined that there had been no error of law in the sense of application of an irrelevant rule or misconstruction of a relevant one considering the modification by the Appeals Commission of the decision of the Competition Jury. There is nothing in the regulatory structure of the FIS which disentitled the Appeals Commission to re-categorise the facts found by them by reference to different rules than those relied on by the Competition Jury; this was a permitted consequence of an open ended first instance appeal. Nor did the Appeals Commission or FIS Court misconstrue the rules found by them to be relevant to the facts found by them.

It is not for the Panel with its limited role described above to question decisions of fact (*e.g.* what was the nature of the obstruction caused, or judgement, what was unsportsmanlike behaviour?); but it may nonetheless question whether the sanction, within the range allowed by the rules, was properly found to be proportionate.

On the one hand it can be argued that *dolus eventualis* is a form of intent distinguishable from the conventional deliberate variety (*i.e.*, where the competitor's very purpose was to obstruct the competitor behind her); hence disqualification could be deemed to be disproportionate as a sanction both in itself and because it leaves no space for a severer sanction in the case of such conventional deliberate intent to obstruct. Moreover the record shows that out of 8 cases including those of similar nature in the relevant cross country ski-competition season out of 8 penalties imposed only 2 were disqualifications, 6 reprimands.

On the other hand are the factors alluded to by the FIS Court in its decision. The Panel observed with the benefit of the video that it does seem to be it that even if (which it has no reason at all to doubt) Ms Saarinen's object was purely to gain bonus points by overtaking Ms Kowalczyk she paid no heed to Ms Majdic, the competitor behind her and in fact not only baulked her but actually caused her to fall. It is indeed admitted by her that she did not look behind her and her coach, Mr Dalen, observed that her technique was faulty. She took, it seems to the Panel, a clear risk on a not altogether simple manoeuvre. The FIS Court considered her actions could not be classified merely as gross negligence.

Moreover in a case of a conventionally deliberate intent to obstruct, sanctions over and above disqualification could be visited upon the offender so allowing for differentiation in terms of sanction between various forms of intentional obstruction.

The Panel has no means (any more than the FIS Court did) of comparing Ms Saarinen's case with others of necessity unexplored before it. It is in any event axiomatic that reasonable people (including sporting bodies) may reasonably have different views as to the gravity of different breaches of the rules of the sports and the sanctions appropriate to them. While CAS enjoys the power to form its own view on the proportionality of any sanction, it ought not to ignore the expertise of the bodies involved in the particular sport in determining what sanctions are appropriate to what offence. It is notable that in this case three separate ski bodies reached the same conclusion as to penalty even if by different routes. The Panel considers that the FIS Court had a margin of appreciation not exceeded in this case. Moreover Swiss case law does not itself suggest that a lesser sanction would in principle be appropriate merely because the intent was of the *dolus eventualis* variety (see Swiss Supreme Court [ATF] 134 IV 28). It will not accordingly reduce the sanction.

Ms Saarinen can at least be consoled by this that on the finding of the FIS Court she was not guilty of a deliberate effort to frustrate in an improper manner a competitor. She was guilty only of an offence of

lesser seriousness. She is an experienced, successful and well respected cross country skier. This incident has caused, the Panel trusts, only a transient blow to her reputation.

The Panel is confident that not only is it not for it, in principle, to interfere with a decision of the kind appealed; but even if it were within its power to do so, there is no sufficient reason shown to it why it should.

Arbitration CAS 2010/A/2098
Sevilla FC v. RC Lens
29 November 2010

Football; "Sell-On Clause" contained in a transfer agreement; principle of interpretation of a contractual provision; notion of "sale" of a player in the world of professional football; object of a "sell-on Clause"; notion of "resale" for the purpose of a "Sell-On Clause"

Panel:
Prof. Luigi Fumagalli (Italy), President
Mr. Stuart McInnes (United Kingdom)
Mr. Olivier Carrard (Switzerland)

Relevant facts

Sevilla FC ("Sevilla" or the "Appellant") is a Spanish football club affiliated to the Real Federación Española de Fútbol (RFEF), which is the national football association for Spain. The RFEF, in turn, is affiliated to the Fédération Internationale de Football Association (FIFA), the world governing body of football.

RC Lens ("Lens" or the "Respondent") is a French football club affiliated to the Fédération Française de Football (FFF), which is also a member of FIFA.

On 10 July 2007, Lens and Sevilla signed, in Spanish and in French, a memorandum of understanding ("*Protocole d'Accord*" or "*Protocolo de Acuerdo*", also referred to as the "Transfer Agreement") providing for the terms and conditions of the transfer of the player S. (the "Player") to Sevilla.

Article 2 of the Transfer Agreement set the financial conditions of said transfer. In particular, its Article 2.1 provided for the obligation of Sevilla to pay Lens the amount of EUR 4,000,000 (four million Euros), net of taxes, duties and charges of all kinds, in three instalments.

Article 2.2.4 of the Transfer Agreement, then, read as follows *("2.2.4 - Profit-sharing. In case of resale of the player S. by Sevilla FC to another club, racing Club of Lens shall receive: - 10% of the capital gain between 4,000,000 Euro and 8,000,000 Euro. - 15% beyond 8,000,000 Euro. - These amounts may be cumulated"* (English translation provided by the Respondent; the translation of the Appellant is equivalent).

In other words, the parties agreed in Article 2.2.4 of the Transfer Agreement (the "Sell-On Clause") that in case of "resale" ("*revente*" or "*reventa*") of the Player by Sevilla to another club, Lens would receive an additional portion of the price to be paid by Sevilla, expressed as a percentage of the "capital gain" ("*plus value*", "*plusvalia*") made by Sevilla.

On 12 July 2007, Sevilla and the Player concluded an employment agreement valid until 30 June 2011 (the "Employment Agreement").

The Second Clause of the Appendix to the Employment Agreement (the "Indemnification Clause") stated, for the purposes of the Spanish *Real Decreto 1006/85, de 26 de junio 1985, por el que se regula la relación laboral de los deportistas profesionales* (the "Real Decreto 1006/85"), that, in the event of unilateral termination of the Employment Agreement by the Player, the Player would pay Sevilla, as indemnification, the sum of EUR 14,000,000, in case of termination before 15 February 2009, and EUR 10,000,000 after said date, as follows ("To the effect of Royal Decree 1006/85 of the 26th of June, in the case of unilateral breach ante tempus of this present contract, or its possible extensions, by the player before the expiry of the agreement, as well as for the purpose of indemnification for this same matter in case that the parties submit the matter to the arbitration bodies of FIFA or UEFA, the Player should indemnify Sevilla FC with the sum of EUR 14,000,000, if the rescission occurs before the 15th of February 2009, and EUR 10,000,000 if it occurs afterwards" (English translation provided by the Appellant).

In a letter dated 26 May 2008, the Player informed Sevilla of the exercise of the right to terminate the Employment Agreement pursuant to the Real Decreto 1006/85, with effect as of 30 June 2008, as follows ("By the present letter, I do inform you that I am exercising my right to extinguish ante tempus the employment contract that links us, from the date of 30 June 2008, according to what it is established

in article 13.(i) of RD (Royal Decree) 1006/1985. As for the payment of the sum that might correspond according to article 16 of the same regulation, I am at your disposal in order to treat the question" (English translation provided by the Appellant).

The amount of EUR 14,000,000 specified in the Indemnification Clause was later (on 14 July 2008) received by Sevilla through the offices of the Spanish *Liga Nacional de Fútbol Profesional*, which remitted to Sevilla a cheque drawn by the Spanish club Barcelona FC ("Barcelona").

Indeed, at the time of the signature by the Player of the letter dated 26 May 2008, news was reported in the press indicating that the Player was to imminently sign an employment agreement with Barcelona.

As a result, on 27 May 2008, Lens contacted Sevilla for information regarding the transfer of the Player to Barcelona, seeking the additional payment provided for in the Sell-On Clause. In the absence of an answer from Sevilla, a further request was made on 12 June 2008.

On 16 June 2008, Sevilla replied to Lens asserting that no agreement had been entered into with Barcelona regarding the transfer of the Player, and that the Player had only informed Sevilla of his intention to unilaterally terminate the Employment Agreement.

Correspondence was then exchanged between Lens and Sevilla, but no agreement was reached by the parties: on one hand, Lens insisted that an additional payment was due by Sevilla on the basis of the Sell-On Clause as a result of the Player's transfer to Barcelona; on the other, Sevilla denied that any payment was due.

On 11 July 2007, Lens filed a claim with the FIFA Players' Status Committee (PSC) to obtain payment of the additional portion of the transfer compensation in accordance with Article 2.2.4 of the Transfer Agreement. The claim was based on Lens's firm belief of the existence of a transfer of the Player from Sevilla to Barcelona and, therefore, of the enforceability of the Sell-On Clause.

Sevilla resisted, asserting that Lens did not have any right to a payment according to the Sell-On Clause. Sevilla argued that no sale of the Player had taken place, because the Player had merely exercised his right to an early termination of the Employment Agreement by means of the payment of the compensation provided for in the Indemnification Clause, and, *de facto*, Sevilla itself had not entered into any agreement with Barcelona.

On 9 December 2009, the Single Judge of the PSC (the "Single Judge") issued a decision (the "Decision") on the claim brought by Lens, as follows:

"1. The claim of the Claimant, Racing Club de Lens, is partially accepted.

2. The Respondent, Sevilla FC, is ordered to pay the amount of EUR 1,300,000 to the Claimant, Racing Club de Lens, within 30 days as from the date of notification of this decision.

3. Any further claims lodged by the Claimant, Racing Club de Lens, are rejected.

4. If the aforementioned sum is not paid within the aforementioned deadline, an interest rate of 5% per year will apply as of expiring of the fixed time limit and the present matter shall be submitted upon the parties' request to FIFA's Disciplinary Committee for consideration and formal decision.

5. The final amount of costs of the proceedings in the amount of CHF 7,500 are to be paid by the Respondent, Sevilla FC, within 30 days as from the date of notification of the present decision as follows:

5.1 The amount of CHF 2,500 to FIFA …

5.2 The amount of CHF 5,000 to the Claimant, Racing Club de Lens.

6. The Claimant, Racing Club de Lens, is directed to inform the Respondent, Sevilla FC, immediately and directly of the account number to which the remittance in accordance with the above points 2. and 5.2. are to be made and to notify the Single Judge of the Players' Status Committee of every payment received".

In support of his Decision, the Single Judge held the following:

"8. … The Single Judge concluded that it had been established and was not contested by the parties to this dispute, that the employment contract between the player and the Respondent had terminated at the above mentioned date, i.e. 14 July 2008, as a result of the payment of the sum of EUR 14,000,000 to the Respondent.

9. The Single Judge further noted that the parties did not dispute that the player in question allegedly signed an employment contract with Barcelona on 26 May 2008. …

12. Consequently, … the Single Judge deemed that the question at the centre of the dispute was whether the payment in question of the sum of EUR 14,000,000 in

the above circumstances was equivalent to the transfer of the player S. between two clubs, which would thus activate clause 2.2.4 of the Protocole signed by the Claimant and the Respondent on 10 July 2007.

13. *The Single Judge firstly analyzed clause 2 of the appendix to the employment contract between the player and Sevilla. In this regard, the deciding authority underlined that this release clause, the content of which had been approved by the above two parties, should not be interpreted literally, i.e. by adhering only to the letter of the clause in question, but in accordance with the theory of the parties' recognizable intent, i.e. by ascertaining the meaning that the parties could reasonably have wished to give to the contractual clause in question. The Single Judge highlighted the fact that according to this interpretation, it appears likely according to the principle of good faith and in view of the considerable sum of EUR 14,000,000 set forth in the clause in question, that the Respondent and the player were providing for the possibility of a third club indirectly intervening in the payment of the release clause on a subsidiary basis with a view to contracting the services of the player in question.*

14. *The Single Judge then noted that in May 2008 the player S. had signed an employment contract with the club Barcelona before the notification and implementation of clause 2 of the appendix to the employment contract he had signed with Sevilla and that said fact had not been disputed by either of the parties. The Single Judge also observed that according to the Respondent's submissions, which are not disputed by the Claimant, Barcelona provided the player with the amount in question, EUR 14,000,000, so that he could terminate the employment contract signed with the Respondent on 12 July 2007.*

15. *In this regard, the Single Judge compared the content of clause 2 of the appendix to the employment contract signed between the player and Sevilla and the facts of this case to a transfer agreement signed by two clubs for the transfer of a player. The Single Judge underlined that a typical transfer agreement signed by two clubs and a player generally stipulates a sum of money freely agreed between the player's former and new clubs in exchange for the early termination of the contractual relationship between the player and his former club, which is thus tantamount to the early termination of the employment contract in question by means of the payment of a sum commonly described as the "transfer amount". Furthermore, the Single Judge underlined that the professional services that a player renders to a club is a factor that is liable to be assessed by the employer from a financial standpoint. Consequently, when a club shows an interest in the professional services of a player who has a valid employment contract with another club, the interested club must reach an agreement with the old club with regard to the value of this transfer, with a view to compensating the old club for agreeing to dispense with the professional services of the player in question before the expiry of the employment contract.*

16. *In view of the above paragraph, the Single Judge deemed that the two situations, i.e. the concrete one at hand in the present procedure concerning the payment of EUR 14,000,000 by Barcelona in accordance with the clause in the appendix to the employment contract signed between the player and the Respondent and the payment of a sum by one club to another in connection with a typical transfer agreement, are similar and have the same characteristics, in that they both constitute a transfer agreed between two clubs and a player for a specific amount for the early termination of a former labour relationship, except for the fact that in this dispute, at first the value of the transfer was agreed bilaterally, i.e. without the intervention of the interested club, Barcelona. Yet, the latter gave its agreement to the move of the player, thus to his transfer, at a later stage, namely when it agreed to sign the player and to pay the amount in accordance with the pertinent clause of the appendix.*

17. *With regard to the similarities in the above two situations, the Single Judge highlighted that in both cases a sum was paid to the player's former club to enable him to terminate the employment contract before the contractually stipulated expiry date with a view to being transferred to a new club. The Single Judge also insisted on the fact that the only difference resided in the fact that in the present case, the "transfer amount" was set bilaterally and Barcelona were not consulted at first, although they nevertheless subsequently freely accepted it and paid the relevant amount, EUR 14,000,000, to the player so that he could forward it to Sevilla. The Single Judge thus concluded that the facts of the present case constitute a transfer agreed to by Sevilla, in the terms it had offered at the time of concluding the employment contract with the player.*

18. *Consequently, and in view of the above paragraphs, the Single Judge decided that in the present case, the activation of the relevant contractual clause by the player S. (cf. clause 2 of the appendix to the employment contract concluded between the Respondent and the player), bearing in mind that the sum in question, EUR 14,000,000, was voluntarily borne by Barcelona, has to be considered a transfer agreed between the Respondent and Barcelona in the sense of clause 2.2.4 of the transfer agreement signed by and between the Claimant and the Respondent. The Single Judge underlined that the fact that said compensation for termination was provided for in the relevant employment contract, as mentioned in art. 17 of the Regulations, does not alter the interpretation of the facts in the present case.*

19. *The Single Judge thus took the view that the specific circumstances of this matter are tantamount to a transfer*

agreed between Sevilla, the player and Barcelona and that therefore, clause 2.2.4 of the Protocole signed by the Claimant and the Respondent was applicable in this case considering the present specificities.

20. *Subsidiary, the Single Judge held that if the present case were not considered a transfer in which clause 2.2.4 of the Protocole was applicable, this would lead to interpret the relevant clause 2.2.4 contrary to the principle of trust between the contracting parties and thus contrary to the principle of good faith. In such a case said clause would be interpreted as contrary to the loyalty that must be observed in legal relations. Not applying clause 2.2.4 of the Protocole in the present matter would be contrary to the meaning that should be objectively given to the clause in question. The Single Judge further held that this opinion was all the more justified in view of the profit of EUR 10,000,000 made by the Respondent following the departure of the player S. to Barcelona.*

21. *The Single Judge also referred to the Respondent's argument that the difference between the payment of a sum for the early termination of an employment contract and the transfer of a player agreed between clubs had been upheld by the Dispute Resolution Chamber in the case concerning the payment of a solidarity contribution between Club Atlético River Plate and Club Newell's Old Boys for the player Ariel Arnaldo Ortega. In this regard, the Single Judge underlined that the Respondent's position regarding the above decision cannot be backed in the matter at stake. In the above-mentioned case, the Dispute Resolution Chamber had previously ordered, via a formal decision, the player Ortega to pay compensation for unilateral termination of his employment contract with his former club without just cause. The Single Judge highlighted the fact that in the case cited by Respondent, the compensation for early termination was not provided for in the employment contract, i.e. on a consensual basis like it is the case in the present procedure, but was imposed by a judicial body after it was established that the employment contract had been unilaterally terminated without just cause. Most importantly, the Single Judge was eager to emphasise that, contrary to the case at stake, the new club of the player following the latter's unilateral and unjustified termination of the contract, had not had the opportunity to decide on its free will on the amount of compensation to be paid. As a consequence the Single Judge concluded that the affair cited by the Respondent is not comparable to the circumstances in the present procedure.*

22. *Consequently, and having established that clause 2.2.4 of the Protocole is applicable in this case, the Single Judge referred to Lens' specific claims.*

23. *With regard to Lens' claim regarding the application of clause 2.2.4 of the Protocole, the Single Judge referred to the content of the clause in question … . In this regard, the Single Judge decided that with regard to the "transfer amount" between EUR 4,000,000 and EUR 8,000,000 received by Sevilla, the Claimant was entitled to receive 10% of EUR 4,000,000 i.e. EUR 400,000. Furthermore, the Single Judge decided that of the "transfer amount" received by Sevilla in excess of EUR 8,000,000, the Claimant was entitled to a 15% share, i.e. EUR 900,000. Consequently, and in view of the foregoing, the Single Judge concluded that in accordance with clause 2.2.4 of the Protocole, the Claimant was entitled to receive the sum of EUR 1,300,000.*

24. *With regard to Lens' claim for interest of 5% on the sum of EUR 1,300,000 payable from 12 June 2008, the Single Judge decided that this part of the claim should be rejected, as in the present case and given the legal complexity of the case, no bad intention could be attributed to the Respondent, as the latter was objectively convinced of the soundness of its arguments that the application of clause 2.2.4 of the Protocole should be excluded from this case.*

25. *Furthermore, the Single Judge analyzed Lens' request that Sevilla be ordered to pay EUR 500,000 for the prejudice suffered due to the Respondent's bad faith and refusal to pay. With regard to this part of the claim, the Single Judge underlined that, as mentioned in the previous paragraph, the Respondent had not been proven to have acted in bad faith in the present case and that consequently, these claims should be rejected".*

The Decision was served upon Sevilla and Lens on 29 March 2010.

On 16 April 2010, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (CAS), pursuant to the Code of Sports-related Arbitration (the "Code"), to challenge the Decision.

Extracts from the legal findings

A. Applicable law

Pursuant to Article R58 of the Code, the Panel is required to decide the dispute

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

In the present case, the question is which "rules of law", if any, were chosen by the parties: i.e., whether

the parties choose the application of a given State law and the role in such context of the "applicable regulations" for the purposes of Article R58 of the Code. In this respect, the parties agree that the FIFA rules and regulations concerning the status and transfer of players apply primarily, with Swiss law applying subsidiarily. The Appellant, however, submits that also Spanish law has to be applied by the Panel, chiefly with respect to the issues concerning the breach of the Employment Agreement by the Player. The relevance of Spanish law is, on the other hand, denied by the Respondent.

In solving this question the Panel has to consider the following:

i. Article 7 of the Transfer Agreement provides that:

"En cas de litige, les deux parties sont d'accord pour que la décision de la FIFA et ou du tribunal administratif du sport soit la seule applicable" – "En el caso de litigio, las dos partes están de acuerdo para que la decisión de la FIFA, y/o del tribunal administrativo del deporte sea la única aplicable" ("In the event of dispute, the two parties agree that the decision of FIFA and/or the Court of administration for sport shall be the only one applicable" (English translation by the Panel; there is no dispute between the parties that the reference to the "Court of administration for sport" is to be intended as a reference to the "Court of Arbitration for Sport"));

ii. Article 62.2 ["*Court of Arbitration for Sport (CAS)*"] of the FIFA Statutes indicates that:

"... CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law";

iii. the Sixth Clause of the Employment Agreement indicates that:

"In the event there is no provision in this contract, the provisions of the Royal Decree 1006/1985 of 26 June, which governs the special labour relation concerning Professional Sportsmen, the Collective Agreement in force and the other applicable rules, will be followed" (English translation by the Panel);

iv. the Indemnification Clause contains an express reference to the Real Decreto 1006/85.

In respect of the foregoing, the Panel remarks that:

i. the dispute concerns the Transfer Agreement, and mainly the claim of Lens to obtain a payment under the Sell-On Clause therein contained;

ii. the appeal is directed against a decision issued by the Single Judge, which considered such claim, and is based on Article 62.2 of the FIFA Statutes, mandating the application of the "*various regulations of FIFA*" and, additionally, of Swiss law;

iii. the parties discussed in this arbitration the meaning of the Indemnification Clause, inserted pursuant to Spanish law in a contract (the Employment Agreement) making reference to Spanish law.

The Panel therefore finds that this dispute has to be determined on the basis of the FIFA regulations, with Swiss law applying subsidiarily. More specifically, the Panel agrees with the Single Judge that the dispute, submitted to FIFA by Lens on 11 July 2008, is subject to the 2008 edition of the FIFA Regulations for the Status and Transfer of Players (the "2008 RSTP"), according to their Article 26.

The Panel however remarks that the interpretation of the Indemnification Clause has to be conducted also on the basis of Spanish law, and mainly of the Real Decreto 1006/85, to which the Employment Agreement made reference. The provisions set in such the Real Decreto 1006/85 which appear to be relevant in this arbitration are the following:

i. Article 13 – "*Termination of the contract*":

"*The employment relationship shall terminate in the following circumstances: … i) as a result of the professional sportsman's will*" (English translation by the Panel);

ii. Article 16 – "*Effects of the termination for sportsman's will*":

"*One. The termination of the contract as a result of the professional sportsman's will, without a cause attributable to the club, shall give the club the right, in its case, to an indemnification which failing an agreement concerning it shall be fixed by the Labour Court taking account of the circumstances of sporting nature, of the loss caused to the entity, off the reasons of the breach and of the additional elements that the court considers relevant. In the event the sportsman within one year after the date of termination enters into a contract with another club or sports entity, these shall be subsidiarily liable for the payment of the mentioned pecuniary obligations. …*" (English translation by the Panel).

B. Merits

The main issue in this arbitration, as raised by the

Appellant, concerns the interpretation of a provision (the Sell-On Clause) contained in the Transfer Agreement. The Appellant maintains that the calculation of the additional payment to be possibly made under it to the Respondent does not include the amount received by Sevilla on the basis of the Indemnification Clause, which is not a transfer fee, but compensation for the damage sustained because of the unilateral breach by the Player of the Employment Agreement. The Decision and the Respondent, on the other hand, hold the opposite view.

As mentioned (see above), the Transfer Agreement and the Employment Agreement, as well as the Sell-On Clause and the Indemnification Clause therein respectively contained, have to be interpreted on the basis of the FIFA rules and regulations, with Swiss law applying subsidiarily. The meaning and the purpose of the Indemnification Clause, however, has to be understood also on the basis of Spanish law and mainly of the provisions set by the Real Decreto 1006/1985 (see above).

Article 18.1 of the Swiss Code of Obligations ("CO"), dealing with the interpretation of contracts, sets the following provision:

"Pour apprécier la forme et les clauses d'un contrat, il y a lieu de rechercher la réelle et commune intention des parties, sans s'arrêter aux expressions ou dénominations inexactes dont elles ont pu se servir, soit par erreur, soit pour déguiser la nature véritable de la convention" ("In order to evaluate the form and the content of a contract, the real and common intent of the parties has to be investigated, without limiting the investigation to the expressions or words improperly used by the parties, either by mistake or to hide the real nature of the agreement" (English translation by the Panel)).

The interpretation of a contractual provision in accordance with Article 18 CO aims at assessing the intention the parties had when they concluded the contract. On this basis, Swiss scholars (Wiegand, in *Basler Kommentar*, No. 7 *et seq*., ad Art. 18 CO) and case law (decisions of the Federal Tribunal of 28 September 1999, ATF 125 III 435, and of 6 March 2000, ATF 126 III 119) have indicated that the primary goal of interpretation is to ascertain the true common intentions (consensus) of the parties. Where a factual consensus cannot be proven, the declarations of the parties must be interpreted pursuant to the principle of good faith in the sense in which they could and should have been understood, taking into account the wording, the context as well as all circumstances.

Therefore, this Panel has to explore the "*real and common intent of the parties*", pursuant to the mentioned principles, beyond the literal meaning of the words used, in order to determine the implications of the Sell-On Clause, as well as of any other contractual provision relevant in this arbitration (save as mentioned above with respect to the Indemnification Clause).

The Sell-On Clause contains a well-known mechanism in the world of professional football: its purpose is to "protect" a club (the "old club") transferring a player to another club (the "new club") against an unexpected increase, after the transfer, in the market value of the player's services; therefore, the old club receives an additional payment in the event the player is "sold" from the new club to a third club for an amount higher than that one paid by the new club to the old club. In transfer contracts, for that reason, a sell-on clause is combined with the provision defining the transfer fee: overall, the parties divide the consideration to be paid by the new club in two components, i.e. a fixed amount, payable upon the transfer of the player to the new club, and a variable, notional amount, payable to the old club in the event of a subsequent "sale" of the player from the new club to a third club.

Following this pattern, in the case at hand, Lens (the "old club") and Sevilla (the "new club") set in the Transfer Agreement a transfer fee (EUR 4,000,000) payable upon the transfer of the Player, and the Sell-On Clause, providing for an additional payment in case of "resale" ("*revente*" or "*reventa*") of the Player to a third club. The dispute between the parties (as summarized above) precisely refers to this point, i.e. to the exact identification of the meaning and scope of this triggering element ("resale").

According to Article 184 of the Swiss Code of Obligations, a "sale" (and therefore a "resale") is a "*contract whereby the seller obligates himself to deliver to the buyer the object of the purchase and to transfer title thereto to the buyer, and the buyer obligates himself to pay the purchase price to the seller*". In other words, in a "sale" the transfer of title to an object is based on the consent of the seller, and the price paid by the buyer is the consideration for such seller's consent.

The Panel notes, however, that in the world of professional football the term "sale" is used in an inaccurate way. It is in fact not possible to describe the transfer of a player, from a club to another, in terms of a sale (or the contract entered into by the old and the new club as a sale contract), in the same way as one could refer to the sale of goods or other property. Clubs, in fact, do not have property rights in, or equivalent title to, the player, which could be

transferred from one entity to another. Such property rights or title are inconceivable, whatever the law applicable to the relation between a club and a player.

In order to make good this lack of property or title and to establish a "right" which can be transferred from one club to another, and therefore become the subject of a "sale" in proper terms, the industry has identified a category of so-called "federative rights", being rights stemming from the registration with a football association or league of a player with a club. Indeed, the Transfer Agreement itself refers to the "*droits sportifs*" or "*derechos deportivos*" as the property of Lens and the object of the transfer to Sevilla.

The Panel, however, holds that this notion of "federative rights" (at least insofar as such expression may be taken to define "rights of a club over a player", including the right to control and transfer him) cannot be accepted, at least to the extent these "federative rights" are held to stem only from the rules of a federation, and are not ultimately based on the player's explicit consent: in other words, on the employment contract between the club and the player. As already noted in a CAS precedent (award of 27 January 2005, CAS 2004/A/635), "*sports rules of this kind*", i.e. rules providing for a right of a club over a player irrespective of the player's consent, would be "*contrary to universal basic principles of labour law and are thus unenforceable on grounds of public policy*".

The "sale" of a player, therefore, is not an agreement affecting a club's title to a player, transferred from one entity to another against the payment of a purchase price. The transfer consented by the seller, and the price paid in exchange, do not directly consider a property right, but are part of a transaction affecting the employment relation existing between a club and a player, always requiring the consent of the "transferred" player and of the clubs involved. Through the "sale", then, the parties express their consent to the transfer (in the ways described below) of the right to benefit from the player's performance, as defined in the employment agreement, which, in turn, is the pre-condition to obtain the administrative registration of the player with a federation in order to allow the new club to field him. This point is confirmed by Article 8 of the 2008 RSTP, under which "*The application for registration of a professional must be submitted together with a copy of the player's contract*".

In the context of a "sale" contract, a transfer, being object and purpose of the parties' consent, can actually be made in two ways: (i) by way of assignment of the employment contract; and (ii) by way of termination of the employment agreement with the old club and signature of a different employment agreement with the new club. In both cases, the old club expresses its agreement (to the assignment or to the termination of the old employment contract, as the case may be) against the receipt of a payment – which substitutes for the loss of the player's services; the new club accepts the assignment of the existing employment contract or consents to enter into a new contract with the player; and the player consents to move to the new club.

At the same time, the Panel recognises that a transfer of a player can also take place outside the scheme of a ("sale") contract, in the event that the player moves from a club to another following the termination of the old employment agreement as a result (i) of its expiration or (ii) of its breach. In both cases, the transfer of the player from one club to another takes place without (or even against) the consent of his old club. Therefore, it takes place without a contract ("sale" or other), because there is no contract (let alone a "sale" contract) in a situation in which there is no obligation freely assumed by one party towards the other. In the second case (transfer following a breach), an amount is due to the old club, but cannot be defined as a "purchase" price, paid as consideration for the consent to the transfer, since it is of a different character and title: it is compensation for the damage caused by the breach. In other words, the transfer of the player in this case is not a sale, because the old club has not agreed to the transfer (necessary element under Swiss law: above), even if it implies the payment of an amount to the old club.

The Sell-On Clause must be interpreted against this background. To the extent it refers to a "resale", it appears to apply not to any and all subsequent transfers of the Player to a new club, but only to either of those transfers which are based on a contract (see above).

The Panel finds in fact that such interpretation corresponds to the notion of "sale" under Swiss law (above), as used in the world of professional football, and consistently applied in the context of the Transfer Agreement (under which the Player was "sold" to Sevilla). Contrary to it, no evidence has been given to prove that, where the parties indicated in the Transfer Agreement the "resale" as the triggering element for the additional payment under the Sell-On Clause, their common and actual intention was to refer to any other form of "transfer". Nor is it possible to presume that the parties, at the time the Contract was concluded, acting reasonably and loyally, intended to include in the notion of "sale" also forms of "transfer" of the Player occurring outside a contractual ("sale") scheme: of such possibility (i.e. of the possibility that a player moves from one club to another even

without, or against, the consent of the former club) the parties, primary clubs of professional football, could not be unaware.

The question, then, arises whether the transfer of the Player from Sevilla to Barcelona, as a result of the exercise of the Player's right to terminate the Employment Agreement under the Real Decreto 1006/1985 and the payment of the amount contemplated in the Indemnification Clause, falls within any of such forms of transfer constituting a sale, and in particular whether it corresponds to the second way in which a "sale" can be structured (i.e., through the termination of the employment agreement with the old club and the signature of a different employment agreement with the new club).

As mentioned, the Indemnification Clause was inserted in the Employment Agreement pursuant to the Real Decreto 1006/1985, to which it explicitly makes reference.

The Real Decreto 1006/1985, in fact, provides, at Article 13(i), for the absolute right of a player to put an end, on the basis of his sole will and irrespective of the existence of any clause justifying it ("*ad nutum*"), to the employment relationship binding him to a club, and obliges the player, by Article 16.1 (together with the club to which the player may have transferred), to pay an indemnification to the old club. That indemnification can be defined in a specific contract clause or by a labour court. The amount mentioned in the Indemnification Clause is precisely intended to quantify the indemnification to be paid, in accordance with Article 16.1 of the Real Decreto 1006/1985, in the event of exercise of the Player's statutory right to terminate the Employment Contract pursuant to Article 13(i) of the Real Decreto 1006/1985.

The Panel notes that the nature and function of contractual clauses, intended to quantify the indemnification to be paid pursuant to Article 16.1 of the Real Decreto 1006/1985, is disputed in the Spanish doctrine and case law. It is in fact not clear whether they perform the function of a "liquidated damages" clause ("*cláusula penal*"), defining in advance the damages to be paid in the event of breach of an obligation ("*pena convencional*"), or a type of "indemnity" to be paid for the exercise of a right of termination, intended to compensate for the loss of the player's services ("*cláusula convencional o pacto indemnizatorio*"). In the same way, a dispute exists as to the nature and effects of the termination right given to the athlete by Article 13(i) of the Real Decreto 1006/1985.

The Panel considers however that it needs not take a position in general and abstract terms on the question, disputed in Spanish legal doctrine and jurisprudence, concerning the characterization of the termination right provided by Article 13(i) of the Real Decreto 1006/1985 and the nature of the payment due under Article 16.1 of the Real Decreto 1006/1985 on the player exercising his right to terminate. The Panel's only task is to verify whether the combination of (i) the insertion in the Employment Agreement of a clause (the Indemnification Clause) pursuant to Article 16.1 of the Real Decreto 1006/1985, (ii) the exercise by the Player of its statutory right to terminate the Employment Agreement in accordance with Article 13(i) of the Real Decreto 1006/1985, (iii) the payment – by Barcelona – of the amount indicated in the Indemnification Clause, and (iv) the signature by the Player of a new employment contract with Barcelona, constitutes a "resale" for the purposes of the Sell-On Clause.

In this regard the Panel notes that the termination of the Employment Agreement was the result of the exercise of a statutory right of the Player. The right of the Player to put an end to the Employment Agreement, and the corresponding obligation to pay an indemnity, was based on the law (the Real Decreto 1006/1985) and not on the Employment Agreement itself, whose limited purpose was to define, in the Indemnification Clause, the measure of the indemnity due under the law. In other words, the Player's release from the Employment Agreement was not effected by Sevilla, but by operation of the law. Sevilla did not consent to the early termination of the Employment Agreement: it was obliged to "tolerate" it, as imposed by the law. Sevilla, actually, stipulated in the Indemnification Clause the amount to be paid by the Player in the event of exercise of the statutory right of termination. But the claim for such payment would have existed irrespective of the Indemnification Clause, and cannot be regarded to refer to a consideration for the grant of a (termination) right to the Player.

The above leads the Panel to distinguish the events concerning the Player (as described above) from a sale effected by way of termination of the employment agreement with the old club and signature of a different employment agreement with a new club. The Panel, in fact, notes that in the second scenario the old club agrees to the termination of the employment contract, and the "transfer fee" represents precisely the consideration for the consent to this termination. In the actual case of the Player there was, on the contrary, no consent by Sevilla to the termination and no consideration, for the grant and exercise of the termination right, was received by it. In other words, the transfer of the Player occurred outside any

contractual scheme. It did not even follow a breach of contract, because the Player exercised a statutory right to terminate his contract of employment; but still it took place regardless of Sevilla's consent.

Contrary to this conclusion, it is not possible to refer to the contractual determination of the indemnity to be paid by the Player – and actually paid by Barcelona – in the Indemnification Clause. As mentioned, the Player (and Barcelona subsidiarily) was obliged by the law to indemnify Sevilla and in the event of there being pre-determined contractual provision, the same indemnity could be set by a labour court. The parties simply agreed in advance on the measure of the indemnity, without implying any consent to the termination of the Employment Agreement or any offer to a third party.

This conclusion, on the contrary, allows the Panel to avoid an inconsistency that the FIFA position makes clear. The payment of an indemnification to the old club under Article 16.1 of the Real Decreto 1006/1985 has in fact the same nature (whatever this is: see above) irrespective of the fact that its measure is defined by the parties or set by the labour court. It is therefore unsustainable to equate the payment of the indemnity (for whatever purpose under the FIFA regulations, including to the ends of the solidarity contribution mechanism) to a transfer fee in one case (consensual determination between the club and the player) and deny the equation in the other case (determination by a court or a FIFA body).

In summary and conclusion, failing a consensual termination of the Employment Agreement, the transfer of the Player from Sevilla to Barcelona cannot be equated to a "sale" of the Player. As a result, it appears to fall outside the scope of the Sell-On Clause that, failing an additional specification, does not cover, through the reference to "resale", transfers made on the basis of the mechanism provided by the Real Decreto 1006/85.

The Decision that held otherwise must therefore be set aside. Indeed, the Decision erred where it held that the transfer of the Player to Barcelona was "*a transfer agreed between two clubs and a player for a specific amount*", with the sole peculiarity that the "*specific amount*" had been agreed only by Sevilla and the Player in the Indemnification Clause. With all deference, in the Panel's view, the Single Judge missed the point: the key aspect is not whether Sevilla agreed the measure of the amount to be paid by the Player in the event of termination of the Employment Contract, but whether Sevilla agreed to the termination of the Employment Contract. In the absence of this consent, the transfer of the Player to Barcelona cannot be equated to a sale.

A final point has however to be emphasized. The Panel, in fact, could have reached a different conclusion if sufficient evidence had been given (also by way of inferences: Swiss Federal Tribunal, 15 June 1978, ATF 104 II 68, 75; 24 September 1974, ATF 100 II 352, 356) of bad faith on the part of Sevilla. Failing such evidence, no departure from the above conclusion seems possible to the Panel.

In light of the foregoing, the Panel finds that the appeal brought by the Appellant against the Respondent with respect to the Decision is to be granted and the Decision set aside. The counterclaim brought by the Respondent is inadmissible.

Arbitrage TAS 2010/A/2101
Union Cycliste Internationale (UCI) c. A. & Fédération Française de Cyclisme (FFC)
18 février 2011

Cyclisme; dopage/Norfenfluramine; droit applicable; demande reconventionnelle; relation entre deux règles de procédure arbitrales contradictoires (Art. 335 RAD et Art. R55 Code 2009); admissibilité de faits nouveaux devant le TAS; devoir de vigilance; amende (Art. 326 RAD); droits de protection des sociétaires: proportionnalité et égalité de traitement

Panel:
Me Quentin Byrne-Sutton (Suisse), Président
Me Olivier Carrard (Suisse)
Me Dirk-Reiner Martens (Allemagne)

Faits pertinents

L'Union Cycliste Internationale (l'UCI ou "l'appelante") est l'association des fédérations nationales du cyclisme. Elle a comme but la direction, le développement, la réglementation, le contrôle et la discipline du cyclisme dans toutes ses formes, au niveau international.

A. (le "coureur"), né en 1988, est un coureur cycliste de la catégorie élite et titulaire d'une licence délivrée par la "fédération française de cyclisme".

La Fédération Française de Cyclisme (FFC) est la fédération nationale française du cyclisme, membre de l'UCI.

A. est un jeune coureur de 22 ans qui est professionnel depuis le 1er février 2009. Il a été embauché par La Française des Jeux avec un contrat de durée déterminée de deux ans arrivant à terme le 30 janvier 2011.

Issu du cyclo-cross, il a gravi régulièrement les échelons depuis l'année 2004; cette progression lui permettant d'être sélectionné en équipe de France espoirs à partir de l'année 2006 jusqu'à son passage en professionnel en février 2009.

En janvier 2009, il était classé 2ème du classement général de la coupe du monde de cyclo-cross "espoir".

A. participa à la course cycliste sur route Circuit franco-belge qui se déroula du 1er au 4 octobre 2009 en Belgique. Cette course était inscrite au calendrier international de l'UCI.

A l'issue de la première étape du 1er octobre 2009, A. fut soumis à un contrôle antidopage initié par l'UCI conformément à son règlement antidopage (RAD).

Les échantillons furent collectés par Dr. Pierre Van De Walle, médecin contrôleur désigné par l'UCI. Sur le formulaire de contrôle, A. se déclara d'accord avec la procédure de prélèvement de l'échantillon et sous la rubrique "médicaments" le coureur indiqua n'avoir pris aucun médicament.

L'échantillon A fut analysé par le laboratoire de contrôle du dopage de Gand (Belgique), laboratoire accrédité par l'Agence Mondiale Antidopage (AMA).

Il résulte du rapport d'analyse du 20 octobre 2009, que l'échantillon A révéla la présence de *Norfenfluramine*, soit un résultat analytique anormal.

Dans la "Liste des interdictions 2009" de l'AMA, la *Norfenfluramine* est classée dans la catégorie des stimulants (S6.a, stimulants non-spécifiés) et, à ce titre, figurait parmi les substances interdites en compétition.

Par courrier recommandé du 21 octobre 2009, l'UCI notifia le résultat d'analyse anormal à A., conformément à l'article 206 RAD, ainsi qu'une suspension provisoire fondée sur l'article 235 RAD.

Le 22 octobre 2009, une copie de la notification envoyée à A. fut transmise à la FFC, à l'équipe du coureur, à l'Agence Française de Lutte contre le Dopage (AFLD) ainsi qu'à l'AMA, conformément à l'article 206 al. 2 et 3 RAD.

En date du 27 octobre 2009, A. accusa réception de la notification faite par l'UCI et renonça à une contre-analyse.

Le 23 novembre 2009, par l'intermédiaire de son Conseil, A. demanda hors délai à ce qu'il soit procédé à l'analyse de l'échantillon B, à titre exceptionnel, quand bien même il avait renoncé préalablement en date du 27 octobre 2009 à cette seconde analyse.

En date du 26 novembre 2009, l'UCI informa le Conseil de A. qu'elle avait décidé de procéder à l'analyse de l'échantillon B malgré la renonciation initiale du coureur.

A. fit usage de son droit d'être représenté par un expert de son choix lors de la contre-analyse et délégua le Conseil de A.

La contre-analyse a été effectuée le 10 décembre 2009 par le laboratoire de contrôle du dopage de Gand qui confirma le 14 décembre 2009 le résultat de l'analyse de l'échantillon A.

A réception des résultats de la contre-analyse, l'UCI demanda par un courrier du 16 décembre 2009 à la FFC d'entamer une procédure disciplinaire contre A., conformément à l'article 234 RAD.

Par courrier du 13 janvier 2010, A. fut convoqué par la Formation professionnelle de la Commission Nationale de Discipline de la FFC (la "Commission de la FFC") à une audience le 2 février 2010 pour faire valoir ses arguments. Le coureur s'est dûment présenté à cette audience, accompagné de son Conseil.

Le 2 février 2010, la Formation de la FFC prononça à l'encontre de A. une suspension de deux ans mais décida de ne pas lui imposer une amende sur la base de l'article 326 RAD et ne se prononça pas sur les frais.

Cette décision de la Commission de la FFC fut notifiée le 1er mars 2010. L'UCI sollicita ensuite l'envoi du dossier complet qu'elle a reçu le 23 mars 2010.

L'UCI décida d'interjeter recours au Tribunal Arbitral du Sport (TAS) contre la décision de la Formation de la FFC pour les raisons "… *qu'il n'a pas été prononcé la sanction financière prévue par l'article 326 des règles antidopage de l'UCI (RAD), ni les frais à la charge du coureur prévus par l'article 275 RAD".*

Extraits des considérants

A. Droit applicable

Selon l'article R58 du Code TAS:

"La formation statue selon les règlements applicables et selon les règles de droit choisies par les parties, ou à défaut de choix, selon le droit du pays dans lequel la fédération, association ou autre organisme sportif ayant rendu la décision attaquée a son domicile ou selon les règles de droit dont la Formation estime l'application appropriée. Dans ce dernier cas, la décision de la Formation doit être motivée".

Les Parties sont d'accord que le règlement applicable est le RAD de l'UCI. Cependant, alors que l'UCI considère que c'est la version du RAD entrée en vigueur en 2009 (la "version 2009") qui s'applique, le coureur argumente que la version 2009 ne lui est pas opposable faute d'avoir été portée à sa connaissance par une publication sur le site web de la FFC ou par une notification écrite, et que dès lors c'est une version antérieure du RAD, datée de 2004, qui doit s'appliquer.

A titre préliminaire à ce sujet, la Formation note que selon l'article 372 RAD (version 2009) "*La présente version des règles antidopage de l'UCI entre en vigueur au 1er janvier 2009"*, sans qu'il ne soit fait mention de la manière de publier cette nouvelle version du RAD, et qu'en ce qui concerne toutes modifications ultérieures du nouveau règlement, l'article 374 RAD (version 2009) stipule que "*Les amendements aux présentes règles antidopage entrent en vigueur à la date de leur publication sur le site web de l'UCI, sauf mention contraire lors de cette publication".*

Au vu des dispositions transitoires précitées et en l'absence d'allégation que la version 2009 du RAD n'était pas publiée en 2009 sur le site web de l'UCI, la Formation considère établi que la version 2009 du RAD était entrée en vigueur au moment où le coureur fut soumis le 1er octobre 2009 au contrôle antidopage qui se révéla positif.

S'agissant de la faculté du coureur de prendre connaissance de la version 2009 du RAD, la Formation considère qu'il n'est pas déterminant qu'elle n'ait été publiée sur le site web de la FFC, dans la mesure où:

- les règles du RAD "… *s'appliquent à tous les licenciés*" (article 1 du RAD),

- selon les Dispositions Préliminaires du "*Règlement UCI du sport cycliste*", dont le RAD constitue une partie intégrante, ce règlement "… *est applicable à toutes les épreuves cyclistes*" (article 1 des Dispositions Préliminaires du Règlement UCI) et *"La participation à une épreuve cycliste, à quel titre que ce soit, vaut acceptation de toutes les dispositions règlementaires qui y trouvent application"* (article 5 des Dispositions Préliminaires du Règlement UCI),

- selon l'article 1.1.021 des règles sur l'Organisation

Générale du Sport Cycliste du Règlement UCI, la licence d'un coureur doit obligatoirement contenir certains renseignements et engagements dont les suivants*: "Je m'engage à respecter les statuts et règlements de l'Union Cycliste Internationale … Je déclare avoir lu ou avoir eu la possibilité de prendre connaissance de ces statuts et règlements"* (article 1.1.023),

- l'épreuve durant laquelle le coureur a été testé positif est inscrite au calendrier international de l'UCI et il y a participé comme licencié professionnel.

En effet, au vu des dispositions précitées du Règlement UCI et de sa qualité de coureur professionnel détenteur d'une licence UCI et participant à une compétition internationale, A. devait le cas échéant, s'il avait un doute à ce propos, se renseigner au préalable auprès de l'UCI sur les règlements en vigueur et sur leur contenu.

De plus, il n'a pas été allégué et il n'y a aucun élément de preuve au dossier permettant de penser qu'au moment du contrôle antidopage subi par le coureur le 1er octobre 2009, la version 2009 du RAD n'était pas publiée sur le site web de l'UCI.

Pour les motifs précités, la Formation considère que c'est la version 2009 du RAD qui est applicable.

Il sied aussi de relever que selon l'article 345 RAD "*Le TAS statue sur le litige conformément aux présentes règles antidopage et, pour le reste, selon le droit suisse*" et que le coureur a invoqué des principes et dispositions du droit Suisse.

Par conséquent, en application de l'article R58 du Code du TAS et de l'article 345 du RAD, le Formation statuera sur la base du RAD (version 2009) et du droit suisse.

B. Recevabilité des demandes contenues dans le mémoire de réponse du coureur

L'argumentation respective des Parties et leur désaccord au sujet de la recevabilité de la réponse du 4 juin 2010 du coureur, soulève les questions suivantes: Est-ce que le mémoire de réponse du coureur comprend des demandes qui doivent être qualifiées en partie de demande reconventionnelle? Dans l'affirmative, est-ce que la demande reconventionnelle est recevable selon les règles de procédure applicables?

La Formation examinera la première question et, si la réponse est affirmative, la deuxième.

1. La nature de la demande du coureur

Pour déterminer si la demande du coureur de faire annuler sa suspension de deux ans et sa disqualification est une demande reconventionnelle, à savoir une demande portant sur un objet autre que l'appel de l'UCI, ou une simple réponse à l'appel de l'UCI, il faut examiner le contenu et la portée de ce dernier.

La Formation considère que l'objet de l'appel de l'UCI n'est clairement pas de contester la suspension de deux ans et la disqualification décidées comme sanctions en première instance par la Commission de la FFC, puisque, bien au contraire, l'UCI en demande la confirmation.

Il ressort de l'argumentation développée par l'UCI et de ses conclusions, que l'objet véritable de son appel est uniquement de demander une sanction sous forme d'amende et le remboursement des frais engagés par l'UCI pour le contrôle antidopage; la demande de confirmation de la suspension de deux ans visant simplement à faire constater qu'une des conditions préalables de l'attribution d'une amende selon l'article 326 RAD – à savoir le fait pour l'athlète de subir une suspension d'au moins deux ans – est remplie. Par ailleurs, toute ambiguïté qui pouvait exister à cet égard a été levée par le retrait par l'UCI de ses conclusions n° 1 et 2 qui visaient la confirmation des sanctions décidées en première instance.

Pour ces motifs, la demande du coureur tendant à faire annuler la suspension de deux ans et la disqualification décidées en première instance, doit être qualifiée de véritable demande reconventionnelle et non pas de simple réponse.

Il faut donc examiner la recevabilité de cette demande reconventionnelle.

2. La recevabilité de la demande reconventionnelle

Il n'est pas contestable que l'article 335 RAD "*Si l'intimé dépose une demande reconventionnelle, l'appelant a le droit de répondre dans un délai d'un mois suivant la réception de la réplique de l'intimé, sauf prolongation de ce délai par le TAS. Si l'intimé est le licencié, celui-ci a le droit de soumettre un mémoire supplémentaire dans un délai de quinze jours suivant la réception de la réplique de l'appelant, sauf prolongation de ce délai par le TAS*", implique clairement la possibilité pour l'intimé (en l'occurrence le coureur) de déposer une demande reconventionnelle, ce qui d'ailleurs était admissible selon la teneur de l'article R55 du Code du TAS, édition 2004, au moment où l'article 335 RAD était adopté. De ce fait, l'UCI ne faisait qu'harmoniser sa règle avec les règles de procédure

du TAS. La Formation relève néanmoins que lors de l'audience, le Conseil de l'UCI, tout en confirmant que sous l'ancien Code du TAS, édition 2004, il n'existait pas de problème d'harmonie en ce qui concerne l'admissibilité des demandes reconventionnelles, a considéré que, avec l'entrée en vigueur du nouveau Code du TAS, édition 2010, la possibilité de soumettre des demandes reconventionnelles au sens de l'article 335 RAD n'était plus d'actualité, les dispositions du Code du TAS, édition 2010, prévalant sur les dispositions de l'article 335 RAD qui, à ce jour, n'ont pas été modifiées.

Cela dit, une nouvelle version du Code du TAS est entrée en vigueur en janvier 2010 (c'est-à-dire avant le dépôt de l'appel de l'UCI) dont la teneur de l'article R55 est différente, le droit de déposer une demande reconventionnelle ayant été supprimé. Selon le commentaire de la nouvelle version du Code publié sur le site internet du TAS au moment de son adoption: "*Article R55: La possibilité de déposer des demandes reconventionnelles en procédure d'appel est supprimée. Les personnes et entités qui souhaitent contester une décision devront donc impérativement le faire avant l'expiration du délai d'appel applicable*".

La question se pose donc du rapport entre l'article 335 RAD et l'article R55 du Code et plus précisément de savoir laquelle des deux dispositions doit l'emporter dans la mesure où elles se contredisent.

Le problème de la relation entre deux règles de procédure arbitrale contradictoires adoptées par des parties doit se régler de cas en cas, en fonction des faits de l'espèce, puisqu'il s'agit de déterminer laquelle de deux règles de procédure voulues par les parties et librement adoptées doit l'emporter.

A cet égard, il est significatif qu'au moment d'adopter l'article 335 du RAD (qui s'insère dans une section du RAD intitulé "Appel devant le TAS"), l'UCI n'avait pas la volonté de déroger aux dispositions du Code du TAS, mais plutôt d'harmoniser ses règles de procédure se rapportant à un appel au TAS avec celles du TAS, puisqu'à ce moment-là l'article R55 du Code permettait les demandes reconventionnelles.

En même temps, il est relevant que le TAS a un intérêt légitime à considérer comme impératives ses règles de procédure en matière d'appel, puisque selon l'article R65 du Code la procédure d'appel est en principe gratuite s'agissant de litiges disciplinaires internationaux.

Enfin, pour des raisons d'égalité entre sportifs de différentes disciplines, il serait inéquitable de ne pas appliquer de manière uniforme l'article R55 du Code dans sa nouvelle teneur à tous les appels déposés depuis son entrée en vigueur (en janvier 2010).

Pour ces motifs, la Formation considère que l'article R55 du Code actuellement en vigueur est seul applicable et que la demande reconventionnelle du coureur (visant à faire annuler sa suspension de deux ans et sa disqualification) est en principe irrecevable.

Il reste néanmoins à examiner si, comme le requiert le coureur, une exception doit être admise, compte tenu de son allégation qu'il a été empêché de contester (par un appel) les sanctions dans le délai d'appel en raison du fait qu'il n'a découvert que plus tard les causes d'ingestion involontaire du produit dopant (Norfenfluramine) ayant causé le contrôle positif à la base de sa suspension de deux ans et de sa disqualification.

A cet égard, le coureur argumente (i) qu'il s'agit d'un vrai fait nouveau (à contraster avec les "*unechte nova*"), en ce sens que les faits libératoires présentement invoqués existaient au moment de la procédure de première instance, mais qu'il ne les connaissait pas, (ii) qu'il s'agit d'un fait nouveau qui est déterminant, et (iii) qu'il n'a pas manqué de diligence dans la recherche des causes de l'ingestion involontaire, n'ayant pu imaginer que sa mère prenait, en rapport avec des problèmes de poids engendrés par sa ménopause, un médicament (le MEDIATOR) qui contenait un principe actif compris sur la "Liste des interdictions 2009" et qu'elle diluait les comprimés dans des bouteilles d'eau; et que par conséquent il doit pouvoir invoquer ces faits en appel.

En d'autres termes, selon le coureur, sa demande correspond en substance à un appel tardif qu'il n'a pas pu déposer dans les délais en raison de la découverte ultérieure des faits le justifiant, plutôt qu'à une véritable demande reconventionnelle.

Afin de déterminer si cette argumentation du coureur peut être retenue, la Formation doit d'abord examiner quelles règles ou principes de procédure s'appliquent à la question de l'admissibilité de l'invocation de faits nouveaux en procédure d'appel devant le TAS, et ensuite - si une telle invocation est considérée comme juridiquement possible en certaines circonstances - vérifier si les conditions sont remplies en l'espèce.
A ce propos, il faut relever tout d'abord que le RAD comprend une disposition (l'article 282) dont la teneur est la suivante:

"Lorsqu'un fait nouveau est révélé qui est de nature susceptible à modifier la décision rendue par l'instance d'audition de la fédération nationale du licencié après la date de son prononcé, la partie intéressé peut demander la réouverture de l'affaire devant

la fédération nationale, sauf s'il est possible d'inclure ce nouvel élément dans le cadre d'une procédure en cours devant le TAS.

La partie qui soumet la nouvelle preuve doit démontrer qu'elle n'aurait pas pu en avoir connaissance ou que cette preuve n'était pas disponible avant l'audience où la décision a été rendue.

La demande de réouverture de l'affaire doit être déposée dans le mois suivant le moment où la partie a pris connaissance de la preuve en question, sous peine d'être déboutée. Il incombe à la partie qui soumet la nouvelle preuve de prouver le respect de ce délai".

Bien que la disposition précitée s'applique à la réouverture de l'affaire devant l'instance d'audition de première instance, à savoir la Commission de la FFC, et non pas à l'appel devant le TAS, elle est fondée sur des principes généraux de procédure qui s'appliquent à l'invocation de faits nouveaux (devant la même instance ou en appel) et qui peuvent aussi être considérés comme pertinents s'agissant d'une procédure d'appel devant le TAS dont le Code ne règle pas expressément la question. En outre, la question de savoir si cette disposition peut faire renaître un délai d'appel manqué, et s'appliquer néanmoins même lorsque la partie qui l'invoque n'a pas saisi le TAS elle-même, peut rester indécise en l'espèce, vu les conclusions de la Formation ci-après sur ce point.

Il s'agit du principe selon lequel, à titre exceptionnel, des faits nouveaux peuvent être pris en considération si la partie qui les invoque démontre qu'il s'agit de faits potentiellement déterminants pour la solution du litige qui existaient déjà au moment de sa demande en justice ou de son appel mais qu'elle n'a pu connaître, même en exerçant la plus grande diligence.

En Suisse, un principe similaire est aussi applicable par exemple en matière de demande de révision devant le Tribunal fédéral mais à des conditions strictes. Ainsi, comme le souligne à ce propos la doctrine, "*La révision ne vise pas à permettre aux parties de réparer les erreurs et les négligences qu'elles ont pu commettre lors de la première procédure. Il faut donc que la circonstance nouvelle n'ait pas pus être invoquée dans la procédure précédente. C'est à la partie requérante d'établir qu'elle a fait preuve de toute la diligence que l'on pouvait exiger d'un plaideur consciencieux pour réunir les faits et les moyens à l'appui de sa cause. En matière d'arbitrage international, le Tribunal fédéral semble même exiger du requérant une diligence accrue: il devra notamment établir avoir tenté "coûte que coûte" d'obtenir le moyen de preuve envisagé"* (Kaufmann-Kohler/Rigozzi, Arbitrage international: Droit et pratique à la lumière de la LDIP, Berne 2006, p. 352, n°863).

A la lumière de la pratique précitée du Tribunal fédéral, et compte tenu du principe de l'immutabilité du litige et du principe du double degré de juridiction selon lequel le litige soumis au juge d'appel doit normalement être identique à celui dont la première instance est saisi, la possibilité d'admettre des faits nouveaux en appel devant le TAS doit être appréciée avec rigueur.

En l'espèce, les faits nouveaux que le coureur invoque sont que sa mère prenait du MEDIATOR (qui contenait un principe actif se métabolisant en Norfenfluramine), qu'elle diluait les comprimés dans des bouteilles d'eau et qu'il a bu dans l'une de ces bouteilles l'avant-veille de la course sans pouvoir se rendre compte que l'eau était souillée.

Le coureur allègue qu'il s'agit de faits nouveaux parce qu'il ne les aurait découverts qu'en mai 2010, après l'échéance du délai d'appel devant le TAS, et qu'auparavant il n'avait aucun raison de suspecter l'existence de ces faits ou moyens de les découvrir, même en cherchant diligemment comment il avait pu ingérer involontairement de la Norfenfluramine.

Selon le coureur, entre le moment où l'UCI lui a annoncé le contrôle positif (21 octobre 2009) et la date de l'appel de l'UCI (21 avril 2010), et notamment lorsqu'il cherchait le moyen de prouver son innocence devant l'instance de la FFC (par laquelle il a été auditionné le 2 février 2010) et après notification de leur décision le 1er mars 2010, il a cherché diligemment la source de son ingestion involontaire de Norfenfluramine mais, malgré toute sa bonne volonté et ses efforts à cet égard, il n'a pu et ne pouvait en découvrir la cause puisque: (i) sa mère ne lui a jamais parlé du fait qu'elle prenait du MEDIATOR et ne lui aurait jamais parlé des soucis de poids liés à sa ménopause, qui est une chose intime, (ii) il n'habitait pas chez ses parents, (iii) il pouvait avoir confiance en eux, et (iv) de toute façon il aurait été très difficile pour lui de faire le lien entre le MEDIATOR et le Norfenfluramine.

Selon le coureur, ce n'est que grâce à la perspicacité de son avocat - qui, lisant par hasard en avril/mai 2010 des articles sur les problèmes de santé publique causés par le MEDIATOR, s'est rendu compte que ce médicament pouvait être à l'origine de l'ingestion involontaire – qu'il a été amené à discuter de la question avec ses parents. En effet, c'est à ce moment-là que son avocat a appelé son père (du coureur) pour lui demander s'il y avait quelqu'un dans la famille ou l'entourage proche du coureur qui prenait du MEDIATOR, et qu'ils ont découvert que sa mère en prenait depuis 2008.

Conformément aux principes précités applicables à l'invocation de faits nouveaux, même si, par hypothèse,

il était admis que les nouveaux faits invoqués par le coureur sont prouvés et n'ont été découverts par lui qu'en mai 2010 dans les circonstances alléguées, juridiquement ces faits ne pourraient être admis comme recevables qu'à condition que le coureur ait prouvé qu'il a exercé auparavant sans succès toute la diligence requise pour essayer de déterminer comment il avait pu ingérer involontairement la substance interdite pour laquelle il a testé positif.

A cet égard et à la lumière des comportements et des circonstances allégués par le coureur et résumés ci-dessus, la Formation considère que le coureur n'a pas rapporté la preuve de sa diligence dans la recherche des faits et des preuves en question devant servir pour sa défense.

Compte tenu des multiples devoirs des coureurs en rapport avec la lutte anti-dopage, et de la grande prudence requise d'eux en matière d'alimentation, de boissons, de traitements médicaux et d'utilisation de suppléments alimentaires, un coureur doit exercer sa prudence également dans les relations avec son entourage (entraîneurs, amis, famille, connaissances) sans que cela ne soit considéré comme de la méfiance. A cet égard, les athlètes sont également responsables des actes de leurs proches, puisque ceux-ci peuvent très bien les mettre involontairement dans une situation à risque.

Par ailleurs, si, confronté à un contrôle positif, un coureur estime qu'il a ingéré involontairement la substance interdite, un élément crucial pour s'innocenter est de démontrer comment le produit est entré dans son organisme.

Pour un athlète l'un des points de départ nécessaire et logique d'une recherche diligente à ce sujet est d'essayer de déterminer - de la façon la plus étendue possible - les types de sources possibles d'ingestion de la substance interdite (médicaments, alimentation, boissons, etc.) et, ensuite, sur cette base et suivant le fil des évènements antérieurs au contrôle positif (chronologie circonscrite en partie par la durée de temps pendant lequel le produit interdit peut subsister de manière détectable dans le système), vérifier toutes les circonstances/situations où un risque a pu naître.

A cet égard, le milieu familial ne peut pas être exclu, a priori, d'une recherche diligente, puisqu'il ne s'agit pas nécessairement d'un environnement dans lequel il y a moins de risque de manger un aliment ou de prendre une boisson ou un médicament problématique.

Or, si l'on suit les allégations du coureur, celui-ci n'a, ni au moment de la notification du contrôle positif, ni en rapport avec son audition par l'instance de la FFC ou au moment de la réception de la décision confirmant la suspension provisoire, interrogé ses parents à cet égard, alors qu'il savait avoir passé chez eux l'avant-veille de la compétition lors de laquelle il a subi le contrôle positif.

Ce ne serait qu'une lecture fortuite d'un article par son avocat – six mois après la notification du contrôle positif à la Norfenfluramine – qui aurait amené le coureur à poser des questions à ses parents concernant les médicaments qu'ils prenaient, alors qu'en se remémorant son passage chez eux deux jours avant la course et en discutant avec eux des sources possible d'ingestion de Norfenfluramine (après avoir fait des recherches préalables à ce sujet), il aurait pu découvrir les faits qu'il a invoqués pour la première fois dans le cadre de la procédure d'appel devant le TAS.

Enfin, de manière plus générale, il est à relever que le coureur a eu plus de trois mois entre la notification du contrôle positif (21 octobre 2009) et son audience en première instance (2 février 2010) pour rechercher de manière approfondie les causes possibles de son ingestion de Norfenfluramine, et ensuite encore presque deux mois entre le moment de la notification de la décision de la Commission de la FFC et l'échéance du délai d'appel devant le TAS, alors qu'il n'y a aucun élément de preuve démontrant qu'il a été diligent à cet égard.

Pour les motifs précités et en raison des limites étroites dans lesquelles des faits nouveaux peuvent être invoqués, à titre exceptionnel, en appel, la Formation considère que le coureur n'a pas rapporté la preuve de sa diligence dans la recherche des faits nouveaux qu'il invoque, et que donc ses conclusions reconventionnelles visant à faire réformer entièrement la décision de première instance de la Commission de la FFC, sont irrecevables.

Par conséquent, il reste maintenant à examiner le bien-fondé de l'appel du l'UCI tendant à faire condamner le coureur au paiement d'une amende et du remboursement de frais liés au contrôle positif.

C. Au Fond

1. L'amende

L'UCI demande à ce qu'une sanction sous forme d'amende soit cumulée avec la sanction disciplinaire (suspension de deux ans) et sportive (disqualification) décidée en première instance par la Commission de la FFC. Selon l'UCI l'amende est obligatoire conformément à l'article 326 RAD et c'est donc à tort que l'instance de la FFC n'en a pas retenue. Le

coureur répond que la nouvelle version du RAD qui prévoit l'amende ne lui est pas opposable et que de toute façon cette disposition et son application seraient disproportionnées et contraires à l'égalité de traitement dans les circonstances.

La Formation a déjà indiqué dans la section de cette sentence consacrée au "droit applicable" les raisons pour lesquelles il faut considérer la version 2009 du RAD, comprenant l'article 326, comme applicable en l'espèce.

Par conséquent, le principe de l'amende étant acquis, la Formation se limitera à examiner la base de calcul de l'amende requise par l'UCI ainsi que la proportionnalité de la sanction et le respect du principe de l'égalité de traitement.

1.1. Les bases de calcul

Selon l'article 326 RDA: *"1. L'amende est obligatoire pour les licenciés qui exercent une activité professionnelle dans le cyclisme et en tout cas pour les membres d'une équipe enregistrée auprès de l'UCI. a) Lorsqu'une suspension de deux ans ou plus est imposée au membre d'une équipe enregistrée auprès de l'UCI, le montant de l'amende est égal au revenu annuel net provenant de l'activité cycliste auquel le licencié avait normalement droit pour l'ensemble de l'année où la violation des règles antidopage a été commise. Le montant de ce revenu sera évalué par l'UCI étant entendu que le revenu net sera établi à 70% du revenu brut correspondant. Il incombe au licencié concerné d'apporter la preuve du contraire. Aux fins de l'application du présent article, l'UCI aura droit de recevoir une copie de tous les contrats du licencié de la part du réviseur désigné par l'UCI. Si la situation financière du licencié concerné le justifie, l'amende imposée en vertu du présent alinéa pourra être réduite, mais pas de plus de la moitié".*

Il n'est pas contesté que le revenu annuel net provenant du l'activité cycliste du coureur (selon son contrat avec La Française des Jeux) au moment des faits était de EUR 30'000, représente un revenu mensuel de EUR 2'500. Par conséquent, l'UCI estime qu'en l'espèce la base de calcul de l'amende selon l'article 326 RAD, nommée "revenu net", devrait être le 70% de EUR 30'000, soit EUR 21'000.

Par ailleurs, l'UCI considère que, conformément au texte de l'article 326 RAD, qui stipule que l'amende ne peut être réduite de plus de la moitié du montant de base ("revenu net") pour tenir compte de la situation financière du licencié, l'amende à payer par le coureur doit être comprise entre EUR 21'000 (son "revenu net" selon la formule de l'article 326) et EUR 10'500 (la moitié du revenu net). A cet égard, l'UCI conclut à ce que la Formation condamne "… *A. à payer à l'UCI une amende conforme à l'article 326 du RAD qui doit en tout cas ne pas être inférieur à 10'500 EUR*".

Ceci étant clarifié, le montant de l'amende requise sera ainsi examiné par la Formation sous l'angle de la proportionnalité et du respect de l'égalité de traitement.

1.2. La proportionnalité et l'égalité de traitement

L'UCI est une association sportive suisse.

En droit suisse, une association jouit d'une liberté importante quant à son organisation et à la réglementation de ses activités. Cette autonomie des associations a néanmoins certaines limites.

Ainsi, en droit suisse, l'intérêt légitime des membres à ce que l'association respecte la loi est protégé, d'une part, par le droit de l'association et, d'autre part, par différents principes généraux et valeurs fondamentales de l'ordre juridique suisse.

Cet ensemble de normes qui protègent les sociétaires, y compris les athlètes qui se soumettent à la réglementation d'une association sportive, est souvent désigné sous le vocable "droits de protection".

Les droits de protection visent autant les règles édictées par l'association sportive que les décisions qui sont prises sur cette base: "*L'association doit exercer son pouvoir en matière d'édiction et d'application de normes dans le respect de certains principes généraux du droit*" (M. Baddeley, l'Association sportive face au droit, Bale 2004, p. 108).

Les droits de protection s'appliquant aux sanctions disciplinaires prises par une association sportive comprennent, entre autres, les principes de la proportionnalité et de l'égalité de traitement.

L'amende est admise comme étant l'une des formes de sanctions disciplinaires pouvant être adoptée valablement par une association sportive, et le cumul d'une amende avec d'autres formes de sanctions, telles qu'une suspension, n'est pas considéré illégal ou disproportionné en soi.

Ainsi, dans son principe, l'article 326 RAD est admissible en tant que norme, cela d'autant plus si, comme le soutient l'UCI, son édiction a été soumise à consultation, y compris auprès du syndicat international des cyclistes professionnels.

S'agissant de la détermination du revenu servant de base pour le calcul de l'amende, l'UCI soutient que le fait d'utiliser le revenu d'une année entière (revenu annuel brut provenant du cyclisme) permet d'assurer

l'égalité de traitement entre coureurs. A cet égard, l'UCI soutient également que toute autre manière de calculer reviendrait à traiter les coureurs de manière inéquitable dans la mesure où un coureur contrôlé positif en fin d'année devrait s'acquitter d'une amende bien plus importante qu'un coureur contrôlé positif en début d'année, ce qui n'est pas le but de la règle de l'article 326 RAD.

La Formation considère qu'il convient tout d'abord de se reporter à la formulation de l'article 326, alinéa 1, lit. a RAD qui indique en substance:

*"… le montant de l'amende est égal au revenu annuel net provenant du cyclisme auquel le licencié avait normalement droit pour l'ensemble de l'année où la violation des règles anti-dopage avait été commise". (*Soulignement ajouté).

Par cette formulation, l'UCI a clairement exprimé dans son règlement la méthode et l'assiette devant servir de base au calcul de l'amende infligée au coureur.

Selon la Formation, cela ne laisse pas place à d'autres interprétations. Dans ce contexte, il y a lieu de se référer aussi à la jurisprudence du TAS (TAS 2010/A/2063) qui a procédé à une analyse détaillée de l'article 326.1, lettre a, RAD en particulier en ce qui concerne la définition du revenu annuel brut.

L'introduction d'amendes dans les règlements trouve sa raison dans la lutte contre le dopage, les sanctions financières pouvant avoir à cet égard un caractère dissuasif supplémentaire.

L'UCI a fixé des bases tenant compte du salaire annuel auquel le coureur a droit, réduit à 70% pour tenir compte des charges sociales et afin d'avoir un revenu net calculé de manière uniforme.

Par ailleurs, l'article 326 RAD mentionnant que l'amende peut être réduite à la moitié du revenu net déterminant "*…si la situation financière du licencié concerné le justifie"*, la Formation constate que cette clause permet de tenir compte des besoins d'une situation particulière.

A cet égard, la Formation considère que les faits suivants, prouvés à sa satisfaction, sont pertinents pour la réduction de l'amende en application du principe de la proportionnalité:

Le coureur n'a que 22 ans et n'a jamais exercé sa profession (il est maçon de formation) en raison de son engagement dans le cyclisme.

Ainsi, au cours de l'année fiscale précédant son engagement par La Française des Jeux, il n'a gagné qu'un revenu annuel brut de EUR 8'440 lié à un emploi auprès de la Commune.

Il n'a pas de sponsors et il n'a ni fortune, ni économies.

Il n'a jamais tiré d'autre revenu du cyclisme que le salaire reçu de La Française des Jeux.

La Française de Jeux a cessé de payer son salaire en octobre 2009 mais pour des raisons juridiques il n'a pu toucher le chômage avant son licenciement effectif en février 2010. Par conséquent, il n'a touché des allocations de chômage qu'à partir de février 2010 et pour un montant mensuel de € 1'350.-- (le premier mois € 675.--).

Son droit au chômage (calculé en fonction de la durée de son emploi antérieur) prendra fin en novembre 2010.

Il habite chez sa compagne propriétaire d'une maison, avec qui il vient d'avoir un bébé, et ne reçoit aucune aide financière de ses parents.

Compte tenu des éléments précités de la situation financière du coureur, la Formation considère que le principe de la proportionnalité requiert que l'amende soit réduite à la moitié du revenu net retenu comme base de calcul.

Pour ces motifs, la Formation décide que l'amende infligée au coureur sur la base de l'article 326 RAD sera du 50% de son revenu net de € 21'000.--, soit un montant de € 10'500.--.

2. Les frais de contrôle antidopage

Selon l'article 275 du RAD:

"Le licencié qui est reconnu coupable d'une violation des règles antidopage doit prendre en charge: 1.[…]. 2. les frais de la gestion des résultats par l'UCI; le montant de ces frais sera de CHF 1'000, sauf si une somme plus élevée est réclamée par l'UCI et déterminée par l'instance d'audition. 2. les frais de l'analyse de l'échantillon B, le cas échéant. La fédération nationale est conjointement et solidairement responsable de leur paiement à l'UCI […] Le licencié est redevable du paiement des frais mentionnés aux points 2) et 3) même s'ils n'ont pas été attribués dans la décision".

Au titre du paragraphe 2 de la disposition précitée l'UCI réclame au coureur le paiement de CHF 1'000, et au titre du paragraphe 3 le remboursement d'un montant de EUR 400 facturé à l'UCI par l'université de Gent pour l'analyse de l'échantillon B.

La Formation considère que cette disposition est sans ambiguïté et que les conditions de son application sont clairement remplies en l'espèce.

Par conséquent et en raison du fait que ces montants n'ont pas été attribués en première instance par la Commission de la FFC, le coureur sera condamné à payer à l'UCI les deux montants réclamés à ce titre.

Arbitrage TAS 2010/A/2141
M. c. Fédération Royale Espagnole de Cyclisme (RFEC)
&
Arbitrage TAS 2010/A/2142
Union Cycliste Internationale (UCI) c. M. & RFEC
8 juin 2011

Cyclisme; dopage (EPO recombinante); litispendence; motifs sérieux pour suspendre la procédure devant le TAS; intégration par renvoi des règles de l'UCI dans la réglementation de la fédération nationale; compétence du TAS; droit d'intervention de l'UCI

Panel:
Me Dirk-Reiner Martens (Allemagne), Président
Me José Juan Pinto (Espagne)
Me Olivier Carrard (Suisse)

Faits pertinents

M. ("M.") est un cycliste professionnel affilié à la Fédération Royale Espagnole de Cyclisme (RFEC). En tant que fédération nationale, la RFEC est affiliée à l'UCI.

L'Union Cycliste Internationale (UCI) est une association de droit suisse ayant son siège à Aigle, Suisse. Elle est l'association des fédérations nationales du cyclisme et a comme but la direction, le développement, la réglementation, le contrôle et la discipline du cyclisme dans toutes ses formes, au niveau international, selon l'article 2 lit. a de ses statuts.

M. a fait l'objet d'un contrôle antidopage hors compétition conduit par l'UCI le 26 juin 2009 à San Sebastian.

Selon les résultats des tests effectués lors de ce contrôle, de l'Erythropoïétine Recombinante (EPO) était présente dans les échantillons d'urine A et B prélevés sur M. L'EPO était incluse, sous le groupe S2, Hormones et Substances apparentées, dans la liste 2009 des substances prohibées édictée par l'Agence Mondiale Antidopage (AMA) ainsi que dans l'annexe de la Décision du 19 décembre 2008 de la Présidence du Conseil Supérieur des Sports, qui est l'autorité compétente en Espagne pour édicter la liste des substances et groupes pharmacologiques et méthodes interdites dans le sport.

Au vu du résultat obtenu lors du contrôle antidopage effectué sur M., le Comité National de Compétition et Discipline Sportive de la RFEC (le "CNCDD"), a décidé, le 11 septembre 2009, d'engager une procédure disciplinaire contre ce dernier pour violation des articles 21 al.1 et 21 al.2 du règlement antidopage de l'UCI (RAD).

Dans le cadre de la procédure devant le CNCDD, M. s'est prévalu de violations de l'article 24 de la Constitution espagnole ainsi que de la Loi Organique espagnole n° 7/2006, commises dans le cadre du contrôle antidopage qu'il avait subi. M. a en outre invoqué différentes violations des procédures antidopage édictées par l'AMA, l'UCI ainsi que l'organisme espagnol d'accréditation du Laboratoire de Madrid. M. invoque en outre que le résultat est "un faux positif". Il conteste avoir jamais pris de produits dopants.

Le CNCDD a rendu sa décision le 30 avril 2010 ("la Décision"). Après avoir notamment constaté qu'il agissait comme "organe délégué" de l'UCI, le CNCDD a décidé ce qui suit:

"De sanctionner M., titulaire de la licence Elite Pro n°44.157.816, par la suspension de la licence pendant deux ans et la disqualification de tous les résultats obtenus depuis le recueil de l'échantillon, conformément aux dispositions des articles 293, 288, 313 et 326 du Règlement Antidopage de l'UCI, comme responsable d'une violation des règles établies à l'article 21.1 du Règlement désigné, par la présence dans son organisme de la Substance Erythropoïétine Recombinante dans le contrôle qui fut réalisé sur lui hors compétition, par l'Union Cycliste Internationale le 26 juin 2009, à San Sebastian, le code de récipient correspondant à l'échantillon étant A-B 2314192, analysé au Laboratoire du Conseil Supérieur des Sports de Madrid, selon le procès-verbal 091241. Lui imposant, en outre, l'amende équivalente à 70% du salaire brut annuel réellement perçu au cours de l'année en laquelle a

eu lieu le contrôle pour son activité cycliste, à savoir 154'566.57 euros et les coûts de la procédure pour dopage conformément aux dispositions de l'article 275 du RAD (…):

(…)

Conformément aux dispositions des articles 329.1 et 333 du Règlement Antidopage de l'UCI, il peut être interjeté appel de la présente décision devant la Cour d'Arbitrage du Sport (CAS) [sic] dans un délai de un mois à compter de sa notification.

J'ordonne que cette décision soit notifiée à l'intéressé, au Président de la Fédération Espagnole de Cyclisme, au Président de la Commission de Contrôle et de Suivi de la Santé et du Dopage, au Président de la Commission de la Santé et de l'Antidopage RFEC et à l'Union Cycliste Internationale".

Le 8 juin 2010, M. a déposé devant le TAS une déclaration d'appel à l'encontre de la décision rendue par la RFEC le 30 avril 2010. Cet appel est uniquement dirigé contre la RFEC. Ce même 8 juin 2011 M. a déposé plainte contre l'UCI devant les tribunaux espagnols à l'encontre de la même décision.

M. conclut dans sa déclaration d'appel à l'annulation de la décision attaquée, au classement de l'affaire et dès lors à son acquittement. Cette déclaration d'appel est faite à titre conservatoire, dans la mesure où M. déclare avoir ouvert action devant les tribunaux espagnols compétents en raison de la non-applicabilité, selon lui, des règles de l'UCI.

Toujours dans sa déclaration d'appel, M. demande la suspension de la procédure d'appel introduite devant le TAS et du délai pour le dépôt de son mémoire d'appel jusqu'au prononcé d'une décision définitive par les tribunaux espagnols.

Le 10 juin 2010, l'UCI a à son tour déposé une déclaration d'appel à l'encontre de la même décision. M. et la RFEC y sont désignés comme parties intimées.

L'UCI conclut à la modification de la décision appelée afin que la sanction financière prononcée à l'encontre de M. soit celle prévue par l'article 326 des règles antidopage de l'UCI (RAD) et que le *dies a quo* de la suspension de deux ans soit fixé au 31 juillet 2009.

Par lettre du 14 juin 2010, l'UCI a estimé qu' *"[i]l s'impose donc que les deux appels soient joints et que l'UCI puisse intervenir dans l'affaire M. / RFEC".*

Par courriers du 16 juin 2010, le Greffe du TAS a ouvert la procédure *TAS 2010/A/2141 M. c. RFEC* ainsi que la procédure *TAS 2010/A/2142 UCI c. M. & RFEC*. M. et la RFEC ont été invités à s'exprimer sur les requêtes de l'UCI.

Par courrier du 25 juin 2010, la RFEC a soutenu les requêtes de consolidation et d'intervention déposées par l'UCI.

Le 6 juillet 2010, M. a notamment soulevé une exception de litispendance en raison de l'action qu'il a intentée, le 8 juin 2010, devant les tribunaux espagnols à l'encontre de la décision appelée et demandé la suspension des procédures TAS 2010/A/2141 et TAS 2010/A/2142 jusqu'à ce qu'une décision définitive soit rendue par la justice espagnole. Il s'est par ailleurs opposé à la consolidation des procédures arbitrales ainsi qu'à l'intervention de l'UCI dans la procédure TAS 2010/A/2141.

Par courrier du 15 juillet 2010, l'UCI a notamment allégué que son règlement anti-dopage (RAD), dans sa version du 28 juin 2009, était applicable au cas d'espèce.

Dans une lettre du 22 juillet 2010, M. a estimé que le RAD ne serait pas applicable au cas d'espèce.

Par ordonnance du 14 septembre 2010, le Président de la Chambre arbitrale d'appel du TAS a décidé que:

"1. La demande d'intervention à la procédure TAS 2010/A/2141 déposée par l'UCI est acceptée, sans préjuger de la décision de la Formation arbitrale sur cette même question.

2. Les procédures TAS 2010/A/2141 et TAS 2010/A/2142 sont jointes et seront soumises à une seule formation arbitrale composée de trois arbitres.

3. Les modalités de désignation des deux co-arbitres seront déterminées selon l'accord des parties dans un délai qui leur sera ultérieurement imparti par le Greffe du TAS. A défaut d'accord dans ce même délai, les co-arbitres seront désignés par le Président de la Chambre arbitrale d'appel ou son suppléant.

4. Le Président de la Formation arbitrale sera désigné par le Président de la Chambre arbitrale d'appel ou son suppléant.

5. Les délais pour le dépôt des mémoires d'appel demeurent suspendus jusqu'à nouvel avis de la part du Greffe du TAS.

6. La présente décision est rendue sans frais".

L'Ordonnance du Président de la Chambre arbitrale d'appel du TAS a été notifiée aux parties le 14

septembre 2010. Dans le même temps, le greffe du TAS a demandé à l'UCI et à la RFEC de se déterminer notamment sur la demande de suspension des procédures devant le TAS formulée par M.

Par courrier du 24 septembre 2010, l'UCI s'est opposée à la suspension des procédures.

En réponse à la demande de la Formation, M. a fait valoir par courrier du 18 février 2011 des moyens supplémentaires s'agissant de la question de la litispendance en se fondant notamment sur l'article 9 LDIP.

La Formation ayant été désignée et les Parties ayant eu l'opportunité de produire l'ensemble des pièces à l'appui de leurs arguments, une audience s'est tenue le 3 mars 2011. Durant l'audience, les parties ont eu l'occasion de rappeler à nouveau leurs arguments relatifs aux questions de procédure posées, notamment les questions liées à l'application des règlements de l'UCI et à l'interprétation de l'article 186 al.1bis LDIP.

Extraits des considérants

A. *Lis pendens*

La Formation a revu en détails tous les arguments soulevés par M. sur le sujet de la litispendance, qui peuvent être résumés comme suit:

1. Une demande a été déposée le 8 juin 2010 devant les Tribunaux espagnols à l'encontre de la Décision. Cette action serait dirigée contre la RFEC et l'UCI.

2. La demande porte sur les mêmes questions que celles soulevées par l'UCI dans son appel et par M. devant le TAS.

3. L'UCI a accepté la compétence des tribunaux espagnols dans le cadre de plusieurs plaintes déposées par des cyclistes contre la RFEC et l'UCI n'aurait ainsi jamais contesté la compétence des tribunaux espagnols.

4. Les articles 9 et 186 de la loi suisse sur le droit international privé (LDIP) obligent le TAS de surseoir à statuer jusqu'à ce qu'une décision définitive soit rendue par les Tribunaux espagnols qui ont été saisis.

5. Le compte rendu des travaux préparatoires de l'article 186 al.1bis LDIP montre que le TAS doit prononcer la suspension de la procédure en vertu de cet article.

L'UCI et la RFEF contestent la compétence des tribunaux civils espagnols, s'opposent à la requête de suspension de M. formulée dans la procédure 2141 et concluent au rejet de l'exception de litispendance soulevée par M. dans la procédure 2142.

A titre liminaire, la Formation relève qu'en l'absence de disposition topique dans le Code et de Convention internationale régissant la matière, le siège du TAS étant par ailleurs en Suisse, la LDIP s'applique pour trancher les questions de litispendance internationale en matière d'arbitrage posées dans la présente procédure, conformément à l'article 1 LDIP, ce qui n'est pas contesté.

S'agissant à présent de la question de la litispendance, la Formation observe qu'en vertu de l'article 181 LDIP, l'instance arbitrale introduite par l'appel de M. est pendante depuis le 8 juin 2010, tandis que celle introduite par l'appel de l'UCI est pendante depuis le 10 juin 2010. Par leurs déclarations d'appel, M. et l'UCI ont ainsi engagé la procédure de constitution du tribunal arbitral en application de l'article R48 du Code. Selon les pièces figurant au dossier, la plainte de M. devant les tribunaux espagnols est datée du 8 juin 2010, soit du même jour que la déclaration d'appel de M. devant le TAS. Les deux actes introductifs d'instance de M. semblent ainsi avoir été déposés le même jour. Dans tous les cas, il convient à ce stade déjà de relever que l'éventuelle antériorité de la procédure devant les Tribunaux espagnols par rapport à la procédure devant le TAS serait extrêmement courte si elle était avérée.

La Formation se réfère ensuite à l'article 186 alinéa 1bis LDIP qui prévoit ce qui suit:

"Il [le tribunal arbitral] *statue sur sa compétence sans égard à une action ayant le même objet déjà pendante devant un tribunal étatique ou arbitral, sauf si des motifs sérieux commandent de suspendre la procédure".*

S'agissant de l'article 9 LDIP duquel M. tire certains moyens, la Formation relève que l'article 186 al. 1bis LDIP, entré en vigueur postérieurement à l'ATF 127 III 118 auquel se réfère M., porte spécifiquement sur la question de la litispendance en cas d'arbitrage international et constitue dès lors une *lex specialis* par rapport à l'article 9 LDIP qui se situe dans la partie générale "dispositions communes" de la LDIP (cf. notamment Kaufmann-Kohler/Rigozzi, Arbitrage International, Droit et pratique à la lumière de la LDIP, 2e ed., Berne 2010, ch. 455 ss). L'article 186 al.1bis LDIP l'emporte donc sur l'article 9 LDIP.

Revenant donc sur l'article 186 al. 1bis LDIP, la Formation relève déjà que même dans l'hypothèse

où une instance est déjà pendante devant d'autres tribunaux, le tribunal arbitral peut se déclarer compétent et poursuivre la procédure. L'existence d'un cas de litispendance ne suffit donc pas à décider de la suspension.

La Formation se réfère à ce sujet à la jurisprudence du TAS notamment à la sentence TAS 2009/A/1881, rendue sous l'égide du nouvel article 186 al. 1bis LDIP et confirmée par le Tribunal fédéral.

Dans cette sentence, le TAS a relevé notamment qu'un appel de nature conservatoire suffit à créer une litispendance (ch. 64 de la sentence citée), ce que M. ne conteste d'ailleurs pas. Le TAS a également relevé qu'il ne suffisait pas que la partie concernée invoque le risque de jugements contradictoires pour qu'il puisse faire valoir des "motifs sérieux" au sens de l'article 186 al. 1bis LDIP (ch. 66 de la sentence citée).

Conformément à cette jurisprudence du TAS, la Formation rejette donc les moyens tirés par M. du risque de jugements contradictoires, notamment l'argument selon lequel une demande portant sur le même objet que l'appel de l'UCI a été déposée devant les Tribunaux espagnols.

Il reste ainsi à déterminer s'il existe des "motifs sérieux" pour suspendre la procédure pendante devant le TAS.

M. se fonde à ce sujet essentiellement sur les travaux préparatoires relatifs à l'article 186 al.1bis LDIP.

La Formation constate qu'en l'absence de jurisprudence topique sur le sujet, il convient en effet de se référer à ces travaux préparatoires et à la doctrine publiée sur le sujet.

La Formation note ainsi que le législateur suisse a en effet reconnu que dans *"certaines situations exceptionnelles, la suspension est préférable dans l'intérêt d'une bonne administration de la justice"*. (Kaufmann-Kohler/Rigozzi, *op. cit.*, ch. 456 a). Le Rapport de la Commission des affaires juridiques du Conseil national du 17 février 2006, page 9 ("le Rapport"), cite plusieurs cas, certains d'ailleurs déjà contestés en doctrine, pouvant constituer des "motifs sérieux" au sens de l'article 186 al.1bis LDIP.

La Formation a notamment porté un grand intérêt à un cas retenu dans le Rapport, à savoir celui où l'introduction de l'arbitrage a pour seul objet de sauvegarder un délai de saisine prévu par la convention d'arbitrage. Ce cas est justement celui de l'appel formé par M. devant le TAS. A ce titre, il pourrait y avoir un motif sérieux de suspendre la procédure 2141.

La Formation relève toutefois que la réforme voulue par le législateur consacre l'autonomie de l'arbitre dans sa décision de suspendre ou non la procédure arbitrale. Il revient ainsi à la Formation de prendre en compte les intérêts en présence et de chercher à assurer l'efficacité de l'arbitrage en évitant toute mesure de nature dilatoire. En d'autres termes, il s'agit d'éviter le risque de jugements contradictoires tout en assurant un déroulement rapide de la procédure dans l'intérêt des parties (cf. notamment Kaufmann-Kohler/Rigozzi, *op. cit.*, ch. 456b).

Sur la base de ces principes, la Formation a pris en compte l'ensemble des circonstances de ce dossier. Elle a notamment pris en compte le fait que les deux actes introductifs d'instance de M. ont apparemment été déposés le même jour et que, dès lors, il n'y a pas une antériorité nette d'une procédure à l'égard de l'autre. A ce titre, selon les allégations de l'UCI non contestées par M., la procédure espagnole n'a toujours pas été notifiée valablement à l'UCI. Il est donc douteux que les autorités espagnoles rendent une décision dans un délai rapproché.

Selon l'expérience de la Formation, il est probable que la sentence finale du TAS sera ainsi rendue bien avant celle des tribunaux espagnols et deviendra donc définitive et exécutoire en premier. Conformément à la Convention de New York sur la reconnaissance et l'exécution des décisions arbitrales, ratifiée par la Suisse et l'Espagne, les tribunaux espagnols devraient ainsi en principe se dessaisir dès que la sentence finale du TAS leur sera présentée, ce qui supprimera le risque de jugements contradictoires.

Compte tenu de ce qui précède, la Formation considère que la continuation de la procédure devant le TAS s'impose afin de permettre aux parties de bénéficier d'une décision sur le fond rapide, ce d'autant plus que M. est actuellement suspendu, nonobstant le caractère conservatoire de l'appel de M.

En outre, l'UCI a elle-même déposé un appel et donc introduit une instance devant le TAS. M. a soulevé une exception de litispendance contre cet appel. De toute évidence, l'appel de l'UCI ne vise pas à préserver un délai, comme dans le cas mentionné dans le Rapport, mais bien à obtenir une décision au fond de la part du TAS. Ceci doit également être pris en compte par la formation dans la pesée des intérêts en présence.

La décision sur la requête de suspension et celle sur l'exception de litispendance formulées par M. sont ainsi manifestement liées.

A ce sujet, la Formation souligne que M. a une attitude contradictoire. Il s'oppose, d'une part, à la jonction

de causes en invoquant que la procédure 2141 et la procédure 2142 ne portent pas sur le même objet. Il demande, d'autre part, la suspension de ces deux procédures au motif qu'elles portent chacune sur le même objet que celui de la procédure ouverte devant les Tribunaux espagnols. Malgré les explications de M., la Formation peine à comprendre les raisons d'une telle attitude.

En présence de deux appels portant sur le même objet, la Formation doit ainsi prendre en compte la nature des deux appels lorsqu'elle applique l'article 186 al.1bis LDIP à chaque procédure d'appel.

La Formation décide donc qu'au vu des intérêts en présence, de la nécessité d'assurer l'efficacité de l'arbitrage et de limiter les risques de décisions contradictoires, il convient de poursuivre les procédures 2141 et 2142 devant le TAS.

La requête de suspension et l'exception de litispendance formulées par M. doivent ainsi être rejetées.

B. Compétence du TAS

L'art. R47 du Code stipule notamment qu' *"un appel contre une décision d'une fédération, association ou autre organisme sportif peut être déposé au TAS si les statuts ou règlements dudit organisme sportif le prévoient ou si les parties ont conclu une convention d'arbitrage particulière et dans la mesure aussi où l'appelant a épuisé les voies de droit préalables à l'appel dont il dispose en vertu des statuts ou règlements dudit organisme sportif".*

L'art. 329 du RAD de l'UCI (version en vigueur au 28 juin 2009) prévoit que *"les décisions suivantes peuvent faire l'objet d'un appel devant le Tribunal arbitral du sport:*

1. *décision de l'instance d'audition de la fédération nationale au sens de l'article 272 [RAD]*

(…)".

Les appels déposés par M., d'une part, et par l'UCI, d'autre part, visent tous deux la Décision rendue par le Comité National de Compétition et de Discipline Sportive (CNCDD) de la RFEC en date du 30 avril 2010.

Il ressort de la Décision que le CNCDD a rendu celle-ci en vertu des compétences qui lui sont déléguées par l'UCI sur la base du RAD, plus précisément sur la base des articles 249 (délégation des compétences disciplinaires à la fédération nationale) et 256 (compétence de l'instance d'audition nationale) RAD.

L'UCI invoque sans réserve l'application du RAD, alors que M. dépose son appel devant le TAS à titre conservatoire, invoquant sur le fond que le RAD ne s'appliquerait pas à la présente procédure.

Après avoir pris en considération l'ensemble des arguments des parties quant à la compétence du TAS et à l'application du RAD à la présente procédure, la Formation retient tout d'abord qu'il ne fait aucun doute que le CNCDD exerce la fonction d'instance d'audition de la RFEC au sens du RAD. A ce titre, le CNCDD rend des décisions susceptibles d'un appel devant le TAS, comme cela est prévu par l'article 329 ch.1 RAD. Ce fait n'est d'ailleurs pas contesté par M., qui, dans sa déclaration d'appel et ses écritures subséquentes, admet qu'en cas d'application du RAD, le TAS est compétent pour connaître d'un appel contre la Décision du CNCDD.

La Formation examine ensuite si le RAD est applicable au cas d'espèce et dès lors si la compétence du TAS est bien donnée.

A ce sujet, la Formation relève que M. était au moment des faits un cycliste professionnel titulaire d'une licence "élite – UCI", valable du 1er janvier 2009 au 31 décembre 2010. Le formulaire de demande de licence fait clairement apparaitre l'UCI aux côtés de la RFEC. Aux articles deux et trois du formulaire, le demandeur de licence, en l'occurrence M., déclare s'engager à respecter les Statuts et Règlements de la RFEC et ceux de l'UCI qui en font partie (*"incorporados a aquellos"*), dans la mesure où ceux-ci respectent les dispositions de droit impératif espagnol en vigueur (*"en la medida que respelen las disposiciones del derecho imperativo español en vigor"*).

Afin de déterminer si le RAD est applicable dans le cas présent, il convient donc d'une part de déterminer la portée des termes *"incorporados a aquellos"* et d'autre part de résoudre la question de la compatibilité du RAD avec le droit impératif espagnol.

S'agissant de la première question, la Formation relève que l'article 7 des Statuts de la RFEC prévoit que les compétences de la RFEC qui découlent du Règlement UCI du sport cycliste, dont le RAD fait partie, doivent être reconnues *("se deberá reconocer (…) los compentencias que le correspondan en virtud de lo que establece (…) los presentes Estatutos y el Reglamento General del Deporte Ciclista Español y de la UCI* (réd.)*)".* Ce renvoi au Règlement UCI du sport cycliste et ainsi au RAD démontre clairement que ce règlement fait partie du corps de règlements applicables au niveau de la RFEC. Cette interprétation de l'article

7 des Statuts de la RFEC est confirmée par le renvoi dans le formulaire de demande de licence aux règlements de l'UCI.

En outre, une interprétation systématique des Statuts et Règlements de l'UCI confirme cette interprétation littérale de l'article 7 des Statuts de la RFEC et du formulaire de demande de licence. En effet, l'article 6 al. 2 des Statuts de l'UCI stipule que les règlements de cette dernière doivent être repris par les fédérations nationales. Les articles 5 des Dispositions préliminaires, 1.1.001, 1.1.004, 1.1.023 ainsi que l'article 1.1.024 (modèle de licence) qui prévoit que *"le titulaire se soumet aux règlements de l'UCI et des fédérations nationales. Il accepte les contrôles antidopages et les tests sanguins qui y sont prévus ainsi que la compétence exclusive du TAS"*, démontrent que le sport cycliste professionnel est organisé autour d'un système de licence gouverné à la fois par les règlementations nationales et par les règlementations de l'UCI. Tout licencié est directement soumis aux règles de l'UCI et les fédérations nationales doivent mettre en œuvre les mesures assurant le respect des normes édictées par l'UCI. Ceci se traduit à l'article 6 para. 1 et l'article 6 para. 3 des Statuts de l'UCI qui prévoient notamment que *"les fédérations* (…) *s'engagent à faire respecter les statuts, règlements et décisions de l'UCI"* (art. 6 par. 1 Statuts UCI) et que *"les statuts et règlements des fédérations ne peuvent aller à l'encontre de ceux de l'UCI. En cas de divergence, seuls les statuts et les règlements de l'UCI seront appliqués"* (art. 6 para. 3 Statuts UCI).

Compte tenu de ce qui précède, la Formation considère que le renvoi au Règlement UCI du sport cycliste et donc au RAD, à l'article 7 des Statuts de la RFEC traduit clairement la volonté de la RFEC de respecter ses engagements vis-à-vis de l'UCI et conduit à l'intégration, par renvoi, du RAD dans les règlements de la RFEC. Le RAD s'applique ainsi à tout cycliste professionnel licencié, que ce soit en vertu des Statuts et règlements de l'UCI qu'en vertu des Statuts de sa fédération nationale, en l'occurrence la RFEC, sans qu'il soit nécessaire pour cette dernière d'éditer formellement un règlement de même contenu que le RAD.

La Formation observe d'ailleurs que cette thèse est fermement soutenue par la RFEC elle-même dans son courrier du 31 mars 2011. Bien que la position de la RFEC, de par sa qualité de partie à la procédure, doive être prise avec réserve, la Formation y voit une confirmation de l'interprétation faite par la Formation de l'article 7 des Statuts de la RFEC.

Dans ce contexte et à l'instar de ce qui a été déjà décidé précédemment par le TAS (TAS 2006/A/1119, ch. 37, citée par l'UCI dans ses déterminations du 31 mars 2011), la Formation retient que M. ne saurait tenter de tirer avantage du fait que la demande de licence de la RFEC ne reprend pas *expressis verbis* le contenu du modèle de demande de licence imposé par l'UCI. D'abord, la demande de licence renvoie explicitement aux règlements de l'UCI. Ensuite, M., coureur cycliste professionnel, ne peut en outre être considéré comme un profane et ne peut donc prétendre de bonne foi ignorer l'existence du TAS et de sa compétence pour connaître des affaires de dopage. On relèvera en outre que la procédure antidopage qui a conduit à l'introduction de la procédure disciplinaire a été conduite sous l'égide de l'UCI. Ceci figure sur les formulaires complétés et signés par M., déjà au stade du prélèvement de l'échantillon d'urine.

Compte tenu de tout ce qui précède, la Formation considère que le RAD s'applique à M. et que la clause attributive de juridiction en faveur du TAS prévue à l'article 329 RAD ainsi que le droit d'intervention de l'UCI prévu à l'article 332 RAD lui sont opposables. S'agissant de l'argument de M. selon lequel la version 2009 du RAD n'était pas encore en vigueur lorsqu'il a signé sa demande de licence, la Formation observe que déjà dans sa version précédente, en vigueur lors de la signature de la demande de licence, le RAD prévoyait la compétence du TAS. Cet argument n'est donc ici pas pertinent.

Une fois l'applicabilité du RAD reconnue, reste à aborder la question de sa compatibilité avec le droit impératif espagnol qui est réservée dans le formulaire de demande de licence ainsi qu'à l'article 7 des Statuts de la RFEC. A ce sujet, la Formation relève tout d'abord qu'au stade de la présente sentence qui porte uniquement sur des questions de procédure, il n'y a pas lieu de se prononcer sur la compatibilité de l'ensemble des dispositions du RAD mais uniquement sur celles ayant trait à la compétence du TAS pour connaître de l'affaire en cause (329 RAD) et du droit d'intervention de l'UCI (332 RAD), qui sera abordé plus loin.

S'agissant de la question de la compétence du TAS, la Formation observe que M. ne semble pas remettre en question l'article 329 RAD mais plutôt les dispositions du RAD ayant trait à la procédure de contrôle en tant que telle. Dans tous les cas, la Formation ne trouve pas dans les moyens soulevés par M. d'argument susceptible de juger l'article 329 RAD non conforme au droit impératif espagnol.

La Formation relève d'ailleurs que le TAS a déjà eu l'occasion de se prononcer sur le sujet de sa compétence dans le cadre de la décision TAS 2006/A/1119, ch. 39 ss, déjà citée ci-dessus. Le

TAS a ainsi constaté en substance qu'aucune disposition de la loi espagnole n'exclut le recours à l'arbitrage. Il y est en outre relevé que ce recours à l'arbitrage est également admis sous l'angle de l'article 6 al. 1 de la Convention Européenne des Droits de l'Homme (CEDH). Enfin, comme le souligne l'UCI, l'Espagne a ratifié la Convention internationale contre le dopage dans le sport qui renvoie aux principes du Code mondial antidopage. Or, l'appel au TAS est un des principes de ce Code.

Enfin, la Formation tient à relever deux moyens soulevés par M. dans le cadre de l'audience, soit, d'une part le moyen tiré de l'article 54 al. 2 du Code de Procédure Civile (CPC) espagnol quant au caractère non valable de sa soumission à un contrat d'affiliation, et d'autre part, le moyen tiré du paragraphe 2 de l'article 3 du formulaire de licence qu'il a signé.

S'agissant de l'article 54 al. 2 CPC espagnol, la Formation relève d'abord que M. a en tout état de cause simplement allégué, et pour la première fois lors de l'audience préliminaire, qu'en droit espagnol, sa soumission au contrat d'affiliation de la RFEC ne serait pas valable en application de cet article. La Formation constate ensuite que le siège du TAS étant en Suisse, la validité de l'engagement de M. doit, dans le cadre d'une sentence partielle sur compétence, être apprécié à la lumière de la loi fédérale sur le droit international privé (LDIP) (articles 176 et 178 de cette loi, CAS 2011/A/2240) et que le Tribunal fédéral a, à plusieurs reprises, reconnu le principe des clauses arbitrales par référence contenues dans la règlementation d'une fédération sportive (cf. not. ATF 4P.230/2000 du 7 février 2001, ATF 4A_460/2008 du 9 janvier 2009, consid. 6.2). L'article 54 al. 2 CPC espagnol ne trouve donc pas application dans le cas d'espèce.

S'agissant ensuite du moyen tiré directement du paragraphe 2 de l'article 3 du formulaire de licence qu'il a signé, la Formation note que M. semble invoquer que seuls les tribunaux du siège de l'UCI sont compétents, ce qui, selon lui, exclurait la compétence du TAS. La Formation ne peut suivre l'argument de M. En effet, comme il a été vu plus haut, le formulaire de licence fait clairement référence à l'article 3 paragraphe 1 aux instances "prévues dans les Règlements" et non aux "tribunaux du siège de l'UCI". Comme l'explique à juste titre la RFEC, l'article 3 paragraphe 1 est l'article topique dans la présente affaire puisqu'il traite de sanctions relatives à la violation de règles de jeu et de compétition, dont les règles antidopage font partie, ce que M. ne conteste pas. En outre, l'article 3 paragraphe 2, qui comprend la référence aux tribunaux du siège de l'UCI, reprend aussi le renvoi aux Règlements et aux clauses attributives de juridiction qu'ils contiennent. A la lecture de ce paragraphe, on peut constater que le renvoi aux tribunaux du siège de l'UCI est subsidiaire ("sans préjudice de (…)"; "sin perjuicio de (…)") au renvoi aux clauses attributives de juridiction des Règlements. Ce renvoi aux tribunaux du siège de l'UCI est en outre limité à un cas précis, à savoir lorsque seule l'UCI est partie à la procédure ("cuando sea easta la unica parte demandada"), ce qui n'est pas le cas en l'espèce. Il existe ainsi plusieurs motifs, chacun suffisant, d'écarter le moyen de M. tiré de l'article 3 paragraphe 2 *in fine* du formulaire de licence.

En conséquence, la Formation retient que le TAS est compétent pour connaître des appels déposés par l'UCI et M., dans la mesure où ils sont recevables.

C. Intervention de l'UCI et jonction de causes

L'ordonnance du 14 septembre 2010 réserve à la Formation la compétence de décider de manière définitive de l'intervention de l'UCI à la procédure 2141 et de la jonction des causes 2141 et 2142.

En substance, M. invoque que les deux causes ne peuvent être jointes dans la mesure où l'UCI ne serait qu'un tiers dans le cadre de la procédure d'appel qu'il a lui-même ouverte devant le TAS. M. invoque encore que l'objet des deux procédures serait différent dans la mesure où l'UCI souhaite modifier la décision du CNCDD, alors que M. souhaite l'annuler. M. explique enfin qu'une procédure porte sur des questions de fait et l'autre sur des questions de droit.

L'UCI et la RFEC demandent eux que la jonction de cause soit maintenue. Elles invoquent notamment le fait que l'UCI peut intervenir à la procédure d'appel lancée par M., sur la base de l'article 332 RAD et soulignent que M. lui-même cherche à attraire l'UCI devant les tribunaux espagnols, démontrant qu'il juge l'UCI comme partie à l'affaire. Depuis son courrier du 14 juin 2010, l'UCI a fait d'ailleurs valoir expressément son droit à intervenir.

Après avoir bien pris en compte l'ensemble des moyens soulevés par les Parties, la Formation arrive à la conclusion que la demande d'intervention de l'UCI à la procédure 2141 doit être admise et que la jonction des causes 2141 et 2142 s'impose.

Le droit d'intervention de l'UCI découle de l'article 332 RAD. La Formation s'est déjà prononcée plus avant sur la question de l'applicabilité du RAD. Quant à la question de la compatibilité de l'article 332 RAD avec le droit impératif espagnol, la Formation observe que M. ne fait valoir aucun argument permettant de

conclure à un conflit entre le droit impératif espagnol et l'article 332 RAD. Ce droit d'intervention s'inscrit dans le but du RAD d'assurer une application stricte et uniforme des dispositions disciplinaires en matière de lutte contre le dopage imposées par l'UCI. Dès lors, la Formation trouve la présence de cette disposition dans le RAD parfaitement légitime. Ce droit d'intervention de l'UCI doit ainsi être reconnu et il doit être donné suite à la requête d'intervention de l'UCI dans la procédure 2141. La Formation observe enfin que M. cherche lui-même à attraire l'UCI dans la procédure civile qu'il a ouverte devant les tribunaux espagnols. Il y a donc une certaine contradiction à invoquer que l'UCI est un tiers à la procédure 2141 devant le TAS alors que M. ouvre action contre l'UCI devant les tribunaux espagnols et demande en même temps la suspension de la procédure 2141 au motif de la litispendance.

L'article 332 RAD faisant suite à la convention d'arbitrage prévue à l'article 329 RAD, la condition fixée à l'article R41.4, qui s'applique *mutatis mutandis* aux présentes procédures d'appel (article R54 al. 5), ce qui n'est pas contesté, est manifestement remplie. L'UCI doit donc pouvoir intervenir dans la procédure 2141.

S'agissant à présent de la question de la jonction de causes, la Formation ne peut qu'écarter les arguments de M. En effet, il ne fait aucun doute que les deux procédures reposent sur les mêmes faits, que les mêmes parties sont concernées et qu'elles visent le même objet, à savoir la Décision du CNCDD. Le fait qu'une partie se fonderait sur des moyens de droit alors qu'une autre se fonderait sur une appréciation différente des faits n'est pas pertinent. Il en est de même de l'argument tiré des conclusions différentes des parties, à savoir l'annulation du côté de M. et la réforme du côté de l'UCI. Les conclusions des parties ne jouent pas un rôle.

Enfin, la Formation relève que M. a requis la suspension de la procédure 2141 devant le TAS dans l'attente du jugement des tribunaux civils espagnols au motif qu'il y aurait risque d'un jugement contradictoire. Il a en outre soulevé une exception de litispendance dans le cadre de la procédure 2142 pour le même motif. M. ne peut pas d'un côté invoquer l'argument du risque de jugements contradictoires pour obtenir la suspension des procédures 2141 et 2142, et, d'un autre côté, le réfuter quand il s'agit de joindre ces mêmes procédures.

Si les appels de M. et de l'UCI étaient touts deux admis, le TAS rendrait en effet des jugements contradictoires.

La Formation souscrit ainsi entièrement aux motifs mentionnés à ce sujet dans l'ordonnance du 14 septembre 2010 et confirme la décision prise dans ladite ordonnance par le Président de la chambre arbitrale d'appel.

Les procédures TAS 2010/A/2141 et TAS 2010/A/2142 doivent donc être jointes et la Formation règlera séparément les modalités procédurales particulières résultant des décisions qui précèdent, conformément à l'article R41.4 alinéa 4 du Code.

Arbitration CAS 2010/A/2144
Real Betis Balompié SAD v. PSV Eindhoven
10 December 2010

Football; transfer of player; submission of new evidence; nature of the deadline to pay the advance of costs; breach of contract for non payment of the transfer fee after the exercise of the option provided in a loan agreement; consequence of the failure to obtain a bank guarantee on the performance of an exercised option; obligation of the buying club to fulfil its obligation notwithstanding the lack of consent of the player in respect of the transfer; compensation for breach

Panel:
Mr. Rui Botica Santos (Portugal), President
Mr. Pedro Tomás Marques (Spain)
Mr. Manfred Peter Nan (Netherlands)

Relevant facts

Real Betis Balompié SAD (the "Appellant" or "Betis") is a Spanish professional football club affiliated to the Spanish Football Federation, *i.e. Real Federación Española de Fútbol* (the "Spanish Federation"). The latter is a member of the Fédération Internationale de Football Association (FIFA).

PSV Eindhoven (the "Respondent" or "PSV") is a Dutch professional football club affiliated to the Dutch Football Federation, *i.e Koninklijke Nederlandse Voetbalbond* (the "Dutch Federation"). The latter is also a member of FIFA.

This appeal was filed by Betis against the decision rendered by the Single Judge of the FIFA Players´ Status Committee (the "FIFA PSC") passed on 30 July 2009 and notified to the Parties on 2 June 2010 (the "FIFA PSC Decision").

The circumstances stated below are a summary of the relevant facts as established on the basis of the submissions of the Parties and the evidence produced by them. The FIFA file was also taken into consideration.

On 31 January 2005, the Brazilian player R. (the "Player") and PSV signed an employment contract valid from 31 January 2005 until 30 June 2008 (the "PSV – Player Employment Contract").

On 22 December 2005, PSV and Betis signed an agreement (the "Loan Agreement") under which PSV agreed to loan the Player to Betis from 1 January 2006 until 30 June 2007 for the net amount of EUR 1,000,000.

Under the Loan Agreement the following was also agreed:

a) PSV granted Betis an option (the "Option") to buy the Player's full "*federative rights*" as per 1 July 2007 for the net amount of EUR 3,250,000 to be paid in instalments as follows:

   - EUR 1,000,000 on 15 July 2007;
   - EUR 562,500 on 15 October 2007;
   - EUR 562,500 on 15 February 2008;
   - EUR 562,500 on 15 June 2008;
   - EUR 562,500 on 15 August 2008.

b) in case Betis were interested in exercising the Option, it was necessary to send PSV a written notice to this effect before 30 April 2007. On its part, PSV agreed to send an invoice in this regard to Betis (cf. clause 3 of the Loan Agreement).

In case Betis exercised the Option, it was required to provide PSV with an appropriate and duly signed bank guarantee confirming its ability to pay the net amount of EUR 3,250,000.

Subject to the fulfilment of clause 3 of the Loan Agreement, Betis was to instruct the Spanish Federation to issue the Dutch Federation with a copy of the Player's International Transfer Certificate (ITC) not later than 30 June 2007.

PSV retained all the rights related to the Player until the fulfilment of clause 3.

Betis would not hold PSV liable for any harm or loss

sustained in relation to the implementation of the Loan Agreement.

Should Betis be unwilling to exercise the Option, it was to unconditionally cause the Player to return to PSV not later than on 1 July 2007 under clause 9. In addition to all the aforementioned, under clause 10, the Parties subjected the Loan Agreement to the FIFA Regulations on the Status and Transfer of Players (the FIFA Regulations).

The relevant parts of the Loan Agreement already summarised above read as follows:

PSV (…) is prepared to grant (…) Betis (…) the right to use the player R. (…) for a limited period of time, effective as from January 1st 2006 until June 30th, 2007 (…) subject to the following conditions:

(…)

3. PSV will grant Real Betis the option to buy the full federative rights on R. as per July 1st, 2007, against a net payment of €3.250.000. This amount will be paid in 4 instalments, i.e.:

- €1.000.000 to be paid on 15 July 2007;

- €562.500 to be paid on 15 October 2007;

- €562.500 to be paid on 15 February 2008;

- €562.500 to be paid on 15 June 2008;

- €562.500 to be paid on 15 August 2008,

PSV will send as proper invoice to Real Betis, Real Betis will inform PSV in writing before 30 April 2007 whether they wish to exercise this option;

4. For the amounts mentioned under 1 and 3, Real Betis and/ or its President Mr. Manuel Ruiz de Lopera y Avela will provide PSV with appropriate bank guarantees duly signed 'por aval', provided that the amounts due will be paid on Rabobank account of PSV;

5. Subject to the fulfilment of clause 3, Real Betis will instruct the Spanish Football Association to issue the International Transfer Certificate to the Royal Dutch Football Federation (KNVB) on June 30th, 2007, at the latest. Furthermore, Real Betis will ensure that a copy of the International Transfer Certificate is sent to PSV by fax;

(…)

7. Subject to the fulfilment of clause 3, any and all rights on R. of whatsoever character (including the right on transfer) will unconditionally continue to be vested with PSV;

8. Real Betis will reimburse and hold PSV harmless for any and all liabilities and consequences resulting from the implementation of this agreement;

9. In the event the option referred to in clause 3 has not been lifted, Real Betis will unconditionally cause R. to return to PSV, at the latest July 1st, 2007;

(…)

11. This agreement is subject to the FIFA Regulations governing the Transfer and Status of Football Players. Any and all disputes will be handled by a competent FIFA Committee".

On 23 December 2005, Betis signed an employment contract with the Player (the "Betis – Player Employment Contract"), under which they agreed the following:

a) Validity: 2 seasons from 22 December 2005 until 30 June 2007;

b) Monthly salary: EUR 2,200;

c) Bonus: EUR 84,000 for the season 2005/2006 and EUR 194,000 for the season 2006/2007.

Furthermore, the Betis – Player Employment Contract contained *"ADDITIONAL CLAUSES". In particular, clause 4 provides that "(…) in the event that REAL BETIS (…), exercised the option for a final transfer of the federative rights of the Player, in accordance with the contract signed with the club PSV (…) dated 22/12/2005, with 250,000 Euro the following retribution for salaries (…): season 2007-2008: 250,000 Euro; season 2008-2009; season 2009-2010, 250,000 Euro; season 2010-2011, 250,000 Euro, with the rest of the clauses of the present contract remaining untouched (…)".*

On 4 April 2007, Betis sent a letter to PSV according to which:

"In December 2005, both entities agreed to the transfer contract with the option to buy the federative rights of the Player R. The option to buy all the federative rights of the Player, R., for an amount of three million two-hundred thousand euro, EUR3,250,000 was located in the third section of said contract.

In light of this, Real Betis Balompié S.A.D. exercises said option to buy.

(…)".

On 14 April 2007, PSV wrote to Betis requesting it to send the required bank guarantee to cover the instalments.

On 1 June 2007, PSV sent an invoice to Betis granting it until 15 July 2007 to pay the first instalment amount of EUR 1,000,000. PSV then sent another letter on 8 June 2007 requesting Betis to send the irrevocable bank guarantee.

On 22 June 2007, Betis´ Spanish bank La Caixa (the "Bank") informed Betis that it would not be authorising the requested bank guarantee of EUR 3,250,000 as such amount exceeded the amount normally accepted by the Bank.

On 16 July 2007, Betis prepared a draft employment contract in favour of the Player (the "Proposed Employment Contract"), proposing, among other conditions, the following:

a) Term of the contract: 4 seasons (valid until 30 June 2011);

b) Annual salary: 16 x EUR 2,200 for the seasons 07/08, 08/09, 09/10 and 10/11 (14 monthly payments plus 2 additional monthly payments);

c) Bonus: EUR 219,200 for each season of 07/08, 08/09, 09/10, 10/11 to be paid in the end of the relevant season by promissory notes; and

d) Penalty clause: EUR 3,000,000 in the event of breach of contract.

In addition, Betis also proposed to the Player to enter into an image rights contract with the Spanish company TEGASA - *Tecnica y Garantia del Deporte S.A.* the "Image Rights Contract"). This company proposed to pay the Player an annual amount of EUR 400,000 for his image rights during his tenure at Betis.

On 16 July 2007, Betis met the Player with a view to finalising and signing both the Proposed Employment Contract and the Image Rights Contract. However, according to Betis, the Player declined to sign the contracts on grounds that the proposed salary was inadequate. During the said meeting were present Betis´ President as well as its external lawyer, Mr. Arredondo, who adduced a statement attesting the Player's refusal to sign for Betis.

On 17 July 2007, and pursuant to the Bank's notice, Betis informed the Player that it had not exercised the Option. It consequently sought the termination of the proposed agreement with him.

On 1 August 2007, the Spanish Federation returned the Player's ITC to the Dutch Federation.

On 3 August 2007, the Dutch Federation sought clarification from the Spanish Federation as to why it had returned the Player's ITC.

Following the end of the negotiations with Betis, the Player signed for the Saudi Arabian Club Al Ittihad ("Al Ittihad") as a free player. This was after the Single Judge of the FIFA PSC had rendered a preliminary decision on 11 September 2007 ("FIFA ITC Decision") allowing the Player to provisionally register with Al Ittihad in accordance with annex 3, art. 2.5 of the FIFA Regulations for the Status and Transfer of Players, edition 2005 ("FIFA Regulations 2005").

On 27 July 2007, PSV filed a claim with the FIFA PSC against Betis for the alleged breach of the Loan Agreement.

On 30 July 2009, the Single Judge of the FIFA PSC issued his decision, partially granting PSV´s prayers.

The single judge based his findings on the following aspects:

a) it was clear that Betis had exercised the Option on a definite basis. The letter dated 4 April 2007 was not a declaration of intention but rather the exercising of the Option;

b) the Option was exercised 26 days before the expiry deadline granted to Betis. The Appellant had ample time to verify whether it would obtain the relevant bank guarantee;

c) in accordance with the principle of *"pacta sunt servanda*", Betis could not evade its contractual duty to buy the Player merely on grounds that it was unable to obtain the bank guarantee;

d) the Player´s loan to Betis had expired and his transfer to Betis had become definite with effect from 1 July 2007;

e) in accordance with clause 3 of the Loan Agreement, Betis was liable to pay PSV all the amounts plus 5% annual interest from the due date of each instalment;

f) there was no legal basis for imposing sporting sanctions on Betis and such request was dismissed; and

g) Betis was condemned to bear the costs of the FIFA PSC proceedings, amounting to CHF 11,000.

On 21 June 2010, the Appellant filed its Statement of Appeal against the FIFA PSC Decision at the Court of Arbitration for Sport (CAS).

Extracts from the legal findings

A. Admissibility

1. Admissibility of prayer 3 of the Appeal Brief

The Respondent argues that prayer 3 of the Appeal Brief is inadmissible because it was not included in the Appellant's Statement of Appeal.

According to art. R56 of the CAS Code, "[u]*nless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the grounds for the appeal and of the answer*".

In view of this provision, the Panel notes that a party is allowed to adduce further evidence or supplement its submissions provided that the time limit for filing its Appeal Brief or its Answer has not expired.

Prayer 3 of the Appeal Brief is therefore considered to be admissible.

2. Advance of costs

On 2 July 2010, the CAS Secretary General wrote to the parties requesting the payment of the advance of costs (CHF 25,000 per party) by 20 July 2010.

On 19 July 2010, the CAS received in its bank account the Respondent's share of the advance of costs.

On its side, the Appellant confirmed to the CAS Court Office that the advance of costs had been paid through two different bank transfers from two different bank offices on 20 July 2010 for an amount of CHF 22,000 and 21 July 2010 for an amount of CHF 3,000.

The Panel wishes to emphasize that the issue of the advance of costs is an administrative issue which is dealt with by the CAS Court Office. The deadline fixed by the CAS Secretary General is only an indicative delay and not a mandatory time limit. The non-payment of the advance of costs within the deadline prescribed by the Secretary General cannot be invoked by a party to request that an appeal or a claim be considered as inadmissible. The deadlines which are fixed only allow the CAS Court Office to terminate a procedure in the absence of payment, in accordance with art. R64.2 of the CAS Code.

In the present matter, it appears that the CAS Court Office has received the total amount of the advance of costs from the Appellant in a timely manner, even though through two different wire transfers, and has considered that the Panel could be constituted and that the proceedings could continue.

B. Merits

The appeal lodged by Betis against the FIFA PSC Decision raises several issues which the Panel has to consider. As a result of the Parties' submissions and petitions, the Panel has to examine the following main issues:

i) Whether the letter dated 4 April 2007 from Betis exercised the Option and bound Betis to buy the Player, taking into consideration the following circumstances:

a) the non delivery of the bank guarantee required under the Loan Agreement; and

b) the Player's refusal to sign the Proposed Employment Contract.

ii) In the affirmative, whether PSV is entitled to any compensation, and if so, the amount of compensation to be paid by Betis to PSV following the former's breach of the Loan Agreement.

Each of the above questions shall be separately considered by the Panel.

1. Whether the letter dated 4 April 2007 from Betis exercised the Option and bound Betis to buy the Player

It is not in dispute that Betis wanted to exercise the Option in its letter dated 4 April 2007. This is a fact acknowledged by Betis itself, which asserts that the fulfilment of this Option and the completion of the Player's transfer were however subject to the delivery of the required bank guarantee and to the Player's consent.

It is the Panel'sunderstanding that the letter dated 4 April 2007 clearly and unequivocally expressed Betis' intention to exercise the Option. This is supported by the wording of the said letter, wherein Betis states that *"(…) el REAL BETIS BALOMPIÉ, S.A.D ejerce dicha opción de compra. En el momento de obrar en nuestro poder la factura correspondiente, remitiremos los instrumentos de pago"*. An english translation of this letter reads

"(…) REAL BETIS BALOMPIÉ S.A.D exercises said option to buy. At the time of acting in our possession an invoice, we will forward payment instruments".

The Panel concurs with the Single Judge of the FIFA PSC that the letter dated 4 April 2007 cannot be interpreted as a mere "declaration of intention" but rather an exercise of the Option. Betis´ arguments that the letter dated 4 April 2007 was sent by its manager is irrelevant and bears no legal consequences towards PSV or any third party in as far as the validity of the Option is concerned. The Option was exercised in good faith.

The Panel shall hence assess the legal relevance of the arguments raised by Betis in the performance of the Option to determine whether it was bound to buy the Player.

1.1. Was the bank guarantee a condition sine qua non for Betis to perform the Option?

Betis states that the bank guarantee was one of the conditions required for the Option to be exercised and that the letter dated 4 April 2007 could not *per se* complete the Option.

PSV avers that a bank guarantee was not a condition *sine qua non* for exercising the Option. It states that there was no contractual provision to this effect and that the bank guarantee was a mere security for the payment of the transfer fee.

The Panel notes the Parties´ agreement under:

- clause 3 of the Loan Agreement according to which *"(…) PSV will send a proper invoice to Real Betis, Real Betis will inform PSV in writing before 30 April 2007 whether they wish to exercise this option".; and*

- clause 4 of the Loan Agreement according to which *"[f]or the amounts mentioned under 1 and 3, Real Betis and/or its President Mr. Manuel Ruiz de Lopera y Avela will provide PSV with appropriate bank guarantees duly signed (…)".*

The Panel considers that the delivery of the bank guarantee established under clause 4 above is not a condition *sine qua non* for the performance of the already exercised Option. The bank guarantee is considered by the Panel as a secondary and subsequent obligation to secure the payment of the transfer fee and it does not make part of the requirements to exercise the Option. In accordance with clause 3 of the Loan Agreement, Betis would only have to inform PSV in writing before 30 April 2007, at the latest, of its decision to exercise the Option and receive the relevant invoice from PSV, as it has in fact occurred. This is further corroborated by Betis´ own conduct, where it omitted to insert any reservations or conditions in its letter exercising the Option.

Relevance is also made to Betis´ subsequent conduct once it exercised the Option by negotiating and offering the Player the Proposed Employment Contract and the Image Rights Contract.

The Panel now turns its attention to whether or not the *force majeure* event claimed by Betis can be invoked as a ground for not complying with its contractual obligations. In fact, Betis pleads *force majeure* stating that failure to secure the bank guarantee meant that it was impossible for it to fulfil its contractual obligations towards PSV.

The Panel highlights that *force majeure* is an event which leads to the non performance of a part of a contract due to causes which are outside the control of the parties and which could not be avoided by exercise of due care. The unforeseen event must also have been unavoidable in the sense that the party seeking to be excused from performing could not have prevented it.

Moreover, *force majeure* is not intended to excuse any possible negligence or lack of diligence from a party, and is not applicable in cases where a party does not take reasonable steps or specific precautions to prevent or limit the effects of the external interference.

Relating the above considerations with the facts of the case, the Panel notes that when exercising the Option, Betis made no express statements reserving, subjecting or conditioning the completion of the transaction to the procurement of the bank guarantee.

As a matter of fact, Betis never manifested its inability to obtain the bank guarantee or disclosed any relevant information in relation to its delicate financial situation with a view to drawing PSV's attention to the fact that this circumstance could be a hindrance in securing the bank guarantee.

The Panel rejects Betis' arguments on the following grounds:

- The precise reasons as to why the Bank declined to provide the guarantee have not been stated and Betis only states that the Bank declined to issue this guarantee because *"(…) the credit was over the acceptable one*".

- Betis has not presented any evidences to

satisfactorily prove its inability to obtain the bank guarantee. Even if Betis had done this, it has not established that such inability was caused by unforeseen facts and events beyond its control, and that these events took place after the date when the Option was exercised, in the way to prove the existence of a *force majeure* event;

- In the Panel's view, the letter issued by the Bank is not enough to conclude that its inability to issue the bank guarantee was entirely caused by events which took place immediately after the Option has been exercised as it does not mention the precise reasons why the bank guarantee was refused;

- Betis requested a bank guarantee of EUR 3,250,000, but by the time the Bank sent its letter, the first instalment of EUR 1,000,000 was already due. If indeed Betis possessed some financial stability prior to the date when the Option was exercised, one would reasonably have expected it to "at least" be prepared to pay the first instalment by cash on 15 July 2007 and only ask the Bank to provide it with a guarantee of the remaining amount (EUR 2,250,000); and

- Betis owed a duty of care to confirm its ability to obtain the bank guarantee with the Bank or any other bank before the exercising of the Option. There is no evidence that Betis undertook these preliminary inquiries. It accepted the risk that a bank guarantee would not be provided, and it is therefore precluded by the principle of estoppel from pleading *force majeure* to evade its contractual obligations. Greater diligence also ought to have been displayed by the internal management and administration of Betis, to ensure that it had enough funds to complete the Player's transfer at the time of signing the Loan Agreement.

In this respect, the Panel emphasises the principle of *pacta sunt servanda* and the fact that Betis cannot avoid fulfilling its contractual obligation by arguing that it had not obtained the necessary finance. If Betis was really interested in buying the Player and prepared to pay the first EUR 1,000,000 on 15 July 2007, it could have drawn PSV's attention to its financial difficulties and proposed to renegotiate alternative means for securing the remaining instalments of the transfer fee. Betis neither undertook, nor has it proved, such diligence.

According to art. 2 of the Swiss Civil Code (the "Swiss CC") "[e]*very person is bound to exercise his rights and fulfil his obligations according to the principle of good faith*".

Therefore, the failure to obtain the bank guarantee does not exonerate Betis from its contractual obligations to complete the Player's transfer, and cannot be invoked as a *force majeure*.

1.2. Whether the Player's refusal to sign the Proposed Employment Contract relieves Betis from its contractual obligation to complete his transfer

The Panel now proceeds to address the issue whether the Player's refusal to sign an employment contract as alleged by Betis relieves it from its contractual obligations towards PSV.

Betis avers that it was unable to fulfil its contractual obligation towards PSV by completing the payment for the Player's transfer because the Player himself declined to sign the Proposed Employment Contract.

The Panel concurs with Betis that a player's consent is a key element for any successful transfer. On this point, the Panel notes that Betis and the Player had not only already agreed personal employment terms in case of an exercise by Betis of the Option, but had also agreed the duration of Betis´ second employment contract with the Player under the Option.

This results from clause 4 of the section titled "ADDITIONAL CLAUSES" of the Betis – Player Contract which states that*"(…) in the event that REAL BETIS (…), exercised the option for a final transfer of the federative rights of the Player, in accordance with the contract signed with the club PSV (…) dated 22/12/2005, with 250,000 Euro the following retribution for salaries (…): season 2007-2008: 250,000 Euro; season 2008-2009; season 2009-2010, 250,000 Euro; season 2010-2011, 250,000 Euro, with the rest of the clauses of the present contract remaining untouched (…)".*

This clause is a clear manifestation of the consent given in advance by the Player, and his refusal to sign the Proposed Employment Contract cannot detach Betis from its contractual obligation towards PSV under the Loan Agreement.

If indeed the Player declined to sign for Betis, this possible breach of the Betis – Player Contract only concerns Betis and the Player to the exclusion of PSV.

It is standard practice in the world of football that a buying club should somehow protect itself from the risk of missing a player's consent to the transfer. Normally, this risk is prevented by inserting a clause stipulating that the player's consent is a precondition for the fulfillment of the transfer contract.

If Betis were keen on securing the Player on a

permanent basis through exercising the Option, it was bound to safeguard itself against the risk of the Player refusing to sign with it. This is a duty which the Panel remarks cannot override Betis' obligations towards PSV under the Loan Agreement.

The Panel stresses that the Player's refusal to sign the Proposed Employment Contract does not relieve Betis from its contractual obligations towards PSV.

2. Is PSV entitled to compensation?

Swiss law clearly provides that a party which is found to have breached a contract without any just cause is liable to compensate the other. This is stipulated under art. 97 of the Swiss CO according to which "[i]*f the performance of an obligation cannot at all or not duly be effected, the obligor shall compensate for the damage arising therefrom, unless he proves that no fault at all is attributable to him*".

Having established the inexistence of any fact or legal argument that could prevent Betis from performing its obligations or negate any fault on the Appellant's part, it follows that art. 97 of the Swiss CO shall apply and PSV is therefore entitled to compensation.

The Panel highlights that no specific FIFA regulation contains provisions in relation to the assessment of damages for cases of a specific nature as the one at stake.

Therefore, and pursuant to the general fundamentals of contractual law, damages due following a breach of contract are calculated in accordance with the principle of restitution. In other words, a party who has been the victim of an unjustified breach of contract is entitled to be compensated with an amount which would reinstate it in the position it would have been had the contract been performed to its end.

In the case at hand, there is no doubt that PSV would have received EUR 3,250,000 from Betis had the latter fulfilled its obligations under the Loan Agreement to the end, plus the accrued interest.

However, the Swiss CO also requires a deciding body to consider other facts and circumstances when assessing the amount of damages. These facts and circumstances include, among others, the degree of fault, the circumstances of the case and the special nature of the transaction.

These have specifically been stipulated under the following Swiss CO provisions:

- *Art. 43.1: "[t]he judge shall determine the nature and amount of compensation for the damage sustained, taking into account the circumstances as well as the degree of fault".*

- *Art. 44.1:"[t]he judge may reduce or completely deny any liability for damages if the damaged party consented to the act of causing the damage, or if circumstances for which he is responsible have caused or aggravated the damage, or have otherwise adversely affected the position of the person liable". and*

- *Art. 99.2: [t]he extent of (…) liability shall be governed by the special nature of the transaction (…)".*

With the aforementioned provisions in mind, the Panel notes that upon realising that it would be unable to keep the Player, Betis made efforts to return the Player to PSV with a view to minimising any possible damage.

This is evident in the Spanish Federation's action of returning the Player's ITC to the Dutch Federation on 1 August 2007.

The Panel emphasises that under clause 9 of the Loan Agreement, in case Betis failed to exercise the Option, it was obliged to cause the Player's return to PSV before 1 July 2007.

It however appears that PSV made no substantial efforts to receive or accept the Player back, despite having been aware of clause 7 of the Loan Agreement which provided that"[s]*ubject to the fulfilment of clause 3, any and all rights on* R. *of whatsoever character (including the right on transfer) will unconditionally continue to be vested with PSV*".

Although the Spanish Federation returned the ITC on 1 August 2007, much later after the time agreed under clause 5 of the Loan Agreement had expired, PSV had the opportunity of regaining control over the Player's registration rights. This is because it still had 1 more year with the Player under its contract, which remained valid in light of clause 7 of the Loan Agreement. In addition to this, PSV had the possibility of extending its contract with the Player for an additional year.

However, PSV still insisted on the bank guarantee and as highlighted by the FIFA PSC, it seems that PSV was rather *"(…) focused on a potential breach of the loan agreement and in particular seeking for the application of financial provisions related to the exertion of the option (...)"* and no longer interested in the Player.

The Panel considers PSV's conduct as having some

degree of fault in aggravating its own damage by not accepting the Player back and consequently by failing to mitigate its own damage.

It is a fact that Betis only tried to cause the Player to return to PSV on 1 August 2007*, i.e.* one month after the deadline stipulated at clause 9 of the Loan Agreement (1 July 2007) had expired. However, PSV could contribute to the non aggravation of its damage by accepting the Player back and making use of its rights over him.

The Panel is of the view that the 30 days remaining under the 90 days period of the summer 2007 transfer window was too short to enable PSV to either (i) negotiate the Player's transfer with a third club; or (ii) reintegrate him as a player with an active role in its team given the fact it was not expecting his return for the forthcoming season.

In view of the foregoing, and considering the nature of the transaction and particularities of the Loan Agreement, the Panel is of the view that PSV's compensation *vis-à-vis* the damage caused by Betis for failing to fulfil its contractual obligations should be limited to a reasonable extent.

Therefore, and in light of art. 44.1 of the Swiss CO, the total amount that PSV expected to receive from the transfer fee (EUR 3,250,000) shall not be considered in full in the calculation of compensation to be granted to PSV.

The amount of compensation should be limited to a period of time within which PSV could reasonably have negotiated the Player's transfer with another club.

The Panel remarks that by the time Betis tried to return the Player, PSV would only have made use of the remaining 30 days period of transfer window to negotiate a possible transfer for the Player. This period is of course considered short for any reasonable negotiations to be held. A fair compensation shall therefore be calculated taking into consideration a more realistic period of time which would have enabled PSV to conduct such negotiations.

With the aforementioned in consideration, the Panel underlines that the remaining period under the August 2007 transfer window together with the subsequent period, including the entire January 2008 transfer window, would have been sufficient to enable PSV to hold negotiations with another club for the Player's transfer.

The Panel notes that the agreed transfer fee was comprised of several instalments, with the first two covering the proportional price of the transfer fee until the end of 15 February 2008 *i.e.* the January 2008 transfer window. Therefore, the Panel is of the view that the amount of compensation shall consider the first two instalments due from the transfer fee *i.e.* EUR 1,000,000 and EUR 562,500.

PSV´s failure to accept the Player back contributed to the aggravation of its own damage and, this is basically the reason why the Panel does not deem it fair and just to grant PSV the remaining three final instalments of the transfer fee in the amount of EUR 1,687,500. This view is adopted in light of the special nature of the transaction, and the particular facts and circumstances of the case.

The Panel considers the Atlas – PSV Contract irrelevant in assessing the amount of damages. In fact, the amortisation of the amount paid by PSV to Atlas under this contract had already been considered in the Player's transfer fee under the Loan Agreement. A consideration of the Atlas – PSV Contract in calculating the amount of compensation would therefore amount to duplication.

Interest shall accrue from the amount of EUR 1,562,500 granted with effect from the date it became due. Since the breach occurred on or about 1 August 2007 when Betis tried to send the Player back to PSV, this manifested its inability to fulfil its contractual obligations. Compensation therefore ought to have been paid with effect from this date, and the Panel finds that interest shall accrue at an annual rate of 5% starting from 1 August 2007.

C. Conclusion

The Panel holds that the appeal filed by Betis has to be partially upheld. The FIFA PSC Decision has to be modified and Betis ordered to pay PSV compensation in the amount of EUR 1,562,500, plus interest accruing from the said amount at an annual rate of 5% starting from 1 August 2007. All other requests for relief submitted by the Parties are dismissed.

Arbitration CAS 2010/A/2145
Sevilla FC SAD v. Udinese Calcio S.p.A.
&
Arbitration CAS 2010/A/2146
Morgan de Sanctis v. Udinese Calcio S.p.A.
&
Arbitration CAS 2010/A/2147
Udinese Calcio S.p.A. v. Morgan de Sanctis & Sevilla FC SAD

28 February 2011

Football; unilateral termination of the employment contract without just cause; calculation of the compensation for damages; liquidated damages clause; application of the "objective criteria" of Art. 17.1 of the Regulations; replacement costs; method of calculation of the compensation for damages; deduction of the remuneration under the former employment contract; specificity of sport; important contribution of the player; *dies a quo* for the awarding of interests

Panel:
Mr. Mark Hovell (United Kingdom), President
Mr. José Juan Pintó (Spain)
Prof. Massimo Coccia (Italy)

Relevant facts

Morgan De Sanctis is a professional footballer, born in 1977 ("De Sanctis" or "the Player"), currently playing for Napoli in Serie A of the Italian Leagues, having previously played for Udinese Calcio S.p.A. ("Udinese"), an Italian football club currently competing in Serie A, and then Sevilla Fútbol Club SAD ("Sevilla"), a Spanish football club currently competing in La Liga.

On 5 July 1999, the Player joins Udinese from Juventus Turin, in the position of goalkeeper, signing his first contract with Udinese, for a period of 5 years effective from 1 July 1999. On 10 November 2000, the Player and Udinese sign a second contract, for 5 years and with effect from 1 July 2000. On 18 October 2003, the Player and Udinese sign a third contract, for 5 years and with effect from 1 July 2003.

On 20 September 2005, the Player and Udinese sign a fourth and final contract, for 5 years and with effect from 1 July 2005 (the "Udinese Contract" or the "Old Contract"), under which the Player was to be paid a gross annual salary of EUR 630,000 along with an annual contribution to his rent of EUR 9,700 and the opportunity to participate in certain squad performance bonuses. On the same day the Player and Udinese sign a loyalty bonus agreement, under which the Player would receive the gross sum of EUR 350,878 for each year he remained at Udinese.

On 7 July 2006, Udinese loans out another of their goalkeepers, S., to FC Rimini Calcio SRL ("Rimini"). Within the loan arrangement was an option for Rimini to acquire the economic rights of S. for EUR 1,200,000 and a counter option for Udinese to take the player back, but at a cost of EUR 250,000, which Udinese would then have to pay to Rimini.

The last match of the 2006/2007 season for Udinese was on 27 May 2007. Around that time, Rimini exercises its option in relation to S.

On 8 June 2007, the Player writes to Udinese to terminate the Udinese Contract. The notice to terminate (the "Notice") was with effect from the end of the 2006/2007 and specifically referred to Art. 17 of the FIFA Regulations for the Status and Transfer of Players (the "Regulations").

On 21 June 2007, Udinese exercises its counter option with Rimini and S. rejoins Udinese. In June 2007, Udinese releases three goalkeepers – Messrs. Casazza, Sciarrone and Murrielo – and, on 29 June 2007, also signs A., a 37 year old goalkeeper, who was at that time without a club.

The Player, on 10 July 2007, signs with Sevilla on a 4 year contract (the "Sevilla Contract" or the "New Contract"), which provided for an annual gross salary of EUR 331,578 and a gross contract premium payment of EUR 1,050,000. In addition, the Sevilla

Contract contained a clause stating that if the Player sought to terminate the Sevilla Contract before its expiry, then he would be liable to pay compensation to Sevilla in the sum of EUR 15,000,000.

On 18 April 2008, Udinese files a complaint with FIFA's Dispute Resolution Chamber (the "DRC") claiming an amount of EUR 23,267,594 as compensation for the Player's breach. Following the request of the parties to issue a detailed decision (the "Appealed Decision" or the "DRC Decision"), the DRC notified this on 3 June 2010, in which it determined: *"(…) 2. The Respondent 1, Morgan de Sanctis, has to pay the Claimant, Udinese Calcio, the amount of EUR 3,933,134, as well as 5% interest per year on the said amount (…); 3. The Respondent 2, Sevilla FC, is jointly and severally liable for the payment of the aforementioned sum; (…)".*

On 24 June 2010, Sevilla, the Player and Udinese all separately filed Statements of Appeal with the Court of Arbitration for Sport (CAS) against the Appealed Decision.

Sevilla filed with the CAS its Statement of Appeal on 24 June 2010, challenging the Appealed Decision, in the matter CAS 2010/A/2145. On 15 July 2010, Sevilla filed its Appeal Brief with the CAS. This contained the revised prayers for relief, as follows: *"(…) 2. To adopt an award annulling the said decision and adopt a new one stating that the Appellant is not liable to compensate the Respondent with EUR 3,933,134 plus 5% annual interest because the amount is disproportionately high and/or incorrectly determined; 3. Further and in the alternative, to adopt an award stating that the Player and Sevilla are jointly and severally liable in the amount of EUR 262,500 as payment for the value of 8 months of salaries of Player in accordance with Article 339 c).2 of Swiss law; 4. Further and in the alternative, to adopt an award stating that the Player and Sevilla are jointly and severally liable in the amount of EUR 1,050,500 as payment for the value of the residual salaries of the Player; (…)".*

The Player filed with the CAS his Statement of Appeal on 24 June 2010, also challenging the Appealed Decision, in the matter CAS 2010/A/2146. On 15 July 2010, the Player filed his Appeal Brief with the CAS. This contained the revised prayers for relief, as follows: *"(…) 2. To overturn the following provision contained in the decision of the FIFA DRC and which forms the subject of this appeal: "Section III. Decision of the Dispute Resolution Chamber: 3. Udinese 1 [sic], Morgan de Sanctis, has to pay the Claimant, Udinese Calcio, the amount of EUR 3,933,134 as well 5% interest per year on the said amount as from 9 June 2007, within 30 days, as from the date of notification of this decision" on the basis that the said amount of EUR 3,933,134 is excessive and has been incorrectly determined; (…) 4. In the event that an award of compensation is made in favour of Udinese, to make an award in the amount of EUR 233,333.00 further to Article 339c.2 of the Swiss Code of Obligations; 5. In the alternative to make an award in favour of Udinese, by way of compensation, in the amount of EUR 1,050,500 being the residual value of the Player's contract; (…)".*

Udinese filed with the CAS its Statement of Appeal on 24 June 2010, also challenging the Appealed Decision, in the matter CAS 2010/A/2147. On 15 July 2010, Udinese filed its Appeal Brief with the CAS. This contained the revised prayers for relief, as follows: *"(…) 2. Morgan De Sanctis and Sevilla Fútbol Club S.A.D are ordered to pay, jointly and severally, EUR 10,000,000 (ten million Euro), plus interest at 5% from 9 June 2007; (…)".*

Extracts from the legal findings

A. How should the "objective criteria" of Art. 17 of the Regulations be applied?

The Panel notes that Article 17.1 of the Regulations states: *"These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the Former Club (amortised over the term of the contract) and whether the contractual breach falls within a Protected Period".* It is clear to this Panel that the list is not intended to be definitive. Indeed, if the positive interest principle is to be applied, then other objective criteria can and should be considered, such as loss of a possible transfer and replacement costs, as were considered in the CAS 2008/A/1519 & 1520 and CAS 2009/A/1880 & 1881 cases. However, the Panel also notes that for compensation to be due in such instances there must be the logical nexus between the breach and loss claimed. The loss of a transfer fee was awarded in CAS 2009/A/1880 & 1881, where the new club and the old club had been directly negotiating a fee at the time of the breach (*"it appears to the Panel that, as a consequence of the early termination of the Player's employment contract, Al-Ahly was deprived of the opportunity to obtain a transfer fee of USD 600,000"*, para. 221 of CAS 2009/A/1880 & 1881). The Panel also noted that within FIFA's commentary on the Regulations, such matters as whether a collective bargaining agreement is in force could be considered.

In the jurisprudence available and referred to by the parties in their submissions and during the hearing, the Panel notes that previous panels did not feel bound to consider the Art. 17.1 criteria in a strict order, but rather consider the most appropriate to the facts of their case first. Udinese in both its submissions and at the hearing provided the Panel with details of the replacement costs it had incurred, it alleged, as a direct

result of the Player's breach. Whilst replacement costs are not referred to in Art. 17.1 of the Regulations, these have been considered in previous CAS jurisprudence (such as CAS 2008/A/1519 & 1520, CAS 2009/A/1880 & 1881 and CAS 2009/A/1856 & 1857) in order to establish the "positive interest", and it thus seems a logical place to start – to see what loss the injured party has actually suffered as a result of the breach, before comparing this with the theoretical calculations a judging authority is directed to make under Art. 17.1 of the Regulations; as stated by the panel in CAS 2009/A/1880 & 1881 (para. 200) *"…Article 17.1 of the FIFA Transfer Regulations is an attempt by FIFA to give some directions on how to calculate the damage suffered"*. The Panel also notes that in these type of cases, which have different facts from others and will have been through the DRC, a panel has the benefit of hindsight or the benefit of seeing how the breach of contract has actually effected the injured party, as the CAS panel may be looking at a breach that happened many years ago. Indeed, in CAS 2008/A/1519 & 1520, the panel was able to derive a lot of information from that player's next contracts.

The Panel notes that in the event that a player waits until the last match of a season, at the end of the protected period and then hands in his notice within 15 days thereof, he avoids the sporting sanctions as set out in Art. 17.3 of the Regulations. However, it then leaves the old club in the position where it is obliged to mitigate its position, but in a short period of time. As detailed in para. 111 of CAS 2008/A/1519 & 1520, *"...any injured party has the obligation to take reasonable steps to mitigate the effects and loss related to his or her damage. This well-recognized principle is confirmed by art. 44 para. 1 of the Swiss Code of Obligations, which states that a judge may reduce or completely deny any liability for damages if circumstances for which the injured party bears the responsibility have aggravated the damage"*.

Whilst there is an obligation on the old club to mitigate its position, how this is done in practice will vary from case to case. In some instances the breach is not in accordance with the notice "window" detailed in Art. 17.3 of the Regulations and the old club may find it impossible to mitigate immediately, as they are outside a transfer window; in other cases clubs may do nothing, when they could have or may seek to bring in a replacement player of greater value than the player in breach – in all instances it is the judging authorities' role to review the particular facts of the case concerned, with the benefit of being able to look back at what actually was done and how that worked out in the specific case. What is normal in football today is the shortage of time available for the injured party in which to make replacements.

In this case, Udinese had argued before the DRC that the breach had resulted in certain losses such as sponsorship, ticket sales and the like, but the DRC had rejected these in the Appealed Decision and the claims were not made to the CAS. However, Udinese submitted and provided evidence to support the claim that they had to bring back one of their squad who was on loan to Rimini as a replacement. That player, S., was subject to a loan agreement between Udinese and Rimini, under which Rimini could acquire his transfer for the sum of EUR 1,200,000. During the hearing, the representative of Udinese confirmed that Rimini had exercised its option prior to Udinese's receipt of the Player's Notice and this evidence has not been contradicted by the other parties. Udinese had a right to counter offer, by which it could reject Rimini's transfer, waive the sum of EUR 1,200,000 and take the player back, but that required an additional payment to Rimini of EUR 250,000, which they duly made and paid, as a result of the Player's breach.

Udinese also submitted that it felt S. would be too inexperienced to be the immediate direct replacement for the Player. He was 22 years old in that moment and he had never played in Serie A or in another primary European league, whereas the Player was 30 years old, the regular starting keeper in a Serie A team for many years, with international experience. As such, they also brought in an experienced goalkeeper, A., aged 37, on a free transfer. The representative of Udinese explained at the hearing that their tactic was to have the older, experienced goalkeeper to be the initial replacement for the Player, whilst continuing to train and develop the younger one, so he could takeover during the next 3 years, the unexpired period of the Player's Old Contract. The Panel noted Udinese acted quickly to bring these players in, both before the Player had signed with Sevilla, but after the receipt of the Player's Notice. The Panel also noted the specific position of the Player – a goalkeeper. Only one is on the pitch at anytime for a club and they tend to be rotated less. Outfield players can often play in different positions and are easier to replace from a squad.

The Panel noted the comments of Sevilla during the hearing, stating that three other goalkeepers had left Udinese at the end of the 2006/2007 season, and, as such, queried whether these two goalkeepers were direct replacements for the Player or whether Udinese would have brought these players back/in anyway. In addition, the Panel noted the submissions of the Player that one player should not be replaced by two new ones. The representative of Udinese at the hearing confirmed their submissions that these two players, S. and A., were brought in specifically

as a result of the Player's breach. On balance, the Panel feels that in this instance Udinese had acted reasonably, immediately upon receipt of the Player's Notice, and forgone the transfer fee for S., paid the counter offer fee and then committed itself to S.'s wages for the next 3 years, to fill the gap left by the Player. The Panel also accepts that Udinese had not replaced like with like and further mitigated its position by bringing in the more experienced goalkeeper as the starting replacement for the Player. Ordinarily, replacing one player with two might seem odd, but the Panel considers as reasonable the strategy of Udinese to replace the Player with both the young player, with potential eventually, and the old player, with experience immediately. Udinese therefore committed itself to the additional costs of A.'s salary. The speed in which Udinese acted and the fact that we are dealing here with a goalkeeper and not a midfield player, for example, made it easier for the injured party to make the logical nexus between these replacement costs/loss and the breach, proving that these two new players were hired in direct substitution for the Player; done as a result of the Player's termination of the Old Contract; and Udinese was able to produce copies of the agreements with Rimini, which expressly set out the sums payable to bring S. back and copies of the new players' contracts. In addition, Udinese did bring in other goalkeepers over the remainder of the Old Contract period, just as other goalkeepers went. Using the ability to look back at how things turned out, the Panel can see that Udinese's strategy here worked, as eventually S. replaced A. as first team choice and remained in that position as at the date of the hearing.

The Panel notes that Udinese did not directly claim the sums it paid out from the Player and Sevilla, but instead sought to use these sums as a reason for the Panel not to look to deduct any savings Udinese made, by not having to pay the Player's remuneration and benefits under the Old Contract. The Panel felt Udinese was still looking for these sums to be taken into account in the overall scheme of calculating compensation, so the Panel does not consider that taking them into account would constitute an *ultra petita* ruling; in addition, the Panel notes that under Swiss law the *ultra petita* doctrine applies only with reference to a party's motions and not to its reasoning and arguments supporting those motions. Therefore, it accepts that Udinese suffered and awards as compensation, the following replacement costs:

Lost transfer fee from Rimini for S.	EUR 1,200,000
Additional counter offer fee paid for S.	EUR 250,000
Salary of S. (3 years)	EUR 1,179,000
Salary of A. (3 years)	EUR 1,881,000
Total	EUR 4,510,000

Whilst the Panel notes Udinese has suffered some direct loss, which it has been able to quantify, the purpose of Art. 17.1 of the Regulations is to lay out some criteria by which a judging authority, be it the DRC or a CAS panel, can look to establish the total loss or damage suffered by the Player's breach. The Panel should look to see if an injured party has in fact suffered more loss than the direct losses; roughly the same; or, indeed, should the injured party have brought in a new player of greater value than the one in breach, whether in fact it should be compensated for all its replacement costs. As stated by the panel in CAS 2008/A/1519 & 1520 (para. 114) *"…the judging authority will have a wide discretionary power to decide on the appropriate amount, taking into consideration the specific circumstances of the case and the responsibilities of both the parties"*. The injured party has a well established duty to mitigate and the level to which this has been done has to be considered by the judging authority. Each case will turn on its own facts, so this Panel will now review these in light of the Art. 17.1 criteria.

The Panel also notes the burden of proof is with the injured party, as it requests the compensation for the Player's breach.

1. Remuneration and other benefits

The Panel notes that this criterion has proved the most contentious to date. The panels in CAS 2008/A/1519 & 1520 and CAS 2009/A/1880 & 1881 both sought to calculate the value of the services of the player looking at the amount the injured party, the old club, would have to pay to replace the player. Those panels felt there were two components, the wages of the replacement player and the cost to acquire him. They felt that the amount the new club were willing to pay the player in breach gave the best indication of what a theoretical replacement player would be paid. Those panels then had to look for evidence as to what the old club would have to pay to acquire a replacement player. In CAS 2009/A/1880 & 1881, the two clubs had started negotiations as to a transfer fee the new club would pay the old; in CAS 2008/A/1519 & 1520, the panel took the evidence from the contracts the new club entered into with a third club. In both instances the remuneration under the old contract was treated as being saved and deducted. This all contrasts with the CAS 2007/A/1298 & 1299 & 1300 decision, in which compensation was the remuneration for the unexpired part of the old contract, not the new (as it could be *"potentially punitive"*) and that panel did not look at what the old club might have to pay to acquire

a replacement player and queried whether the costs of acquiring any player should be amortised beyond the protected period. The protected period being defined in the Regulations as *"a period of three entire seasons or three years, whichever comes first, following the entry into force of a contract, if such contract was concluded prior to the 28th birthday of the Professional, or to a period of two entire Seasons or two years, whichever comes first, following the entry into force of a contract, if such contract was concluded after the 28th birthday of the Professional"*.

In this matter, Udinese claimed that the compensation should be the remuneration under the New Contract, for the 3 years that were unexpired on the Old Contract. It felt that any savings made under the Old Contract should not be deducted, as they had been used to acquire the replacement players, S. and A. Udinese did not request the acquisition costs of a replacement player be used in addition to calculate the value of the Player's services, rather submitted that his market value should be awarded as compensation, under the specificity of sport criterion.

On the other hand, both Sevilla and the Player submitted that the facts of this case were closer to those in CAS 2007/A/1298 & 1299 & 1300 and that the compensation should be limited to the net remuneration payable under the Old Contract, over the 3 year unexpired term, and disregarding other benefits, such as rent and the loyalty bonus (if not reduced further pursuant to their arguments that using the Swiss Code of Obligations any award should be limited to 8 months salary, as a maximum).

The Panel has determined that the applicable law in this matter is contained within the Regulations, with Swiss Law applying subsidiarily. The Panel did not believe that there was any gap or *lucuna* within the Regulations that required the Panel to utilise Art. 339c(2) of the Swiss Code of Obligations when assessing any damage under this criterion and further notes Udinese's submission that Art. 17.1 actually directs a judging authority to look at *"the time remaining on the existing contract up to a maximum of five years"* as opposed to placing any maximum limit. As such the Panel rejects the claims of Sevilla and the Player to limit the amount of compensation awarded to a maximum of 8 months salary.

The Panel has determined that in this specific case, there are considerable actual damages suffered as a result of the breach. The Panel further notes that it had limited evidence provided to it by the parties in order to attempt to calculate the theoretical calculation of the value of the services of the Player in order to put the injured party, Udinese, back in the position it would have been if there had been no breach by the Player.

If the Panel attempted to follow a CAS 2008/A/1519 & 1520 or CAS 2009/A/1880 & 1881 type calculation, then it would need to look at the remuneration under the New Contract, submitted as:

Annual salary	EUR 331,578
Annual contract premium	EUR 1,050,000
Annual total	EUR 1,381,578
Three year total	EUR 4,144,734

To complete the theoretical calculation, that sum would be less the savings under the Old Contract, but then the Panel would seek to assess the acquisition costs Udinese would have to pay for a replacement goalkeeper by looking at the value of the Player.

Quite apart from the fact that Udinese did not actually advance the argument that the Panel should look to calculate the value of the Player's services, as would be requested under the CAS 2008/A/1519 & 1520 approach, and that both Sevilla and the Player argued the CAS 2007/A/1298 & 1299 & 1300 principles should be followed here instead, the Panel were not provided with clear evidence that would enable them carry out this task, in particular what would the acquisition costs of a theoretical replacement player be. During the hearing the Panel were made aware of the amount Napoli paid for the Player, 2 seasons after he left Udinese, i.e. EUR 1,500,000 – if Napoli signed him for a 3 year contract, does that place his acquisition value at EUR 500,000 per season? Indeed, the Panel noted Sevilla loaned the Player out to Galatasaray for the 2008/2009 season, for a loan fee of EUR 500,000.

The Player at the hearing submitted that he had become a far better player after he left Udinese, so was the transfer fee paid by Napoli something that should be used to compensate Udinese? Would he have received as much remuneration and contract premium in the New Contract by Sevilla if they had paid to acquire him? Is it safe for a judging authority to use a transfer fee paid 2 years after the breach as evidence as to the amount a replacement player might have cost Udinese at the time of the breach? – a lot can happen in football in 2 years. How much of that transfer fee was down to the Player's *"own efforts, discipline and natural talent"* or from his *"charisma and personal marketing"* (see para. 142 of CAS 2007/A/1298 & 1299 & 1300)? On the other hand, if Napoli paid EUR 1,500,000 for the Player when he was 2 years older, might they have paid more at the time of the breach?

Udinese did not produce concrete evidence of any offers for the Player, just the details from a website of some other transfers of goalkeepers over the last few years, where the Panel had no details of those players' salaries, unexpired terms, etc. There was no expert evidence provided. If this was a personal injury claim for damages, one might expect the judging authority to be provided with expert evidence, reports and statements. Here, the Panel was not put in a position by Udinese where it could safely value the services of the Player. In the absence of any concrete evidence with respect to the value of the Player, the Panel cannot apply exactly the same calculation as in CAS 2008/A/1519 & 1520 and shall use a different calculation method to determine the appropriate compensation, the one which would be the closest to the amount that Udinese would have got or saved if there had been no breach by the Player. By using the value of the replacement costs only rather than the estimated value of the Player, the Panel does not seek to depart from the CAS 2008/A/1519 & 1520 jurisprudence but wishes to emphasize that there is not just one and only calculation method and that each case must be assessed in the light of the elements and evidence available to each CAS panel.

The Panel can still use the remuneration of the Old Contract, as directed by Art. 17.1 of the Regulations when considering the issue of whether Udinese has saved the remuneration that it would have paid the Player. The Panel believes it is correct to deduct these as part of the calculation of compensation, but also to give credit for the actual replacement costs incurred. In this case, keeping the consistent approach (see for example the grossing up in CAS 2009/A/1856 & 1857 decision, at paras. 196 and 197) of looking at the gross sums (as tax rates differ from country to country and, more basically, in any playing contract, the club's obligation is to pay the whole contract sum, and the tax liability is the player's; for convenience and usually as a result of tax legislation, the club deduct the tax at source and pay it on the player's behalf to the government), Udinese have saved the following:

The yearly salary of the Player	EUR 623,000
The yearly loyalty bonus	EUR 350,878
The annual rent contribution	EUR 9,700
A yearly total	EUR 983,578
The total for the 3 years	EUR 2,950,734

The Panel determined that the loyalty bonus and the rent should be treated as remuneration, whether they were detailed in the Udinese Contract or an agreement between the same parties, supplemental to the Udinese Contract. The Panel did not agree with Sevilla's submissions that the loyalty bonus *"is effectively an appearance bonus"*. If the Player had remained, yet never physically played again, say due to an injury or loss of form, that bonus would still be due. Only the squad bonuses were uncertain and required participation in matches. The Panel very much doubts whether the Player would not have made a claim for the loyalty bonus, had it been Udinese that breached the Old Contract prematurely.

So at this juncture, the Panel has determined to award Udinese as compensation for the Player's breach:

The replacement costs	EUR 4,510,000
Less, the savings made	EUR 2,950,734
Sub total	EUR 1,559,266

2. In or out of the protected period

Whilst Udinese had argued before the DRC that the breach occurred within the protected period, this had been disputed by the Player and Sevilla, and the DRC, in the Appealed Decision, determined that the breach was outside of the protected period. As such the arguments were not advanced to the CAS. It was therefore common ground that the breach occurred outside of the protected period.

The Panel noted that in certain previous cases, such as CAS 2008/A/1519 & 1520, this was dealt with in the specificity of sport criterion and determined to deal with the same below.

B. Specificity of Sport

The Panel noted it *"should aim at reaching a solution that is legally correct, and that is also appropriate upon an analysis of the specific nature of the sporting interests at stake, the sporting circumstances and the sporting issues inherent to the single case"* (para. 155 of CAS 2008/A/1519 & 1520 and confirmed at para. 233 of CAS 2009/A/1880 & 1881). The Panel agreed with the jurisprudence set out in previous cases mentioned herein that the specificity of sport is not an additional head of compensation nor a criterion allowing to decide in equity, but a correcting factor which allows the Panel to take into consideration other objective elements which are not envisaged under the other criteria of Art. 17 of the Regulations.

In this specific case, Udinese has suffered loss as a result of the Player's breach. Udinese has mitigated its position, in a reasonable way. It did not go out and acquire a more expensive replacement; instead it brought in an experienced, older goalkeeper on a free transfer and brought back a younger goalkeeper with prospects. However, the Panel is not convinced that these direct replacement costs have fully

compensated Udinese for the loss it suffered as a result of the breach.

At the hearing, Udinese submitted that the market value of the Player was evidenced by the liquidated damages clause in the New Contract, a sum of EUR 15,000,000. However, Udinese also conceded that this was set at an artificially high level and that a more realistic level would be a third or half of this sum. So should the Panel look at the value set in the New Contract, should the Player have looked to breach that, i.e. EUR 15,000,000? Or perhaps the lower of the suggestions made by Udinese, i.e. a third of that sum (as all parties agreed at the hearing that clubs tended to set the sums in a liquidated damages clause far in excess of the player's true market value – these clauses are more a deterrent than a price tag), so EUR 5,000,000 and should the Panel, as suggested by Udinese, use the specificity of sport criterion to award that sum to Udinese? To further their position, Udinese also submitted that the Panel should look at the market value/transfer fees paid for other goalkeepers in the market around that time and use the specificity of sport to award between EUR 5,000,000 and EUR 10,000,000 to Udinese.

The Panel, in addition to being unimpressed by a few pages downloaded from a sporting website as evidence to support this submission, did not find that there was any similarity between those transfers and this specific case, and also determines that the specificity of sport is a correcting factor, and not one that enables a transfer fee through the back door. The Panel noted that Udinese quoted para. 156 of CAS 2008/A/1519 & 1520 in its submission, in which that panel stated this head of compensation is limited, that it serves to correct and should not be misused, yet then Udinese request between EUR 5,000,000 and EUR 10,000,000 under this criterion.

In addition, the Panel did consider the parties' submission regarding the time left unexpired on the Old Contract – 3 years left of a 5 year contract; the special role of the Player in the eyes of sponsors, fans and his colleagues at Udinese; the position he played on the pitch and the success he had brought to Udinese; whether it was felt there was any evidence that the Player and Sevilla had met before the Player handed his notice in (and on that point, the Panel noted the lack of evidence produced by Udinese to back up its allegations); but also the time he had given to the club; whether he was a "model professional" or not; the fact he was outside the protected period; that he felt he followed a "process" set out in Art. 17.3 of the Regulations; whether the Player felt as Udinese had not offered him a new deal, after 2 years on the 4th contract, it was a sign he was not their future or whether any renegotiation would typically have occurred a few months later; and the like. On balance, the Panel felt that a downside of Udinese's strategy to replace the Player with the older, experienced goalkeeper and with the younger goalkeeper with potential was a factor that is specific to football and sport in general, that is the effect it will have on the fans and sponsors.

The Panel noted that Udinese had attempted to quantify such losses before the DRC – a near impossible task. However, the Panel notes that the Player was a senior professional, with whom the club had enjoyed some of their greatest successes. The fans and sponsors of all clubs demand immediate success and results. The Panel believes that at any club, when a key player is sold or goes and time is required for a new "hero" to materialise, revenues will be affected, the injured party will suffer losses which it may not be able to prove in Euros. This, in the opinion of the Panel, is where the specificity of sport can be used and should be used.

The Panel notes that in the various previous cases mentioned above, only the panels in CAS 2007/A/1358 & CAS 2007/A/1359 and CAS 2008/A/1519 & 1520 awarded any sum for the specificity of sport, where the breach is by the player. The Regulations offer no express guidance as how a judging authority should calculate compensation under this basis. However, the commentary to the Regulations states, as a footnote on the specificity of sport:

"… Furthermore, there was also the possibility of awarding additional compensation. This additional compensation may, however, not surpass the amount of six monthly salaries …".

In the Appealed Decision, the DRC awarded a sum of EUR 350,000, but did not offer any detail as to how they arrived at this sum. In CAS 2007/A/1358 & CAS 2007/A/1359, the panel rounded the compensation up – having worked from the remuneration due under the old contract, but then reviewing the increased remuneration the player received at his new clubs. In CAS 2008/A/1519 & 1520, the CAS panel considered Swiss Law as guidance, to fill that gap or *lacuna*, in particular, Art. 337c(3) and article 337d(1) of the Swiss Code of Obligations. Further, two of the parties in their submissions referred to the Swiss Code of Obligations as being applicable in this case. The Player did in his written submissions put forward an excerpt from academic paper, suggesting Swiss Law had no place here, but the author referred to was actually a panel member in the CAS 2008/A/1519 & 1520 case, so without the entire paper, the Panel decided to follow the jurisprudence. That panel stated *"… the specific circumstances of a case may lead a panel to*

increase the amount of the compensation, by letting itself inspire, mutatis mutandis, by the concept of fair and just indemnity in the … Swiss Code of Obligations". In that instance that panel awarded additional compensation in the form of an additional indemnity amount equal to 6 months of the salary under the new club's contract. That panel used as further support Art. 42 para. 2 of the Swiss Code of Obligations, stating *"if the exact amount of damages cannot be established, the judge shall assess them in his discretion, having regard to the ordinary course of the events and the measures taken by the damaged party to limit the damages"*. The Panel in this determines to follow the specificity of sport jurisprudence detailed in CAS 2008/A/1519 & 1520. So, taking into account the specific facts of this matter, determines the additional compensation for Udinese shall be EUR 690,789, being 6 months remuneration under the New Contract.

As such, the total compensation due to Udinese is:

The replacement costs	EUR 4,510,000
Less, the savings made	EUR 2,950,734
	EUR 1,559,266
Add, the specificity of sport	EUR 690,789
Total	EUR 2,250,055

Such sum being payable jointly and severally by the Player and Sevilla.

Arbitration CAS 2010/A/2235
Union Cycliste Internationale (UCI) v. T. & Olympic Committee of Slovenia (OCS)
21 April 2011

Cycling; Doping (Athletes' Biological Passport, ABP); burden and Standard of Proof; evaluation of the Experts' Panel report by the CAS Panel; application of the rules related to the ABP by CAS Panels; adaptive Model and specificity threshold for abnormality of athletes' blood values; coincidence of the abnormal levels with the Athlete's racing programme; violation of EU competition law; disqualification in case of a violation found by reference to the ABP; blood manipulation as aggravating factor for the determination of the ineligibility period; determination of the amount of the fine according to the UCI ADR

Panel:
Mr. Michael J. Beloff QC (United Kingdom), President
Prof. Massimo Coccia (Italy)
Mr. Michele Bernasconi (Switzerland)

Relevant facts

This is an appeal brought by Union Cycliste Internationale (UCI) against a decision ("the Appealed Decision") of the Senate ("the Senate") of the National Anti-Doping Commission of the Olympic Committee of Slovenia (OCS).

Its importance lies in the fact that it raises the issue of whether a doping violation can be established not on the basis of an adverse analytical finding but by reference to the so-called Athletes Biological Passport (ABP) i.e. longitudinal profiling, in this instance said to evidence use of a prohibited method. The same issue has been previously considered by the Court of Arbitration for Sport in TAS 2010/A/2178.

UCI is a non-governmental association of national cycling federations recognized as the international federation governing the sport of cycling under all forms worldwide. Its registered office is in Aigle, Switzerland.

T., born on 13 April 1977, is of Slovenian nationality ("the Athlete"). He has been a professional rider since 2000 and is an Elite category cyclist, who holds a licence issued by the National Cycling Federation of Slovenia.

OCS was founded in 1991 and achieved International Olympic Committee recognition in 1992. It is the organisation responsible for the coordination, the management and the development of Slovenian sport in all its various forms.

While direct detection methods aim to detect the doping agent itself, the focus of the ABP is not on the detection of prohibited substances but rather on the effect of these substances on the body. Designed, as they are, to create physiological enhancements, biological markers of disease are used in medicine to detect pathological conditions. Biomarkers of doping are used to detect doping. The comment to article 3.2 of the WADA Code which refers to "*conclusions drawn from the profile of a series of the Athlete's blood or urine samples*" gives an authoritative imprimatur to the principle of using such evidence.

The ABP is an individual, electronic record for each athlete, in which the results of all doping tests over a period of time are collated (TAS 2010/A/2178 para. 5). It is the paradigm that uses biomarkers of doping. "*L'ABP est fondé sur un profil hématologique élaboré sur la base de résultats de contrôles sanguins permettant d'établir les limites individuelles de chaque athlète pour trois paramètres hématologiques : la concentration de hémoglobine (…) le pourcentage de réticulocytes (…) et l'index de stimulation on "Off-score" (qui exprime le rapport entre les deux valeurs précédentes)*" (ditto para. 38).

The statistical result for the athlete does not in itself justify a conclusion that an anti-doping rule violation has occurred but rather calls for an explanation by the athlete.

The Panel accepts too that in order to evaluate such explanation a whole range of factors related to the sport as well as to the athlete in question will require consideration.

In January 2008, UCI started its ABP program, which is applicable to all riders competing in UCI ProTeams

or UCI Professional Continental Teams with wild card status.

On 3 August 2007, the Athlete and EUSRL France Cyclisme – Parc d'activités de Côte Rousse entered into an employment contract for the period 1 January 2008 to 31 December 2009 ("the Contract"). According to the Contract, UCI Regulations and statutes were applicable to the signatories.

The Athlete was included in the UCI ABP program and subject to 21 in and out-of-competition blood sample collection between March 2008 and August 2009. The data contained in his ABP file were recorded under the following anonymous identifying code: J150L29. The analyses were on all occasions carried out in an accredited laboratory.

According to UCI, two abnormal values were identified by the Adaptive Model in that the samples results of 19 April and of 29 August 2009 deviated from the norm by 99.9%. In accordance with The Guidelines, the Athlete's file was anonymously reviewed by a panel of three experts, namely Dr Michael Ashenden, Dr Giuseppe Fischetto and Dr Olaf Yorck Schumacher (the "Expert Panel").

On 6 December 2009, all these members of the Expert Panel signed the following statement ("the Experts' Statement"):

"We, the undersigned scientific experts, state that the haematological profile BP_ID J150L29 provides convincing evidence of the use of a prohibited method listed under category M1. Enhancement of Oxygen Transfer of the Prohibited List maintained by the World Anti-Doping Agency.

We have reviewed data contained in the Rider's Biological Passport file including the raw haematological results and the graphical profile established by the Athlete Biological Passport software as attached and signed. We have also reviewed the full laboratory documentation packages associated with each sample in the profile.

In accordance with Article 3 of Annex D of the Athlete Biological Passport Operating Guidelines, it is the panel's unanimous opinion, absent a satisfactory explanation from the rider, that based on the Haemoglobin (Hb) and OFF-hr Score data, it is highly likely that the rider has used a Prohibited Substance or Prohibited Method.

We therefore recommend that the UCI initiate disciplinary proceedings for a potential anti-doping rule violation under Article 21.2 of the UCI Anti-Doping Rules".

On 1 March 2010, UCI informed the Athlete that abnormal variations were identified in his biological parameters and forwarded him the Experts' Statement accompanied by the raw results of blood variables measured in his blood samples as well as by the graphical representation of his haematological profile generated from the results of his blood variables by the Adaptive Model. UCI invited the Athlete to provide his own clarification for the results within 30 days. The Athlete was informed that if, after reviewing his explanation, the members of the Expert Panel were of the unanimous opinion "*that there is no known reasonable explanation for [his] blood profile information other than the use of a prohibited method, the UCI shall proceed with the case as an asserted anti-doping rule violation*".

By email dated 5 March 2010, the Athlete noted that UCI did not specify which values were found to be abnormal. Nonetheless, he outlined the various health problems encountered during the first part of the season of 2009:

i) in February 2009, he dropped out of the first stage of the Tour of California due to stomach aches, and suffered vomiting and cramps at night,

ii) he felt "bad again" during the Criterium International as well as during the altitude training for the Giro in Italy,

iii) on 19 April 2009 at the moment of the sample collection he was also in a state of great stress due to his second child's birth, and

iv) on 25 August 2009 he had to be treated for a wasp sting on his tongue with a cortisone injection.

He also explained that, since January 2009, he spent much time at his mountain house which is situated at 1,300 meters and equipped with hypoxic rooms: and that to simulate altitude up to 4200m high from 5 to 26 July 2009 he stayed at an altitude of 2,800 meters and from 13 to 24 August 2009 at one of 3,200 meters.

On 29 April 2010, the members of the Expert Panel unanimously confirmed that they reviewed the Athlete's explanation and concluded that "*there (is) was no known reasonable explanation for his blood profile information other than the use of a prohibited substance or method*". They recommended UCI to proceed with the case as an asserted Anti-Doping Rule Violation.

On 3 May 2010, UCI informed the Athlete as well as the Slovenian Federation of Cycling that the Athlete was found to have committed a "*potential anti-doping rule violation*" under article 21.2 of the UCI Anti-Doping Rules. It explained that the haematological profile consisting of blood samples collected from the

Athlete during 2008 and 2009 provided convincing evidence that he used the prohibited method of enhancement of oxygen transfer. As a consequence, UCI required the Slovenian Federation of Cycling to instigate disciplinary proceedings in accordance with the applicable UCI Anti-Doping Rules.

On 18 May 2010 the Athlete submitted a written defence.

On 28 July 2010, after having heard the parties and evaluated the available evidence, the Senate of the National Anti-Doping Commission ("the Senate") ruled that UCI failed to prove the effective use by the Athlete of a prohibited method.

On 16 September 2010, UCI filed a statement of appeal with the Court of Arbitration for Sport (CAS), where it principally requested that the decision of the Senate of the National Anti-Doping Commission of the OCS date July 28, 2010 be annulled and that the Athlete be sanctioned with minimum 3 years of ineligibility in application of art. 293 ADR and 305 ADR, starting from the date of the hearing decision in application of art. 314 ADR

Extracts from the legal findings

A. Burden and standard of proof

The burden of proof of establishing an anti-doping violation *ex concessis* is imposed on UCI (Article 22 of the UCI ADR). The standard of proof "*comfortable satisfaction*" is provided in the same article. It is a lower standard than the criminal standard (beyond reasonable doubt) but a higher standard than the civil standard (balance of probabilities).

In so far as the Athlete, by invoking the principle in "*in dubio pro reo*" and in seeking to quantify the requisite standard in terms of an equal to or a less than 1 in 1000 chance, seeks to depart from the language of the rules, the CAS Panel rejects his approach. Application of the standard to any particular set of facts may produce different results depending on those facts. But the standard itself is uniform, irrespective of the facts. It demands an exercise of judgment.

UCI submits that given the CAS Panel's lack of specific scientific expertise "*it should limit itself to check that the Expert Panel considered the correct issues and exercised its appreciation in a manner which does not appear arbitrary or illogical. In any event it should not substitute its own subjective appreciation to the one of the expert panel*".

The CAS Panel recognises that it does not stand in the shoes of the Expert Panel (or indeed of those of the experts for either side), nor does it seek nor should it in this (or any other case) to repeat the exercises carried out by experts. It also recognises that any Tribunal faced with a conflict of expert evidence must approach the evidence with care and self-awareness of its own lack of expertise in the area under examination. Nonetheless, notwithstanding these caveats, it cannot abdicate its adjudicative role (cf: *Kumho Tire Co. Ltd v Patrick Cormichael* US Supreme Court 23 March 1994); Roman Law put the matter pithily: "*iudex peritus peritorum*" (the judge is the expert on the experts). Bearing in mind the prescribed provisions as to burden and standard of proof, the CAS Panel conceives its function in applying the standard as an appellate body to determine whether the Expert Panel's evaluation (upon which UCI's case rests) is soundly based in primary facts, and whether the Expert Panel's consequent appreciation of the conclusion be derived from those facts is equally sound. It will necessarily take into account, *inter alia*, the impression made on it by the expert witnesses in terms of their standing, experience, and cogency of their evidence together with that evidence's consistency with any published research: and it has done so in this appeal.

The CAS Panel has been alert to ignore reference to cases of other road race cyclists where charges of doping violations by blood doping or otherwise have been established, or to avoid making the lazy assumption that a participant in such a sport is more prone to resort to doping practices than participants in other professional sports. However, this CAS Panel rejects the assertion, not infrequently made, both before it and (previously) before the Senate that the experts produced by UCI acted as advocates, or even accusers. UCI itself has nothing to gain from exaggerating the extent to which its sport is troubled by the scourge of doping.

There was some debate before the CAS Panel as to the merits of the ABP as presently devised. In particular Prof Dine was a critic of the current APB and the markers used. The CAS Panel is not called to adjudicate on whether some other or better system of longitudinal profiling could be created. WADA has approved the use of ABP and this has been codified in the current UCI rules. The CAS Panel must respect and apply the rules as they are and not as they might have been or might become.

The first question then is whether the analyses of the Athlete's blood samples were correctly carried out and, in consequence, whether the results of those analyses were reliable. It is to be noted that although the Appealed Decision did not leave the analyses unscathed, the Senate did not consider

that any administrative errors affected the results. It said "*With regard to the irregularities in the analysis of the Athlete's blood samples, stated by the Athlete, the Senate DK finds that the Athlete has proven with at least the balance of probability that the irregularities with some analysis have been made. Not even Dr. d'Onofrio, who was of the opinion that these were administrative mistakes when writing the report, opposes to this. Considering the lack of other evidence, which would indicate that the mistakes in the analysis of the Athlete's blood samples actually and significantly influenced the Athlete's blood profile results in the way that they would no longer be "abnormal", the Senate DK finds that the Athlete has not proven with the balance of probability that his blood profile is a consequence of mistakes in the procedure of blood sample analysis. The UCI on the other hand submitted evidence, expert opinion (A30), from which it arises that especially in the case of the most critical results (19 April 2009 and 29 August 2009) there were no irregularities made".* The CAS Panel sees no reason to depart from that conclusion.

The attack on the analysis had two main prongs; in relation to the 19 April 2009 sample the issue was whether it was properly mixed; in relation to the 29 August 2009 sample the issue was whether the external quality controls were effective. The CAS Panel accepts the evidence of Prof D'Onofrio, an expert in haematology, which, in its judgment, complemented by the disclosed documentary evidence from the laboratory, satisfactorily rebutted that assault. The consistency of the aliquots tested on 29 August repels the first challenges. The internal quality controls repel the second. Pursuant to direction by the CAS Panel, UCI provided (albeit in redacted form) the results of other samples analysed on both 27 April and 29 August 2009, which gave no indication as to any analytical problems. The CAS Panel does not criticise the Athlete's lawyers for taking all reasonable steps to see if some fatal flaw could be found in the analytical procedure. It can only comment that the exercise of the inquiry in the event yielded no forensic fruit. It is not without interest that both in his initial explanation dated 5 March 2010 and in the pre defence email from his lawyer dated 17 May 2010 the Athlete's challenge was not to the accuracy of the results of the blood tests but to the legitimacy of drawing any adverse inference from them. The presumption of regularity enshrined in article 24 of the UCI ADR was not displaced.

The second and, accordingly, key question was what conclusions could be drawn from the results. The expert evidence relevant to this question was essentially divided into three sections; statistics, gastroenterology and haematology.

The Adaptive Model identifies a specificity threshold of 99.9% for abnormality of an Hb (haemoglobin concentration) or OFF-hr to justify such investigation, i.e. that only one sample in a thousand would exceed the threshold if the athlete was both healthy and not using prohibited substances and/or methods. This formula itself allows for variations which result either from ordinary biological variability or from imprecisions in sample analysis and provides a protective barrier of some fortitude against unwarranted investigation. The abnormality justifying such investigation had to be assessed by reference to the Athlete's own profile. It seemed to the CAS Panel that the main thrust of the somewhat elusive statistical evidence of Dr Perme (complemented by that of Dr Henderson) called on behalf of the Athlete was that there was no basis for an investigation at all because of the propensity for multiple tests to generate false positive. Dr Sottas satisfied the CAS Panel that he was aware of the risk and had relied in his analysis on other connecting factors. He had also taken into account exposure to altitude, so rebutting another of Dr Perme's complaints about his graphs.

The following features of the tests carried out in the Athlete's samples are noteworthy. First the threshold of 99.9% was exceeded on not one only, but on two occasions, ie 19 April 2009 and 29 August 2009. Second on 19 April 2009 the threshold of 99.9% was exceeded both by reference to the Hb score and by reference to the OFF-hr score (on 29 August 2009 only by reference to the latter). Third, as Dr Sottas explained the abnormalities are at a high level: abnormally high reticulocytes and correspondingly abnormally low haemoglobin on 19 April 2009, (as well as an abnormally high increase in haemoglobin from 27 August 2009 to 29 August 2009.) Fourth the abnormality on 29 August 2009 had to be assessed not only against the Athlete's general profile but against the (normal) scores of the test of 27 August 2009 ("the particular factors"). The abnormal values are (for the purposes of the ABP) a necessary but not a sufficient proof of a doping violation.

The results called for explanation, which was unlike the calculations made qualitative and not merely quantitative in nature.

In principle such explanation could fall into one or more of five categories

(i) pure chance

(ii) incorrect analysis

(iii) breaches in the chain of custody both to and in the laboratory which tested the samples

(iv) medical condition, physiological or psychological

(v) manipulation of blood.

As to these possible explanations:

(i) can be discounted in the light of the particular factors

(ii) the CAS Panel has already dismissed, see above

(iii) has not been seriously advanced and the documentation which the CAS Panel has studied itself rules it out.

The choice therefore lies between (iv) and (v). The Athlete contended for (iv), UCI for (v).

The Athlete's explanations were varied, not singular. That fact does not by itself mean that they were not worthy of consideration. It does, however, at least prompt the thought that, if correct, they identify the Athlete as the victim of a measure of misfortune.

The explanation for the 19 April 2009 reading was a combination of a physiological condition (gastric bleeding) enhanced by a psychological condition (stress). The CAS Panel is prepared to accept that the Athlete did suffer from a chronic gastric complaint that manifested itself as far back as 2001; and that a gastroscopy administered on 1 May 2010 provided some evidence of internal lesions. The question however, is not whether the Athlete had such a complaint, but whether it could be explanatory of the 19 April 2009 reading. A chronic (but stable) complaint would have produced a consistent series of values. The Athlete's case depended upon the complaint being acute, even if spread over a few days. The CAS Panel is satisfied from the evidence of Dr Schumacher and Dr Ashenden that the loss of blood through haemorrhage capable of producing such readings would have been of a volume which the Athlete could not have ignored. It is in this context notable that:

(i) the gastric fissures had produced no abnormal values in the recorded tests from 21 March 2008 up to 19 April 2009;

(ii) no mention was made of any such condition by the Athlete to the doping control officer or on the doping control form which permitted (even if it did not solicit) such information;

(iii) the Athlete did not seek any treatment for his gastric condition (said to be evidenced by black stools at the time) or indeed seek any medical advice until many weeks later;

(iv) in the intervening period the Athlete competed with some distinction in a major (and demanding) race;

(v) the significant medical information recorded in the medical certificate of 7 August 2009, i.e. the black stool, was sourced from the Athlete's own statements, prompted by the doctors' questions, and was uncorroborated by medical testimony and did not, it seems, persuade the doctor who provided the certificate to undertake a gastroscopy. The certificate appears rather designed to support the Athlete's version of events than as a precursor of treatment;

(vi) whereas the Athlete's expert, Dr Zver, suggested that the complaint had resolved itself, the more cogent medical opinion of the UCI experts, in particular Dr Schumacher, was that an inflammation causing sufficient blood loss to explain the 19 April 2009 reading could not resolve itself but would require medical treatment.

The gastroscopies carried out for the Athlete by Dr Gruden in May and November 2010 demonstrated no contemporary bleeding and were, on the assessment of Dr Dorta (which the CAS Panel accepted), of limited, if any retrospective relevance.

The CAS Panel saw and heard no evidence to persuade it that the Athlete's stress connected with his wife's confinement could have itself tipped the balance. It is itself comfortably satisfied, not least by the objective facts relating to the Athlete's own actions at the material times, that the Expert Panel was right to discount the explanation of gastric inflammation.

The explanation for the 29 August 2009 reading was actual or simulated altitude exposure. As in the case of the gastric inflammation explanation, the CAS Panel accepts that such exposure could sometimes explain abnormal haemoglobin values. The issue is not, in appropriate circumstances, its capacity to have such effect, but whether in the case of this Athlete it provides such an explanation for the particular values noted. This again raises a question of degree. The area has been the subject of research, not least because the advantages of altitude training and their beneficial impact on blood are well appreciated; indeed were appreciated by the Athlete himself – he had built his house incorporating a device designed artificially to simulate a higher altitude. The research drawn to its attention amply persuades the CAS Panel that at least two to three weeks continuous hypoxic exposure is required to have any significant impact on haemoglobin concentration such as would be evidenced in a test. The Athlete's own evidence shows that he was never the subject of such prolonged exposure at the relevant times. The effect of the July exposure, which was of sufficient duration, would have exhausted itself by 29 August 2009. The August exposure was itself of insufficient duration. The CAS Panel therefore accepts that the Expert Panel was fully justified in concluding that neither a terrestrial

nor, *a fortiori*, the less potent simulated exposure could itself explain the reading of 29 August 2009.

In any event, the Athlete faces a further hurdle in relation to the reading of 29 August 2009, for he has to explain how the hypoxic exposure said to be the cause of the 29 August 2009 reading did not equally manifest itself in the 27 August 2009 reading (which it is common ground it did not). Here the Athlete's explanation lies in the treatment he received for a fortuitous wasp sting on a training ride. It should be noted that what precise aspect of the treatment was responsible for the reading was not advanced with any consistency. In his explanation of 5 March 2010 the Athlete referred only to the cortisone injection; he made no mention of any abnormal ingestion of water. In his pre defence email of 17 May 2010 the Athlete's lawyer made no mention of the injection, but only of heamodilution, something repeated in the defence statement of 19 May 2010 para. 8. The Senate seems to have accepted that both aspects contributed to the reading.

It appears from the contemporary medical evidence that the injection administered to the Athlete was far less than that usually administered to prevent an anaphylactic reaction (80mg as against 250mg). The CAS Panel is disposed to accept the Expert Panel's evidence that such an amount would have a *'negligible mitrocordial effect'* in preference to that of Dr Zver's whose counterclaim is made less convincing by his dubious assertion that the dose was *"rather large"*.

As to the heamodilution, the expert evidence (itself founded on assumed facts the evidence for which was fragile) fell far short of establishing that it could be responsible for the haemoglobin concentration of 15.2.g/dl shown. Further, according to Dr Sottas it could not explain the decrease in reticulocytes between 27 August and 29 August 2009, since the percentage of reticulocytes "*is independent of any haemodilution*" and this was indeed common ground (see Respondent's answer para. 45). The alternate explanation was that this decrease was a response to altitude training and its cessation. But the published Article relied on (produced, as it happens, by UCI and not the Athlete) does not sustain this explanation, given both the gap between the altitude training and the test, and the rapidity of the decrease in reticulocytes.

The CAS Panel should also note that even were the explanation of Dr Zver credible, it would not itself undermine the conclusion drawn from the 29 August 2009 test viewed in isolation.

Blood removal produces lower than normal haemoglobin – the molecular carrier that transports oxygen from lung to body tissue – and higher than normal reticulocytes – the red blood cells released from bone marrow to respond to blood loss. The reverse is the position post- EPO.

The Athlete's values on 19 April 2009 coincided closely with the average results found, in documented research relied on by Dr Ashenden, when eight healthy male subjects had a substantial volume of blood removed over a 2 week period: and the stabilization of those values by the time of the Giro d'Italia was far more compatible with elaborate replenishment than of natural recovery. By contrast, the Athlete's values on 29 August 2009 were consistent with EPO treatment or blood transfusion or both – again as vouched for by research studies.

Although it is not necessary for UCI under the UCI ADR to establish a reason for blood manipulation, the CAS Panel does note the coincidence of the levels with the Athlete's racing programme. As Dr Sottas convincingly explained, in the same way as the weight of DNA evidence said to inculpate a criminal is enhanced if the person whose sample is matched was in the vicinity of the crime, so the inference to be drawn from abnormal blood values is enhanced where the ascertainment of such values occurs at a time when the Athlete in question could benefit from blood manipulation. As Dr Sottas put it "*The observed patterns are typical of blood doping, very likely blood withdrawal in close time, in vicinity of sample 17 (April 19th) and blood reinfusion prior to the Giro d'Italia 2009, and, most prominent, prior to the start of the Vuelta*".

The Athlete has raised arguments based on discrimination and violation of EU competition law (articles 101 and 102 of the Treaty on the Functioning of the European Union, TFEU) by UCI. However, the Athlete has adduced no evidence which could persuade the Panel that UCI held a discriminatory attitude toward him. In this respect the Panel notes that (i) a variety of cyclists with different personal characteristics and status have been lately charged by UCI with anti-doping violations due to their anomalous ABP values, (ii) the Expert Panel's initial review of the Athlete's ABP was carried out on an anonymous basis, and (iii) the Athlete offered no motives for or identity of the UCI's alleged discrimination (nationality? gender? religion?). In addition, the Panel is satisfied that the EU Court of Justice clearly stated in Meca-Medina that anti-doping rules and sanctions "*are justified by a legitimate objective*" and that any related limitation to the athletes' economic freedom "*is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes*" (Case C-519/04P Meca-Medina and Majcen v Commission, [2006] 5

C.M.L.R. 18, para. 45). While it is true that restrictions imposed by anti-doping rules and sanctions "*must be limited to what is necessary to ensure the proper conduct of competitive sport*" (ditto, para. 47) and, thus, they must be proportionate, the Athlete has equally adduced no evidence to establish that the anti-doping rules and sanctions at issue are disproportionate and, as a consequence, has not established a violation of article 101 TFEU. As to article 102 TFEU, the Athlete has offered no market analysis to define the relevant market and submitted no evidence to prove the existence of a dominant position, let alone the perpetration of abuses, by UCI. Accordingly, this submission on behalf of the Athlete also fails.

B. Summary

In summary the CAS Panel finds that:

there were no defects in the process of analysis or breaches in the chain of custody such as would make the results of the critical tests unreliable;

those tests on 19 April and 29 August 2009 revealed abnormalities in the context of the Athlete's ABP such as to excite the need for explanation;

the explanations given were as scrutinized by the UCI's experts whose testimony, where their evidence conflicted with the evidence of the Athlete's experts, the CAS Panel preferred both because of their (for the most part) greater experience and expertise, and because of the weight of published literature which supported it;

in any event the factual premise for the Athlete's explanations depended in substantial measure on his say- so uncorroborated by independent testimony, and the CAS Panel was disinclined to accept it where it was manifestly improbable, e.g. the failure to report alarming black stools in April 2009;

the pattern of values under scrutiny was entirely consistent with blood manipulation, not least, but not only, because of the degree of abnormality;

the coincidence of the blood manipulation asserted by UCI with the Athlete's racing calendar was striking;

no discrimination against him nor violation of EU competition law was proven by the Athlete.

C. Sanction

1. The following issues arise:

- *for which, if any, events, should the Athletes results be disqualified ('disqualification');*

- *what, if any, should be the Athlete's period of ineligibility ('ineligibility period');*

- *when should any such period of ineligibility commence ('ineligibility commencement');*

- *what, if any, fine should be imposed on the Athlete ('fine').*

2. Analysis of the *lex mitior* principle

The CAS Panel considers that the Athlete cannot find any assistance in the 2009 version of articles 13.1.063 or 13.1.063 bis of PART 13 UCR, for his argument that these provisions should prevail over the UCI ADR (also referred to as "PART 14 ANTI-DOPING") as they are allegedly more favourable to the accused.

Articles 13.1.063 or 13.1.063 bis are included in the chapter of PART 13 UCR which imposes the obligation on riders to submit to blood tests organised by the UCI to check their following blood levels: haematocrit, haemoglobin, reticulocytes and free plasma hemoglobin (article 13.1.062). These articles are ex facie not of a disciplinary nature and are not designed to sanction riders. Article 13.1.063 provides for the provisional suspension of the rider whose *"blood analysis shows an atypical blood value"*. Article 13.1.063 bis states that "*If the blood values determined by the analysis, without being atypical following article 13.1.063, denote a situation where a follow-up can be justified, the rider and his team can be informed"*.

Those articles therefore do no more than put in place provisional measures where any unusual blood values are identified until further steps may be taken by UCI. Article 23 of the UCI ADR makes a direct reference to article 13.1.063 of PART 13 UCR. It therefore appears that the two bodies of law (articles 13.1.063 or 13.1.063 bis of PART 13 UCR and UCI ADR) are complementary, not mutually exclusive, so invalidating the Athlete's claim that "*the same facts lead to punishment under two different laws, protecting the same value – fair competition"*. There is therefore no basis in the UCI regulations, read as a whole, for the application of the lex mitior principle.

3. Disqualification

The CAS Panel would observe that although the provisions as to disqualification are expressly made applicable to violations consisting of use of a prohibited method, they are not easy to apply where the proof of such violation is to be found by reference to the ABP. The provisions are geared to the situation where the violation is an occurrence rather than a process, most obviously where the violation is the presence of a prohibited substance.

Article 289 of the UCI ADR provides in its title for disqualification of results in events during which an anti-doping violation occurs. Even though the text enlarges the title to embrace violations occurring "in connection with an event" it is not easy in a case such as the present to identify in connection with which events the Athlete's doping violation occurred. The prime candidates are the Giro in Italy and the Vuelta in Spain.

Article 313 of the UCI ADR provides in its title for disqualification of results in competitions subsequent to anti-doping rule violation but is applicable only when article 289 of the UCI ADR is not (note the words "except as provided" in article 289). The CAS Panel considers that this article more easily fits a case such as the present. Doping violations were established on 19 April and 29 August 2009. The results subsequent to each violation must be disqualified up to the commencement of the period of ineligibility "unless fairness requires otherwise". The comment provides a non exhaustive example of where such proviso is engaged, i.e. where it is not likely that the results were affected by the violation. The CAS Panel sees no basis for concluding that the violations actually established were likely to have affected any results other than from 19 April 2009 through to the end of September 2009 (there being, it must be stressed, no evidence of subsequent violations). This means that the Athlete must suffer disqualification for the following events: Tour de Romandie, Giro in Italy, Tour de Suisse, Tour of Poland and Vuelta in Spain.

4. Ineligibility period

The default minimum period of ineligibility is prescribed by article 293 of the UCI ADR, i.e. 2 years. The Athlete has not sought to adduce mitigating circumstances under articles 296 of the UCI ADR ("No Fault or Negligence"), 297 ("No significant Fault or Negligence"), 298 ("substantial assistance") or 303 ("Admission") or otherwise and in view the circumstances of the case, the requirements of those provisions are obviously not met.

UCI claims that blood manipulation constitutes an aggravating factor and, consequently, that a minimum three-year ban should be imposed upon the Athlete. This submission has no foundation in the UCI ADR which does not under article 293 differentiate between various forms of first offence or suggest that blood manipulation attracts ratione materiae a higher sanction than the presence of a prohibited substance. It is the circumstances of the offence not the commission of the offence itself which may aggravate. Here there is nothing before the CAS Panel to displace the presumption that 2 years ineligibility for a first offence is appropriate in this case.

5. Ineligibility commencement

The Article 314 of the UCI ADR provides that prima facie the period of ineligibility should start on the date of the hearing decision providing for ineligibility. Under Article 315 of the UCI ADR this can be displaced where the circumstances so justify. The Panel, after consideration of all specified circumstances of the present case, considers it fair to start the period of ineligibility on 20 January 2011. Obviously, any results obtained by the Athlete after 20 January 2011, including medals, points and prizes are forfeited.

6. Fine

The amount of the fine is governed by Article 326 of the UCI ADR. It provides a formula for computation of the fine with a proviso allowing for a reduction of up to a half for the financial situation of the licence holder concerned. Its meaning has been the subject of scrupulous analysis in TAS 2010/A/2063 from a quartet of perspectives, literal, historic, systematic and teleological, leading to the conclusion that the sum to which the 70% discount should be applied should be that to which the cyclist was contractually entitled rather than that which he actually received. The CAS Panel would note that according to CAS jurisprudence the doctrine of proportionality – "a widely accepted principle of sports law" – might also require reduction below a stipulated minimum (DS v FINA 2005/A/830 para. 44) but does not need to resort to that doctrine in this case. The Athlete testified that, during the litigious period, his yearly gross income was EUR 150,000, which is the amount mentioned in the employment contract in force at relevant time (and which is moreover accepted by UCI, as it seeks precisely the imposition of a fine of EUR 105'000 (70% of EUR 150,000).

Reduction from the figure so calculated is available under the same article where the Athlete's financial situation justifies it. It requires the CAS Panel to consider the particular facts before it (TAS 2010/A/2101, para. 129). In the post hearing brief, the Athlete's lawyer provided written details of the time spent on the present case and of all other legal fees. The expenses incurred by the Athlete in connection with the proceedings before the Senate and the CAS amount to EUR 118,940.71 which the CAS Panel is prepared to accept as plausible and reasonable. In view of i) the significant legal costs incurred, ii) the Athlete's family circumstances, iii) the fact that the Athlete's cycling career will considerably suffer in

consequence of the CAS Panels finding's, the CAS Panel holds that a reduction of the fine by 50% from EUR 105,000 to EUR 52,500, is justified by the Athlete's financial situation within the meaning of the proviso to Article 326 para. 1 lit. a. of the UCI ADR (cf TAS 2010/A/2063, para. 91-95, where the Panel was furnished with no material other than a mere declaration to justify any reduction).

Arbitration CAS 2010/A/2266
N. & V. v. Union des Associations Européennes de Football (UEFA)
5 May 2011

Football; match-fixing; principle of the individualisation of the sanction; standard of proof in cases relating to "integrity issues"; burden of proof; content of the principles of "loyalty, integrity and sportsmanship" in Art. 5 of the UEFA Disciplinary Regulations; absence of exculpatory circumstances; measure of the sanction

Panel:
Prof. Luigi Fumagalli (Italy), President
Mr. Andras Gurovits (Switzerland)
Mr. Christian Duve (Germany)

Relevant facts

N. is a professional football player of Hungarian nationality, born on 19 August 1980. In the season 2009-2010 N. was a player of Debreceni VSC ("Debreceni"), a Hungarian football team participating in the 2009-2010 edition of the UEFA Champions League (the "UCL"). V. (N. and V. are referred to as the "Players" or the "Appellants") is a professional football player of Montenegrin nationality, born on 30 August 1982. In the season 2009-2010 V. was a goalkeeper of Debreceni.

On 20 October 2009, the UCL match Debreceni v. Fiorentina (the "Match") was played in Budapest (Hungary), with the final result of 4-3 in favour of the Italian team. Investigations carried out by the police authorities of Bochum (Germany) in cooperation with the UEFA Disciplinary Services revealed that a criminal gang was planning, *inter alia*, to manipulate the Match within the framework of an organised betting fraud. As a result of such investigations, criminal proceedings (the "German proceedings") were started, and are currently pending, before the German judicial authorities.

On 15 June 2010, the UEFA Disciplinary Inspector, deeming that the Players had violated the principles of loyalty and integrity, *"by non reporting attempts of bribery and by acting in a way that is likely to exert an influence on the progress and/or result of a match by means of behaviour in breach of the statutory objectives of UEFA"*, requested the Control and Disciplinary Body of UEFA (the "CD Body") *"to take the appropriate disciplinary measures"*. On 24 June 2010, the Chairman of the CD Body, acting as a single judge, rendered a decision (the "CD Decision") as follows: *"1. The player N. is suspended until 31.12.2011; 2. The player N. is fined EUR 7,000; 3. The player V. is suspended until 30.06.2012; 4. The player V. is fined EUR 10,000; (…)"*.

The CD Body considered the provisions deemed to be relevant within the UEFA system, underlining that *"UEFA controls the behaviour of individuals engaged in its football activities through various rules, notably the UEFA Statutes and the UEFA Disciplinary Regulations (DR), whose goal is to facilitate game play and to protect the integrity of matches, competitions and UEFA's reputation"*, holding, with respect to Article 5 of the UEFA Disciplinary Regulations (Edition 2008) (the "DR"), that

"under the broad wording of this provision, which gives only examples of forbidden conduct, the loyalty expected from players implies total transparency in all situations they find themselves in, including attempted bribery, corruption and match-fixing, and full cooperation with the football authorities to denounce such attempts. A breach of this loyalty is therefore committed by any player who fails to notify UEFA or any football authority that he has been approached by people looking to fix a match, in an attempt to have him help them to do so.

This loyalty can be breached even if their conduct does not actually have any negative result.

Preserving the uncertainty of the outcome of football matches is UEFA's prime concern. Indeed, it is the raison d'être of organised football. If supporters knew the result of a match in advance or how many goals were going to be scored, there would be no sporting interest in watching the game and this would spell the end of football. For this reason, UEFA has a zero tolerance policy towards anyone jeopardising the uncertainty of the outcome of football matches and the reputation of UEFA in this respect".

The CD Body, then, remarked that *"the different pieces of evidence on file establishes the facts the two players are charged with"*, and concluded that *"it appears clear enough … that both the accused at least failed to inform UEFA or their club of the fact that they had been approached by people*

looking to fix the match. Their silence constitutes a violation of the loyalty and integrity expected from players towards UEFA under Article 5 DR and gives reason to think that they had, at least at some point, accepted the idea of fixing the match".

On 9 July 2010, the Chairman of the FIFA Disciplinary Committee adopted two decisions whereby the Players were *"(…) suspended worldwide for the duration of the suspension imposed by UEFA. This suspension covers all types of matches, including domestic, international, friendly and official fixtures".*

The Players appealed against the CD Decision before the UEFA Appeals Body (the "Appeals Body"). By decision dated 8 September 2010 (the "AB Decision"; the CD Decision and the AB Decision are jointly referred to as the "Decisions"), the Appeals Body decided as follows: *"1. The appeal is rejected. Consequently, the challenged decision of 24 June 2010 is upheld. (…)".*

In its examination of the merits of the alleged disciplinary infringements, the Appeals Body found the Players responsible of the violations found by the CD Body, and that UEFA *"was right to sanction them"*, on the basis of the following findings:

"a) In this case, the respondent based its decision on telephone recordings made by the Bochum criminal police on the orders of the German public prosecutor's office, the investigation carried out by UEFA disciplinary services and the hearing of informer X (…)

b) In the Appeals Body's opinion, the transcripts of the recorded telephone conversations between Ante Sapina and Marijo Cvrtak, and Ante Sapina's statement, are objective elements that are sufficient to prove the appellants' culpability.

(…), these individuals are members of a criminal organisation; they were arrested by the German police; they were charged and remanded in custody pending their trial, which is due to begin on 6 October 2010.

It is clear from their telephone conversations, especially those that took place on 20 and 21 October and 5 November 2009, that they tried to contact players with a view to manipulating the Debreceni VSC v Fiorentina match. In this context, they referred to the team's goalkeeper and player No. 17.

The match-fixing plot ultimately came to nothing after the Debreceni VSC players refused to cooperate, as Ante Sapina explained in his statement to police officers Bahrs and Selzer in Bochum on 14 May 2010 (see minutes of 14.05.2010, UEFA/chief inspector exhibit No. 6).

There is absolutely no doubt that the goalkeeper in question is V. and that the No. 17 must be the player N. who, as he told today's hearing, has worn this number at the club for at least two years.

(…)

As for the person known by the appellants as 'witness X', the Appeals Body notes, firstly, that he cannot be considered a UEFA witness in the sense of Article 58 DR, since he is not subject to UEFA's disciplinary powers. He is, in fact, an informer who infiltrated the criminal fraternity and provided information to UEFA as part of the vast investigation opened by the German authorities. The chairman and vice-chairman of the Control and Disciplinary Body, as well as the Appeals Body, considered this person to be credible and that his testimony could be taken in good faith (…).

c) That being said, the Appeals Body considers that the documents provided by the public prosecutor's office in Bochum are sufficient to establish with an adequate balance of probability that V. and N. were approached by members of a criminal network with a view to manipulating a UEFA Champions league match. They failed to inform UEFA, the Hungarian Football Federation or club officials of this approach.

Therefore, in view of the transcripts of telephone recordings and Ante Sapina's statements to the German police, and having examined the parties, the Appeals Body considers that the evidence submitted is sufficient to conclude that the appellants violated the principles of conduct that they are bound to respect under Article 5(1) DR, and their duty of information. With regard to V., the panel has rarely seen records of conversations where the involvement of an individual in a criminal network had been established so clearly. As far as N. is concerned, the records of the conversations amongst members of the criminal group revealed at least their contact with the player with the intention to fix the match v Fiorentina. Both appellants are cited in the conversation (the goalkeeper and the number 17)".

Finally, the Appeals Body concluded that the CD Decision had applied *"the appropriate sanction, bearing in mind the particular circumstances of the case and the gravity of the offence".*

On 29 October 2010, the Players filed a statement of appeal with the Court of Arbitration for Sport (CAS), pursuant to the Code of Sports-related Arbitration (the "Code"), to challenge the Decisions. On 18 November 2010, the Appellants filed their appeal brief.

On 10 March 2011, a hearing was held in Lausanne. At the conclusion of the hearing, the parties, after

making submissions in support of their respective cases, confirmed that the Panel had respected their right to be heard and to be treated equally in the arbitration proceedings.

Extracts from the legal findings

A. Can the Appellants be found to have committed the violations for which they were sanctioned?

1. Introduction

The Decisions found the Players responsible for the violation of Article 5.1 DR: more exactly, for breach of the *"principles of conduct"* therein established and of *"their duty of information"*, because, after having been *"approached by members of a criminal gang with a view to manipulating a UEFA Champions league match"*, they *"failed to inform UEFA (…) of this approach"*.

The Appellants in this respect raised, in their submissions, a point which needs to be examined first. The Appellants, in fact, allege that nothing in Article 5 DR, or elsewhere in the UEFA rules, obliges the players to report to the sporting authorities any form of illicit approach. Therefore, their alleged omission, following contacts which they in any case deny, could not be considered, even if proved, a violation of the disciplinary regulations.

The Panel does not agree with the Appellants' suggestion and confirms (in line with CAS precedents: CAS 2010/A/2172, para. 70) that the principles of *"loyalty, integrity and sportsmanship"* imply the duty of the players to fully cooperate with the sporting authorities in their effort to prevent manipulation of matches. Indeed, without the assistance of the players, target of attempted bribery, it would be impossible for UEFA to guarantee the credibility of the competitions it organizes. Therefore, the players, approached in view of a manipulation, have the obligation to inform the authorities. The failure to do so breaches the principles of *"loyalty, integrity and sportsmanship"* also because it amounts to a *"conduct [which] brings the sport of football into disrepute"* (Article 5.2(d) DR), and ends up in the (at least passive) involvement in a bribery attempt (Article 5.2(a) DR).

The finding, therefore, that any of the Players had been contacted for the manipulation of a match and failed to report such contact would amount, for the player in question, to a breach of Article 5 DR.

2. Has a disciplinary offence been committed by V.?

V. admitted, before the UEFA disciplinary bodies, to having been contacted by the criminal gang, object of the German Proceedings. Such events were confirmed also before this Panel, with the explanation, however, (i) that V. failed to report the approach because he was afraid of the possible reaction of the criminal gang, and (ii) that *"this statement should not be taken into account with respect to the Champions League match Debreceni VSC – ACF Fiorentina"*.

With regard to the Match, indeed, the parties discussed the available evidence to support (the Respondent) or deny (the Appellants) the finding, made by the Decisions, that V. had been contacted in view of its manipulation.

The Respondent points to the following evidence: (i) the declarations rendered in the German Proceedings before the German authorities; (ii) the telephone conversations, monitored for the purposes of the German Proceedings, which occurred on 20 October 2009 (day of the Match, scheduled for 20:45), on 21 October 2009 and on 5 November 2009; (iii) a text message (SMS), also monitored by the German authorities, sent on 20 October 2009; and (iv) the team schedule for Debrecen for 20 October 2009 showing that the Players had free time in the hotel between 4:45 pm and 6:30 pm.

According to UEFA, all the above shows that the criminal gang had attempted to manipulate the Match and that V. (the goalkeeper of Debreceni) – approached also on a different occasion – had been contacted for such purposes, even though something happened at the very last moment, preventing the manipulation from actually succeeding. In addition, the Respondent questions also the credibility of V. and refers to his declarations before the CD Body, when he claimed not to remember the shirt number of his team-mate N., who had been playing in front of him for two years.

Contrary to the UEFA's submissions, the Appellants point to the following elements: (i) the depositions before the Panel; (ii) the other declarations lodged before the UEFA bodies; (iii) the unreliability/ inadmissibility of the declarations rendered by Mr X [the informer of UEFA]; (iv) the unreliability of the transcriptions of the telephone conversations, which are not *"authenticated"* and *"the geographical position of the caller and the receiver of the phone calls are [not] identified"*; (v) the behaviour of the UEFA disciplinary inspector, who threatened V. while gathering his declarations; (vi) the declarations rendered by Mr Cvrtak on 2 September 2010 before the German authorities, admitting that he was not in Budapest on the day of the Match and that *"there was absolutely no fix (…)"*; (vii) the declarations rendered by Mr Sapina on 19 July

2010 before the German authorities, indicating that he did not know who the corrupt players were; and (viii) the lack of direct evidence proving the contacts between the criminal gang and V.

All the above, in the Appellants' opinion, shows that V. did not meet Mr Cvrtak before the Match and that the attempt of manipulation has not been proved.

The Panel has carefully reviewed the facts and the various pieces of evidence available, summarized above. On their basis, the Panel concludes that, on a balance of probability, it has been proven to its comfortable satisfaction that there were contacts between V. and the members of a criminal group involved in match fixing and betting fraud. V., indeed, admitted such contacts, even though not with respect to the Match, but to a different one. V. was obliged to report the said contacts to UEFA. By failing to make such a report, V. violated the principles of conduct as set forth under Article 5 DR.

With respect to the Match, the Panel finds that the transcripts of the telephone recordings of 20, 21 October and 5 November 2009 made available by the German authorities, in conjunction with all the other evidence, are particularly incriminating. The transcripts suggest that V. participated in the planning of an attempt to fix the Match as they make reference on several occasions to the goalkeeper (i.e. V.) in the context of match fixing and betting fraud, showing that the members of a criminal group contacted V. Such transcripts refer to conversations made by persons were not aware of their tapping, and were therefore talking freely about their planned fraud: such persons had no reason or benefit to falsely implicate V. in the crime. The content of such conversations, then, has not been challenged in the depositions rendered by the persons involved before the German authorities: well to the contrary, they appear as confirmed. Furthermore, V. did not provide any plausible explanations that would contradict the content of the conversations. The Panel therefore holds that it has been convincingly established that V. was contacted before the Match by persons who offered him monies to manipulate its result and that V. participated in a concealed planned attempt of match fixing very shortly prior to the Match.

The Panel does not find the contrary suggestions and explanations, offered by the Appellants, to be impressive. The Panel in fact notes: (i) that such conclusion is not based on the declarations of Mr X, who had indicated before the CD Body that meetings had occurred on 18 and 20 October 2009 between the criminal gang and V.; (ii) this conclusion is not contradicted by any of the elements brought by the Appellants to cast doubts on the occurrence of such meetings; (iii) even if these particular meetings had not taken place, the transcripts of the telephone conversations show that there were contacts between V. and the members of a criminal group in the contexts of match fixing and betting fraud. In this regard, contrary to the Appellants' submission, the transcriptions of the telephone conversations provide for reliable evidence: as already noted, they document dialogues whose content has been confirmed in the depositions rendered by the persons involved before the German authorities. In any case, they show the elements which, in the Appellants' opinion, are necessary for them *"to be acceptable as evidence"*; (iv) the statement of Mr Cvrtak that *"there was absolutely no fix"* made on 2 September 2010 does not contradict all the other evidence concerning the contacts with V., and can be intended to mean that at the end the Match result was not fixed; (v) the declarations rendered by Mr Sapina on 19 July 2010 before the German authorities indicating that he did not know who the corrupt players were referred to players *"other"* than the goalkeeper; (vi) there is no evidence of an intimidating attitude of the UEFA disciplinary inspectors in the gathering of the deposition of V., and, even if there had been such evidence, it would not be clear to the Panel in which direction such attitude could have interfered with the finding of a disciplinary responsibility of V.; and (vii) the fear of possible reactions by the criminal gang is no excuse under the DR for a player's failure to report an illicit approach.

The finding that V. violated the principles of conduct set forth under Article 5 DR by failing to report the said contacts to UEFA makes it unnecessary for the Panel to express a final finding on whether or not V. actually manipulated the Match or actually received any money for agreeing to manipulate it. The offences are made out in any event.

3. Has a disciplinary offence been committed by N.?

The Decisions found also N. responsible for a violation of Article 5 DR. In support of such conclusion, the Respondent, which is no longer relying on the declarations of Mr X, refers, in essence, in this arbitration only to the following elements: (i) the telephone conversation of 20 October 2009 between Mr Ante Sapina and Mr Marijo Cvrtak, during which Mr Cvrtak said, about the Match, *"They've scored three before the game's even started. Mutlin (…) is on his own against three (…) and (…) OK, he could not stop the third (…) . But three (…) are around him. Do you understand?! But I can't see the other one. I didn't see his number. I only saw the number 17"*; and (ii) the text message sent by Mr Marijo Cvrtak to Mr Ivan Pavic on 21 October 2009

at 20:49:43, transcribed by the German authorities as follows: *"Number 17 was at the café"*.

Contrary to the finding of N.' responsibility, the Appellants submit that the elements adduced by UEFA are not sufficient to establish, on a balance of probability, that N. had been contacted in view of the Match's manipulation. With respect to the elements brought by UEFA, the Appellants, then, point ou that: (i) the text message sent by Mr Marijo Cvrtak to Mr Ivan Pavic on 21 October 2009 at 20:49:43, transcribed by the German authorities as follows: *"Number 17 was at the café"*, should be read in the Croatian original (*"Broj 17 je bio na kavi"*) and be better translated as *"Number 17 was having a coffee"*; which means that it cannot be held to confirm that N. attended a meeting in a Budapest café with the criminal gang on the day of the Match; and (ii) the depositions before the Panel, and chiefly of Mr Dombi, his roommate, indicated that it was not possible for N. to meet the criminal gang on the day of the Match.

The Panel finds that the elements offered by UEFA (the two ambiguous references to the jersey number of N.) are not sufficient to establish to its comfortable satisfaction that there were contacts between N. and the members of a criminal group involved in match fixing and betting fraud. As opposed to V., the involvement of N. has not been confirmed in any declaration in the German Proceedings or before the UEFA disciplinary bodies, save as in the statements of Mr X, on which UEFA no longer relies; and no mention of the name of N. can been found in the telephone conversations recorded by the German authorities.

Based on the available evidence, it is not possible to conclude on a balance of probability that N. violated the principles of conduct set forth under Article 5 DR. The Decisions, in the portions that held otherwise, must be set aside.

B. What is the appropriate sanction to be imposed on by V.?

Article 15 DR lists the sanctions that can be imposed on an individual who has committed a disciplinary infringement. According to Article 17 DR, then, the determination of the type and extent of the sanction is based on the gravity of the infringement and the degree of the offender's guilt.

The Appellants submit that the sanction imposed on V. by the UEFA disciplinary bodies is excessive.

This Panel subscribes to 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 TAS 2004/A/547, paras. 66, 124; CAS 2004/A/690, para. 86; CAS 2005/A/830, paras. 10.26; CAS 2005/C/976 & 986, para.143; CAS 2006/A/1175, para. 90; CAS 2007/A/1217, para. 12.4).

The Panel, in this specific case, and taking in mind the totality of its circumstances, holds the sanction imposed by the DC Body, and confirmed by the AB Decision, to be proportionate to the level of V.'s guilt and the gravity of his infringement. V. was found involved in a match fixing scandal which occurred in a major European championship. In view of the importance of the UCL, of the level of this competition, and of the sporting and financial interests at stake, the highest standards of behaviour must be demanded of all the people involved – players, managers, coaches, officials. It is vital that the integrity of the sport is maintained. In this context, any reason advanced in support of some form of mitigation is inadequate to displace the conclusions of UEFA disciplinary bodies as to the appropriate penalty for the misconduct of V.

The Panel therefore finds that the suspension to 30 June 2012 and the fine of EUR 10,000 is a proportionate sanction. Thus, the AB Decision in the portions relating to V. must be upheld, without any modification.

C. Conclusion

In light of the foregoing, the Panel finds that the appeal brought by the Appellants against the AB Decision is to be dismissed with respect to the position of V. and upheld with respect to the position of N. The AB Decision is therefore to be partially modified: the suspension of V. until 30 June 2012 and the fine imposed on him of EUR 10,000 are confirmed; no sanction is imposed on N.

Arbitration CAS 2011/A/2495
Fédération Internationale de Natation (FINA) v. César Augusto Cielo Filho & Confederação Brasileria de Desportos Aquáticos (CBDA)
&
Arbitration CAS 2011/A/2496
FINA v. Nicholas Araujo Dias dos Santos & CBDA
&
Arbitration CAS 2011/A/2497
FINA v. Henrique Ribeiro Marques Barbosa & CBDA
&
Arbitration CAS 2011/A/2498
FINA v. Vinicius Rocha Barbosa Waked & CBDA

29 July 2011

Swimming; doping; contamination of a caffeine capsule with a diuretic (Furosemide); nature of caffeine -medication or supplement- for the purposes of the FINA Rules / WADC; sanction appropriate with regard to the individual Athlete's degree of fault; sanction appropriate to a recidivist; commencement of the period of ineligibility

Panel:
Mr. Alan Sullivan QC (Australia), President
Mr. Olivier Carrard (Switzerland)
Mr. Jeffrey G. Benz (USA)

Relevant facts

The Fédération Internationale de Natation (FINA or "the Appellant") is the International Federation governing disciplines relating to swimming and is the Appellant in these Appeals.

César Augusto Cielo Filho ("Mr Cielo") is a Brazilian swimmer and is one of the Respondents to Appeal CAS 2011/A/2495 FINA v. César Augusto Cielo Filho & CBDA.

Nicholas Araújo Dias dos Santos ("Mr dos Santos") is also a Brazilian swimmer and is one of the two Respondents to Appeal CAS 2011/A/2496 FINA v. Nicholas Araujo Dias dos Santos & CBDA.

Henrique Ribeiro Marques Barbosa ("Mr Barbosa") is another Brazilian swimmer and one of the two Respondents to Appeal CAS 2011/A/2497 FINA v. Henrique Ribeiro Marques Barbosa & CBDA.

Vinicius Rocha Barbosa Waked ("Mr Waked") is also a Brazilian swimmer and is one of the two Respondents to Appeal CAS 2011/A/2498 FINA v. Vinicius Rocha Barbosa Waked & CBDA.

The Confederação Brasileria de Desportos Aquáticos (CBDA) is the Brazilian National Federation in respect of swimming, is a member of FINA and is also a Respondent to each of the four abovementioned Appeals.

In this Award, where appropriate, Mr Cielo, Mr dos Santos, Mr Barbosa and Mr Waked are referred to collectively as "the Athletes".

Although there are four separate appeals to determine it is convenient to provide one set of reasoning in respect of all of them due to the commonality of issues and to the fact that the Athletes have each filed a consolidated answer.

In May 2011 the Athletes competed at a Brazilian national level swimming event known as *Maria Lenk* ("the Event") and were the subject of in competition doping control tests.

Urine samples were provided by each of the Athletes. The samples were split into an A sample and a B sample for each Athlete. Each Athlete's A sample was found to contain *Furosemide* which is a diuretic and which is a Prohibited Substance under Class *S5 Diuretics and other Masking Agents* on the *2011 WADA Prohibited List*. Importantly, *Furosemide* is also designated as a *Specified Substance* for the purposes of the *World Anti-Doping Code* (the WADC) and for the

FINA Doping Control Rules ("the FINA Rules – in this Award, individual rules of the FINA Rules are prefaced by the phrase "Rule DC") which, as they must be (because FINA is a signatory to the WADC), are relevantly identical to the equivalent provisions of the WADC (see Article 23.2.2 of the WADC).

As required by the FINA Rules, a hearing was held in respect of the positive result by each of the Athletes on 1 July 2011 by the CBDA Doping Panel ("the CBDA hearing"). At the CBDA hearing each Athlete expressly confirmed that he accepted the result of the A Sample analysis and that he waived the B Sample analysis.

Accordingly, in effect, each Athlete admitted he committed an anti-doping rule violation (ADRV) within the meaning of Rule DC2.1.2 (which is identical to Article 2.1.2 of the WADC – unless otherwise indicated in this Award, the FINA Rules have identical counterparts with identical numbering in the WADC).

Thus, each of the Athletes became subject to the sanction regime contained in Rules DC9 and DC10.

At the conclusion of the CBDA hearing, the CBDA Doping Panel decided in respect of each of the Athletes, other than Mr Waked, that:

(a) pursuant to Rule DC9 the Athlete's results at the Event were disqualified;

(b) the question of the appropriate sanction had to be determined in accordance with Rule DC10.4;

(c) there was *No Fault or Negligence* on the part of the Athlete and that, therefore, the appropriate sanction was one of a warning.

The situation was a little different in respect of Mr Waked as he had a previous ADRV in 2010. In his case, the CBDA Doping Panel made the same findings as set out above but, in addition and because of the previous ADRV, it had to consider the multiple violation provision contained in Rule DC10.7.

In Mr Waked's case, the CBDA Doping Panel concluded that because there was *no fault or negligence* on his part, the sanction of the warning would not be taken into account for the purposes of Rule DC10.7 by reason of the operation of Rule DC10.5.1. Thus, no *Period of Ineligibility* was imposed upon him.

As will become apparent later in this Award, this Panel considers, with great respect and deference to the CBDA Doping Panel, that its reasoning in respect of the imposition of sanctions against each of the Athletes was internally inconsistent and in error. That is because if it was concluded, as the CBDA Doping Panel did, that there was *No Fault or Negligence* on the part of any of the Athletes then:

(a) no sanction, not even a warning, should have been imposed because of the operation of DC10.5.1;

(b) not all the results obtained by the Athletes at the Event should have been disqualified. Rather only those results of the particular competition at that Event in respect of which the positive sample was obtained should have been disqualified (see Rule DC9 and Rule DC10.1.1).

However, the appeal to this Panel involves a hearing *de novo* with this Panel having full power to review the facts and the law (see R.57 of the Code of Sports-related Arbitration ("the CAS Rules") and, for example, *CAS 2010/A/2216* at [4.3]). Consequently, this Panel may conclude that the result arrived at by the CBDA Panel was correct or partly correct even if its reasoning was faulty. Furthermore, this Panel must consider the Appeals on the evidence before it which is not necessarily the same as that which was before the CBDA Doping Panel.

It is to that evidence that the Panel now turns and in respect of which it sets out its findings of fact relevant to these Appeals.

Although we are considering four individual Appeals, overwhelmingly the material facts in respect of each appeal are common to each other appeal. As noted later in this Award, all of the parties agreed that the Appeals be heard concurrently and in parallel with evidence in one to be evidence in each of the other Appeals. In those circumstances, it is convenient to deal with the findings of fact in each Appeal on a collective basis.

All of the documentary evidence relied upon before the CBDA Panel was tendered and relied upon in these Appeals. Additionally, and importantly, this Panel had the benefit of oral evidence given to it in person by:

(a) each of the Athletes;

(b) the Athletes' doctor, Dr M.

The Panel has concluded that each of the witnesses called before it gave his evidence honestly and candidly and, except where expressly noted, accepts that evidence which, the Panel observes, is, in any

event, largely corroborated by the documentary evidence before the Panel.

In those circumstances, the Panel makes the following findings of fact based on the evidence before it and the concessions made by FINA:

(a) Dr M. is an experienced medical practitioner specialising in sports medicine who has worked with Mr Cielo since 2008 and with each of the other Athletes since, at the latest, January 2011;

(b) sometime in 2009, after he had entered into a sponsorship relationship with its manufacturer, Mr Cielo began taking an energy drink called TNT and also, on occasions, drank coffee whilst competing at various swimming events. He did so in the knowledge that, and indeed because, each of those products contained caffeine. He consumed these products with his doctor's knowledge and in order to assist in overcoming tiredness or fatigue associated with either the fact of taking sleeping tablets to help him sleep during events extending over a period of days or the fact of having to compete in multiple races over a period of days during that particular swimming event;

(c) as stated, TNT and coffee contain caffeine as Mr Cielo and Dr M. knew and understood. Caffeine is not a *Prohibited Substance* for the purposes of the FINA Rules and Mr Cielo's undisputed estimate before this Panel was that about 90% of elite male freestyle sprinters take caffeine at some stage or other during swimming events;

(d) as a result of his consumption of TNT and coffee, Mr Cielo experienced some gastric problems and together with Dr M. sought to find another source of caffeine which would provide its perceived benefits without the gastric side effects;

(e) Dr M. read medical literature on the ingestion of caffeine and determined that the appropriate dosage of caffeine for Mr Cielo and other swimmers to take before a race was a minimum of 50 milligrams and a maximum of 100 milligrams. There was not available "over the counter" in Brazil any caffeine in tablet or capsule form in dosages of less than 250 milligrams and, even then, the tablets or capsules available did not contain pure caffeine but rather were mixed with other substances;

(f) Dr M., therefore, decided that the best course was for him to prescribe pure caffeine for Mr Cielo in the form of 50 milligrams capsules which could be taken one or two at a time (so as not to exceed Dr M.'s maximum dosage of 100 milligrams);

(g) both Mr Cielo and Dr M., and, for that matter, each of the other Athletes, were at all times conscious of the requirements of the WADC and the FINA Rules, the obligations of Athletes and of their medical advisers thereunder, and the risk of contamination of products such as caffeine capsules;

(h) Mr Cielo and Dr M., therefore, regarded it as important to ensure that the prescribed caffeine capsules were compounded or made up by a reputable, competent and reliable pharmacy which was aware of an elite swimmer's need to be supplied with caffeine in a pure form and of the need to avoid any risk of contamination of the capsules which were made up because of the fear of falling foul of the WADC or FINA Rules;

(i) Mr Cielo's father was a paediatrician who also happened to be the Health Secretary in Mr Cielo's home town of Santa Barbara (which has a population of about 200,000). This is a public office in Brazil. As Health Secretary, Mr Cielo's father was responsible for inspecting all the pharmacies in that town to ensure their compliance with various Brazilian health regulations;

(j) Mr Cielo's father recommended the Anna Terra Pharmacy to his son and Dr M. as an appropriate pharmacy to make up the prescribed caffeine capsules. He assured them that the Anna Terra Pharmacy was the best he had seen in the whole time he had been Health Secretary in Santa Barbara. Additionally, Mr Cielo's family had had medications made up at that pharmacy over many years without experiencing any problems;

(k) Dr M. personally visited the pharmacy on a number of occasions and had conversations with the pharmacist to satisfy himself of its suitability. He was satisfied, as a result of those visits, of the pharmacy's suitability and thought that it was safer to use that pharmacy rather than one in Sao Paolo (where he and Mr Cielo were based) because he would not have the assurance of Mr Cielo's father in respect of any of the pharmacies in Sao Paolo;

(l) from January 2010, Mr Cielo began using the caffeine capsules prescribed by Dr M. and

made up at the Anna Terra Pharmacy at various major swimming meets around the world. It should be noted that Mr Cielo is a champion swimmer being the current world record holder in the Men's 50 Metre and 100 Metre Freestyle Events and the reigning Olympic champion in the Mens' 50 Metres Freestyle Event. As such, he is frequently drug tested and was so at the events we have mentioned where he was using the caffeine capsules. Mr Cielo gave evidence, which the Panel accepts, that he used the prescribed caffeine capsules during, at least, five swimming meets in 2010 and 2011 (other than the Event) without ever returning an adverse doping test result. At such events, and, indeed, at the Event in question Mr Cielo always declared his use of caffeine in his Doping Control Form;

(m) Mr dos Santos is a very close friend of Mr Cielo. In 2010, he visited Mr Cielo at the Auburn University, in Alabama, United States of America where Mr Cielo was then studying and swimming. Prior to 2010, Mr dos Santos had used energy drinks such as Red Bull as a source of caffeine but, in 2010, as a result of his visit to Auburn, he also began using the caffeine capsules prescribed for Mr Cielo by Dr M. He did with their knowledge and the Panel accepts his evidence that, in taking the pills, he always relied on Dr M. Mr dos Santos has been a member of the Brazilian Swimming Team since 2000 and competed at the Beijing Olympics. He has been drug tested on average about four or five times per year with no positive results until the result the subject of these Appeals. He, also, has been drug tested at swimming meets whilst using the prescription caffeine capsules without an adverse result being recorded;

(n) early in 2011, Mr Cielo decided to form a club of elite swimmers in Brazil known as Pro 16. His idea was to have elite Brazilian swimmers such as himself and the other athletes who usually trained or prepared overseas return to Brazil to train with the confidence that they would have the same conditions and expertise available to them as they had in their overseas training centres or better;

(o) to this end, he persuaded his own personal coach, Mr Silva, who had been the head coach at another highly respected Brazilian swimming club for over thirty years and who had an extremely high reputation in Brazil, to agree to coach the Pro 16 Club and he also persuaded Dr M. to become the doctor for the club (or at least its eight leading swimmers) on the strict condition that Dr M. would attend all training sessions to advise the swimmers and to assist with their medical and nutritional needs and to provide counselling and information concerning doping;

(p) one of the first swimmers he invited to join the Pro 16 Club was Mr dos Santos and, at about the same time, he also invited each of Mr Barbosa and Mr Waked to join the Pro 16 Club. Each of the Athletes accepted that invitation and joined the Pro 16 Club in about January 2011;

(q) thereafter, each of the four Athletes began to use (or in the case of Mr Cielo and Mr dos Santos continued to use) the caffeine capsules prescribed by Dr M. in the circumstances described below;

(r) the procedure in which the four Athletes engaged in respect of the subsequent taking of the prescribed caffeine capsules was that Mr Cielo would take the prescription written by Dr M. for him to be made up at the Anna Terra Pharmacy when he visited his parents in Santa Barbara. Having obtained the bottle of caffeine capsules, he would then deliver that bottle of caffeine capsules to Dr M. who retained it in his personal care and who would then dispense the caffeine capsules, as required, to Mr Cielo and the other Athletes at various swimming events when the swimmers requested them and Dr M. thought it appropriate for the swimmer to use them;

(s) each of the Athletes gave evidence, corroborated by the evidence of Dr M., which the Panel accepts, that before using the caffeine capsules at any particular event he consulted with Dr M. and acted on his advice. Each of the swimmers, corroborated by Dr M., gave evidence to the effect that Dr M. informed the Athletes that the caffeine capsules were made according to prescription, were safe and were okay to use. It was particularly important in Mr Waked's case that he received such assurances because he had tested positive for a Prohibited Substance in 2010 and was very anxious to avoid inadvertently committing another ADRV. Mr Waked said he talked to Dr M. before he started using the caffeine capsules and was assured that they were "really safe". Dr M. gave evidence, which the Panel accepts, that before taking the caffeine capsules the Athletes always asked the same questions namely "Is it safe?", "Can I take it?" or "Is it okay to take". When asked those questions, Dr M. always assured the Athletes that the

caffeine capsules were safe to take;

(t) notwithstanding that Dr M. wrote the prescription in Mr Cielo's name, he had no difficulty in dispensing the caffeine products made up as a result of that prescription to the other Athletes. As stated, he gave evidence that he had read medical articles confirming the suitability and efficacy of caffeine and he gave it to the Athletes because during competition their sleep processes were sometimes disturbed and also in order to make their neurodynamic function work better;

(u) from time to time after first prescribing the caffeine capsules in January 2010, Dr M. visited the Anna Terra Pharmacy in Santa Barbara when the pharmacy had acquired a new lot or consignment of caffeine to make up the caffeine capsules to be prescribed by him. On those occasions, the Panel accepts that Dr M. was shown on a computer screen by the pharmacy a certificate showing that the caffeine to be used to make up the capsules was 100% pure (or so close thereto as makes no difference). One of the documentary exhibits before this Panel was a printed version of one of the certificates that Dr M. said he saw in electronic form and that exhibit confirmed that the caffeine to be used was 100% pure (or virtually so – it certainly does not indicate any prohibited substance);

(v) Dr M. was extremely conscious of the risk of contamination of supplements used by Athletes (he said it was "a world reality and a reality in Brazil") and extremely conscious of the need to determine that the products which he dispensed to the Athletes under his control were safe to take and free of risk both for personal health reasons and in respect of the doping requirements of the WADC / FINA Rules. He believed he had done everything possible to ensure that the prescribed caffeine capsules contained only pure caffeine and were not contaminated by other substances. In his view, the only other thing he could possibly have done to make sure that the caffeine pills to be used by the Athletes were completely pure was to have each bottle of pills, after they had been made up in accordance with his prescription, tested in an accredited laboratory;

(w) no problems were experienced by any of the Athletes in using the caffeine capsules up to the Event in May 2011. In that period, at least some of the Athletes were subject to doping control tests at various swim meets whilst using the prescribed caffeine capsules but did not return adverse results. Given their proximity as members of the same Pro 16 Club, the Panel infers that each of the Athletes knew that the others were using the prescribed caffeine tablets and had not returned any adverse doping result as a consequence;

(x) however, at the Maria Lenk Event in May 2011, each of the Athletes returned positive doping results;

(y) ultimately, it was determined that the cause of the adverse test results was the contamination of the caffeine capsules by Furosemide. This was established when an independent WADA – accredited laboratory, LABDOP of Rio de Janeiro, tested the remaining capsules in the bottle of capsules from which the caffeine capsules used by the Athletes at the Event were taken. The documentary evidence confirmed that independent testing. It appears this contamination occurred because, as admitted by Ms Ana Tereza Cósimo de Souza from the pharmacy in a declaration dated 27 June 2011 which was tendered as evidence by the Athletes in these appeals, on the same day that one bottle of the caffeine capsules was being made up at the Anna Terra Pharmacy, that pharmacy was also making up for other clients several prescriptions for the treatment of heart disease, an ingredient of which was Furosemide. It appears that, somehow or other, on that day the caffeine to be used in the caffeine capsules was inadvertently contaminated with the Furosemide which was being used in respect of the heart disease medication and which was made up at the pharmacy just before the caffeine capsules. Dr M. gave further detailed evidence, which the Panel accepts, as to how the source of the contamination was found. He was not seriously challenged in respect of that evidence and, as we note below, FINA has, for the purposes of this Appeal, conceded that the Athletes have established how the *Specified Substance* entered their bodies for the purposes of Rule DC10.4. In those circumstances, at least for the purposes of these Appeals, it is common ground that the caffeine pills were contaminated in the manner summarised above and more fully described in Dr M.'s evidence;

(z) although it is not strictly relevant because FINA did not submit that the Athletes deliberately ingested the Specified Substance in order to mask the presence of other drugs, the doping results obtained in respect of the Athletes at the Event

also showed that their urine concentrations were within the normal range and not diluted which meant that the *Furosemide* could not have been used as a masking agent.

There are other facts which the Panel may need to refer to when discussing the resolution of these Appeals, particularly in the case of Mr Waked, but what the Panel has recited above is the factual background which it considers most important for the disposition of each of the Appeals before it. The facts were not seriously disputed by FINA. However, the Panel has set out the facts at some length because of the difficult task with which it is confronted in considering the proper application of Rule DC10.4 and Rule DC10.5 and because of the importance of the facts in cases such as these.

These Appeals came before CAS on a very urgent basis, mainly due to the fact Mr Cielo had been selected to compete for Brazil in the World Swimming Championships in Shanghai, China at which the first swimming events began on Sunday, 24 July 2011. Two of the other Athletes were also selected to compete at the World Championships but became ineligible to do so following disqualification of their results at the Event. The CBDA decision was issued on 1 July 2011.

FINA filed four separate Statements of Appeal and Appeal Briefs (one in respect of each Athlete) on 8 July 2011. The Athletes and CBDA filed their Answers on or about 15 July 2011. This Panel was convened, as quickly as possible, to enable a hearing to take place in Shanghai and an Award to be delivered before 24 July 2011.

The hearing was conducted in Shanghai, with all parties, witnesses and legal representatives present in person, on Wednesday 20 July 2011.

Extracts from the legal findings

All the parties and the Panel are bound by the FINA Rules as properly interpreted. The Panel is not at liberty to give a loose or sympathetic application to those Rules, as properly interpreted, merely because the Panel may think that, in a particular case, they produce an unduly harsh or unreasonable result. The FINA Rules and the WADC on which those Rules are modelled, are drafted in the way they are for very particular and important reasons, based in the input of all the stakeholders in the Olympic movement and in other major sports. It is not the role of this Panel to seek to do justice as it perceives it by giving the Anti-Doping Rules an interpretation or application inconsistent with the language of those Rules, with the object and purpose of those Rules or with the body of CAS jurisprudence which has developed in respect of those Rules.

However, whilst CAS jurisprudence on the WADC, and its analogues such as the FINA Rules, is of extreme importance in respect of the interpretation of the WADC and related anti-doping regimes given the purpose of "*enforcing anti-doping rules in a global and harmonised way*", nevertheless the WADC and its analogues must be applied in the light of the facts of the specific case (hence the reference to "*the unique facts of a particular case*" in the comment to Rule DC10.5.1). Other CAS decisions based on fact-specific findings are of little relevance in deciding the present appeals unless the facts in such decisions are identical, or at least extremely similar, to the facts with which the present appeals are concerned.

Despite the helpful references by the parties to a number of previous cases (at least some of which were based on the significantly different provisions of the 2003 WADC) we do not consider any of the cases referred to us to be so close, in a factual sense, to the present one as to be of any significant relevance to our decision. Whilst we are informed by the views expressed in those cases by different Panels on legal issues, we do not consider that the particular outcomes in those cases are particularly useful in determining the outcome of these appeals in the light of the significantly different factual situations pertaining. Indeed, it is noteworthy that all parties to the present Appeals accepted, and presented their cases on the basis that, these Appeals presented unique or new issues as compared with previous cases.

The following central issues emerge from the submissions of the parties:

(a) whether the prescribed caffeine capsules were a medication on the one hand or a supplement on the other for the purposes of the FINA Rules / WADC?

(b) if not, given that these Appeals are appropriately dealt with by application of Rule DC10.4, what is the appropriate sanction in each appeal having regard to the individual Athlete's degree of fault?

(c) in the case of Mr Waked, if his Appeal is to be determined by reference to Rule DC10.4, can a sanction be imposed outside the expressed range of a Period of Ineligibility of between one and four years apparently required by Rule DC10.7?

A. Medication or supplement?

As the Panel has noted, it must take into account the comments to Rule DC10.5.1 in interpreting that Rule.

The relevant comments to the Rule are as follows:

(a) it is only to have an impact in circumstances *"that are truly exceptional and not in the vast majority of cases"*;

(b) a sanction cannot be completely eliminated in the circumstances where "*a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest)* (Article 2.1.1) *and have been warned against the possibility of supplement contamination)*".

It is apparent from these comments that the Panel cannot utilize, without significant unwarranted adjustment to the concept of "No Fault or Negligence" employed in this Rule, notions of what would be regarded as fault or negligence under either civil or common law.

It is very easy to imagine situations where a party would be held neither to be at fault nor negligent in circumstances of contamination or mislabeling of a supplement by third parties if civil law or common law principles were to be applied strictly. However, the comments to the Rule makes it clear that wherever there is such contamination or mislabeling of a supplement then a sanction of some sort must be applied and, it follows, that notwithstanding the definition of "No Fault or Negligence" in the FINA Rules / WADC, some fault or negligence has to be found to exist whenever an Athlete uses a contaminated or mislabeled supplement.

Further, the preamble to the WADC makes it clear that the WADC and its derivatives are not to be subject to or limited by the laws of any particular nation and the scheme of the WADC (and its derivatives), in the light of the difficulties of detecting and deterring doping in sport, is clearly to impose strict, if not absolute, liability once a Prohibited Substance is detected subject to the rules of natural justice and the tempering effect of provisions such as Rule DC10.4.

Thus, if the caffeine as prescribed in the circumstances of these cases is a supplement rather than a medication, then notwithstanding that there may not, in an ordinary sense, be any fault or negligence on the part of the Athlete who takes that caffeine nevertheless the FINA Rules / WADC dictate a conclusion that the Athlete does not establish that he or she bears "No Fault or Negligence" for the purposes of Rule DC10.5.1.

Recognizing these difficulties, Mr Jacobs and Mr Franklin, on behalf of the Respondents, urged on the Panel that the caffeine used in the circumstances being considered by these Appeals was a medication not a supplement so that the comments to Rule DC10.5.1 relating to supplements were irrelevant and so that resort could, in fact, be had to that Rule by the Athletes.

The Panel is of the view, strictly speaking, that it would have been necessary for the Respondents to file a cross-appeal to pursue such an argument since it would involve, if successful, the overturning of the CBDA's decision to impose a warning. Further, it is difficult to see, in any event, how the CBDA, at least, could appeal against the decision of one of its own constituent bodies. However, FINA did not object to the submissions being made on behalf of the Respondents on that basis and, in all the circumstances, the Panel is not disposed to reject or not consider the argument on that basis.

But the Panel rejects the submissions made on behalf of the Respondents on this issue anyway. Neither the FINA Rules nor the WADC defines, or distinguishes, what is a "medication" on the one hand and what is a "supplement" on the other. Apart from some very limited evidence from Dr M., there was no expert medical evidence before the Panel to assist in drawing such a distinction.

Dr M.'s view, unsupported by any reference to medical literature and not corroborated by any independent medical practitioner, was that prescribing caffeine in a pure form in the circumstances of the present Appeals was a medication.

The Panel is unable to accept this view. Caffeine is readily available, without medical intervention, in many forms such as in energy drinks and in coffee. The Panels knows of no situation in which caffeine is regularly or routinely prescribed by responsible medical practitioners to treat a diagnosable medical condition nor has any evidence been given before the Panel of caffeine being used in such a way.

The "pure" caffeine in capsules with which these Appeals are concerned was apparently prescribed in order to avoid the adverse gastric side effects caused by ingestion of caffeine in other forms such as through energy drinks and coffee.

Without convincing medical evidence (which was not produced), the Panel is not prepared to accept that something can be a medication because it is

prescribed in a pure form solely to overcome the adverse side effects of using it in a different form.

Moreover, the Panel does not think an ordinary person would regard caffeine as a medication. It is much more like a vitamin or nutritional supplement which is used to overcome fatigue or tiredness on a temporary basis. It is not a curative or healing substance as is the primary dictionary meaning of a "medication".

The Panel thus concludes that the caffeine used in the circumstances it is presently considering was a "supplement" as that term is used in the comment to Rule DC10.4 and that it is irrelevant, for so classifying it, that it was "prescribed" as opposed to being bought over the counter. The way the caffeine was acquired cannot change its fundamental character.

It follows, as properly conceded by Mr Jacobs and Mr Franklin on behalf of the Respondents if the Panel concluded that caffeine was a supplement, that Article 10.5.1 is not available to the Respondents and the Panel so finds.

B. Application of Rule DC10.4

Rule DC10.4 reads as follows:

"DC 10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

Where a Competitor or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Competitor's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in DC 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Competitions, and at a maximum, two years' of Ineligibility.

To justify any elimination or reduction, the Competitor or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the Use of a performance enhancing substance. The Competitor's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility".

As the Panel has observed previously, FINA accepted that Rule DC10.4 did apply to each of these Appeals and that its prerequisites had been satisfied. Rule DC10.4 expressly provides for a minimum sanction of a warning and a maximum sanction of a two year Period of Ineligibility with the Athlete's degree of fault to be the sole criterion for determining the appropriate sanction within that range.

In these circumstances, the only matters which the Panel needs to consider are the degree of fault of the individual athlete and the appropriate sanction for each individual athlete viewed in the light of that degree of fault.

In the particular circumstances of these Appeals, the Panel considers that the "fault" of the Athletes is at the very lowest end of the spectrum of fault contemplated by the FINA Rules / WADC.

The Panel's factual findings are set out above. In the light of those facts, it is very difficult to see what, if anything, else the Athletes (and their doctor) could have done reasonably or practically to avoid the positive test results.

Of course, the Athletes could have refrained from using caffeine at all but it can hardly be a "fault" (or at least a significant one) to use a substance which is not prohibited by the WADC or the FINA Rules and which is in widespread use amongst the Athletes' peers.

Perhaps the Athletes (or their doctor) could have conducted an audit or due diligence procedure on the pharmacy to satisfy themselves that the processes the pharmacy went through to make the capsules were sound and reliable. But even if that was the case, there is no evidence to suggest that such an investigation would have demonstrated a faulty or unreliable manufacturing process. Indeed, what evidence there is suggests this was an excellent, well managed and highly regarded pharmacy.

Perhaps, the Athletes (and the doctor) could have investigated the possibility of importing pure caffeine capsules in the required dosages from reputable large multinational drug companies established outside Brazil. But there is no evidence before the Panel that such products were available from such sources and, even if there was, the Panel would not be prepared to accept, without evidence, that supply from such a source would necessarily be more reliable and safe than from a hand-picked pharmacy chosen by someone (Mr Cielo's father whose views were endorsed by Dr M. on independent examination) with a public duty to assess the professional and ethical standards of such pharmacies.

Perhaps, the Athletes could have gone to the considerable trouble and expense of having each

individual bottle of pills made up from Dr M.'s prescription independently analysed by an accredited laboratory. Undoubtedly, such a procedure would be both disproportionately expensive and time consuming. Notwithstanding the very high threshold of responsibility imposed on athletes by the WADC and its derivatives, the Panel does not think that it would be reasonable to attribute anything other than minimal fault to athletes for failing to embark upon such a disproportionately expensive and time consuming precaution.

No other steps were suggested by FINA as being available to the Athletes in order to have avoided the outcomes that are the subject of these Appeals.

The Panel is thus in somewhat of a dilemma. As explained, it cannot find that there was *No Fault or Negligence* as defined in the FINA Rules / WADC (and as explained or interpreted in the light of the comments to Rule DC10.5.1). On the other hand, looking at the matters objectively and with common sense, it cannot find anything but the slightest fault on the part of the Athletes in respect of the ingestion of the *Specified Substance*.

In these circumstances, in the Panel's view, the only appropriate sanction to impose on each of the Athletes, other than Mr Waked, for the ADRV's arising out of the Event is a warning and that is the sanction which the Panel imposes in respect of Mr Cielo, Mr dos Santos and Mr Barbosa.

C. Mr Waked's Special Position

Mr Waked committed an ADRV in February 2010 by inadvertently using a medicine which contained a stimulant. By his own admission, it was a mistake on his part but as he stated, and as the imposed sanction of two months ineligibility strongly suggests, this ADRV was a careless rather than an intention or reckless violation of the anti-doping regime and was a violation of a comparatively minor nature.

The conclusions of this Panel means that Mr Waked has been found to have committed another ADRV which is at the lowest end of the fault spectrum.

In those circumstances, if permitted to do so by the FINA Rules / WADC, this Panel would have been disposed to impose a comparatively lenient sanction on Mr Waked.

With characteristic fairness Mr Morand, on behalf of FINA, also submitted that, but for the structure and language of the FINA Rules / WADC, Mr Waked should be treated more leniently than by having imposed the minimum sanction for multiple offences apparently dictated by Rule DC10.7.

Further, there is much force in Mr Jacobs' submission that, bearing in mind the overriding principle of proportionality, Mr Waked should receive a sanction much less than the minimum one required by Rule DC10.7, namely ineligibility for a period of one year.

In support of his submission, Mr Jacobs referred us to a number of CAS cases on proportionality which suggest, according to him, that the Panel can impose a sanction outside the range otherwise mandated by the provisions of the FINA Rules / WADC.

The Panel has considered those cases. Unfortunately, however, those cases were ones decided under the 2003 WADC and its analogues. The Panel is presently dealing with the FINA Rules based on the 2009 WADC which changed radically the previous regime.

The 2009 WADC (and its derivatives such as the FINA Rules) made significant changes to Article 10 of the WADC and is derivatives such as Rule DC10. Those changes may be summarized as follows:

(a) the 2009 WADC Code provides for an increase of sanctions in doping cases involving aggravating circumstances such as being part of a large doping scheme, the Athlete having used multiple *Prohibited Substances* or a *Prohibited Substance* on multiple occasions;

(b) at the same time a greater flexibility has been introduced in relation to sanctions in general. Whilst the flexibility provides for enhanced sanctions, for example in cases involving aggravating circumstances, lessened sanctions are possible where the Athlete can establish that the substance involved was not intended to enhance performance;

(c) for the purpose of giving a discretion to impose those lessened sanctions, the definition of "*Specified Substances*" has been changed in the 2009 Code. The 2003 Code stated that "*The Prohibited List may identify specified circumstances which are particularly susceptible to unintentional anti-doping rule violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents".*

Where an Athlete could establish the use of such a *Specified Substance* was not intended to enhance performance, a doping violation could result in a reduced sanction (at a minimum a warning and reprimand and no period ineligibility and a

maximum of one year ban).

The 2009 Code now provides that all *Prohibited Substances*, except substances in the classes of anabolic agents and hormones and those stimulants so identified on the *Prohibited List*, shall be "*Specified Substances*" for the purposes of sanctions.

This means that where an Athlete can establish how a *Specified Substance* entered his or her body or came into his or possession and that such *Specified Substance* was not intended to enhance sport performance, the sanction may be reduced to a reprimand and no period of ineligibility at a minimum and a two year ban at a maximum (where there are no prior ADRV's to consider);

(d) further, in the 2009 Code incentives to come forward have been strengthened. As compared with the 2003 Code, the 2009 Code provides for a greater suspension of any ineligibility period otherwise imposed than was the case with the 2003 Code.

It can be seen, therefore, that the clear intention of the 2009 WADC (and its analogues) was to provide for greater, or harsher, sanctions in what are viewed as aggravating circumstances (such as multiple offences) whilst providing for flexibility and the lessening of sanctions in circumstances where, under the 2003 WADC, an Athlete, who was not a multiple offender, may have received what was considered to be an unduly harsh sanction.

The Panel cannot ignore the changes to the 2009 WADC or the evident purpose behind them. Those changes, and the purpose behind them, make the cases relied upon by Mr Waked (which were decided under the 2003 WADC or its derivatives) largely irrelevant to our determination of this issue.

Rather, the Panel's obligation is to determine Mr Waked's sanction in the light of the language of Rule DC10.7 in its present form.

Rule DC10.7 relevantly states:

"For a second anti-doping rule violation, the period of ineligibility shall be within the range set forth in the table below ..". (emphasis added)

If one then goes to the table referred to in Rule DC10.7, the relevant range is 1 to 4 years.

There is thus a mandated minimum period of ineligibility of 1 year as a sanction for Mr Waked's latest ADRV.

Despite Mr Jacobs' submissions, the Panel does not believe it is entitled, by invocation of any principle of proportionality, to reduce Mr Waked's sanction to one below the minimum specified by this Rule. In this respect, the Panel respectfully and expressly adopts the reasoning of a differently comprised CAS Panel in CAS 2009/A/1870 at [138] where it was stated:

"The Panel ... does not find that the requirements of the fundamental principles of proportionality ... allow (or even compel to) a deviation from the applicable anti-doping rule. In this respect, in fact, the following is to be underlined:

- *It is recognised that the measure of the sanctions contemplated by the WADC (and consequently of the FINA DC) is consistent with the principle of proportionality (compare Advisory Opinion of 21 April 2006, CAS 2005/C/976 and 986, at [139]);*

...

- *This Panel agrees with the holding of another CAS Panel, where it is stressed that 'the WADC [and therefore the FINA DC] contains some degree of flexibility to enable the Panel to satisfy the general legal principle of proportionality. However, the scope of flexibility is clearly defined and deliberately limited so as to avoid situations where a wide range of factors and circumstances, including those completely at odds with the very purpose of a uniformly and consistently applied anti-doping framework are taken into account' (Award of 12 June 2006, CAS 2006/A/1025, [11.7.8])".*

It is to be noted that the CAS 2009/A/1870 case (and the cases to which it refers) were decided before the 2009 WADC (and the derivative FINA Rules) came into force. It is this Panel's view that the reasoning expressed by the Panel in CAS 2009/A/1870*'s* case applies with even greater force bearing in mind the changes effected by the 2009 WADC as summarised above.

The Panel therefore rejects the submission made on behalf of Mr Waked that, by reason of the principle of proportionality, it can and should impose a sanction of less than a period of one year's ineligibility.

Therefore, the Panel concludes that the minimum sanction it can impose on Mr Waked is a period of one year's ineligibility.

However, a question does arise as to the date from which Mr Waked's period of ineligibility should commence.

Mr Jacobs submitted that Mr Waked had promptly admitted the ADRV and that, therefore, his period of

ineligibility should start from the date of his Sample collection namely 7 May 2011.

As stated above, by waiving the testing of his B Sample, Mr Waked did effectively admit his ADRV and, in these circumstances, the Panel considers he is entitled to the benefit of Rule DC10.9.2 which confers a discretion on the Panel to determine that the period of ineligibility may start as early as the date suggested by Mr Jacobs.

In all the circumstances of Mr Waked's case, the Panel considers it is appropriate to exercise its discretion in the manner suggested by Mr Jacobs. Therefore, Mr Waked's one year period of ineligibility will commence from 7 May 2011.

As stated, the Panel has sympathy for Mr Waked's position. The majority of the Panel considers that, but for the requirements of Rule DC10.7, an appropriate sanction for Mr Waked, considering the relatively minor nature of each of the two ADRVs, would be one much less than one year's ineligibility. However, for the reasons it has stated, the Panel must apply Rule DC10.7 in the circumstances and impose such a sanction.

D. Results obtained by Mr Waked since the Maria Lenk Event

Mr Jacobs submitted that certain results, medals, points and prizes obtained by Mr Waked since the Event should be retained by him. Unfortunately, the Panel is unable to accept that submission.

Subject to the mitigating provisions of Rule DC10.1.1, the provisions of Rule DC9 provide for the automatic disqualification of all results obtained at the Event including forfeiture of any medals, points and prizes.

The mitigating effect of Rule DC10.1.1 only applies where the Athlete establishes *No Fault or Negligence*. For the reasons we have given, Mr Waked has not established that matter in the present case. Accordingly, all of his results etc. obtained at the Maria Lenk Event in May 2011 must be disqualified.

So far as results which Mr Waked has obtained since the Maria Lenk Event in May 2011 it follows that, from our reasoning, those were obtained whilst he was, or should have been, serving a Period of Ineligibility. In the Panel's view, commonsense and the combined operation and effect of Rules DC10.8 – 10.10 means that any results obtained by Mr Waked since 7 May 2011 must also be disqualified.

4A_392/2010
Arrêt du 12 janvier 2011
Ire Cour de droit civil

Composition	Mmes et MM. les Juges Klett, Présidente, Corboz, Rottenberg Liatowitsch, Kolly et Kiss Greffier: M. Carruzzo
Parties	FC Sion Association, recourante, représentée par Me Dominique Dreyer, et par Me Alexandre Zen-Ruffinen, **contre** Fédération Internationale de Football Association (FIFA), intimée, représentée par Me Christian Jenny, & Al-Ahly Sporting Club, intimé,
Objet	arbitrage international; droit d'être entendu; ordre public, recours en matière civile contre la sentence rendue le 1er juin 2010 par le Tribunal Arbitral du Sport (TAS).

Faits

A.

A.a Essam El Hadary est un footballeur professionnel de nationalité égyptienne, né le 15 janvier 1973. Gardien de but, il a effectué l'essentiel de sa carrière professionnelle sous les couleurs de l'équipe égyptienne Al-Ahly Sporting Club et a porté plus d'une centaine de fois le maillot de l'équipe nationale d'Égypte.

Al-Ahly Sporting Club est un club de football professionnel, membre de la Fédération d'Égypte de football (FEF), elle-même affiliée à la Fédération Internationale de Football Association (FIFA).

A.b Le 1er janvier 2007, Essam El Hadary et Al-Ahly Sporting Club ont signé un contrat de travail dont le terme a été fixé à la fin de la saison 2009-2010.

En date du 15 février 2008, le joueur a conclu avec le FC Sion, club de football professionnel suisse, un contrat de travail pour une période expirant à l'issue de la saison 2010-2011.

A.c Le 12 juin 2008, Al-Ahly Sporting Club a assigné Essam El Hadary et le FC Sion devant la Chambre de Résolution des Litiges (CRL) de la FIFA en vue d'obtenir leur condamnation solidaire au paiement de 2 millions d'euros pour rupture injustifiée du contrat, respectivement incitation à une telle rupture, ainsi que des sanctions sportives.

Par décision du 16 avril 2009, la CRL a condamné solidairement les défendeurs à payer au demandeur la somme de 900'000 euros. Elle a, en outre, suspendu le joueur pour une durée de quatre mois à partir du début de la prochaine saison et a interdit au FC Sion de recruter de nouveaux joueurs durant les deux périodes d'enregistrement suivant la notification de sa décision.

B.

Le 18 juin 2009, FC Sion Association a déposé une

déclaration d'appel auprès du Tribunal Arbitral du Sport (TAS) contre ladite décision (CAS 2009/A/1880). A la même date, Essam El Hadary a, lui aussi, appelé de cette décision (CAS 2009/A/1881). Les deux causes ont été jointes pour instruction et jugement.

Le TAS, composé de MM. Massimo Coccia, président, Olivier Carrard et Ulrich Haas, arbitres, a rendu sa sentence finale en date du 1er juin 2010. Admettant partiellement l'appel interjeté par Essam El Hadary, il a condamné ce dernier à payer la somme de 796'500 dollars, plus intérêts, à Al-Ahly Sporting Club et l'a suspendu de tout match officiel pour une durée de quatre mois à partir du début de la saison 2010-2011. En revanche, la Formation a déclaré l'appel de FC Sion Association irrecevable pour des motifs qui seront exposés plus loin dans la mesure utile.

C.
Le 1er juillet 2010, FC Sion Association a formé un recours en matière civile en vue d'obtenir l'annulation de la sentence du TAS. Elle a complété ce recours par un mémoire déposé le 15 juillet 2010.

La FIFA et le TAS concluent au rejet du recours, la première mettant également en doute la recevabilité de celui-ci. Al-Ahly Sporting Club n'a pas déposé de réponse dans le délai qui lui avait été imparti à cette fin.

Par ordonnances des 14 juillet et 11 octobre 2010, la présidente de la Ire Cour de droit civil a rejeté la requête de la recourante tendant à l'octroi de l'effet suspensif à son recours à titre superprovisoire et jusqu'à droit jugé dans la présente cause.

Considérant en droit

1.
D'après l'art. 54 al. 1 LTF, le Tribunal fédéral rédige son arrêt dans une langue officielle, en règle générale dans la langue de la décision attaquée. Lorsque cette décision est rédigée dans une autre langue (ici l'anglais), le Tribunal fédéral utilise la langue officielle choisie par les parties. Devant le TAS, celles-ci ont utilisé l'anglais et le français. Dans le mémoire qu'elle a adressé au Tribunal fédéral, la recourante a employé le français. La réponse de la FIFA, intimée, a été rédigée en allemand. Conformément à sa pratique, le Tribunal fédéral adoptera la langue du recours et rendra, par conséquent, son arrêt en français.

2.
2.1 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 LDIP (art. 77 al. 1 LTF).

Le siège du TAS se trouve à Lausanne. L'une des parties au moins -en l'occurrence, le club de football intimé - n'avait pas son domicile en Suisse au moment déterminant. Les dispositions du chapitre 12 de la LDIP sont donc applicables (art. 176 al. 1 LDIP).

2.2 La recourante se demande si la sentence attaquée n'est pas une sentence partielle du fait qu'elle se borne à indiquer la partie qui devra supporter les frais de la procédure arbitrale (ch. 5 du dispositif) et laisse au Greffe du TAS, conformément à l'art. R64.4 in fine du Code de l'arbitrage en matière de sport (ci-après: le Code), le soin de communiquer séparément aux parties le montant définitif des frais de l'arbitrage arrêté par lui. Il n'est pas nécessaire d'approfondir cette question. En effet, quand bien même elle ne revêtirait qu'un caractère partiel, la sentence du 1er juin 2010 n'en était pas moins immédiatement attaquable devant le Tribunal fédéral, et ce pour l'ensemble des motifs prévus à l'art. 190 al. 2 LDIP (**ATF 130 III 755** consid. 1.2.2).

Point n'est besoin d'examiner ici la question - controversée - de savoir si le recours en matière civile est soumis à la condition d'une valeur litigieuse minimale lorsqu'il a pour objet une sentence arbitrale internationale. A supposer que ce soit le cas, cette condition serait remplie en l'espèce. Toutefois, contrairement à ce que soutient la recourante, la valeur litigieuse n'équivaudrait pas au montant présumé des frais de l'arbitrage (44'000 fr. au moins au dire de la recourante, vu les avances requises par le TAS) et des dépens octroyés aux intimés (10'000 fr. au total selon le ch. 6 du dispositif de la sentence), mais à la somme allouée par la CRL au club intimé (900'000 euros), attendu que la recourante a soutenu, dans la procédure d'appel conduite devant le TAS, que la condamnation pécuniaire prononcée en première instance était dirigée contre elle.

La recourante, qui a pris part à la procédure devant le TAS (cf. art. 76 al. 1 let. a LTF), est directement touchée par la sentence attaquée, car la Formation a refusé d'entrer en matière sur l'appel interjeté par elle contre cette condamnation pécuniaire et contre la sanction sportive qui l'accompagnait. Soutenant que ces deux mesures la visaient personnellement, elle a donc un intérêt propre, actuel et juridiquement

protégé à ce que l'irrecevabilité de son appel n'ait pas été prononcée en violation des garanties découlant de l'art. 190 al. 2 LDIP, ce qui lui confère la qualité pour recourir (art. 76 al. 1 let. b LTF).

2.3 La recourante a reçu une expédition complète de la sentence par télécopie du 1er juin 2010 et sous pli recommandé du 15 juin 2010. Elle a déposé son recours le 1er juillet 2010. Le 15 juillet 2010, elle a adressé au Tribunal fédéral un complément à son recours. Le mémoire de recours, qui satisfait aux exigences formelles (art. 42 al. 1 LTF), a sans conteste été déposé en temps utile. Le recours complémentaire l'a été également si l'on prend pour point de départ la notification postale de la sentence, mais non si l'on retient l'envoi du fax comme dies a quo.

2.3.1 En vertu de l'art. 100 al. 1 LTF, le recours contre une décision doit être déposé devant le Tribunal fédéral dans les 30 jours qui suivent la notification de l'expédition complète. Ce délai, qui n'est pas prolongeable (art. 47 al. 1 LTF), vaut aussi pour le dépôt d'un ou de plusieurs recours complémentaires.

Sous réserve de pouvoir constater la date de la réception, l'art. 112 al. 1 LTF n'impose aucun mode de communication (Bernard Corboz, in Commentaire de la LTF, 2009, n° 12 ad art. 112). La LDIP ne règle pas non plus le mode de communication de la sentence arbitrale. La question dépend, par conséquent, au premier chef de la convention des parties ou du règlement choisi par elles (arrêt 4P. 273/1999 du 20 juin 2000 consid. 5a).

Selon la jurisprudence du Tribunal fédéral, le dépôt d'une écriture par télécopie ne permet pas de respecter le délai de recours (**ATF 121 II 252** consid. 4; arrêt 4A_258/2008 du 7 octobre 2008 consid. 2). Cette méthode de transmission ne fournit, en effet, aucune assurance quant à la provenance ou à l'intégrité du document reçu (cf. Message du 28 février 2001 concernant la révision totale de l'organisation judiciaire fédérale, FF 2001 4064 in limine). Par identité de motif, la validité d'une notification faite par télécopie apparaît, elle aussi, problématique, hormis les cas d'urgence (Yves Donzallaz, Loi sur le Tribunal fédéral, 2008, n° 708), même si elle ne peut être exclue par principe (Corboz, ibid.). Le premier de ces deux auteurs préconise, en tout cas, une solution consistant à faire partir le délai de recours dès la notification de la décision par voie postale, lorsque cette notification fait suite à la transmission d'une copie de la décision au moyen d'un téléfax (Donzallaz, ibid.).

2.3.2 Dans la première édition de leur ouvrage, deux spécialistes de l'arbitrage international écrivaient qu'une communication par fax suffit à faire courir le délai de recours (Kaufmann-Kohler/Rigozzi, Arbitrage international, 2006, n° 733). A l'appui de cette opinion, ils citaient, toutefois, un précédent - l'arrêt 4P.88/2006 du 10 juillet 2006 consid. 2.3 - qui ne tranchait pas la question (arrêt 4A_628/2009 du 17 février 2010 consid.2). Dans la deuxième édition du même ouvrage, publiée en 2010, ces deux auteurs se montrent moins affirmatifs, puisqu'ils réservent l'hypothèse dans laquelle les parties ou le règlement d'arbitrage prévoient des modalités de notification spéciales (op. cit., n° 733). Se référant à cette réserve, ils précisent qu'il doit en aller de même lorsque le TAS notifie une sentence par fax en indiquant que "l'original sera notifié par courrier recommandé ultérieurement". Ils ajoutent que, tant que la question n'aura pas été tranchée par le Tribunal fédéral, le recourant prudent calculera néanmoins le délai à partir de la notification par fax (op. cit., p. 465, note de pied n° 524).

Récemment, le Tribunal fédéral s'est penché sur un cas comparable à celui qui est présentement examiné. A propos de l'art. 55 du Règlement d'arbitrage accéléré de l'Organisation Mondiale de la Propriété Intellectuelle (OMPI; ci-après: le Règlement), qui prescrit la notification formelle aux parties d'un original de la sentence comportant la signature de l'arbitre, il a exclu que le délai de recours puisse courir à compter de l'envoi de la sentence à titre de pièce jointe à un courrier électronique, motif pris de ce que semblable communication ne revêtait pas le caractère officiel requis par le Règlement (arrêt 4A_582/2009 du 13 avril 2010 consid. 2.1.2, non publié in **ATF 136 III 200**). L'art. R31 al. 2 du Code prévoit que les sentences du TAS sont notifiées "*par un moyen permettant la preuve de la réception*". Quant à l'art. R59 al. 1 du Code, il exige que la sentence soit signée, fût-ce par le seul président de la Formation. Dans la continuation du précédent cité, et même si ces deux dispositions sont moins catégoriques que l'art. R55 du Règlement, force est d'admettre que la notification par fax d'une sentence du TAS en matière d'arbitrage international ne fait pas courir le délai de l'art. 100 al. 1 LTF: d'une part, la signature manuscrite ne saurait

être remplacée par la signature de l'original de l'acte dont une copie est faxée aux destinataires de la sentence (cf., mutatis mutandis, l'**ATF 121 II 252** consid. 3); d'autre part, le fax n'est généralement pas un moyen permettant la preuve de la notification.

2.3.3 Appliqués au cas particulier, ces principes conduisent la Cour de céans à constater que le recours complémentaire a, lui aussi, été déposé en temps utile, c'est-à-dire dans les 30 jours dès la réception du pli recommandé contenant la sentence du 1er juin 2010. On se trouve ici dans le même cas de figure que celui évoqué par les deux auteurs précités dans la mesure où, à cette date-là, le secrétariat du TAS a faxé aux intéressés une copie de ladite sentence, laquelle n'était du reste munie que de la signature du président de la Formation, en les informant qu'ils recevraient ultérieurement l'original de la sentence signé par tous les membres de la Formation.

3.

3.1 Le Tribunal fédéral statue sur la base des faits établis par le Tribunal arbitral (art. 105 al. 1 LTF). Il ne peut rectifier ou compléter d'office les constatations des arbitres, même si les faits ont été établis de manière manifestement inexacte ou en violation du droit (cf. l'art. 77 al. 2 LTF qui exclut l'application de l'art. 105 al. 2 LTF). En revanche, comme c'était déjà le cas sous l'empire de la loi fédérale d'organisation judiciaire (cf. **ATF 129 III 727** consid. 5.2.2; **128 III 50** consid. 2a et les arrêts cités), le Tribunal fédéral conserve la faculté de revoir l'état de fait à la base de la sentence attaquée si l'un des griefs mentionnés à l'art. 190 al. 2 LDIP est soulevé à l'encontre dudit état de fait ou que des faits ou des moyens de preuve nouveaux sont exceptionnellement pris en considération dans le cadre de la procédure du recours en matière civile (cf. art. 99 al. 1 LTF).

3.2 Dans un long préambule, la recourante décrit l'organisation du football en Suisse de même que sa propre organisation (recours, p. 2 à 7). Semblable description ne figure pas comme telle dans la sentence attaquée. Dans la mesure où elle va au-delà des explications fournies à ce sujet par la Formation (sentence, nos 1, 2 et 148), elle ne saurait être prise en considération.

Pour la compréhension des tenants et aboutissants de l'affaire en litige, il suffira de constater, avec la Formation, que "FC Sion Association" (la recourante) est un club de football organisé en association selon le droit suisse (art. 60 ss CC), qui est affilié à l'Association Suisse de Football (ASF) (n° 8040) et dont la première équipe évolue dans le championnat amateur; que "FC Sion" est le nom généralement utilisé par un club de football professionnel, constitué sous la forme d'une société anonyme de droit suisse (art. 620 ss CO) appelée Olympique des Alpes SA (ci-après: OLA) et ayant son siège social à Martigny-Combe, lequel club dispute le championnat suisse de première division ("Super League"); qu'en 2005-2006, à la suite d'une réorganisation du football suisse, OLA est devenu membre de la "Swiss Football League"(SFL) et, partant, de l'ASF (n° 8700), en prenant la place de FC Sion Association pour l'ensemble du secteur professionnel; enfin, que vis-à-vis de l'extérieur (ASF, SFL, médias, fans, public), OLA a continué à apparaître, dans l'usage courant, sous le nom "FC Sion" qu'elle utilise d'ailleurs régulièrement dans ses propres documents.

4.

La recourante avait formulé un premier grief, fondé sur l'art. 190 al. 2 let. a LDIP, en rapport avec la présence de l'arbitre Ulrich Haas au sein de la Formation ayant rendu la sentence attaquée. Elle avait également requis l'administration de preuves afin d'étayer le grief en question. Cependant, par lettre du 23 novembre 2010, elle a retiré purement et simplement ce grief. Il n'y a donc pas lieu d'examiner ce moyen, ni de statuer sur l'admissibilité des preuves proposées à son appui.

5.

En deuxième lieu, la recourante reproche à la Formation d'avoir fondé sa sentence sur un motif juridique imprévisible pour les parties, en violation de son droit d'être entendue (art. 190 al. 2 let. d LDIP).

5.1 En Suisse, le droit d'être entendu se rapporte surtout à la constatation des faits. Le droit des parties d'être interpellées sur des questions juridiques n'est reconnu que de manière restreinte. En règle générale, selon l'adage jura novit curia, les tribunaux étatiques ou arbitraux apprécient librement la portée juridique des faits et ils peuvent statuer aussi sur la base de règles de droit autres que celles invoquées par les parties. En conséquence, pour autant que la convention d'arbitrage ne restreigne pas la mission du tribunal arbitral aux seuls moyens juridiques soulevés par les parties, celles-ci n'ont pas à être entendues de façon spécifique sur la portée à reconnaître aux règles de droit. A titre exceptionnel, il convient de les interpeller lorsque le juge ou le tribunal arbitral envisage

de fonder sa décision sur une norme ou une considération juridique qui n'a pas été évoquée au cours de la procédure et dont les parties ne pouvaient pas supputer la pertinence (**ATF 130 III 35** consid. 5 et les références). Au demeurant, savoir ce qui est imprévisible est une question d'appréciation. Aussi le Tribunal fédéral se montre-t-il restrictif dans l'application de ladite règle pour ce motif et parce qu'il convient d'avoir égard aux particularités de ce type de procédure en évitant que l'argument de la surprise ne soit utilisé en vue d'obtenir un examen matériel de la sentence par l'autorité de recours (arrêts 4A_254/2010 du 3 août 2010 consid. 3.1, 4A_464/2009 du 15 février 2010 consid. 6.1 et 4A_400/2008 du 9 février 2009 consid. 3.1).

5.2 Dans une "Remarque préliminaire", la recourante qualifie de "sidérant", de "burlesque" ou encore de "surréaliste" le point de vue exprimé par la Formation, reprochant à celle-ci d'avoir sombré dans "l'absolutisme total" (recours, n. 28 et 29). Plus loin, elle se plaint d'avoir été la victime "d'une incongruité intellectuelle imprévisible" de la part des arbitres (recours, n. 34). Cette manière d'argumenter est à la limite de l'inconvenance. Elle ne saurait remplacer, quoi qu'il en soit, une critique intelligible des motifs sur lesquels repose la sentence attaquée.

En tout état de cause, la recourante concède elle-même "*qu'il n'est probablement pas possible de soutenir ici que la question de la qualité de partie de la recourante (en instance arbitrale inférieure) n'a pas été évoquée devant le TAS*" (recours, n. 34). C'est dire que, de son propre aveu, le moyen fondé sur la jurisprudence susmentionnée tombe à faux. Il n'y a donc pas lieu de pousser plus avant l'analyse de ce moyen.

6.
En dernier lieu, la recourante fait grief à la Formation d'avoir violé l'ordre public procédural et l'ordre public matériel, au sens de l'art. 190 al. 2 let. e LDIP.

6.1 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 (**ATF 132 III 389** consid. 2.2.1).

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 (arrêt cité, ibid.).

6.2
6.2.1 Au titre de la violation de l'ordre public procédural, la recourante, reprenant sous un autre angle les arguments qu'elle a avancés à l'appui du moyen précédent, fait valoir que le TAS l'aurait privée d'un accès à la justice étatique en confirmant, par une sentence d'irrecevabilité, une décision qui la condamnait solidairement à payer 900'000 euros au club égyptien. Selon elle, les arbitres auraient ainsi contrevenu de façon flagrante aux garanties minimales de procédure, en particulier à l'autorité de la chose jugée dont était revêtue la décision rendue le 16 avril 2009 par la CRL. Le moyen est dénué de fondement.

Sans doute un tribunal arbitral viole-t-il l'ordre public procédural s'il statue sans tenir compte de l'autorité de la chose jugée d'une décision antérieure (**ATF 128 III 191** consid. 4a p. 194). Encore faut-il que cette condition soit réalisée. Or, tel n'était manifestement pas le cas, en l'espèce, puisque la décision de la CRL censée revêtue de l'autorité de la chose jugée avait fait l'objet de deux appels interjetés auprès du TAS, l'un par la recourante, l'autre par le footballeur égyptien. Aussi la Formation ne peut-elle se voir reprocher de ne pas s'être considérée comme liée par la décision de première instance attaquée devant elle.

Pour le surplus, toute l'argumentation de la recourante repose sur la prémisse selon laquelle ce serait elle qui aurait été condamnée par la CRL à payer 900'000 euros au club intimé. Or, une telle prémisse est erronée dès lors qu'il ressort clairement des explications détaillées fournies sur ce point par la Formation que la recourante n'était pas partie à la procédure de première instance et que la décision condamnatoire rendue le 16 avril 2009 visait une autre personne morale, à savoir OLA, c'est-à-dire la société anonyme constituant la structure juridique du club de football professionnel valaisan qui dispute le championnat suisse de première division. A cet égard, la conclusion

ainsi formulée par la Formation sous le n. 178 de la sentence attaquée est catégorique quant à l'identité de la partie défenderesse devant la CRL:

"*On the basis of the above elements, the Panel is persuaded that the Swiss "club" which actually took part in the FIFA proceedings, and against which the Appealed Decision directed its ruling, has been the professional club FC Sion/Olympique des Alpes SA. The Panel holds that, contrary to the allegations set forth by its counsel, FC Sion Association was never a party to the FIFA proceedings and, anyway, it was never affected by the Appealed Decision*".

La recourante ne démontre pas, par une motivation suffisante, en quoi cette conclusion, fondée sur une pluralité d'indices et soigneusement motivée, serait erronée. Pour l'infirmer, elle se focalise sur le passage suivant, extrait du consid. 4 de la décision de la CRL (p. 6):

"*... the Dispute Resolution Chamber found it uncontested that the club for which the player has been registred with the Swiss Football Association (upon the latter's explicit request to be able to register the player for its affiliated club "FC Sion") and for which he has been participating in organised football ever since is the club FC Sion and not the entity Olympique des Alpes SA*".

Cependant, la Formation a bien exposé, sous le n. 180 de sa sentence, pourquoi le passage cité, quelque peu obscur il est vrai, ne pouvait pas avoir le sens que la recourante entend lui prêter aujourd'hui si on le replaçait dans son contexte. Et elle est arrivé à la conclusion suivante:

"*The Panel has no hesitation in finding that the DRC [i.e. la Dispute Resolution Chamber] meant to consider as party to its proceedings, and as addressee of its ruling, the professionnal club and not the amateur club*".

Or, la recourante ne formule pas une critique recevable de cette conclusion lorsqu'elle reproche au TAS d'avoir délibérément dénaturé la décision de la CRL en invitant "*la partie visée à lire les considérants litigieux à l'envers, pour leur donner une interprétation contraire à celle qu'ils ont lorsqu'on les lit à l'endroit*" (recours, n. 37; recours complémentaire n. 37ter). Peu importe, dès lors, qu'elle s'en prenne - par hypothèse à juste titre - à l'argument subsidiaire par lequel la Formation a indiqué qu'elle arriverait à la même conclusion si elle devait juger l'affaire de novo (sentence, n. 180 in fine; recours complémentaire, n. 37quater).

De même, la recourante attache en vain de l'importance au fait que le Président suppléant de la Chambre arbitrale d'appel du TAS lui a accordé l'effet suspensif, par ordonnance du 7 juillet 2009, en faisant référence, dans le premier attendu de son prononcé, à la décision rendue le 16 avril 2009 par la CRL et "c*ondamnant le FC Sion Association*". Il s'agit là, en effet, d'une décision qui a été prise à l'issue d'une procédure sommaire, laquelle n'abordait pas la question de la qualité pour agir devant le TAS et ne pouvait lier en aucun cas la Formation, non encore constituée, appelée à statuer sur la recevabilité de l'appel.

Enfin, que la FIFA n'ait pas conclu expressément à l'irrecevabilité de l'appel interjeté par la recourante, comme celle-ci le souligne avec références à l'appui (recours, n. 32), n'est pas non plus déterminant. D'une part, il appartenait au TAS de statuer d'office sur la recevabilité de l'appel qui lui était soumis. D'autre part, la conclusion de la FIFA tendant au rejet de l'appel n'excluait pas que celui-ci fût écarté comme étant irrecevable.

6.2.2 Au titre de l'incompatibilité de la sentence avec l'ordre public matériel, la recourante reproche au TAS d'avoir violé les règles de la bonne foi (recours, n. 38; recours complémentaire, n. 37ter et 37quater). Les arguments qu'elle développe sur ce point ont déjà été réfutés dans le cadre du moyen pris de la violation de l'ordre public procédural (cf. consid. 6.2.1). Il n'y a donc pas lieu de le faire derechef.

7.
Le présent recours doit ainsi être rejeté dans la mesure où il est recevable. Succombant, son auteur paiera les frais judiciaires (art. 66 al. 1 LTF); il versera, en outre, des dépens à la FIFA (art. 68 al. 1 et 2 LTF). Le club intimé, qui n'a pas déposé de réponse, n'a pas droit à une indemnité.

Par ces motifs, le Tribunal fédéral prononce:

1.
Le recours est rejeté dans la mesure où il est recevable.

2.
Les frais judiciaires, arrêtés à 5'000 fr., sont mis à la charge de la recourante.

3.
La recourante versera à la Fédération Internationale de Football Association (FIFA) une indemnité de 6'000 fr. à titre de dépens.

4.
Le présent arrêt est communiqué aux parties et au Tribunal Arbitral du Sport (TAS).

Lausanne, le 12 janvier 2011

Au nom de la Ire Cour de droit civil du Tribunal fédéral suisse

La Présidente:	Le Greffier:
Klett	Carruzzo

4A_394/2010
Arrêt du 12 janvier 2011
Ire Cour de droit civil

Composition	Mmes et MM. les Juges Klett, Présidente, Corboz, Rottenberg Liatowitsch, Kolly et Kiss Greffier: M. Carruzzo
Parties	Essam El Hadary, recourant, représenté par Me Léonard A. Bender, **contre** Fédération Internationale de Football Association (FIFA), intimée, représentée par Me Christian Jenny, & Al-Ahly Sporting Club, intimé,
Objet	arbitrage international; droit d'être entendu; ordre public, recours en matière civile contre la sentence rendue le 1er juin 2010 par le Tribunal Arbitral du Sport (TAS).

Faits

A.

A.a Essam El Hadary est un footballeur professionnel de nationalité égyptienne, né le 15 janvier 1973. Gardien de but, il a effectué l'essentiel de sa carrière professionnelle sous les couleurs de l'équipe égyptienne Al-Ahly Sporting Club et a porté plus d'une centaine de fois le maillot de l'équipe nationale d'Égypte.

Al-Ahly Sporting Club est un club de football professionnel, membre de la Fédération d'Égypte de football (FEF), elle-même affiliée à la Fédération Internationale de Football Association (FIFA).

A.b Le 1er janvier 2007, Essam El Hadary et Al-Ahly Sporting Club ont signé un contrat de travail dont le terme a été fixé à la fin de la saison 2009-2010.

En date du 15 février 2008, le joueur a conclu avec le FC Sion, club de football professionnel suisse, un contrat de travail pour une période expirant à l'issue de la saison 2010-2011.

La FEF a refusé de transmettre le Certificat International de Transfert (CIT) à l'Association Suisse de Football (ASF).

Par décision du 11 avril 2008, le juge unique de la Commission du Statut du Joueur de la FIFA a autorisé l'ASF à enregistrer provisoirement Essam El Hadary en tant que joueur du FC Sion avec effet immédiat. Cette décision réservait l'issue du différend opposant le club égyptien à son joueur quant aux circonstances dans lesquelles il avait été mis un terme à leurs rapports de travail, différend qui devait être tranché par la Chambre de Résolution des Litiges (CRL) de la FIFA.

A.c Le 12 juin 2008, Al-Ahly Sporting Club a assigné Essam El Hadary et le FC Sion devant la CRL en vue d'obtenir leur condamnation solidaire au paiement de 2 millions d'euros pour rupture injustifiée du contrat, respectivement incitation

à une telle rupture, ainsi que des sanctions sportives.

Par décision du 16 avril 2009, la CRL a condamné solidairement les défendeurs à payer au demandeur la somme de 900'000 euros. Elle a, en outre, suspendu le joueur pour une durée de quatre mois à partir du début de la prochaine saison et a interdit au FC Sion de recruter de nouveaux joueurs durant les deux périodes d'enregistrement suivant la notification de sa décision.

B.
Le 18 juin 2009, Essam El Hadary a adressé au Tribunal Arbitral du Sport (TAS) une déclaration d'appel visant ladite décision (CAS 2009/A/1881). Il y indiquait n'effectuer cette démarche que pour la sauvegarde de ses droits, tout en contestant la compétence du TAS.

Le même jour, FC Sion Association a, elle aussi, déposé une déclaration d'appel auprès du TAS contre la décision précitée, mais sans remettre en cause la compétence de cette juridiction arbitrale (CAS 2009/A/1880).

Dans son mémoire d'appel du 10 juillet 2009, Essam El Hadary a requis principalement la suspension de la cause arbitrale jusqu'à droit connu sur la procédure civile qu'il avait ouverte devant un tribunal du canton de Zurich afin d'obtenir l'annulation de la décision de la CRL en application de l'art. 75 CC. Subsidiairement, il a invité le TAS à rendre une décision incidente par laquelle il se déclarerait incompétent pour connaître de l'appel.

Le TAS a joint les deux causes arbitrales susmentionnées pour instruction et jugement. Il a cependant décidé de traiter séparément les exceptions d'incompétence et de litispendance. Par sentence du 7 octobre 2009, il a écarté ces exceptions et s'est déclaré compétent pour examiner les mérites de l'appel interjeté par Essam El Hadary.

Contre ladite sentence, le footballeur égyptien a formé un recours en matière civile que le Tribunal fédéral a rejeté par arrêt du 20 janvier 2010 (cause 4A_548/2009).

C.
Après avoir instruit simultanément les deux causes, le TAS, composé de MM. Massimo Coccia, président, Olivier Carrard et Ulrich Haas, arbitres, a rendu sa sentence finale en date du 1er juin 2010. Admettant partiellement l'appel interjeté par Essam El Hadary, il a condamné ce dernier à payer la somme de 796'500 dollars, plus intérêts, à Al-Ahly Sporting Club et l'a suspendu de tout match officiel pour une durée de quatre mois à partir du début de la saison 2010-2011.

En bref, les arbitres, après avoir examiné les preuves versées au dossier, ont estimé que l'appelant n'était pas parvenu à établir que le contrat de travail qui le liait au club égyptien avait pris fin d'entente entre les parties. Ils ont ensuite appliqué aux circonstances de l'espèce les critères énoncés à l'art. 17.1 du Règlement du Statut et du Transfert des Joueurs édicté par la FIFA (RSTJ) pour fixer le montant de l'indemnité due par l'appelant au club intimé, ramenant ce montant de 900'000 euros à 796'500 dollars. En application de l'art. 17.3 RSTJ, la Formation a encore prononcé une sanction sportive à l'encontre de l'appelant.

D.
Le 1er juillet 2010, Essam El Hadary a formé un recours en matière civile en vue d'obtenir l'annulation de la sentence du 1er juin 2010.

La FIFA et le TAS concluent au rejet du recours. Al-Ahly Sporting Club n'a pas déposé de réponse dans le délai qui lui avait été imparti à cette fin.

Admise dans un premier temps à titre superprovisoire, la demande d'effet suspensif présentée par le recourant a été rejetée, par ordonnance présidentielle du 12 octobre 2010, à l'instar de la requête tendant à ce que la présente cause et la cause 4A_392/2010, relative au recours interjeté par FC Sion Association contre la même sentence, fussent jointes.

Considérant en droit

1.
D'après l'art. 54 al. 1 LTF, le Tribunal fédéral rédige son arrêt dans une langue officielle, en règle générale dans la langue de la décision attaquée. Lorsque cette décision est rédigée dans une autre langue (ici l'anglais), le Tribunal fédéral utilise la langue officielle choisie par les parties. Devant le TAS, celles-ci ont utilisé l'anglais et le français. Dans le mémoire qu'il a adressé au Tribunal fédéral, le recourant a employé le français. La réponse de la FIFA, intimée, a été rédigée en allemand. Conformément à sa pratique, le Tribunal fédéral adoptera la langue du recours et rendra, par conséquent, son arrêt en français.

2.
Dans le domaine de l'arbitrage international, le recours en matière civile est recevable contre les décisions de tribunaux arbitraux aux conditions fixées par les art. 190 à 192 LDIP (art. 77 al. 1 LTF). Qu'il s'agisse de l'objet du recours, de la qualité pour recourir, du délai de recours, des conclusions prises par le recourant

ou encore des griefs soulevés dans le mémoire de recours, aucune de ces conditions de recevabilité ne fait problème en l'espèce. Rien ne s'oppose donc à l'entrée en matière.

3.
Le recourant avait formulé un premier grief, fondé sur l'art. 190 al. 2 let. a LDIP, en rapport avec la présence de l'arbitre Ulrich Haas au sein de la Formation ayant rendu la sentence attaquée. Il avait également requis l'administration de preuves afin d'étayer le grief en question. Cependant, par lettre du 16 novembre 2010, il a retiré purement et simplement ce grief ainsi que les offres de preuve y relatives. Il n'y a donc pas lieu d'examiner ce moyen, ni de statuer sur l'admissibilité des preuves proposées à son appui.

4.
4.1 Pour le recourant, le TAS aurait «violé gravement les principes impératifs de procédure mentionnés à l'art. 190 al. 2 let. e LDIP». A l'en croire, la sentence attaquée porterait atteinte à son droit d'être entendu et à l'égalité des parties dans la mesure où la Formation aurait méconnu son devoir minimum d'examiner et de traiter les problèmes pertinents. Concrètement, le recourant cherche à démontrer que les arbitres n'ont pas pris en considération le témoignage du dénommé Abdel Zeaf, qui était propre, selon lui, à établir le caractère consensuel de son départ du club égyptien.

4.2 La recevabilité du grief est déjà sujette à caution. Aussi bien, la let. e de l'art. 190 al. 2 LDIP, que cite le recourant, ne mentionne pas un quelconque principe impératif de procédure, puisqu'elle sanctionne l'incompatibilité de la sentence avec l'ordre public. C'est, en réalité, la let. d de la même disposition que le recourant aurait dû invoquer pour faire constater la violation des garanties ancrées à l'art. 182 al. 3 LDIP (égalité entre les parties et droit d'être entendu en procédure contradictoire). Vrai est-il qu'il serait peut-être trop formaliste d'écarter ce grief pour ce seul motif, étant donné que le recourant a indiqué de manière expresse les garanties de procédure que la Formation n'aurait pas respectées. Point n'est, toutefois, besoin de pousser plus avant l'examen de cette question de recevabilité dès lors que le grief examiné est, de toute façon, mal fondé.

Le recourant reproche au TAS de ne pas avoir pris en considération le témoignage capital d'Abdel Zeaf. Ainsi formulé, pareil reproche confine à la témérité. En effet, la Formation a consacré trois paragraphes de sa sentence à l'analyse de ce témoignage (n. 190 à 192); deux d'entre eux sont du reste cités expressis verbis dans le mémoire de recours (p. 9 s.). Ce que le recourant déplore, en réalité, par une argumentation de type purement appellatoire, c'est le résultat de cette analyse. Il se borne, ce faisant, à critiquer la manière dont les arbitres ont apprécié un moyen de preuve. C'est ignorer que l'appréciation des preuves, fût-elle arbitraire, ne constitue pas un motif de recours entrant dans les prévisions de l'art. 190 al. 2 lDIP, sous quelque angle que ce soit.

Par conséquent, il n'existe pas, en l'espèce, le moindre indice de la prétendue violation du droit d'être entendu du recourant non plus que d'un traitement inégal dont ce dernier aurait eu à pâtir.

5.
Le recourant fait encore grief à la Formation d'avoir méconnu le principe de la "fidélité contractuelle" et, partant, d'avoir rendu une sentence incompatible avec l'ordre public.

5.1 L'examen matériel d'une sentence arbitrale internationale, par le Tribunal fédéral, est limité à la question de la compatibilité de la sentence avec l'ordre public (**ATF 121 III 331** consid. 3a).

Une sentence est incompatible avec l'ordre public si elle méconnaît les valeurs essentielles et largement reconnues qui, selon les conceptions prévalant en Suisse, devraient constituer le fondement de tout ordre juridique (**ATF 132 III 389** consid. 2.2.3). Elle 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 figure la fidélité contractuelle, rendue par l'adage latin pacta sunt servanda.

Le principe pacta sunt servanda, au sens restrictif que lui donne la jurisprudence relative à l'art. 190 al. 2 let. e LDIP, n'est violé que si le tribunal arbitral refuse d'appliquer une clause contractuelle tout en admettant qu'elle lie les parties ou, à l'inverse, s'il leur impose le respect d'une clause dont il considère qu'elle ne les lie pas. En d'autres termes, le tribunal arbitral doit avoir appliqué ou refusé d'appliquer une disposition contractuelle en se mettant en contradiction avec le résultat de son interprétation à propos de l'existence ou du contenu de l'acte juridique litigieux. En revanche, le processus d'interprétation lui-même et les conséquences juridiques qui en sont logiquement tirées ne sont pas régis par

le principe de la fidélité contractuelle, de sorte qu'ils ne sauraient prêter le flanc au grief de violation de l'ordre public. Le Tribunal fédéral a souligné à maintes reprises que la quasi-totalité du contentieux dérivé de la violation du contrat est exclue du champ de protection du principe pacta sunt servanda (arrêt 4A_43/2010 du 29 juillet 2010 consid. 5.2 et les arrêts cités).

5.2 En l'espèce, la Formation, appréciant les éléments de preuve versés au dossier, a jugé que le recourant avait rompu de manière unilatérale le lien contractuel qui l'unissait au club intimé. Partant de cette prémisse, elle lui a infligé les sanctions pécuniaires et sportives prévues par la réglementation ad hoc en cas de rupture du contrat de travail sans juste cause. Semblable raisonnement ne comporte pas la moindre contradiction interne. Cela suffit à exclure une quelconque violation du principe pacta sunt servanda, au sens restrictif qu'il revêt dans ce contexte. Bien qu'il s'en défende, le recourant critique uniquement la prémisse de ce raisonnement, c'est-à-dire les constatations relatives aux conditions dans lesquelles il a quitté le club égyptien. Il n'est pas recevable à le faire dans un recours dirigé contre une sentence arbitrale internationale.

Enfin, les seules affirmations du recourant, d'après lesquelles la sentence attaquée serait choquante dans son résultat, heurterait le sens de l'équité et équivaudrait "à une sorte de mort sportive", sont tout à fait impropres à établir l'incompatibilité de ladite sentence avec l'ordre public matériel, dans l'acception étroite que lui donne la jurisprudence susmentionnée.

6.
Le présent recours doit ainsi être rejeté dans la mesure où il est recevable. Succombant, son auteur paiera les frais judiciaires (art. 66 al. 1 LTF); il versera, en outre, des dépens à la FIFA (art. 68 al. 1 et 2 LTF). Le club intimé, qui n'a pas déposé de réponse, n'a pas droit à une indemnité.

Par ces motifs, le Tribunal fédéral prononce:

1.
Le recours est rejeté dans la mesure où il est recevable.

2.
Les frais judiciaires, arrêtés à 10'000 fr., sont mis à la charge du recourant.

3.
Le recourant versera à la Fédération Internationale de Football Association (FIFA) une indemnité de 12'000 fr. à titre de dépens.

4.
Le présent arrêt est communiqué aux parties et au Tribunal Arbitral du Sport (TAS).

Lausanne, le 12 janvier 2011

Au nom de la Ire Cour de droit civil du Tribunal fédéral suisse

La Présidente:	Le Greffier:
Klett	Carruzzo

4A_402/2010**
Judgment of 17 February 2011
First Civil Law Court

Composition	Federal Judge Klett, President Federal Judge Corboz Federal Judge Rottenberg Liatowitsch Clerk of the Court: Mr Leemann
Parties	X._____, Appellant, represented by Mr. Philipp J. Dickenmann and Reto Hunsperger, **versus** A._____, Respondent, represented by Dr. Stephan Netzle, Party joined to the proceedings, Fédération Internationale de Football Association (FIFA) , represented by Mr. Christian Jenny.

* From Charles Poncet's translation, courtesy of the law firm ZPG/Geneva (www.praetor.ch).
* Translator's note : Quote as X._____ v. A._____, 4A:402/2010. The original of the decision is in German.The text is available on the website of the Federal Tribunal www.bger.ch.

Facts

A.

A.a X._____ (Appellant), a legal person domiciled in Istanbul, is a Turkish football club. The Appellant is a member of the Turkish Football Federation, which is, in turn, a member of the Fédération Internationale de Football Association (FIFA; Joined Party). A. _____ (Respondent), is a professional football player from Y._____. He currently plays for the Italian soccer club FC Z._____.

A.b. From the 2003/2004 season on, the Respondent played for the Italian football team Q._____. In July 2005, Q. agreed to a transfer of the Respondent to the Appellant in exchange for compensation in the amount of EUR 8 million. In connection with this transfer, the Appellant was also required to make solidarity contributions to third parties in an amount totaling EUR 390'000. In addition, it paid a fee of EUR 200'000 to the players' agent.

On July 19, 2005, the Respondent signed an employment contract with the Appellant for a fixed term from July 1, 2005 to June 30, 2009. In addition to the immediate payment of a signing fee in the amount of EUR 250'000.-- for the agreed four years of service, the contract provided for the payment of annual salaries for the agreed four years of service in the respective amounts of EUR 1.85 million (year 1), EUR 1.9 million (year 2), EUR 1.95 million (year 3) and EUR 2 million (year 4). Furthermore, the Appellant undertook to place at the Respondent's disposal an Audi A4, a furnished apartment, and five round trip flight tickets between Istanbul and Y._____ each year. Finally, the Appellant was granted the unilateral option of extending the employment relationship for an additional year, that is, to include the 2009/2010 playing season.

Subsequently the Parties signed an additional, undated, employment contract confirming the terms of the agreement dated July 19, 2005, and adding further clarifications on certain points. Thus, among other things, the amount available for the furnished apartment to be placed at the Respondent's disposal was limited to USD 3'000.-- ; and it was agreed that the player would be entitled, in addition to his salary, to a performance bonus based on the Appellant's "incentive scheme". Moreover the Respondent expressly undertook to obey the Appellant's rules, to follow its instructions, to take due care of his health, and to take part in the Appellant's official and friendly games, and to attend its training sessions and camps.

On July 22, 2005, the Parties signed a third agreement corresponding to the standard contract of the Turkish Football Federation. They essentially reiterated the terms of the two previous agreements with the exception of the duration of the contract, which was shortened by one month (that is, to May 31, 2009) and of the provision that the salary promised was to be paid without deduction of taxes ("free of taxes of the player") [sic].

A.c. In January 2007, the Respondent suffered an injury to his left knee during a friendly match in Ankara. Inasmuch as, by March 2007, the injury had not yet healed, the Appellant arranged for a medical examination at the R._____hospital in Istanbul. This led to a diagnosis of damage to the cartilage, for which surgery was required. The Respondent nevertheless continued to play until the end of the 2006/2007 season, in which the Appellant won the Turkish championship title.

The Respondent underwent surgery on May 24, 2007. This involved the replacement of the injured cartilage with healthy cartilage using a special transplant procedure ("mosaicplasty)".

During the period of recuperation following surgery, the Respondent and his advisors conducted discussions with other football teams. On July 11, 2007, the FC S._____ confirmed to the Appellant that it was interested in taking over the player in exchange for compensation in the amount of EUR 4 million. Although that the Appellant turned this offer down, the advisors continued to pressure it to agree to a transfer, upon which the Appellant applied to FIFA for sanctions against both the Respondent's advisors and the German football club.

On September 5, 2007, having complained of symptoms exhaustion and shortness of breath, as well as a cough, the Respondent was once again referred to the R._____ hospital. He was diagnosed by a pulmonary specialist as suffering from asthma, for which medication was prescribed.

On October 10, 2007, the Respondent was once again referred to the same hospital due to breathing difficulties.

In October 2007, the Respondent resumed his official competitive activity. In November 2007, he played for his national team Y._____ at a four-nation tournament and participated in his last competitive match for the Appellant on December 1, 2007.

In December 2007, the Respondent was once again admitted to R._____ hospital, as the state of his health had not improved. This time, the doctors diagnosed an acute left femoral thrombosis as well as a pulmonary embolism. The diagnosis was then confirmed by the Italian doctors who were consulted by the Respondent in December 2007 and January 2008 with the Appellant's consent.

On January 12, 2008, a meeting took place in Italy, in which, in addition to the Respondent and various representatives of the Appellant, a doctor from the R._____ Hospital and the doctors consulted by the Respondent also took part. At that meeting, the Respondent underwent further examinations, on the basis of which the Italian doctors diagnosed various venous diseases in the player's left leg, the one that had been operated on, as well as a pulmonary embolism. Even before the meeting ended, differences of opinion arose between the Parties' medical experts as to the diagnosis and the necessary treatment, as well as to the issue of when the player would be able once again to begin training and play in competition.

In view of the Respondent's inability to play, due to injury, he was requested by the Appellant to accept de-registration until the last game of the 2007/2008 season, which was scheduled for May 11, 2008, which would have permitted the Appellant, pursuant to the applicable rules of the Turkish Football Federation, to field another foreign player in the place of the Respondent. On January 14, 2008, the Appellant confirmed to the Respondent that notwithstanding de-registration, he would still receive his salary

and other contractual benefits, and that his employment contract would remain in force. The Respondent refused his consent, as the possible consequences of de-registration were not clear to him.

On January 16, 2008, the Appellant requested the Respondent, who was still in Italy at the time, to rejoin the club in Istanbul by no later than January 19, 2008 in order to continue his medical treatment and rehabilitation under the supervision of their medical staff. This was accompanied by a warning that his case would be referred to FIFA if he failed to follow these instructions. The Respondent did not appear in Istanbul on January 19, 2008, but traveled rather to Y._____, in order to attend the Africa Cup, from January 20, to March [sic] 10, 2008, as a "special advisor".

On January 22, 2008, the Appellant declared its intention to exercise his contractual option to extend the employment relationship for an additional year. In addition, it summoned the Respondent to return to Istanbul without delay.

On January 25, 2008, the Appellant urged the Respondent, without avail, to travel, at the former's expense, to the T._____ Clinic in Arizona (USA), for an examination scheduled for January 29, 2008.

A.d. On January 28, 2008, the Appellant's internal disciplinary committee imposed a fine on the Respondent in the amount of USD 73'500.-- for contravention of various provisions of its internal regulations.

A.e. By writings dated January 31 and February 4, 2008, the Appellant complained to FIFA and requested, among other things, that the Respondent and his advisors be issued a warning and that the Respondent be summoned to return to Istanbul and that sport sanctions be imposed. This was followed by an exchange of various submissions.

On April 21, 2008, the Appellant initiated proceedings with the FIFA Dispute Resolution Chamber and requested that the Respondent be ordered to pay compensation in the amount of EUR 12 million and, in addition, that he be barred from participating in official games for a period of six months.

By decision dated January 9, 2009, the Dispute Resolution Chamber awarded the Appellant compensation in the amount of EUR 2'281'915.- ; the Respondent's counterclaim was rejected.

In November 2009, the Respondent signed a one-year contract with the football club FC Z._____, for a net annual salary of approximately EUR 200'000. To date, however, he has not been fielded in any official games.

B.
On May 25, 2009, the Appellant appealed the FIFA Dispute Resolution Chamber decision of January 9, 2009 before the Court of Arbitration for Sport (CAS), requesting that the decision be partially set aside and that the Respondent be ordered to make payments in the amounts of EUR 12'131'178.-- and EUR 701'190.--, with interest.

Also on May 25, 2009, the Respondent filed an appeal before the CAS against the FIFA Dispute Resolution Chamber decision of January 9, 2009. He requested that the decision be set aside and that it be ruled that he was not liable to the Appellant, inasmuch as he had terminated his employment relationship for just cause or, alternatively, because the amount of the damages owed was zero. In addition, by way of a counterclaim, the Appellant was to be found guilty of breach of contract and ordered to pay damages in an amount to be determined by the Arbitral tribunal.

In an award dated June 7, 2010, the CAS upheld the Respondent's appeal, insofar as it set aside in part the FIFA Dispute Resolution Chamber decision of January 9, 2009, dismissed the Appellant's claim and ruled that the Respondent was not liable for any compensation.

The CAS considered that based on the FIFA Regulations and complementarily applicable Swiss law the Respondent was in breach of contract. With regard to the duration of the contract it held that the Appellant, based on its conduct with regard to salary payments and otherwise, had acknowledged that the employment relationship due to expire at the end of May 2009 had first been maintained until the end of April 2008 and then terminated prematurely at that time. The unilateral extension of the contract asserted by the Appellant was held by the CAS to be invalid. It found that the Respondent, from the beginning of 2008 and at least until the end of the agreed term of the contract was, for health reasons, unable to participate in games without risking serious damage to his health. With regard to the financial damage, the CAS held, on the basis of art. 17 of the FIFA Regulations for the Status and Transfer of Players, 2005 edition (hereinafter, Transfer Regulations), that due to the early termination of the

employment relationship the Appellant had saved of EUR 2'633'020.65, in that it had not been required to pay the Respondent any salary or other contractual benefits from the beginning of May 2008 to the end of May 2009. The compensation to which it was entitled for the early termination of the contract without cause amounted, by contrast, to only EUR 2'445'106.35 for the non-amortized transfer fee plus supplementary damages of EUR 51'172.50 (corresponding to the disciplinary fine imposed in the amount of USD 73'500.--). In consideration of the "specificity of sport", pursuant to art. 17 (1) of the FIFA Transfer Regulations, the Appellant, who had made a savings of EUR 136'741.80 more than it had lost through the early termination of the contract, was deemed not to be entitled to any compensatory damages.

C.
In a Civil law appeal of July 7, 2010, the Appellant submits that the Federal Tribunal should annul the arbitral award of the CAS of June 7, 2010 and refer the matter back to the Arbitral Tribunal for a new decision.

The Respondent requests that the appeal be rejected, insofar as the matter is capable of appeal. The CAS submits that the appeal be rejected. The FIFA has waived active participation in the proceedings.

The records of the arbitration proceedings have been produced. By further submission dated December 7, 2010, the Appellant replied to the Respondent's Answer and to the observations submitted by the CAS.

Reasons

1.
In the field of international arbitration, a Civil law appeal is possible under the requirements of Art. 190-192 PILA[1] (SR 291) (Art. 77 (1) BGG[2]).

1.1 The seat of the arbitral tribunal is in Lausanne in this case. Both the Appellant and the Respondent were domiciled or resided outside Switzerland at the time of the relevant events. As the parties did not exclude in writing the provisions of chapter 12 PILA, they are applicable (Art. 176 (1) and (2) PILA).

1.2 Only those grievances which are set forth exhaustively in Art. 190 (2) PILA are admissible (BGE 134 III 186 at 5 p. 187; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282). According to Art. 77 (3) BGG, the Federal Tribunal reviews only the grievances made in the appeal and reasoned; this corresponds to the duty to present reasoned grievances contained in Art. 106 (2) BGG for the violation of fundamental rights and for that of cantonal and inter-cantonal law (BGE 134 III 186 E. 5, p. 187 with references). Criticism of an appellate nature is not allowed (BGE 119 II 380 at 3b p. 382).

1.3 The Federal Tribunal bases its decision on the factual findings of the arbitral tribunal (Art. 105 (1) BGG). It may not rectify or supplement the factual findings of the arbitral tribunal, even when these are obviously inaccurate or result from a violation of the law within the meaning of Art. 95 BGG (see Art. 77 (2) BGG ruling out the application of Art. 97 and Art. 105 (2) BGG). Yet the Federal Tribunal may review the factual findings of the award under appeal when some admissible grievances within the meaning of art. 190 (2) PILA are brought against the factual findings or exceptionally when new evidence is considered (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733 with references). In order to claim an exception from the Federal Tribunal being bound by the factual findings of the lower court and to have the facts corrected or supplemented on that basis, an appellant must show with reference to the record that the corresponding factual allegations were already made in conformity with the procedural rules in the proceedings in front of the lower court (BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c p. 473; with references).

1.4 The Appellant's legal assertions are preceded by its own thorough presentation of the facts, in which it describes the course of events and the proceedings from its point of view. As to various points, it deviates from the factual findings of the CAS or widens them without alleging any substantiated exceptions to the binding character of the factual findings. It submits, for example, that the Arbitral tribunal wrongly proceeded on the assumption that the Appellant had, in fact, paid an amount of only EUR 200'000.-- to the players' agent in connection with the Respondent's transfer. In its presentation of the facts, moreover, it raises criticisms of an appellate nature regarding the arbitral award, as if the Federal Tribunal were able to adjudicate the dispute again from the beginning. Thus it contrasts its own views with

1. Translator's note : PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

2. Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

the findings of the CAS concerning the date at which the contract was terminated and the calculation of damages. It submits, for example, that the Arbitral tribunal wrongly proceeded on the assumption that the extension of the contract, declared by the Appellant, was invalid. The Arbitral tribunal would also have wrongly held that, from January 2008 until the expiry of his employment contract, the condition of the Respondent's health was such that he could take part in games. The Appellant devotes several pages to a submission as to why the calculation of the damage and the setting of the compensatory damages suffers, in its view, from various errors of fact and law. Its statements in this regard, in which no grievance pursuant to Art. 190 (2) PILA, satisfactorily reasoned, can be found, must therefore be disregarded.

Inadmissible pursuant to Art. 99 (1) BGG is the allegation, first brought forth before the Federal Tribunal, that the Respondent was fielded in several serious games during the 2010 FIFA World Cup. This is as irrelevant to the appeal proceedings before the Federal Tribunal as is the new evidence submitted by the Appellant in this regard.

2.
The Appellant submits that the Arbitral tribunal failed to consider a request in connection with the claims asserted for the restitution of salaries and for the payment of a disciplinary fine (Art. 190 (2) (c) PILA) and infringed in various respects the Appellant's right to be heard (Art. 190 (2) (d) PILA).

2.1

2.1.1 The Appellant argues that in the proceedings before the Arbitral tribunal it had asserted "three completely different claims"; specifically, for compensatory damages for premature termination of the contract without cause, pursuant to Art. 17 of the Transfer Regulations, in the amount of EUR 12'131'178.--; for the repayment of salaries paid without justification for the period from January 19 to April 30, 2008, in the amount of EUR 650'000.--; and for the disciplinary fine pronounced in January 2008, in the amount of EUR 51'190.10. However the Arbitral tribunal, it is argued, did not deal at all with the repayment of the EUR 650'000.--, while it dealt with the payment of the disciplinary fine of EUR 51'190.10 "in a completely wrong overall context".

2.1.2 The Arbitral tribunal proceeded on the assumption that, from the beginning of 2008 and at least until the end of the agreed term of the contract, the Respondent was, for health reasons, unable to work, that is, play, without serious risk to his health. With regard to his salary for the months of January through April 2008, it determined that the Appellant had paid the Respondent his salary, without reservation, throughout this period. In spite of the fact that it had, on April 21, 2008, formally initiated proceedings before the FIFA Dispute Resolution Chamber, the Respondent had still been paid his salary for the month of April, on April 25, 2008. Based on these circumstances, the CAS proceeded on the assumption that the Appellant had acknowledged that the working relation had been maintained until the end of April 2008, until it was prematurely terminated by the Respondent.

Against this background, there is no support for the Appellant's argument that the CAS had itself confirmed in the Award, at 222, that it had not judged the claim for repayment asserted by the Appellant. Rather, it may be assumed that the Arbitral tribunal judged, at the least, the essence of the claim, based on unjustified enrichment, for restitution of the salaries paid from January through April 2008, in its relevant reasons, in that it took as the legal ground for these payments precisely one that had been acknowledged by the Appellant. In deciding that the Respondent did not owe the Respondent any compensation (award no. 1) and that all other claims were dismissed (award no. 4), the Arbitral tribunal also dismissed the unjustified enrichment claim in the amount of EUR 650'000.-- for allegedly mistakenly made salary payments during the period from January 19, 2008 to April 30, 2008. The fact that it did not refer expressly to the unjustified enrichment claim is not, under these circumstances, an infringement of the Respondent's right to be heard. The principle of the right to be heard within the meaning of Art. 190 (2) (d) PILA does not encompass pursuant to the case law of the Federal Tribunal, the right to a reasoned award (BGE 134 III 186 E. 6, p. 187 with references).

The Arbitral tribunal thus neither failed to pass judgment on a request submitted by the Appellant (Art.190 (2) (c) PILA) nor did it infringe the principle of the right to be heard (Article 190 (2) (d) PILA). In asserting in its further arguments, with reference to Art. 62ff., Art. 82 and Art. 324a OR, that the salary payments were made mistakenly, for which

reason it is entitled to restitution, based either on the law of unjustified enrichment or on the law of contract, the Appellant criticizes the merits of the award. Review on the merits of an international arbitral award by the Federal Tribunal is limited to the question of whether the arbitral award is inconsistent with public policy (BGE 121 III 331 at 3a p. 333). The Respondent makes no assertion that this is the case.

2.2

2.2.1 With regard to the claim asserted in the amount of EUR 51'172.50, the Arbitral tribunal found that the Appellant, in consideration of the disciplinary fine in the amount of USD 73'500 (equivalent to EUR 51'172.50), which it had imposed on the Respondent on January 28, 2008, for breach of various provisions of its internal regulations, was, in principle, entitled to compensatory damages in that amount. However, through the termination of the contract, the Appellant made a savings of EUR 2'633'020.65, an amount superior by EUR 136'741.80 to the compensation due to it, which comprises the non-amortized transfer fee (EUR 2'445'1'6.35) and the additional compensatory damages (EUR 51'172.50). In the Arbitral tribunal view, the principle of the "specificity of sport", pursuant to Art. 17 (1) of the FIFA Transfer Regulations, demands, given the concrete circumstances – in particular the irreversible harm to the Respondent's health and the consequences thereof for his athletic career – that the Appellant not be awarded compensatory damages, where it has already been established that the Appellant actually saved money as a result of the breach of contract.

2.2.2 The Appellant fails to demonstrate an infringement of its right to be heard when it submits in that regard that the Arbitral tribunal, while not omitting entirely to mention the claim for payment of the disciplinary fine as asserted by the Appellant, deals with it "in a completely wrong overall context". It similarly fails to demonstrate a grievance within by Art. 190 (2) PILA when it accuses the CAS of taking a "blatantly false" and "absurd" position on the law and maintains that the CAS failed to understand that this claim had "absolutely nothing to do with the 2005 FIFA Transfer Regulations". Rather, it thereby criticizes in an inadmissible manner the legal reasoning of the award.

The Appellant also wrongly submits that Arbitral tribunal failed to take cognizance of its central arguments and, more precisely, of the fact that it had asserted its claim for payment of the contractual penalty independently and separately from the compensatory damage claim based on Art. 17 of the FIFA Transfer Regulations. In fact, the Arbitral tribunal held that the claim for USD 73'500.-- (equivalent to EUR 51'172.50) was indeed justified, but offset it - together with the compensation for the non-amortized transfer fee - against the even greater amount that was saved, in keeping with the "specificity of sport" principle pursuant to Art. 17 (1) of the FIFA Transfer Regulations. This last-named provision was at the center of the proceedings. Both Parties, each represented in the arbitration proceedings by at least two lawyers, must have been aware of the large measure of discretion vested in the Arbitral tribunal, arising out of the indefinite legal terms employed, for setting the amount of compensation, particularly in view of the fact that the provision called for taking into consideration the "specificity of sport" and "any other objective criteria". The inclusion of the contractual penalty in the Arbitral tribunal's considerations on this issue did not, therefore, occur in such a way as to require a hearing with regard to this legal assessment according to federal case law. Contrary to the view expressed in the appeal brief the Appellant could reasonably be expected to have anticipated the relevance of Art. 17 of the FIFA Transfer Regulations to its claim concerning the contractual penalty (cf. BGE III 35 at 5 p. 39f; 126 I 19 at 2c/aa p. 22; 124 I 49 at 3c p. 52).

Whether the various items were correctly set off against each other is an issue as to the application of the law by the Arbitral tribunal, a review on the merits of which - unless in the presence of a breach of public policy (Art. 190 (2) (e) PILA), which has here rightly not been asserted - is beyond the purview of the Federal Tribunal.

3.

The Appellant submits that its right to be heard in adversarial proceedings was violated by the Arbitral tribunal by finding that, from the beginning of 2008 onwards and at least until the agreed expiration of his contract (i.e., until the end of May 2009), the Respondent had not been able to participate in games without danger to his health.

3.1 Pursuant to Art. 182 (1) and (2) PILA, the parties and, if necessary, the arbitral tribunal, may determine the procedure to be followed in the arbitration. In order to assure a minimum level of due process, however, Art. 182 (3) of the PILA provides that not subject to disposition by the parties are the parties' rights to equal treatment and to be heard in adversarial proceedings. Art. 190 (2) (d) PILA allows for appeal only on grounds of breach of the mandatory procedural rules set forth in Art. 182 (3) PILA. The arbitral tribunal must therefore respect, in particular, the parties' right to be heard. With the exception of the requirement for reasons, this corresponds to the constitutionally protected right in art. 29 (2) BV (BGE 130 III 35 at 5 p. 37f.; 128 III 234 at 4b p. 243; 127 III 576 at 2c p. 578f.). Case law deduces therefrom, in particular, the right of the parties to express themselves with regard to all facts relevant to the judgment, to present their legal stand, to prove their essential factual allegations by admissible evidence produced in proper form and in a timely manner, to participate in the proceedings and to access the record (BGE 130 III 35 at 5 p. 38; 127 III 576 at 2c, with references).

3.2 The Appellant misconstrues the scope of the right to be heard in adversarial proceedings in submitting, with reference to various party submissions in the course of the arbitral proceedings, that the Arbitral tribunal disregarded procedural rights in Art. 190 (2) (d) PILA by not basing its award on an allegation of fact that allegedly remained uncontested, but relying instead on facts of a different nature. This is an issue that relates primarily to the procedural principle applicable to the establishment of the facts, but not, however, to the Appellant's right to present its standpoint in the proceedings. It then also fails to demonstrate that it was not given the possibility in the arbitration proceedings to present its position with regard to the submissions of the Respondent. Its submission to the effect that, in its filing dated December 10, 2009, in answer to the appeal before the CAS, it had demonstrated that the Respondent had been fielded at least three times for the national team of Y._____ during the 2008/2009 season, in qualification games for the 2010 FIFA World Cup, which allegedly remained uncontested by the Respondent in the arbitral proceedings, cannot base an admissible grievance pursuant to Art. 109 (2) (d) PILA.

Aside therefrom, the Appellant incorrectly presents the findings of the award when it argues that, in view of the Parties' allegations of fact, the Arbitral tribunal had acted "completely unexpectedly" in proceeding on the assumption that it had not been possible for the Respondent to play football competitively in the period prior to the expiry of the employment contract (i.e., prior to May 31, 2009). Rather, the Arbitral tribunal considered as proven the fact that this had not been possible for the Respondent "without exposing himself to major health complications". Moreover, the presentation of the Parties' submissions in the award (at 89, p. 21) shows - as the Respondent rightly points out - that the Arbitral tribunal very well took note of the Appellant's contentions regarding the Respondent's participation in World Cup qualification games. The Appellant's argument that it did not receive a hearing for its submission in the arbitral proceedings, is unfounded.

In submitting that the Respondent's participation in the qualification matches referred to leads necessarily to the conclusion that - contrary to the award - the player was able to play and work up to the end of the contract's term and that the Appellant is thus entitled to a higher amount of compensation, the Appellant merely states its position in an appellatory manner and raises doubts as to whether the award is correct on its merits. The right to be heard, however, does not comprise the right to a ruling that is correct on its merits (BGE 127 III 576 at 2b p. 577f.). The same applies to the Appellant's arguments regarding the duration of the period over which the transfer fee would have been, but could no longer be, amortized, which consist solely of inadmissible criticism of the Arbitral tribunal's construction of the law.

4.

Finally, the Appellant claims that its right to be heard was also violated in connection with the commission owed to the players' agent for the transfer of the Respondent.

4.1 In calculating the transfer costs that could not be amortized as a result of the early termination of the contract, the Arbitral tribunal also took into account, in addition to the transfer fee in the amount of EUR 8 million that was paid to the preceding football club of the Respondent, to the the solidarity contributions in the amount of EUR 390'000.--, and to the signing fee in the amount of EUR 250'000.--, the commissions paid to a players' agent that were asserted by the Appellant. It considered that while the Appellant, basing itself on a contractual document dated

July 19, 2005, had asserted a commission in the amount of EUR 400'000.--, it had succeeded in proving only an actual payment in the amount of EUR 200'000.--, while the alleged receipt for the payment of the remainder evidenced no indication of any connection with the services of the players' agent in question. The CAS accordingly took into account the commission payment in the amount of EUR 200'000.--, proportionately to the remaining 13 months of the total 47-month duration of the contract.

4.2 The Appellant errs in submitting that the CAS thereby based its award on legal arguments not made by the Parties, and whose relevance they could not be expected to anticipate. It misconstrues the Arbitral tribunal's reasoning when it submits, in this connection, that not even a layman could imagine that a debt still unpaid was no debt at all, for which reason it ought to have been heard specially concerning this "purely and simply untenable" legal conception. The CAS examined the contractual documents and payment receipts produced by the Appellant as means of proof in support of its claim of having paid a total amount of EUR 400'000.-- in two installments, and found that the players' agent had been owed only EUR 200'000. That this was the amount taken into consideration is founded, contrary to the Appellant's view, not on a legal conception that it could not have anticipated, but on a deduction logically following from the Arbitral tribunal's assessment of the evidence. There can be no question here of an unanticipated application of the law, which would have called for a special hearing in advance (cf. BGE 130 III 35 at 5 p. 39; 126 I 19 at 2c/aa p. 22; 124 I 49 at 3c p. 52). As the Appellant itself admits, moreover, in view of the Arbitral tribunal's calculations of the savings made, and of the compensation claim (appealed to no avail before the Federal Tribunal as being incorrect), the surplus amount of EUR 200'000.--, which has been asserted (proportionately to the remaining term of the contract), would in any case have no bearing on the decision.

5.
The appeal is unfounded and must be rejected to the extent that the matter is capable of appeal. In view of the outcome of the proceedings the Respondent must pay the costs and compensate the other party (art. 66 (1) and art. 68 (2) BGG).

Therefore, the Federal Tribunal pronounces:

1.
The appeal is rejected, to the extent that the matter is capable of appeal.

2.
The judicial costs set at CHF 40'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent compensation of CHF 50'000 for the Federal judicial proceedings.

4.
This judgment shall be notified in writing to the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, 17 February 2011

In the name of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:	The Clerk:
Klett	Carruzzo

4A_326/2010**
Judgment of 23 February 2011
First Civil Law Court

Composition	Federal Judge Klett, President Federal Judge Kolly Federal Judge Kiss Clerk of the Court: Mr Leemann
Parties	X._____, Appellant, represented by Mr. Michael Bader and Mrs Elena Valli, **versus** Fédération internationale de Football Association (FIFA), Respondent, Represented by Mr. Christian Jenny.

*** From Charles Poncet's translation, courtesy of the law firm ZPG/Geneva (www.praetor.ch).**
*** Translator's note : Quote as A.X._____ v., FIFA 4A_326/2010. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.**

Facts

A.

A.a X._____ (The Appellant) is a legal person incorporated in Y [name of the country omitted].

The Fédération Internationale de Football Association (FIFA; Respondent) is a nonprofit corporation under Swiss law with headquarters in Zurich.

A.b In October 2006 the Respondent suspended the membership of the Appellant for interference by the authorities in football matters among other reasons. On March 9, 2007, the Respondent lifted the aforesaid suspension provisionally and under certain conditions. A few days later it issued a so called "Road Map"[1] with a view to normalizing the situation as to the game of the Football in [name of country omitted].

Differences of opinion rose within the Appellant in the meantime between two groups, both claiming to be legally entitled to act for the Appellant. Both groups eventually conducted parallel general meetings.

Among others a general meeting of the Appellant took place on November 15, 2008 in the presence of representatives of the respondent. The creation of Q._____ Ltd. and the dissolution of the Appellant were decided. Subsequently the Respondent and the Government of Kenya stated that henceforth they would recognize Q._____ as sole national Football Federation of Z._____ [name of country omitted].

B.

On March 18, 2009 the Appellant initiated arbitration proceedings in front of the Court of Arbitration for Sport against the Respondent. It submitted essentially that the Appellant should be recognized as legal representative of the game of football in [name of country omitted]. Furthermore the Respondent should be enjoined from any further collaboration with Q._____ and ordered to disclose certain financial transactions.

1. Translator's note: In English in the original text.

A Hearing took place in Lausanne on January 26, 2010.

In an award of April 27, 2010 the CAS rejected the Appellant's request. The CAS based its decision in particular on the fact that the decisions of the general meeting of the Appellant of November 15, 2008 and the subsequent acts and decisions of Q._____and of the Respondent had never been challenged in Court.

C.
In a Civil law appeal, the Appellant submitted that the Federal Tribunal should annul the CAS arbitral award of April 27, 2007 and send the matter back to the CAS for a new decision.

The Respondent submits that the appeal should be rejected to the extent that the matter is capable of appeal. The CAS submits that the appeal should be rejected.

D.
On July 2010 the Federal Tribunal upheld the Respondent's request for security for cost. Subsequently, the Appellant deposited the amount of CHF 5000 with the Federal Tribunal as requested for security for costs.

Reasons

1.
In the field of international arbitration a Civil law appeal is possible under the requirements of Art. 190-192 PILA[2] (SR 291) (Art. 77 (1) (a) BGG[3]).

1.1 The seat of the arbitral tribunal is in Lausanne in this case. At least one of the parties, here the Appellant, did not have its seat in Switzerland at the relevant point in time. Since the parties did not rule out the provisions of chapter 12 PILA in writing they are applicable (Art. 176 (1) and (2) PILA).

1.2 Only the grievances limitatively listed in Art. 190 (2) PILA are admissible (BGE 134 III 186 E. 5 S. 187; 128 III 50 E. 1a S. 53; 127III 279 E. 1a S. 282). According to Art. 77 (3) BGG, the Federal Tribunal reviews only the grievances which are brought forward and reasoned in the appeal; this corresponds to the duty to present reasons contained in Art. 106 (2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186 E. 5 S. 187 with references). Criticism of an appellate nature is not allowed (BGE 119 II 380 E. 3b S. 382).

1.3 The Federal Tribunal bases its judgment on the factual findings of the arbitral tribunal (Art. 105 (1) BGG). It may neither rectify nor supplement the factual findings of the arbitral tribunal even when they are blatantly wrong or based on a violation of the law within the meaning of Art. 95 BGG (see. Art. 77 (2) BGG ruling out the applicability of Art. 97 BGG as well as Art. 105 (2) BGG). However the Federal Tribunal may review the factual findings of the award under appeal when some admissible arguments within the meaning of Art. 190 (2) PILA are brought against the factual findings or exceptionally when new evidence is taken into account (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733; all with references). Whoever invokes an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and wants to rectify or supplement them on that basis must prove with reference to the record that the corresponding allegations of facts were already made in the arbitral proceedings in accordance with procedural rules (see BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c p. 473; with references). The Appellant precedes its legal arguments with a statement of facts of several pages in which it presents the background of the dispute and of the proceedings according to its own views. In doing so, it significantly departs from the factual findings of the Arbitral Tribunal or broadens them without showing any substantive exceptions to the binding character of the factual findings. Its submissions are accordingly not to be reviewed.

2.
The Appellant argues a violation of the right to be heard and of the rule of equal treatment of the parties (Art. 190 (2) (d) PILA).

2.1
2.1.1 It argues in this respect that it showed thoroughly in the arbitral proceedings that and why the general meeting of November 15, 2008 had not been regularly called and could not adopt any legally valid decisions. It then mentions various situations which in its view do not meet the requirements of Art. 60 of the Respondent's by-laws.

2.1.2 The argument is unfounded already because

2. Translator's note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

3. Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

the Appellant does not show with reference to the record where it would have raised in the arbitration proceedings the allegations contained in the appeal, which would have been overlooked. Be this as it may, the CAS addressed the Appellant's argument according to which Q._____ was not the legal successor of the Appellant. It took in consideration in this respect that the general meeting of November 15, 2008 could not have any legal validity according to the Appellant as the legal requirement concerning the transmission of membership rights had not been complied with. Yet he CAS did not consider this decisive, particularly because according to the factual findings in the arbitration proceedings, it remained unchallenged that the decisions taken during the disputed general meeting of November 15, 2008 had not been challenged judicially by the Appellant or one of its members. The Appellant's argument that its argument as to the allegedly defective convocation and decision making process during the general meeting would have been overlooked by the Arbitral Tribunal would therefore be unfounded anyway.

2.2 The Appellant further argues that the Arbitral Tribunal did indeed admit a report of the Reconciliation Committee and a letter from the Minister for Youth and Sport into the arbitral proceedings but disregarded them and failed to mention them in a single word of the award under appeal. In this respect also it merely quotes from the aforesaid exhibits without showing with reference to the record which of its factual allegations made in the arbitral proceedings in accordance with procedural rules should have been proved thereby. A violation of the right to be heard is therefore not shown.

2.3 The Appellant argues that the Arbitral Tribunal did not treat the parties equally as would be clear from the choice of words. Thus at paragraph 21 of the award the Arbitral Tribunal would have held with regard to the meeting of November 15, 2008 "in this meeting the formation of Q._____ was apparently agreed[4]" whilst with regard to the meeting of December 20, 2008 it would have stated at paragraph 22 "at such meeting the members of the Executive Committee were allegedly elected[5]". By simply comparing the two sentences quoted and arguing that the CAS used the word "apparently[6]" and elsewhere "allegedly[7]" the Appellant shows no violation of the principle of equal treatment of the parties, particularly because the Arbitral Tribunal did not let the matter rest with these factual findings but explained in the reasons of the award why it considered that the decisions taken at the meeting of November 15, 2008 were legally valid. A bias of the Arbitral Tribunal would not be apparent there either. Furthermore, the Appellant rightly does not argue that there would be a ground for appeal according to Art. 190 (2) (a) PILA.

3.
The Appellant argues that the Arbitral Tribunal would have violated public policy (Art. 190 (2) (e) PILA).

3.1 The substantive review of an international arbitral award by the Federal Tribunal is limited to the issue as to whether the arbitral award is consistent with public policy or not (BGE 121 III 331 at p. 333). The substantive adjudication of a claim violates public policy when it disregards some fundamental legal principles and is no longer consistent with the important and widely recognized values which should be the basis of any legal order according to prevailing opinions in Switzerland. The observance of contracts (pacta sunt servanda), the prohibition of the abuse of rights, the principle of good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of incapables belong to such principles. An annulment of the arbitral award is possible only when its result and not merely its reasons contradict public policy (BGE 132 III 389 at 2.2 p. 392 ff. with references).

3.2 The Appellant disregards the concept of public policy when it criticizes in front of the Federal Tribunal the reasons adopted by the Arbitral Tribunal as to applicable law and argues that the law of [name of the country omitted] was applicable to certain issues. Neither does it show a violation of public policy when it argues in an appellatory manner that irrespective of the applicable law, the convocation of a general meeting by unauthorized people and the violation of mandatory requirements for the validity of the incorporation of a company could not lead to the foundation of a company or that "a transmission of rights did not legally take place". The argument that the Arbitral Tribunal would have followed the Respondent without

4. Translator's note: In English in the original text.

5. Translator's note: In English in the original text.

6. Translator's note: In English in the original text.

7. Translator's note: In English in the original text.

any further consideration of the mandatory applicable Kenyan law and would thereby have "helped the Respondent with the other violation of its own by-laws" does not show any disregard of one of the fundamental principles belonging to public policy.

4.
The appeal is unfounded and must be rejected to the extent that the matter is capable of appeal. In such an outcome of the proceedings the Appellant must pay the costs and compensate the Respondent (Art. 66 (1) and Art. 68 (2) BGG).

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected to the extent that the matter is capable of appeal.

2.
The judicial costs set at CHF 4000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent CHF 5000 for the federal judicial proceedings. That amount shall be taken from the deposit made with the Federal Tribunal.

4.
This judgment shall be notified in writing to the parties and to the Court of Arbitration of Sport (CAS).

Lausanne, 23 February 2011

In the name of the First Civil law Court of the Swiss Federal Tribunal.

The Presiding Judge:	The Clerk:
Klett	Leeman

Publications récentes relatives au TAS / Recent publications related to CAS

- Guillaumé J., "L'automie de la nationalité sportive", Journal du Droit International, Avril-mai-juin 2011, 2/2011, p. 313 ss

- Crespo Perez J. D. (dir.), Tribunal Arbitral, Revista Aranzadi de Derecho de Deporte y Entretenimiento, Año 2011-2, Número 32 p.435 ss

- Crespo Perez J. D. (dir.), Tribunal Arbitral, Revista Aranzadi de Derecho de Deporte y Entretenimiento, Año 2011-1, Número 31 p.487 ss

- Dubey J.P., "Panorama 2010 des sentences du Tribunal Arbitral du Sport", Jurisport, 110/2011, p. 24 ss