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Message du Président du CIAS

A la fin de l'année 2010, plusieurs changements importants se sont produits au Conseil International de l'Arbitrage en matière de Sport (CIAS): deux nouveaux membres du CIAS, Me Göran Petersson (Suède) et M. Patrick Baumann (Suisse), ont été désignés; de plus un nouveau Bureau du CIAS a été nommé, comité que j'ai le grand honneur de présider et qui se réunira plus souvent afin d'agir et de réagir rapidement en dehors des réunions habituelles du CIAS.

La composition du nouveau Bureau du CIAS est la suivante:

Me John Coates (Australie), Président; Me Gunnar Werner (Suède), Premier Vice-Président; Me Michael Lenard (Etats-Unis), Deuxième Vice-Président; Dr Nabil Elaraby (Egypte), Président de la Chambre d'arbitrage ordinaire; Dr Thomas Bach (Allemagne), Président de la Chambre arbitrale d'appel.

Le Bureau du CIAS, en collaboration avec le Secrétaire général du TAS, Me Matthieu Reeb, contrôlera l'évolution du TAS et entreprendra toutes les réformes appropriées pour continuer à améliorer l'efficacité des services du TAS.

Parmi les mesures potentielles qui seront examinées dans un futur proche, le CIAS évaluera la tenue d'audiences du TAS par vidéo conférence. Bien qu'un tel système ne soit pas applicable en toutes circonstances, il peut favoriser des économies de temps et d'argent pour les parties, ainsi que pour le TAS. Le dépôt de mémoires écrits par courrier électronique sera également évalué mais un tel système devra être examiné avec soin étant donné qu'il devrait être accessible partout dans le monde et devrait garantir une sécurité totale lors du dépôt de documents.

Le CIAS offrira également de nouvelles possibilités aux arbitres et médiateurs du TAS de poursuivre leur formation afin de garantir l'harmonisation des pratiques et de la jurisprudence du TAS. Parmi les mesures prises, un outil sera également utile à tous les utilisateurs du TAS: le développement et la mise à jour de la base de données sur le site internet du TAS. La publication régulière du Bulletin TAS sera également un important moyen pour diffuser les informations du TAS. Le CIAS veillera également à ce que les arbitres et médiateurs du TAS puissent consacrer le temps nécessaire pour se concentrer sur leurs missions et les remplir conformément au Code de l'arbitrage en matière de sport.

Le CIAS continuera à suivre avec attention les décisions rendues par le Tribunal fédéral suisse, qui est la seule instance capable d'annuler des décisions du TAS. Dans la présente édition du Bulletin TAS, vous constaterez que le Tribunal fédéral suisse a rendu des décisions très importantes, en particulier au sujet du statut et de l'indépendance des arbitres du TAS et en ce qui concerne le pouvoir d'examen des formations du TAS en matière d'appel (Article R57 du Code; appel *de novo*). Enfin, le Tribunal fédéral suisse a également rappelé aux arbitres du TAS qu'il y avait certaines conditions et limites à la compétence du TAS qui doivent être strictement observées.

Je vous souhaite une agréable lecture de cette nouvelle édition du Bulletin TAS.

John Coates

Message from the ICAS President

At the end of 2010, some significant changes occurred at the International Council of Arbitration for Sport (ICAS): two new ICAS members, Mr Göran Petersson (Sweden) and Mr Patrick Baumann (Switzerland), have been selected; and a new ICAS Board has been appointed, which I have the great honour to chair and which will meet more frequently in order to act and react promptly outside the regular ICAS meetings.

The composition of the new ICAS Board is the following:

Mr John Coates (Australia), President; Mr Gunnar Werner (Sweden), Senior Vice-president; Mr Michael Lenard (United States), 2nd Vice-president; Dr Nabil Elaraby (Egypt), President of the Ordinary Arbitration Division; Dr Thomas Bach (Germany), President of the Appeals Arbitration Division.

The ICAS Board, together with the CAS Secretary General, Mr Matthieu Reeb, will monitor the evolution of the CAS and manage all appropriate reforms to continue to improve the efficiency of the CAS services.

Among the possible measures which will be examined in the near future, the ICAS will consider the conduct of CAS hearings by video conference. Although such system may not be applicable in all circumstances, it can help saving time and costs for the parties and for the CAS. The filing of written submissions by electronic mail will be also contemplated but such measure will have to be considered carefully as it should be easily accessible everywhere in the world and should guarantee full security in the filing of documents.

The ICAS will also offer more opportunities to the CAS arbitrators and mediators to pursue their education in order to guarantee the harmonization of the CAS practices and case law. Among the measures taken, one tool will be also useful to all CAS users: the development and update of the database on the CAS website. The regular publication of the CAS Bulletin will be also an important mean to share the CAS knowledge. The ICAS will also make sure that the CAS arbitrators and mediators can dedicate the time necessary to focus on and to perform their missions in compliance with the Code of Sports-related Arbitration.

The ICAS will continue to carefully monitor the decisions issued by the Swiss Federal Tribunal, which is the only authority able to annul CAS decisions. In this edition of the CAS Bulletin, you will see that the Swiss Federal Tribunal has rendered very important decisions, in particular with respect to the status and independence of the CAS arbitrators and to the scope of review of CAS Panels in appeals (Article R57 of the Code; ruling *de novo*). Lastly, the Swiss Federal Tribunal has also reminded the CAS arbitrators that there were some conditions and limitations to the CAS jurisdiction, which should be strictly observed.

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

John Coates

The jurisprudence of the CAS in football matters (except Art. 17 RSTP)

Documented excerpt of the speech of 18 September at the 3rd CAS/SBA Conference in Lausanne*

Dr Jean-Philippe Dubey, Counsel to the CAS

*** The present paper is an updated version of a speech that was originally delivered at the 3rd Court of Arbitration for Sport (CAS)/Swiss Bar Association (SBA) Conference on 18 September 2010 in Lausanne. The opinions expressed are those of the author and are not binding on the CAS as an institution.**

The new Statutes recognising the jurisdiction of CAS to hear appeals against decisions taken by the Fédération Internationale de Football Association (FIFA) came into force on 1 January 2004. Since then, CAS has registered more than a thousand procedures regarding decisions issued by the football authorities, be them FIFA (for the most part), the Union des Associations Européennes de Football (UEFA) or national associations.

For the period between March 2008 and September 2010 alone (the period of investigation between the second and third CAS/SFA Seminars), the football cases filed with CAS amounted to more than 400. Out of the pending cases and of the procedures that were closed by termination order or consent award, a final award or an award on jurisdiction was rendered in about 130 cases.

Obviously, the purpose of this article is not to present all of these cases but only a few of them according to the following themes:

- status of player,
- training compensation, and
- just cause for breach or unilateral termination of the employment contract.

I. Status of player

In the general sense of the word, the status of the player regards his/her ability to participate in organised competition, in other words his/her eligibility[1]. The questions related to it are therefore numerous. Among them, the status of the player as either amateur or professional comes up regularly (1.); this question is of particular interest when the protection of minors is at stake (2.). The disciplinary sanctions resulting in the ineligibility of the player to

1. See Dubey J.-P., Nationalité sportive, une notion autonome?, in Oswald D. (ed.), La nationalité dans le sport, Enjeux et problèmes, Actes du Congrès des 10 et 11 novembre 2005, Neuchâtel 2006, p. 31 s.

participate in a competition must also be considered in this context (3.).

A. Amateur or professional?

In Article 2 of the Regulations on the Status and Transfer of Players (RSTP, 2010 version), paragraph 1 sets out the principle (1.1) and paragraph 2 the criteria (1.2). In this context, the fate of conflicting national regulations and laws needs to be addressed (1.3)[2].

1. In general

According to Article 2 paragraph 1 RSTP, *"[p]layers participating in organised football are either amateurs or professionals"*. CAS panels have repeatedly stated that this unequivocal provision leaves no room for a third, hybrid, status to which might belong players undertaking training dedicated to the practice of football but who are at the same time students with the goal of becoming professional football players, even if such players would not ordinarily (i.e. in common professional parlance) be called either amateur or non-amateur[3].

2. Conditions

Paragraph 2 of Article 2 RSTP sets out the criteria according to which a player is to be considered a professional: *"[a] professional is a player who has a written contract with a club and is paid more for his footballing activity than the expenses he effectively incurs"*. So there are two criteria for the recognition of a professional status: 1) the player must have a written contract, and 2) the player must earn more than the expenses he effectively incurs for his footballing activity. As recognised by numerous CAS panels, these criteria are cumulative[4].

3. Conflicting national regulations, respectively laws

There is no room for conflicting national regulations when it comes to defining the status of the player. As stated in the award TAS 2009/A/1895, of 6 May 2010, the status of the player as a "professional" is exclusively defined in the RSTP without any reference to national regulations. This primacy exists not only for international transfers according to Article 1 paragraph 1 RSTP which states that *"[t]hese regulations lay down global and binding rules concerning the status of players, their eligibility to participate in organised football, and their transfer between clubs belonging to different associations"*, but also for national transfers since Article 1 paragraph 3 lit. a RSTP provides that Article 2 RSTP is binding at national level and must be included without modification in the national association's regulations[5]. As FIFA members have an obligation to "*comply fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time*" (Art. 13 FIFA Statutes), the Regulations on the Status and Transfer of Players prevail over conflicting provisions of the national regulations.

When it comes to conflicting national laws, a distinction must be made between national and international transfers. In the award CAS 2009/A/1781, of 12 October 2009, the Sole Arbitrator emphasised that national Brazilian law (the "Pele Law") undoubtedly governed internal transfers within Brazil, but that in case of a dispute with an international element[6], national laws and internal regulations were not applicable as only the RSTP applied. Moreover, in case of inconsistency between a Brazilian provision and a FIFA provision, the FIFA provision was to prevail.

B. Status of minor players

The status of the player was also at stake with regard to the protection of minor players according to Article 19 RSTP.

In the case CAS 2008/A/1485, of 6 March 2009, bringing a Danish club into conflict with FIFA about minor players who were transferred in accordance with a "cooperation agreement" passed with a Nigerian club[7], the Panel was called to assess the personal scope of Article 19 RSTP. The Danish club submitted that this provision applied to professional

2. The question of the amateur or professional status of the player is dealt with in detail in the next article of this Bulletin. For this reason, only general points will be mentioned here. For more information, see Mavromati D., Status of the Player and Training Compensation, this CAS Bulletin, p. 21.

3. CAS 2006/A/1177, of 28 May 2007, para. 7.4.3; CAS 2009/A/1781, of 12 October 2009, para. 8.13; CAS 2008/A/1739, of 30 March 2010, para. 92.

4. See e.g. CAS 2008/A/1739, of 30 March 2010, para. 104; TAS 2009/A/1895, of 6 May 2010, para. 29; CAS 2010/A/2069, of 16 August 2010, para. 106. For more details, see Mavromati, *op. cit.*, p. 21.

5. According to the FIFA Commentary on the Regulations for the Status and Transfer of Players (the "FIFA Commentary"), *"[a]ssociations are responsible for regulating domestic transfers, i.e. transfers between clubs affiliated to the same member association"*, but *"[t]he autonomy of the associations is, however, limited by the basic principles of the Regulations that have to be observed at all times and in particular by those provisions that are in particular binding at national level and have to be included without modification in the association's regulations"* (no 2 para. 1 and 2 *ad* Art. 1 RSTP).

6. *In casu*, a Brazilian player was transferred from a Brazilian club to a Czech club.

7. According to this "cooperation agreement", the Danish club had a purchase option on the Nigerian club's biggest talents, including players below the age of 18 who were enrolled in the Danish club's football academy. The Danish Football Association registered the players as amateurs in accordance with its definition of amateur players which allows a player to receive a maximum total amount of EUR 3,219.00 per calendar year without losing his amateur status. The players were granted a residence permit by the Danish Immigration Service, allowing a short-term stay, as students. The permits granted to the players did not include the right to work. Upon intervention of the World Players' Union (FIFPro), the Players Status Committee decided to issue the Danish club and the Danish Football Association with a "strong warning" for the infringement of Art. 19 para. 1 RSTP.

players only. This opinion was supported by the wording of Article 19 paragraph 2 lit. b (ii) RSTP that referred to the situation in which the player was to *"cease playing professional football"*.

The Panel did not follow this submission. It considered that a literal interpretation of the provision did not indicate that the application of the provision would be limited to professional players. The title of the chapter V of the RSTP, under which Article 19 RSTP had been set, referred to *"International Transfers involving Minors"*. The term *"Transfer"* was to be linked with the notion of *"Registration"*, which applies to both amateur and professional players (Art. 5 para. 1 RSTP). Furthermore, Article 19 RSTP was entitled *"Protection of Minors"* and paragraph 1 referred to *"Players"* without any specification as to the status of these players. It was thus clear to the Panel that the provision had been drafted to apply to minor players in general, irrespective of whether they were professional or amateur according to the RSTP. Any other construction would have been contrary to the clearly intended objective and spirit of the regulation, which was to protect all minor players, amateur included, from the risk of abuse and ill treatment.

In view of the finding that the protection provided by Article 19 RSTP applied equally to amateur and professional minor players, the Panel also found that there was no need to determine whether the players registered with a national association were to be considered as amateur or professional according to Article 2 RSTP. Finally, the Panel noted that the status of *"Professional"* or *"Amateur"* as defined by the RSTP was not to be confused with any other status, not specific to the RSTP or to the activity of playing football, such as the status of *"Worker"* or *"Student"*.

C. Disciplinary sanctions against the player

Except for doping cases (3.1), there are only few cases of disciplinary sanctions against players for wrongful behaviour on the field of play (3.2). Among possible explanations, one is probably that CAS does not have jurisdiction for suspension below two games or one month for UEFA (Art. 63 para. 1 lit.b UEFA Statutes), respectively four games or three months for FIFA (Art. 63 para. 3 lit. b FIFA Statutes).

1. Disciplinary sanctions linked to the infringement of doping regulations

In the case CAS 2009/A/1918, of 15 December 2009, the Panel noted that the anti-doping regulations of FIFA, and of the national association at stake, now corresponded to the rules contained in the World Anti-Doping Code (WADC). As a result, the understanding and interpretation of the FIFA rules could be informed by the text and the interpretative notes included in the WADC.

In this vein, the principles according to which possible fault or negligence by the player is to be taken into consideration are the ones found in the WADC. It follows that the burden is upon the player to prove, first, how the prohibited substance entered his system and, then, either 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 a prohibited substance or method ("*No Fault or Negligence*"), or that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence, was not significant in relationship to the anti-doping rule violation ("*No Significant Fault or Negligence*"). In any case, the task of the player is very difficult or – as CAS panels usually put it – the player has *"a very high hurdle to overcome"*, since a reduction of the sanction is possible only in cases where the circumstances are truly exceptional[8].

As regards the standard of proof, the player must rebut a presumption or establish specified facts or circumstances by a balance of probability. According to CAS case law, the balance of probability standard means that the indicted player bears the burden of persuading the judging body that the occurrence of the circumstances on which he relies is more probable than their non-occurrence or more probable than other possible explanations of the doping offence[9].

Considering the sanctions against the players has given the opportunity to several panels to recall the well-established CAS case law according to which the athlete is responsible for what he ingests[10]. Thus, even in cases where the doping offence has occurred following false or incomplete information provided by the supplier of the product or by the medical personnel, the player is not automatically exempted from fault or negligence. He cannot rely totally on the medical profession (even the doctors of his own club) and follow their instructions without asking any question, especially when it comes to nutritional supplements concerning which it is common knowledge that they might be contaminated or even contain a prohibited substance from the moment they are produced, and regarding which anti-doping organisations from all over the world continually

8. Comment to Article 10.5 WADC. Cf. CAS 2005/A/830; TAS 2007/A/1252; CAS 2007/A/1370 & 1376; CAS 2008/A/1494; CAS 2008/A/1495.

9. CAS 2004/A/602; TAS 2007/A/1411; CAS 2007/A/1370 & 1376; CAS 2008/A/1494; CAS 2008/A/1495.

10. Cf. e.g. CAS 2005/A/847, and Comment to Articles 10.5.1 and 10.5.2 WADC.

issue public warnings[11].

That the fault or negligence, when established, be considered significant or not depends from the circumstances of the case. Thus, the negligence of a player who argues that he used a medicine containing a prohibited substance for years because of diuretic problems and headaches without submitting evidence that there was no alternative treatment or asking for a Therapeutic Use Exemption (TUE) is clearly significant. The circumstances, that he immediately admitted the anti-doping rule violation, that he played (at the highest level of) non-professional futsal and that he was not aware of the need of a TUE, are not relevant with regard to the degree of his negligence[12]. The negligence is also significant when a player knows that he consumed cocaine a few days before the football-match but does not tell anyone about it, nor sees a doctor for advice, nor makes a comment on the Doping Control Form. The circumstances, that he admitted the anti-doping rule violation, participated in an anti-doping program and/or played in the lowest professional league of Italian football, are not relevant as regards the degree of his negligence[13]. In any case, the assessment of the degree of fault or negligence is clearly independent from the player's explanations about how the prohibited substance entered his system. Thus, the behaviour of a player can be deemed significantly negligent even if the explanations about how the prohibited substance entered his system are plausible and convincing[14].

It is also worth noting, as reminded in CAS 2009/A/1918, of 15 December 2009, that CAS panels are reluctant to review the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules. Hence, they do so only when the sanction is evidently and grossly disproportionate to the offence[15].

2. Other disciplinary sanctions

Two cases are worth being mentioned in this context.

The case CAS 2010/A/2114, of 3 September 2010, is interesting in that the panel re-qualified the offence committed by Frank Ribéry against Lisandro Lopez during the Champions League game of 21 April 2010 between Bayern Munich and Olympique Lyonnais. The Control and Disciplinary Body as well as the Appeals Body of UEFA had come to the conclusion that the player had greatly endangered the physical integrity of his opponent and therefore applied Article 10 paragraph 1 lit. d of the UEFA Disciplinary Regulations (DR) that sanctions a player who *assaults* another with a suspension of three competition matches. Basing its reasoning on the TV recordings, the official report of the referee, as well as the testimony of Lisandro Lopez himself, the Panel decided that the behaviour of Ribéry rather came under the offence of *rough play* as defined in Article 10 paragraph 1 lit.a DR and sanctioned by a suspension of one competition match. The Panel deemed that Ribéry's play was not an attack against the physical integrity of his opponent but more a missed attack on the ball with in mind the acceptance of an injury of the other player in case it would happen. As a logical consequence, the Panel should have reduced the sanction of Ribéry to one game. However, in application of Article 18 RD that sanctions repeat offences if disciplinary measures have to be imposed within five years of a previous offence of a similar nature, the Panel took into consideration the fact that Ribéry had been sanctioned for a similar offence in August 2005 when playing with Olympique Marseille, that is less than five years before the Bayern Munich – Olympique Lyonnais game. Therefore, the Panel deemed that this aggravating circumstance justified a suspension for three competition matches. The final duration of the suspension is the same, but based on other provisions and a different legal reasoning.

The second case CAS 2008/A/1610, of 8 May 2009, was the occasion for the Panel to recall the longstanding CAS case law[16] according to which the appeal lodged with CAS against a decision of the FIFA Disciplinary Committee (DC) imposing a disciplinary sanction for failing to comply with a previous final and binding decision passed by a body of FIFA or by the CAS cannot extend beyond the limits of a review of the disciplinary sanction imposed by the DC. Hence, it can only be directed at the issues addressed in the DC decision and cannot amount to a review of the previous FIFA body or CAS decision. As a result, only submissions relating to the fine imposed by the DC, such as its legal basis and quantum, can be heard.

II. The various compensations

It is obviously not possible to deal with the compensation for breach or unilateral termination of the employment contract since Article 17 RSTP

11. CAS 2007/A/1370 & 1376; CAS 2009/A/1918.

12. CAS 2008/A/1495, paras. 80-82.

13. CAS 2008/A/1494, paras. 79-80.

14. CAS 2008/A/1494, para. 77; CAS 2008/A/1495, para. 79.

15. CAS 2009/A/1918, para. 106. See also CAS 2004/A/690, para. 86; CAS 2005/A/830, para. 10.26; CAS 2005/C/976 & 986, para. 143; CAS 2006/A/1175, para. 90.

16. Cf. e.g. CAS 2007/A/1294, para. 73; CAS 2007/A/1303, para. 9.10; CAS 2006/A/1008, para. 39.

has expressly been left out of the scope of this paper. Therefore, only the compensation for training (1.) and the solidarity contribution (2.) will be addressed here.

A. Compensation for training

CAS panels have dealt with numerous questions regarding the compensation for training. After a recollection of the principle (1.1) and some reflections specific to Article 6 of Annexe 4 RSTP (1.2), issues such as the training period (1.3), the calculation of the compensation (1.4) and the waiver as well as the debtor of the compensation (1.5) will be considered.

1. Principle

The RSTP provides that the training of a player takes place between the age of 12 and 23, and that clubs that invested in the training of a player are entitled to a financial reward for the sporting education that the player received up to the age of 21, unless it is evident that the player terminated his training period before this age[17]. Thus, according to Article 20 RSTP, training compensation shall be paid to a player's training club(s) when the player signs his first contract as a professional and each time a professional player is transferred until the end of the season of his 23rd birthday[18].

2. *Lex specialis*

In CAS 2008/A/1521, of 12 December 2008, and CAS 2008/A/1533, of 30 July 2009, the panels deemed that Article 6 of Annexe 4 RSTP provided for some specific principles that applied as *lex specialis* for players moving from one national association to another inside the territory of the EU/EEA[19].

Thus, in order to safeguard its entitlement to training compensation, the former club must have 1) offered the player a contract, 2) in writing and via registered mail, at least sixty days before the expiry of his current contract, and 3) at least of an equivalent value to the current contract. According to CAS case law, the first condition applies to players with or without contract (which means to amateur players as well as professionals), while the second and third conditions apply to players who are already under contract (that is, to professionals). It was also underlined that this provision did not require that a club offered a professional contract to all its young amateur players for fear of losing all right to training compensation. Such an obligation would have been too costly for the clubs and would have contravened "*the spirit and purpose of the FIFA transfer rules, which are set out in order to grant to clubs the necessary financial and sportive incentives to invest in training and education of young players*"[20]. This line of reasoning was confirmed in CAS 2008/A/1521, of 12 December 2008, and CAS 2009/A/1757, of 30 July 2009. When reading the FIFA Commentary, it even seems that this obligation applies only to professional players, and not at all to amateur players: paragraph 3 ad Article 6 of Annex 4 provides that if the former club *"does not offer a professional player a new employment contract"*, this club loses its entitlement to training compensation unless it can justify that it is entitled to such compensation. However, the topic provision in the RSTP is largely worded since it states that if the former club *"does not offer the player a contract"*, no training compensation is due unless it can justify that it is entitled to such compensation.

However, before even examining if such a contract has been offered to the player, the case must come within the scope of the provision, that is, the transfer from one national association to another one within the EU/EEA. In the case CAS 2009/A/1810-1811, of 5 October 2009, a German club submitted that Article 6 paragraph 3 of Annex 4 RSTP applied because of the Italian nationality of the player who was transferred from an Argentinean club. The Sole Arbitrator however confirmed the existing CAS case law which provided that this provision applied according to a geographical criterion and that the criterion of nationality was irrelevant[21]. For the same reason, the benefit of the provision was refused to a Turkish club in the case CAS 2010/A/2069, of 16 August 2010, although Turkey is a member of UEFA, and to a Brazilian player being transferred from a Brazilian club in the case CAS 2010/A/2075, of 22 October 2010, although the new club in which the player was being transferred was Portuguese and in spite of the provisions of the Treaty of Friendship, Cooperation and Consultation between the Federative Republic of Brazil and the Portuguese Republic granting equal treatment between workers of both nationalities[22].

17. In this case, compensation is limited to the period between 12 and when the player's training effectively terminated; cf. FIFA Commentary, no 1 *ad* Annex 4, Art. 1.

18. For further detail, see Mavromati, *op. cit.*, p. 21.

19. Also CAS 2006/A/1152, of 7 February 2007, para. 8.4.

20. CAS 2006/A/1152, para. 8.15.

21. CAS 2009/A/1810-1811, para. 74; see also CAS 2006/A/1125, paras. 6.14; 6.16. The FIFA Commentary also confirms this construction when providing that *"[s]pecial provisions apply to transfers within the EU/EEA"*.

22. In the latter case, the Panel deemed that, in any event, the result would have been the same had the player been of Portuguese citizenship, *"as the application of [Art. 6 of Annex 4] is dependent upon the location of the transferring clubs, not on the nationality of the players"*, CAS 2010/A/2075, of 22 October 2010, para. 7.2.10. As regards the mentioned Treaty, the Panel concluded that the topic provisions gave rights to individual workers or individual professionals, but not to companies (*in casu*: the club) employing the beneficiaries of those provisions.

Coming to the contract offer itself, it must be underlined that even if the exercising of an option of unilateral renewal of a contract could be seen as an offer in writing – which is far from being evident according to the Panel in the award CAS 2008/A/1533, of 30 July 2009[23] – the club would have had to deliver the statement of unilateral renewal to the player via registered mail at least 60 days before the expiry of the current contract. This was not done in the case at stake.

In fine of its first sentence, Article 6 paragraph 3 of Annex 4 RSTP provides for an *"exception to the exception"* (Art. 6 para. 3 already being an exception)[24]: even if the player was not offered a contract – especially if the player is an amateur – the training club is entitled to training compensation if it can justify that it has taken a proactive attitude vis-à-vis that player so as to clearly show a *bona fide* and genuine interest in retaining him for the future. For instance, the club can demonstrate that it invested considerable training efforts during the key formative years of the player's training and education and that it would be *"contrary to common sense"* to suppose that it would not have been at all interested in keeping the player, had it been able to do so[25]. In the award CAS 2008/A/1521, of 12 December 2008, the Panel eventually came to the conclusion that the *"exception to the exception"* did not apply as the particular case did not concern an amateur but rather a professional player, and that the club had not even produced a letter or similar written document showing that it had expressed its interest in keeping the player in its team.

3. Training period

The period to be considered when establishing training compensation owed is the time during which a player was effectively trained by a club. Therefore, as stated by the Panel in CAS 2008/A/1705, of 29 May 2009, this rules out any time spent by a player on a loan agreement at another club unless the loaning club can demonstrate that it bore the costs for the player's training during the duration of the loan.

As a general rule, training compensation is due for training incurred up to the age of 21, unless it is evident that the player already terminated his training period before this age. The burden of proof to demonstrate that the training was indeed concluded before the player reached the age of 21 lies within the new club. Although regular performance for a club's 'A' team constitutes the major indication of the completion of a player's training, it is not necessarily the only one. In the case CAS 2008/A/1705, of 29 May 2009, the Panel established that there were further factors that could be taken into consideration such as the player's value at a club (reflected in the salary a player is paid, in the loan fee that is achieved for his services or in the value of his transfer), the player's public notoriety at national and international level, his position at the club if established as a regular player or even holding the captaincy, his regular inclusion in the national team and so forth.

4. Calculation of the compensation

The compensation due for training and education costs is calculated in accordance with the principles set forth in Articles 4 and 5 of Annex 4 RSTP, as well as in the FIFA circular letters, starting with circular letter no 826 of 31 October 2002 and going on with the yearly updates.

This system is designed to promote solidarity within the world of football. The aim is to discourage clubs from hiring young players in some foreign countries only because the training costs in these countries are lower. Therefore, the clubs that have the resources to sign players from abroad must pay the foreign training clubs according to the costs of their own country[26]. So the clubs are rewarded for their worthy work done in training young players and not simply reimbursed for the actual costs incurred in cultivating youth teams. The training compensation thus appears to be a reward and an incentive rather than a refund[27].

However, a club is allowed to demonstrate that the strict application of the system leads to an amount that is clearly disproportionate and to ask for a reduction or an increase of the amount. CAS case law has established that the club claiming that the training compensation is disproportionate has to submit concrete evidence in the form of documents such as invoices, training centre costs, budgets, etc[28].

23. For the Panel, the issues about the validity of the contract with its unilateral renewal options and/or a possible breach of contract by the player have nothing to do with the establishing of the entitlement to training compensation. They must be discussed between the player and his former club, but they are no concern of the new club.

24. In accordance with the words used by the Panel in CAS 2009/A/1521, para. 57.

25. CAS 2009/A/1757, of 30 July 2009, para. 7.16. See also CAS 2006/A/1152, paras. 8.16; 8.18.

26. FIFA Commentary, no 1 *ad* Art. 5 of Annex 4 RSTP; see also CAS 2009/A/1810-1811, para. 81. The same idea lies within paragraph 9.7.3 of the award CAS 2008/A/1705: *"the system of calculation put in place bears the objective to ensure that training compensation correspond to the amounts that the clubs would have had to spend in order to train young players themselves. This is based on the concept of solidarity and reflects the idea that geographic locations of clubs should not place them at a disadvantage. Equally, a club from a more developed country should not be encouraged to seek the best players from less advantaged countries only to benefit from generally lower costs of living and training. Instead, to uphold the principle of solidarity, the clubs employing players training in less advantaged countries should pay the same amount in training compensation as they would have had if they were engaging a player from a developed country"*.

27. CAS 2009/A/1810-1811, para. 82; CAS 2009/A/1908, para. 112.

28. FIFA Commentary, no 4 ad Art. 5 of Annex 4 RSTP; See also CAS 2008/A/1705, para. 9.7.4; CAS 2009/A/1810-1811, para. 83 with references; CAS 2009/A/1908, paras. 115; 120; CAS 2010/A/2075, para. 7.4.2 with references.

Only economic parameters are relevant to evaluate the real and effective costs. Thus, time factors, such as a short contractual period[29], or qualitative factors, such as the player's lack of skills[30] or, to the contrary, the fact that the player is highly talented[31], cannot be taken into consideration. In addition, the quality of information displayed in audited accounts and audited financial statements should be such as to allow any interested third party – including judges or arbitrators – to evaluate in depth an entity's economic performance and to verify in depth whether true and fair values were used for measuring, presenting, and disclosing specific components of assets, liabilities and the like[32].

5. Other questions

With regard to the concept of "free agent" granted to a player by his former club in the case CAS 2009/A/1919, of 7 May 2010, the question arose if a club could validly waive its entitlement to training compensation. According to CAS case law, "free agents" are *"players who are free from contractual engagements"*[33]. In the case at stake, the Panel came to the conclusion that there was no reference in the FIFA Regulations or CAS jurisprudence that this concept could also refer to training compensation. Accordingly, the letter by which the club granted the player the status of "free agent" did not amount to a waiver of the club's right to training compensation.

Finally, it remains to be seen who must pay the training compensation. In the case CAS 2009/A/1757, of 30 July 2009, the Panel deemed that this obligation was incumbent upon the club that had actually benefited from the services of the player and from the training efforts invested by the training club. Therefore it was for the Italian club with which the player was in fact registered to pay the amount, and not for the Maltese club with which the player had only been registered for nine days before going to Italy and for which he had not played a single official game…

B. Solidarity contribution

Apart from the training compensation, the RSTP also provides for a solidarity mechanism in case a professional player is transferred before the expiry of his employment contract. It is meant to foster the training of young players by awarding a contribution that will be distributed to all clubs that have trained the player throughout his entire sporting activity[34].

According to the principle set forth in Article 21 RSTP, it is for the new club to retain and distribute the 5% contribution to all clubs involved in the player's training and education over the years. However, it will beforehand have deducted this sum from the transfer compensation due to the former club. Thus, the financial burden in fact lies with the former club. However, there are no provisions in the FIFA Regulations or in Swiss legislation, suggesting that a different "internal arrangement" between the clubs involved in a transfer would be prohibited, as long as the new club remains responsible *vis a vis* the clubs that trained the player. This longstanding CAS jurisprudence has been confirmed in the awards CAS 2008/A/1544, of 13 February 2009, and CAS 2009/A/1773 & 1774, of 3 November 2009[35].

The problem often comes from the terms that were used in the transfer agreement. In the award CAS 2008/A/1544, of 13 February 2009, the Panel had to interpret the provisions of a transfer agreement in which a Qatari club acquired from a Spanish club a player *"free of any burden or tax"*. The agreement also provided for a *"net price"* with regard to the transfer fee. For the Panel, both expressions were not clear enough to conclude that the solidarity contribution was not to be deducted from the transfer fee. Seeking in the evidence submitted and the testimonies heard at the hearing for the "*mutually agreed real intention of the parties"* in accordance with Article 18 of the Swiss Code of Obligations (CO), the Panel came to the conclusion that after having the draft of the transfer agreement reviewed, the Qatari club had requested the inclusion of an express clause saying that the Spanish club would have to carry the financial burden of the solidarity contribution. This request had been denied by the Spanish club, which had refused to bear the final financial burden of the solidarity contribution and insisted on receiving a net amount. Therefore, in order not to lose the deal, the Qatari club had signed the transfer agreement without any clause assessing the burden of the solidarity contribution to the Spanish club. For the Panel, it was therefore clear that the Qatari club had agreed that in this one, particular case, the payment(s) to be performed to the training club(s) in application of the solidarity contribution were not to be reimbursed by the former club. In the award CAS 2009/A/1773 & 1774, of 3 November 2009, the agreement provided that the *"complete amount"* of the transfer fee was immediately payable and that the former (German) club would release the player in favour of the new (Mexican) club upon reception of

29. CAS 2009/A/1810-1811, para. 87.

30. CAS 2009/A/1810-1811, para. 89.

31. CAS 2009/A/1908, para. 143.

32. CAS 2009/A/1810-1811, para. 85.

33. CAS 2004/A/635, para. 64.

34. FIFA Commentary, *ad* Art. 21.

35. Previous case law includes, amongst others, CAS 2006/A/1018, para. 7.4.10.

said *"complete amount"*. In this particular case however, the Panel deemed that the evidence brought forward by the parties only led to the conclusion that there was no *"mutually agreed real intention of the parties"* in the sense of Article 18 CO regarding the meaning of the word *"complete"*. Therefore, in application of the principle *"in dubio contra stipulatorem"*, it was for the club having drafted the transfer agreement, *in casu* the German club, to prove the existence of an agreement to shift the final internal financial obligation for the solidarity contribution from the German club to the Mexican club. Since the German club was solely responsible for the choice of words in the transfer agreement, it had to bear the consequences of the unresolved ambiguity surrounding the word *"complete"*. Consequently, the Panel concluded that the parties had not agreed to shift the final financial burden for solidarity contribution to the Mexican club and thus the German club had to reimburse the amounts decided by the FIFA DRC to the Mexican club.

In the case CAS 2008/A/1751, of 5 August 2009, the Panel stated that only clubs that were linked to a national association, member of FIFA, were authorised to claim the solidarity contribution within 18 months after the transfer of the player, as only such clubs could refer to the set of rules of FIFA and especially to the RSTP[36]. The amount of the solidarity contribution for the years between 12 and 23 during which the player was trained by a club that is not a member of a national association or by a club that did not claim the solidarity contribution within 18 months after the transfer of the player (for instance because the club no longer exists) can be claimed by the national association(s) for itself/themselves. However, Article 2 paragraph 3 of Annex 5 RSTP required the national association to make the solidarity contribution available *"… earmarked for youth football development programmes in the Association(s) in question"*. For the Panel, the question as to whether or not the national association claiming the solidarity contribution needed to prove the existence of such a youth promotion programme could remain open. The fact that the corresponding contributions were earmarked bound the national association to affect them in favour of such programmes. A use not corresponding to the purpose of the funds could be deemed to be an abstraction in legal terms according to the national legislation and lead to sanctions[37].

III. Causes for termination of the employment contract

According to the principle of the maintenance of contractual stability between professionals and clubs, unilateral termination of an employment contract is not possible[38]. However, Article 14 RSTP states that a contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is *"just cause"*. The 2010 RSTP does not define just cause any more than the previous versions did. Therefore, the definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. For such purpose, one will usefully refer to ample case law developed by CAS on this question, as recalled by the panels in the awards CAS 2008/A/1517, of 23 February 2009, CAS 2009/A/1956, of 16 February 2010 and CAS 2009/A/1932, of 19 March 2010.

A. From the player's perspective

From the player's perspective, the main cause for termination of an employment contract is because of *non-payment or belated payment of the remuneration owed under the contract*. In the cases CAS 2008/A/1517, of 23 February 2009, and CAS 2008/A/1589, of 20 February 2009, the panels confirmed that the players were entitled to terminate their employment contracts due to the seriousness and the repetition of the violations by the clubs concerned.

A *violation of the player's right to be occupied* can also constitute a just cause for terminating the employment contract. However, as noted by Haas[39], a breach of this right only constitutes just cause by way of exception because Article 15 RSTP precisely governs termination by a professional player because the latter has, in the course of the season, appeared in fewer than ten per cent of the official matches in which his club has been involved. However, this *"sporting just cause"* is reserved for *"established professionals"*[40], and the very low threshold that is set up in the regulations can obviously not be invoked by a player whose participation in the official matches of his team is close to 60%, as recalled by the Panel in the award TAS 2008/A/1696, of 30 July 2009. The right to be occupied is also violated if the player cannot adequately train with his club. CAS 2008/A/1589, of 20 February 2009, provides for the "standard" case

36. CAS 2008/A/1751, para. 8.6.

37. CAS 2008/A/1751, para. 8.16.

38. Article 13 RSTP provides that a contract can only be terminated upon expiry of the term of the contract or by mutual agreement. Numerous CAS awards have at least part of their merits dealing with the cause for unilateral termination of the employment contract; for more details, see Haas U., Football Disputes between Players and Clubs before the CAS, in Bernasconi/Rigozzi (éd.), Sport Governance, Football Disputes, Doping and CAS Arbitration, 2nd CAS & SAV/FSA Conference Lausanne 2008, Bern 2009, p. 215 ff (227 ff).

39. Haas U., *op. cit.*, p. 230.

40. An established player is a player who has terminated and completed his training period and whose level of footballing skill is at least equal to or even superior to those of his team-mates who appear regularly; cf. FIFA Commentary, no 2 *ad* Art. 15.

in which the player was prevented from accessing the club's facilities. However, a club also violates this right if it grants access to the facilities, but imposes on the player training sessions at odd and abusive times. The Panel found that it was the case in the award CAS 2008/A/1517, of 23 February 2009, as the club imposed on the player individual training sessions on 31 December from 10:00 to 12:30 as well as from 18:00 to 20:00, and then again on 1 January at 07:00.

A player also has a *right to appropriate medical treatment* in case he is injured. If the club refuses to provide him with treatment, the player has a just cause to terminate the contract[41]. In the case CAS 2009/A/1856-1857, of 7 June 2010, the Panel established however that a club does not infringe its duty of care and cannot be held responsible for complications arising following a surgical intervention if it put at the disposal of its player its medical staff, then sought help from one of the most sophisticated and well-equipped medical establishments in Turkey with many specialized physicians, and then even allowed its player to undergo another medical treatment with other foreign specialists. Indeed, the Panel deemed that the club simply did not have the capacity and the expertise to cast doubt on the choices made by those experts.

B. From the club's perspective

From the club's perspective, the main just cause to terminate the employment contract arises when the player *does not offer his services* to the club, either that he does not report for work or that he leaves his place of work without permission or with permission but for longer than agreed[42]. The club bears the burden of proving that its player left his place of work. In the case TAS 2009/A/2008, of 13 August 2010, the Sole Arbitrator held that the club had not discharged its burden since it had not filed any document, for example an injunction to report to work, or any witness statement acknowledging that the player had left his place of work. In the absence of any evidence, there was no need to analyse whether or not, in the case at hand, the behaviour of the player constituted a just cause to terminate the contract. In the award CAS 2010/A/2049, of 12 August 2010, a club was submitting that one of its players had reported late from international duties at repeated times[43]. However, and although the employment contract allowed it to do so, the club had not taken action against the player for 10 months before deciding to terminate the contract. To the Sole Arbitrator, this passage of time created a rebuttable presumption to the effect that the player might have legitimately believed that, assuming *arguendo*, he had been late returning to the club after he had completed his international duty, he was exonerated from any liability. As the club had adduced no evidence at all to rebut this presumption, it had no just cause to terminate the contract.

There is *no breach* of the duty to work if the player *does not play at the level expected* by the club. This longstanding CAS case law was recalled in the cases CAS 2009/A/1784, of 27 August 2009, CAS 2009/A/1932, of 19 March 2010, and CAS 2010/A/2049, of 12 August 2010[44]. A club can all the less put forward the bad sporting performances of the player if, as in case CAS 2009/A/1956, of 16 February 2010, they are not caused by the deliberate intention of the player to play below his potential, but rather by an old injury of which the club was perfectly aware.

A player is required to do *whatever is necessary on his part to maintain his working capacity*. However, there is no breach of this duty if the player is injured or ill, and therefore no just cause for termination of the contract[45]. In the case TAS 2009/A/2008, of 13 August 2010, the player had at many times been summoned for medical examination in order to establish whether or not he was still suffering from an employment-related disability. Since he had not followed up these summonses, he had been declared fit to resume working. In the meantime, the club had stopped paying the remuneration due under the contract, relying upon press releases that recalled the allegations of the player that he was not fit for work and arguing that it was not in a position to contest the decision of the insurance to force the player to resume working. The Sole Arbitrator held that press releases were not sufficient evidence of disputed facts and that, contrary to its allegations, the club did in its capacity as employer have by (Belgian) law the opportunity to control the alleged employment-related disability by resorting to a doctor. In not doing so, the club had acted negligently and therefore had no just cause to terminate the employment contract.

The player also has a *duty of loyalty* that can be infringed if he adopts an improper behaviour, for instance if this behaviour can qualify as racist. However, the Sole Arbitrator in the award CAS 2010/A/2049, of 12 August 2010, recalled that if the club intended to terminate the employment contract for such reason, it had to so within the briefest of all deadlines after

41. Haas U., *op. cit.*, p. 231.

42. In these latter cases, the club only has a just cause if it has warned the player about such conduct; cf. Haas U., *op. cit.*, p. 232.

43. According to Article 1 para. 7 of Annexe 1 RSTP, players must resume duty with their clubs no later than 24 or 48 hours, depending on the case, after the end of the match for which they were called up.

44. For earlier case law, see Haas U., *op. cit.*, p. 232.

45. Whether or not injury due to a sport whose practice is expressly forbidden in the employment contract can lead to the termination of said contract is another question.

the incident had occurred; moreover, the alleged improper behaviour had to be of a certain seriousness. *In casu*, it was not even sure that the behaviour of the player could qualify as being racist; besides, the national association had only sanctioned him with a rather routine sanction. In addition, the club had not reacted until some four months after the incident had occurred. The Sole Arbitrator therefore came to the conclusion that, under these circumstances, the club had no just cause for terminating the employment contract.

IV. Conclusion

This quick survey of the jurisprudence of the CAS in football matters only gives an imperfect overview of the considerable activity of the CAS in this field over the last two years. As mentioned earlier in this paper, awards have been issued in more than a hundred football-related cases. As this trend is not slackening, there is little doubt that there will be room for many more articles discussing new trends (or established case law) in the issues tackled above and/or other important questions such as the financial and disciplinary consequences of the unilateral termination of the employment contract which was deliberately left out of the present paper.

Standing to sue, a procedural issue before the CAS

A short analysis of the standing to sue issue in light of the jurisprudence of the CAS

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I. Principle: existence of an interest worthy of protection

In principle, the standing to sue or to appeal belongs to any person putting forward a right of his own in support of his request. In other words, standing to sue belongs to any person who has an interest worthy of protection. The standing to sue belongs also to the parties listed by the relevant regulations among the parties entitled to appeal against a particular decision. Those listed parties are obviously considered to have an interest at stake by the regulations. The Court of Arbitration for Sport (CAS) jurisprudence has constantly upheld this principle. In CAS/A/1674, in analyzing the Appellant's standing to appeal, the Panel determined whether the Appellant had shown that it had a "sufficient interest" in the matter being appealed. The Panel stressed that sufficient interest is a broad, flexible concept free from undesirable rigidity and includes whether the Appellant can demonstrate a sporting and financial interest.

The issue of the Appellant's sufficient interest has to be considered both at the preliminary stage of the proceedings and at the substantive stage. At the preliminary stage of the proceedings it is sufficient for the Appellant to show that it has *prima facie* standing to appeal. According to the CAS jurisprudence, the requirement of legitimate interest is satisfied if it can be stated that the appellant (i) is sufficiently affected by the appealed decision and (ii) has a tangible interest, of financial or sporting nature, at stake. In this respect, the Appellant is directly affected by the appealed decision, if as a result of this decision the Appellant (football club) is deprived of the Player's services throughout his suspension, which has a direct impact on the Appellant's team. The fact that the Appellant also paid a substantial sum to retain the Player and continued to pay the Player's salary, despite the fact that the Player was presently unable to play is relevant. Furthermore, the Appellant was found jointly and severally liable to pay the compensation awarded by the FIFA Dispute Resolution Chamber (DRC). The Panel concluded that the Appellant had a financial and sporting interest in this matter and accordingly had sufficient interest to appeal to the CAS[1].

Likewise, only an aggrieved party, having something at stake and thus a concrete interest in challenging a decision adopted by a sports body, may appeal to the CAS against that decision. "*The 'aggrievement requirement' is an essential element to determine the legal interest and the standing of a party to appeal before the CAS a sports body's decision, because the duty assigned to a panel by the CAS Code rules governing the appeal arbitration procedure*

1. CAS/A/1674 Order, para. 7.2.

is that of solving an actual dispute and not that of delivering an advisory opinion to a party that has not been aggrieved by the appealed decision" [2].

On another hand, if the Appellant is not a party to the procedure within FIFA leading to the Appealed Decision, it does not have an own legal interest to appeal against said decision. The mere fact that the Appellant erroneously received a copy of the Appealed Decision does not turn it into a party of an agreement to which it was never a party of, nor to a procedure to which it never participated[3].

In CAS ad hoc division (O.G.Beijing) 2008/001 regarding an application made the Azerbaijan National Olympic Committee (ANOC), the Azerbaijan Field Hockey Federation (AFHF) and the players of the women's Azerbaijan Field Hockey Team against the International Hockey Federation (FIH), the CAS ad hoc division gives another illustration of the principle according to which the person having no individual interest and not listed among the parties entitled to appeal against a decision would have no standing. In the particular case, the applicants were requesting urgent preliminary measures from the CAS to authorize the Women's Azerbaijan Field Hockey team to participate in the Olympic Games in Beijing. The ANOC and the AFHF challenged the decision issued by the FIH Judicial Committee in relation to an alleged doping case committed by two Spanish players during the Women's World Hockey qualifying tournament. The FIH Judicial Committee found that one player committed a doping violation without fault or negligence whereas the second player was exonerated from any anti-doping rule violation. The Applicants submitted that both Spanish players had committed an anti-doping rule violation. As a consequence, they claimed that the Azerbaijan team ought to be designated as the team to replace the Spanish team at the Olympic Games.

The CAS ad hoc division firstly ruled that the Spanish players' doping cases were personal matters in which the Applicants had no individual interest and would have no standing to be present before the Disciplinary Commission whilst it determined if either player committed a doping infraction. Therefore, the Applicants were not parties to the procedure, nor were they entitled to be interested parties before the Disciplinary Commission. The Panel further stressed that under Article 13.2.3 of the FIH Anti-Doping Policy 2007, once the FIH Disciplinary Commission has issued its Decision the listed parties to an appeal include: the Athlete, FIH, as the other party to the original decision of the Disciplinary Commission or as the organization under Article 13.2.3 of the FIH Anti-Doping Policy whose rules a sanction would have to be imposed; International Olympic Committee, where the decision may have an effect in relation to the Olympic Games; and WADA. None of the named parties had filed an appeal of the Decision and the Applicants had anyway no rights of appeal under Article 13. The Panel therefore concluded that the Applicants had no standing to make this Application to the CAS ad hoc division[4].

II. Applicable law

A. Article 75 Swiss Civil Code (CC): the conditions for challenging the decisions of an association

Article 75 CC states: *"Any member of an association is legally entitled to file an action with a court, within one month after having received knowledge thereof, to set aside the decisions to which it has not adhered and which are contrary to law or the constitution of the association" (free translation of: "Tout sociétaire est autorisé de par la loi à attaquer en justice, dans le mois à compter du jour où il en a eu connaissance, les décisions auxquelles il n'a pas adhéré et qui violent des dispositions légales ou statutaires".* As a result, according to Article 75 CC the members of an association have standing to sue, provided the object of their claim is a decision of the association that violates its constitution or the law, and that the decision in question is challenged within a period of one month. Regarding the reasons upon which a decision of the association can be challenged, Article 75 CC refers to a breach of law or of the association's constitution. Article 75 CC is therefore based on the concept of "protection of membership".

In this respect, in CAS 2007/A/1392, on the basis of the Swiss doctrine, the Panel underlined that it is admitted under Swiss law that Article 75 CC encompasses the right to file a claim in arbitration for the annulment of the internal decisions of a Swiss association i.e. that such claims are arbitrable and that the CAS offers sufficient guarantees of independence to be a valid forum for arbitration in this regard[5]. The Panel also stressed that the fact that the appealed decision is not directly affecting the situation of the Appellant is not relevant. The submission that the challenged decisions contravene legal or statutory provisions is sufficient as regards the admissibility of the appeal. The principle according to which the decisions of Sports Federations or Associations may be challenged by the members of those Associations

2. CAS 2009/A/1880 & 2009/A/1881, paras. 153 & 154.

3. CAS 2004/A/790, para. 46.

4. See also in the same direction, infra CAS/A/748.

5. Jean-François Perrin, Droit de l'association, 2004, p. 182; H.M.Riemer, Berner Kommentar, Bd. I/3/2, Berne 1990, n° 85 ad art. 75; Piermarco Zen-Ruffinen, Droit du Sport, 2002, p.493, n° 1405.

or Federations, without restrictions as regards the *locus standi* or the standing right, is part of the transnational general principles applicable to the world of sport, the so-called *Lex sportiva*, irrespective of any national rule of law[6].

Both the Swiss case law and the Swiss doctrine have concurred in specifying that in addition to decisions being annullable under Article 75 CC i.e. action for annulment of a decision by a federation or association which is a legal action for a change of legal status or legal rights, decisions of an association must be deemed void *ab initio* if they are affected by a serious formal or material flaw[7].This case concerns a legal action to obtain a declaratory judgement from the court that the measure is null and void. In such case, the time limit of one month for challenging the decision is inapplicable. An action for a declaratory judgement will only succeed if the challenged decision is suffering from a qualified contravention of the law of the statutes. There is no statutory provision or precedent defining precisely what constitutes a serious enough flaw to make a decision void *ab initio*. However, it has been circumscribed by scholarly opinion as, *"Any decision that contravenes public policy, mandatory law, the fundamental rules of the association or that is taken in violation of the rules of procedure of the association …"* (free translation of "*Toute décision qui viole l'ordre public, le droit objectif impératif, les règles fondamentales de l'association ou qui a été prise en violation des règles de procédure de l'association ….*")[8].

Regarding the validity of time limits stipulated in the statutes of an association, international sports associations often provide that disputes between members or between one member and the association are to be referred to arbitration and particularly the CAS usually as the last instance. The provisions of those associations also often provide that an appeal can be filed with an arbitration court within 10 or 21 days, i.e. within a deadline which is shorter than one month stipulated in Article 75 CC. For example there are different time limits in Article 62(3) UEFA statutes (10 days), Article 15(2) IAAF Constitution (60 days), Article 59(3) AIBA Statutes (30 days), Article L1.9 FIBA International Regulations (30 days), Article 165 FEI General Regulations (30 days) or Article 7.2.7 of the FIE Statutes (21 days).

The validity of time limits stipulated in some statutes of associations is apparently in conflict with Article 75 CC. In this respect, Bernasconi and Huber nevertheless consider that *"a provision in the statutes of a Swiss association pursuant to which last instance decisions of the association can be referred to a court of arbitration for review is valid even if the prescribed time limit for appeal is less than the time limit of one month provided in Art. 75 Swiss Civil Code – if Art. 75 Swiss Civil Code applies at all. A prerequisite for this is that the legal protection provided by the court of arbitration is "equivalent" to that which can be achieved by way of ordinary jurisdiction. It is therefore a prerequisite that the court of arbitration guarantees the same legal protection as a state court and that the time limit for appeal is calculated and the other applicable procedural provisions are designed such that they do not make it more difficult for association members to exercise their rights. This is clearly the case with a 10-day time limit and jurisdiction of the CAS[9] - as confirmed in the recent CAS jurisprudence"*[10].

Meanwhile, U. Haas considers that: *"the correct view is that there is no potential conflict between Art. 49 CAS Code (or the corresponding regulations of a federation) and Art. 75 Swiss Civil Code (ZGB) because the applicable law is determined by Art. 58 CAS Code: According to this provision, the regulations of a federation or an association apply primarily. According to the regulation, a national legal system (e.g. Swiss law) only applies subsidiarily, or additionally if the legal question is not (exhaustively) dealt with in the federation's statutes and regulations (or the deadline in Art. 49 CAS Code) take precedence over national law (here therefore over Art. 75 Swiss Civil Code (ZGB))- at least in international arbitration proceedings. This applies even if the federation's regulation conflict with mandatory law 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"*. Then Haas seems to join the opinion of Bernasconi and Huber when he further states: *"To summarise therefore, time limits for instituting an action which are shorter than 10 days -without any particular justification- are to be considered as being legally problematic in the light of the public policy ("ordre public")"*[11]. *A contrario,* a 10 days -or any longer- time limit to file an action should not be problematic.

In CAS 2005/A/996[12], the conditions for challenging the decisions of an association under Swiss law have been analysed. The facts in CAS 2005/A/996 can be summarised as follows: a national table tennis federation was challenging the elections which

6. CAS 2007/A/1392, paras. 63 *et seq.*

7. Margareta Baddeley, L'association sportive face au droit, 1994, p. 311; A. Heini/U. Scherrer, Kommentar zum schweizerischen Privatrecht, Schweizerischen Zivilgesetzbuch I, Bâle 1996, n° 31 ad art. 75; H.M. Riemer,*op-cit* n° 89 and 94 ad art. 75; Piermarco Zen-Ruffinen, *op-cit.* p.493, p. 494, n° 1408.

8. Baddeley, ibid; Zen-Ruffinen, ibid; see also ATF 93 II 31 relating to the case of a cooperative.

9. This view, in substance, is shared by A. Rigozzi, L'arbitrage internationale en matière de sport, n° 1024 *et seq.*, in particular n° 1039 and, to some extent, by U. Scherrer, Aktuelle Rechtsfragen bei Sportvereinen, in CausaSport 2005, No. 1, p. 46 *et seq.*, in particular p. 49-50.

10. Bernasconi/Huber, The Question of the Validity of Time Limits stipulated in the Statutes of an Association published, in German, in the review SpuRt, 2004, n°. 6, p. 268 *et seq.*

11. U. HASS, The time limit for appeal in Arbitration proceedings before the Court of Arbitration for Sport (CAS), Schieds VZ 1/2011.

12. See CAS 2005/A/996.

took place during the annual general assembly. In any event, the appeal was filed within the period of one month stipulated in Article 75 CC and an election constitutes a decision of the Annual General Meeting. Consequently, the national federation was entitled to challenge the election in question under Article 75 CC. According to the national federation's prayers for relief, the elections were affected by irregularities requiring them to be annulled. The Panel found convincing evidence that bribery did take place. Indeed, an offer to reimburse travel expenses and to supply equipment in exchange for a vote constitutes at least a case of attempted bribery. It is generally admitted by the doctrine that bribery contradicts various public interests, notably the interest in moral and ethical behaviour, the interest in equality of treatment and the interest in the security of transactions and is today universally condemned[13]. The Swiss Federal Court has also held that bribery is illegal under Swiss law[14]- as contrary to international public policy. In this regard, the Panel stressed that one of the main provisions of private law that protects *bones mores* (principles of morality) is article 20 of the Swiss code of obligations (CO). In addition, according to Article 7 CC, the general provisions of the Swiss code of obligations can be applied in civil law outside the realm of contracts. According to the Swiss doctrine, the constitution of an association must not contradict *bones mores.*

In the particular case, the Panel stated that *"Based on the foregoing scholarly opinions and the concept of bones mores defined by the Swiss Federal Tribunal, there is no doubt that elections within a Swiss association involving corrupt behaviour (bribes) must be deemed to violate a general principal of Swiss private law prohibiting acts contra bones mores"*[15]. However, the Panel considered that the question remained whether it was sufficient for the bribe and other irregularities to be proven for the election to be annulled, or whether it was necessary to establish that the bribe and other irregularities were causal in producing a result that would otherwise have been different, i.e. that they definitely affected the final result of the election. Neither the applicable rules of law (articles 60-79 CC) nor case law or the International Table Tennis Federation's Constitution address this question. One part of the doctrine seems to consider that when applying Article 75 CC to an election it is necessary to examine whether the invalidity of specific votes has influenced the overall election[16]. In the particular case, the Panel considered that when the litigious election is that of an association, there are several reasons to consider it must be annulled because of the possibility that the tainted votes affected the entire election.

B. The World Anti Doping Code (WADC)

Article 13.2 WADC provides an exhaustive list of who may be considered as a *"party"* and identifies who has the right to appeal to the CAS. Only the persons or organisations listed are entitled to appeal to the CAS. In this respect, by signing the Entry Form for the Olympic Games in a case arising in connection with the Athens Olympic Games, all parties expressly agreed to comply with the Olympic Charter, the World Anti-Doping Code (WADC) and the International Olympic Committee Anti-Doping Rules applicable to the Games of the XXVIII Olympiad in Athens in 2004 (the "IOC Anti-Doping Rules"). According to Article 12.2.2 of the IOC Anti-Doping Rules corresponding to Article 13.2.3 WADC, only the following parties have the right to appeal to the CAS: "*(a) the Athlete or other Person who is the subject of the decision being appealed; (b) the IOC; (c) the relevant International Federation and any other Anti-Doping Organisation under whose rules a sanction could have been imposed; and (d) WADA*".

As a result, neither a competitor of the athlete subject to an anti-doping decision nor his National Olympic Committee are among the individuals or organisations listed therein. This interpretation is confirmed by the Comment on the WADC – particularly relevant in light of Art. 16.5 of the IOC Anti-Doping Rules – which unambiguously states that such list of persons or organizations having standing to appeal "*does not include Athletes, or their federations, who might benefit from having another competitor disqualified*"[17]. This leaves the question of parties not listed in the relevant provision but nevertheless affected by a decision. The question will be therefore to determine if a third party can also be a party, i.e. a person against whom the measure taken by the association is not directly aimed but who is affected by the decision cf. *Infra.*

C. The FIFA rules

The FIFA rules- Articles 62 *et seq.* of the FIFA Statutes and Articles 22 *et seq.* of the Regulations on Status and Transfer of Players (RSTP)- do not provide for a specific provision as to who is entitled to lodge an appeal against decisions by FIFA to the CAS. However, there is a provision regulating who is entitled to file an internal appeal within the instances of FIFA. Article 126 FIFA Disciplinary Committee (FDC) provides in this respect that *"anyone who is*

13. Pierre Tercier, La corruption et le droit des contrats, in: SJ 1999 II, p. 233.

14. ATF 1993 II 380, 384-385.

15. CAS 2005/A/996, para. 99.

16. H.M. Riemer, *op-cit*, n° 110 & 111 ad art. 75.

17. CAS 2004/A/748, para. 119.

affected and has an interest justifying amendment or cancellation of the decision may submit it to the Appeal Committee". In principle, there is a presumption that the question of the standing to appeal is regulated in a uniform manner throughout all internal and external channels of review. In this respect, a football club which is not the addressee of a FIFA decision which was only notified to the national football federation to which the club is affiliated but which is materially affected by the decision as the decision requests the national federation to deduct points from the club, should have standing to appeal before the CAS against the FIFA decision[18].

Article 6 para. 1 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (edition 2008) provide an exhaustive list of who may be considered as a *"party"* and identify who has the right to lodge *"a request for arbitration proceedings … with the FIFA Players' Status Committee"*. In this regard, the company of a players' agent is not among these persons, as it is not a licensed match or players' agent, whose activity may only be carried out by natural persons and whose license is strictly personal and non-transferable[19].

Likewise, the issuance of International Transfer Certificates (ITC) is clearly defined by the RSTP as taking place exclusively between national associations. As a result, a football club is not entitled to participate in the procedure regarding the issuance of an ITC before FIFA. As such, there is no ground for a club to appeal before the CAS against a decision taken by the single judge in this respect[20].

D. The UEFA rules

Under Article 62(2) of the UEFA Statutes "*only parties directly affected by a decision may appeal to the CAS"*. This provision does not stipulate in any further detail when a party is "directly affected" (or "concerned") by a measure taken by a federation. According to CAS jurisprudence, the decision taken by the association must directly interfere with the rights of the person. The latter is always the case if the matter concerns the accused or the addressee of the (potential) measure by the association or disciplinary measure. However, the wording of Article 62(2) of the UEFA Statutes does not exclude the possibility that a third party can also be a party, i.e. a person against whom the measure taken by the association is not directly aimed, for the provision refers to the actual state of being affected, not to whether someone is formally the addressee of the measure or not[21]. This leads to the question of the delimitation of directly affected parties from indirectly affected parties.

III. Delimitation of directly affected parties from indirectly affected parties

The person having standing to sue can be the person entitled to the right but also, in certain circumstances, a third party who can act along the same lines as the owner of the right pursuant to an express provision of the law or pursuant to the applicable jurisprudence[22].

CAS jurisprudence displays a "common thread", which can be succinctly put as follows: where the third party is affected because he is a competitor of the addressee of the measure/decision taken by the association, - unless otherwise provided by the association's rules and regulations - the third party does not have a right of appeal (see *supra* CAS 2004/A/748*)*. Effects that ensue only from competition are only indirect consequences of the association's decision/measure. If, however, the association disposes in its measure/ decision not only of the rights of the addressee, but also of those of the third party, the latter is directly affected with the consequence that the third party then also has a right of appeal[23]. The CAS has dealt with this question on several occasions. The fact that a third party, who is himself not the addressee of the measure taken by an association, is directly affected and therefore has a right of appeal, is a question of the facts of the individual case.

For example, a CAS Panel has granted an athlete placed second the right to appeal against a decision by the IOC to leave the gold medal with the first-placed athlete -despite his involvement in a doping scandal[24]. By contrast, athletes who lack any chance of obtaining a medal have no right of appeal[25]. If FIFA has banned a player from matches because of a breach of contract with a club, the club cannot file an appeal against this decision with the objective of obtaining a higher penalty against the player[26]. If in a league system which extends over a whole season a match is newly evaluated because a win is allowed or disallowed, a club, which was not involved in that match, should also not be able to appeal the new evaluation of the match[27]. On the contrary, in CAS 2008/A/1583 & 2008/A/1584, the clubs/appellants

18. CAS 2008/A/1658, para., 114.
19. CAS 2008/A/1726, para. 58.
20. TAS 2009/A/1828 & 1829, para. 47.
21. CAS 2008/A/1583 & 2008/A/1584, para. 9.5.1.
22. TAS 2009/A/1869, para. 85 *et seq.*; F. Hohl, Procédure civile, T. I, Berne 2001, p. 97 *et seq.*; Rigozzi., *op-cit.*, no 1061.
23. CAS 2008/A/1583 & 2008/A/1584, para. 9.6.1.
24. CAS 2002/O/373, paras. 62 *et seq.*
25. CAS 2002/O/373, para. 66.
26. TAS 2006/A/1082-1104, para. 102 *et seq.*
27. CAS 2007/A/1278&1279 & 1893, paras. 82 *et seq.*

have been considered by the CAS Panel directly affected for if UEFA grants a club a starting place in a championship which has a closed field of starters, it has at the same time made a negative decision about including other candidates for said starting place.

In CAS 2008/A/1726 mentioned above, the CAS Panel has decided that in any event, third parties (other than those to whom the decision was addressed) may have the standing to appeal exclusively if they are directly affected by the measure taken by the association. In this respect, the right of appeal of a company must be denied if it has no tangible or legitimate interest, of financial or sporting nature, at stake and is not affected by the Appealed Decision[28].

Regarding the interpretation of Article 62 (2) UEFA Statutes mentioned above, its legislative history supports a very restrictive understanding, according to which only whoever is the direct addressee of the measure has a right to appeal. However, in CAS 2008/A/1583 & CAS 2008/A/1584, in weighing up the considerations the Panel has considered that "*the better reasons support the argument that third parties also be granted a right of appeal – under certain conditions. First, the wording of the provision has particular importance compared with the historical "legislative materials"; for the rules and regulations of an association must, first and foremost be interpreted according to their objective wording and purport, not according to the subjective will of the association's organs responsible for the provision. This is particularly so when the (extremely) restrictive interpretation of the provision is not sufficiently demonstrated in its wording. Secondly, this opinion is in line with Swiss law, which applies subsidiarily. Finally, since it can be assumed that the association's legislator wanted to comply with the (minimum) statutory requirements, this is also an argument for granting third parties the right to appeal if they are directly affected by the measure taken by the association*"[29].

For example, in CAS 2009/A/1869, the Appellant, a Swiss football club organized as a Swiss association entered into a "cooperation contract" with a Swiss Limited company whereby the Club delegated the management of its first football team evolving in challenge league to the Limited company. The unique shareholder of the Limited company then decided to renounce to manage the first team of the Club and indicated that if a buyer was not found for the company, the latter would be dissolved. The Licence Commission of the Swiss Football League (SFL), a Swiss association affiliated to the Association Suisse de Football (ASF), decided to reject the request for a licence to evolve in Challenge league submitted by the Limited Company and reminded the Club that it was not a member of the SFL (only the Ltd Company was) and as such was not entitled to assert any right as member of the SFL. The CAS Panel held that the decision taken by the SFL denying the Club the status of member of that association and the consequent rights directly affected the legal position of the Club. By refusing to examine the Appellant's relief on the grounds that the Club was not a member of the SFL, the Appellant was indeed directly affected since it was precisely the quality of member in lieu of the Ltd Company and the consequent rights (management of the first team of the club) that was claimed before the CAS. As such, the standing to sue against the decision of the SFL was recognized to the Appellant.

On the contrary, the party who has no interest worthy of protection cannot have standing to sue[30]. In this respect, under Italian Civil Procedure Code (ICC) applicable to the case CAS 2006/A/1114, a qualified interest of the party as to the possible outcome of the controversy is requested in order to file a claim. In this regard, the Confédération Mondiale des Activités Subaquatiques (CMAS) Underwater Hockey Commission was not sufficiently affected by the disputed decision rejecting the application of a national club to become a member of the CMAS. The CMAS Commission had no tangible interest at stake in the procedure since the admission of prospective members was the sole competence of the Board of Directors along with the Ordinary General Meeting. The CMAS Commission is just an internal administrative unit and/or department with no authoritative powers, subordinated to the Sports Committee and to the Board of Directors of the CMAS. The CMAS Commission is therefore not granted any binding powers of its own. Therefore, it cannot be considered as an "*internal body*" as defined under Article 23 ICC and does not have the ability to challenge the decisions of the Respondent rejecting the application of a Club to become a member of the CMAS[31].

Likewise, concerning the possibility to appeal before the CAS against a decision deciding that an athlete has violated the anti-doping rules, the procedure initiated against the athlete and aiming to potentially sanction the athlete is absolutely indivisible from the latter, the club having, in this context, no cause to defend "independent" from the one of the athlete. Therefore, because of this indivisibility of the procedure, the Club has no standing to appeal on its own before the CAS in connection with the

28. CAS 2008/A/1726, para. 66.

29. CAS 2008/A/1583 & CAS 2008/A/1584, para. 9.5 *et seq.*

30. CAS award 2006/A/1189, para. 6.5: the FFF was declared not to have any procedural standing in the case because it had "*nothing at stake*" in the dispute; The same principle was applied in CAS 2007/A/1329-1330, paras. 27-31; similarly in CAS 2006/A/1206, para. 31, the Panel stated that a party has no standing if it "*is not directly affected by the decision appealed from*".

31. CAS 2006/A/1114, paras. 27 *et seq.*

disciplinary procedure conducted against the athlete since the latter has implicitly renounced to challenge the decision[32].

IV. Legal nature of the standing to sue

The question is whether the standing to sue issue is related to the admissibility of the appeal or whether it belongs to the material conditions of the claim. In the first case, the issue is a procedural one: without any standing to sue that is without any interest worthy of protection, the appeal will be dismissed as inadmissible. In the second case, without any standing to sue, the appeal will be dismissed as unfounded.

The Swiss Federal Tribunal has clearly established that the standing to sue together with the standing to be sued belong to the material conditions of the claim[33]. As a result, the lack of quality to sue leads to the dismissal of the claim as unfounded[34].

In CAS 2007/A/1392, the Panel considered however that the standing to file an appeal with the CAS against the decisions passed during the ordinary congress of an International Federation was related to the question of the admissibility of the Appeal and was thus to be qualified as a question of procedural nature[35].

In CAS 2009/A/1583 & CAS 2009/A/1584[36] the question has been evoked in connection with Article 62 (2) sentence 1 of the UEFA Statutes which reads as follows: *"Only parties directly affected by a decision may appeal to the CAS"*. The Panel reviewed whether Article 62(2) of the UEFA Statutes is a (special) condition for admissibility or a question of justifying the request for arbitration. It held: *"If one compares the appeals arbitration procedure before the CAS - which appears logical due to the wording - with an appeal procedure before state courts, the right to challenge (more correctly the right to appeal) would have to be classified as a condition for admissibility. In an appeal procedure before state courts the right to file an appeal is in any event (at least under Swiss law) deemed to be a question of the admissibility of the appeal[37]. In the absence of any such right, the state court therefore dismisses the appeal as inadmissible"*.

At this point, the Panel has nevertheless wondered whether an appeal to the CAS can be assimilated or compared with an appeal before the state courts*: "However, it is now questionable whether an appeal to the CAS in an appeals arbitration procedure can really be compared with an appeal procedure before the state courts; for in reality the CAS acts not as a second instance but as a first instance - even in an appeals arbitration procedure. This is because the arbitration agreement prevents the first instance state court, which would otherwise be seized of the matter, from admitting the case. However, if the decision by a sports organization were to be appealed against before a (first instance) state court (e.g. pursuant to Art. 75 Swiss Civil Code (ZGB)), the right to appeal would be classified as a requirement for justification. The court would therefore, if the person concerned is not entitled to appeal, dismiss the action not as inadmissible but as unfounded"*[38].

In the particular case, whether in the light of these rules Article 62(2) of the UEFA Statutes is to be considered to be a special condition for admissibility or a requirement for justification of the request for arbitration was finally not crucial, for in the Panel's opinion the Appellants did in any event had standing to appeal under this provision.

Finally, CAS jurisprudence seems to have drawn a line in connection with this matter. In a recent case, the Panel held that "*the capacity to sue alone is a condition for admissibility whereas the lack of standing to sue belongs to the material conditions of the claim. As a result, the standing to sue is governed by substantive law and cannot lead to the dismissal of the appeal as inadmissible. Instead, the standing to sue would lead to the dismissal of the appeal as unfounded, if the person is not entitled to appeal"* (free translation of: « *seule la capacité d'ester en justice représente une question de recevabilité, alors que le défaut de qualité pour agir appartient aux conditions matérielles de la prétention litigieuse (ATF 126 III 59 c. 1a), de sorte qu'il s'agit d'une question régie par le droit de fond qui ne constitue ainsi pas une fin de non-recevoir, mais, le cas échéant, aboutit à un rejet de la demande »)*[39].

V. Valid representation of an athlete who has standing to sue

In the framework of proceedings before CAS, Article R30 of the Code provides that the parties can be represented or assisted by persons of their choice. It appears quite usual that a player be represented, informally, by his football association or federation. That does not mean that the football federation, which indeed has no standing for itself, is involved in the dispute in lieu of the player. It is contrary to good faith to raise the issue of the representation of the player by his football association for the first time before the CAS, while the standing was never

32. TAS 2008/A/1764, paras. 58 *et seq.*

33. ATF 114 II consid.3a; 126 III 59 consid. 1a.

34. ATF 126 III 59 consid. 1; 107 II 82 consif. 2a; see also F. Hohl, Procédure Civile, Tome I, n°2092 et seq. et Tome II n° 433 et seq.

35. CAS 2007/A/1392, para. 63.

36. CAS 2009/A/1584, para. 9.4 *et seq.*

37. BG Urteil 4P.105/2006 of 4.8.2006, no. 6.2; Vogel/Spühler, Grundriss des Zivilprozessrecht, 8thed. 2006 § 13 no. 49 *et seq.*

38. Riemer, Anfechtungs- und Nichtigkeitsklage im schweizerischen Gesellschaftsrecht, Bern, 1998, no. 70, 82; see also for a more detailed analysis of the question CAS 2007/A/1278 & 1279, para. 75 *et seq.*

39. TAS 2010/A/2056, para. 56.

questioned before, neither in front of the Arbitration Committee of national federation nor in front of the FIFA, which proceedings both related to the same contractual relationship and involved the same parties[40].

When the parties to a Contract are a Company and a football Club, even if the contract itself clearly states that the Agent acts on behalf of the Company whilst in the Contract the reference to the Agent means reference to the Company, the only person entitled to claim is the Company and not the Agent which acts on behalf of the Company[41].

Moreover, the fact that the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (art. 6 para. 1 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber) allow only a licensed agent – and not a company – to file a claim before the FIFA Players' Status Committee regarding agent fees, cannot lead to the conclusion that an agent has the right to bring before the said body and under his own name a claim that belongs to companies of which he is a member, a shareholder or even the only owner. It is rather for the owner of the right, i.e. the legal entity, to seek judicial protection before the competent (state or arbitral) tribunals[42].

VI. Burden of proof regarding the existence of a legal interest worthy of protection

An individual as well as a legal entity cannot vindicate his/its rights without establishing full entitlement (the "active legitimation") for his/its standing before the CAS (cf. *supra).* The active legitimation (legitimatio ad processum) is a question of material law[43] (cf. *supra*). According to the Swiss Civil Code (art. 8) and to the Swiss jurisprudence, it is the party's duty to objectively demonstrate the existence of its subjective rights and that it possesses a legal interest for its protection[44]. It is not sufficient for it to simply assert its right to be a party or the mere existence of a violation of its interests for the tribunal to consider the matter without further treatment, especially when its legal existence is objected by the opposing party.

In CAS 2005/A/932, the Respondent was claiming a training compensation for the transfer of a football player. Due to the fact that the legal existence of the Respondent or its capacity to be a party was expressly disputed, the first question to be answered was whether the Respondent was entitled to claim training compensation for the Player. In the particular case, the Respondent had not only to prove that it existed but also that it was the same football club as the one which might had rights deriving from the dispute over the transfer of the Player or, ultimately, that it was the assignee of the said putative rights[45].

40. CAS 2005/A/871, para. 4.22.

41. CAS 2007/A/1260, para. 32.

42. CAS 2007/A/1274, para. 8.9.

43. Swiss Supreme Court awards ATF 126 III 59 consid. 1; 125 III 82 consid. 1a; 123 III 60 consid. 3a.

44. ATF 123 III 60 consid. 3a ; ATF 130 III 417 consid. 3.1.

45. CAS 2005/A/932, para.10.8 & 10.9.

Status of the Player and Training Compensation

A short study on the status of a player in the light of the jurisprudence of CAS

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I. The training compensation according to the FIFA Regulations on the Status and Transfer of Players (RSTP)

A. Training compensation and FIFA Regulations

The Fédération Internationale de Football Association (FIFA) Regulations on the Status and Transfer of Players foresee, *inter alia*, a system for the payment of training compensation. As indicated in the Commentary on the FIFA RSTP[1], the Regulations create a detailed system for the payment of training compensation so as to encourage the training of young players by awarding financial compensation to clubs that have invested in training young players.

Article 20 of the FIFA RSTP (2010 version) reads as follows: "*Training compensation shall be paid to a player's training club(s): (1) when a player signs his first contract as a professional and (2) each time a professional is transferred until the end of the season of his 23rd birthday. The obligation to pay training compensation arises whether the transfer takes place during or at the end of the player's contract. The provisions concerning training compensation are set out in Annexe 4 of these regulations.*" The Regulations consider that a player's training and education takes place (and compensation is therefore payable) between the ages of 12 and 23. Clubs that invest in the training of a player are entitled to a financial compensation for the education that the player received up to the age of 21, unless it is evident that the player terminated his training period before this age, in which case, compensation is limited to the period between 12 and the time when the player's training effectively terminated.

In CAS 2003/O/527[2], a player signed his first professional contract at the age of 17. In his first season as a professional, he played 15 times with the first team. Additionally, at that time, he was noticed for his good technical skills and speed. Therefore, it was considered that the player had terminated his training period before his second season as a professional player at the age of 18. Another essential

1. Commentary on the RSTP, published in the FIFA Circular N° 1075 of 18 January 2007 ("FIFA Commentary").

2. See CAS 2003/O/527.

element in order to establish the period of training is the registration date. In CAS/2004/A/594[3], a player was considered by his training club as "*the most talented player who played at all ages at the highest level in the country of the training club and in the national teams at all ages*". Moreover, the player was described by his training club as a "*regular player*". Therefore, it was considered that the player's training was terminated at the age of 17, when he first signed a five-year contract with his training club.

Annex 4 to the 2008 RSTP contains some provisions that clarify the modalities of granting the training compensation as well as some methods to calculate such compensation. As stated in Article 3 of the Annex 4 to the 2008 RSTP, when a player is registering as a Professional for the first time, the club for which the player is being registered is responsible for paying training compensation within 30 days of registration to every club for which the player was registered (in accordance with the players' career history as provided for in the player passport) and that has contributed to his training starting from the Season in which he had his 12th birthday. Training compensation is thus compensation from which all clubs that have contributed to the training of a young player benefit from until the player becomes a professional player[4].

Training compensation is due for the first time when a player signs his first employment contract and thus registers as a professional. All the clubs that have contributed to the training of the player as from the age of 12 are entitled to training compensation for the timeframe that the player was effectively registered with them; in CAS 2004/A/560[5], the Panel confirmed the decision of the FIFA Dispute Resolution Chamber (DRC), according to which a club that trained a player as an amateur for a certain period of time before concluding an employment contract with him shall be compensated for the entire time that it trained the player and not only for the time it trained him as a professional.

Last, for every subsequent transfer of the professional player until the end of the season of the player's 23rd birthday, only the last club for which the player was registered is entitled to training compensation for the period that the player was effectively registered for this club.

3. See CAS 2004/A/594.

4. See the FIFA Commentary on the RSTP, p. 115.

5. See CAS 2004/A/560.

B. Jurisdiction for matters related to training compensation

Article 22 of the 2010 RSTP foresees that, without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent for disputes related to training compensation, under the condition that such disputes concern training compensation between clubs belonging to different Associations. FIFA DRC (and thus not the Players' Status Committee) has exclusive jurisdiction over those matters (see the Commentary on the RSTP, Article 23 para. 2, p. 69 and Article 24 para. 2 ii). As to disputes related to training compensation between clubs belonging to the same association, they shall be settled by national bodies in accordance with national regulations[6].

According to Article 24 para. 2 (ii) of the 2010 RSTP, the issue of training compensation is settled by a single DRC judge and not by the default composition of the DRC, which is composed of at least three members. The Single Judge, however, only deals with simple cases in which the facts and figures are clear and unquestionable, e.g. where the player's new club refuses to make the payment without a valid reason. In cases where the DRC judge is faced with more complex issues, he must submit such matters to the chamber as a panel. The FIFA Commentary describes as fundamental issues situations not covered by existing jurisprudence, situations in which existing jurisprudence needs to be extended or amended and, more generally, all situations that have a major impact on the daily application and interpretation of the Regulations[7].

As a third – and last – step, decisions reached by the DRC judge may be appealed before the Court of Arbitration for Sport (CAS), according to Article 24 para. 2 last paragraph of the 2008 RSTP. The CAS is called to apply – and to some extent also interpret – the RSTP.

C. Applicable law in disputes related to training compensation

As seen above, disputes related to training compensation between clubs belonging to the same association are settled by the competent national bodies in accordance with national regulations. For disputes regarding training compensation between clubs belonging to different associations both the FIFA DRC and the CAS Panels have to apply the applicable FIFA RSTP (and subsidiarily, Swiss law

6. See Commentary on the RSTP, p. 67.

7. See FIFA Commentary on the RSTP, p. 73.

since Switzerland is the seat of the international federation, i.e. FIFA). In CAS 2009/A/1781, one of the parties referred to Brazilian law as the law governing the contract between the player and his former club; the Sole Arbitrator held that there was no place for the application of national law or national definitions and criteria in deciding the status of the Player in a case involving clubs belonging to different associations; national law and definitions of the status of a player in a specific country are only relevant and govern internal transfers within the country involved according to Article 1 (2) of RSTP 2010. By the same token, national laws and the internal regulations are not the applicable law in case of a dispute with an international element[8]. In such cases, the RSTP set down the applicable criteria to establish and decide on the status of a player when a transfer occurs between *"clubs belonging to different associations"*[9].

In general terms, under the RSTP, the applicable version of the RSTP depends on the time that the dispute has been brought to the FIFA competent adjudicating body. According to Article 26 para. 1 of the 2010 RSTP (as well as the previous versions thereof), any case that has been brought to FIFA before the entry into force of the RSTP shall be solved on the basis of the previous regulations. The entry into force of the 2010 RSTP is the 1st October 2010. The same applies when cases are brought to the CAS.

It is noteworthy that the 2010 RSTP foresee an exception for the specific issue of training compensation: according to Article 26 para. 2 (a), the pertinent point in time dictating the applicable RSTP is not the claim before the FIFA's competent body, but rather the signing of the contract in dispute (in casu the signing of the first professional contract of the player with his new club) or the time when the disputed facts arose[10].

Finally, in some cases, and upon agreement between the parties (which might arise even during the course of the proceedings) CAS Panels might decide in equity. This was the case in CAS 2010/A/2259 where the Sole Arbitrator decided, after establishing the status of the player, to reduce the amount of the training compensation due by the club based in equity. The Sole Arbitrator took notably different elements into consideration such as the very short period of time spent by the Player with the club and the fact that the club had not really benefited from the formation of the Player (see CAS 2010/A/2259).

II. The distinction between professional and amateur players as a criterion for granting the training compensation

A. Professional and amateur players in the different versions of FIFA Regulations

From the various provisions included in the FIFA RSTP related to training compensation it becomes obvious that the status of a player is an important element for establishing whether training compensation is due. Although the distinction between amateur and professional players can also be pertinent in other fields (such as for the application of the FIFA RSTP on contractual stability[11], or, to a lesser extent, for the application of the international rules on the registration of players[12]), is of major importance for the training compensation: the latter is only due when the player previously had an "amateur" status. The first "professional" contract triggers therefore the payment of training compensation. The question of differentiation between professional and amateur players has been raised in numerous CAS Panels dealing with issues of training compensation.

The FIFA RSTP include some provisions that define the professional player and differentiate the professional from the amateur player. Nevertheless, the provisions of the RSTP contained in the oldest i.e. the 2001 version are not identical to the latest versions (i.e. the 2005 and the 2008 RSTP). Since some important CAS cases have been rendered on the application of the older regimes (2001 RSTP), it is interesting to examine them in order to see whether such CAS Awards could still be taken as a basis for similar decisions on training compensation and the status of a player.

According to Article 2 of the 2010, the 2008 and the 2005 RSTP (entitled "Amateur and Professional Players") *"1. Players participating in Organised Football are either Amateurs or Professionals. 2. A Professional is a player who has a written contract with a club and is paid more than the expenses he effectively incurs in return for his footballing activity. All other players are considered as Amateurs."* According to the Commentary on the RSTP (which *mutatis mutandis* applies to the 2008 RSTP), an amateur is a player who pursues sport just for fun or as a hobby, without any material gain, and who has never received any remuneration other than for the actual expenses incurred. Furthermore, an amateur player has, in principle, no written contract with the club

8. See also CAS 2007/A/1370 & 1376, award of 11 September 2008, no 87.

9. See Article 1 para. 1 of RSTP 2005; see also the Commentary on the RSTP, p. 67.

10. For more details see FIFA Commentary on the RSTP, p. 79.

11. FIFA Regulations on contractual stability apply only to professional contracts, see also 2004/A/691, award of 9 February 2005.

12. See 2010/A/2045.

with which he is registered. In CAS 2004/A/691 no. 76 & 77, the Panel found that the mere existence of a written agreement between an amateur and the club for which he is registered does not suffice to consider the player as a professional, and the amateur status is not defined by reference to an "amateur contract" but rather by the fact that a player has never received any remuneration other than the reimbursement of the actual expenses incurred.

The social aspect of participating in the group life of the club as well as his own health and fitness play a major role for an amateur player. In this respect, the FIFA Commentary on the RSTP repeats what was previously stated in Article 2 of the 2001 RSTP, by explaining that expenses incurred through involvement in a match or in training (e.g. travel and hotel, insurance etc.) and the costs of a player's equipment can be reimbursed to the player without jeopardising his amateur status.

As stated also in CAS 2007/A/1177 and repeated through the most recent CAS Awards[13] players can only be divided into two categories: professional and amateurs or, according to the older classification, amateurs and non-amateurs, and there is no space for a third or hybrid category, to which might belong players undertaking training dedicated to the practice of football but who are at the same time students with the goal of becoming professional football players, even if such players would not ordinarily (i.e. in common professional parlance) be called either amateur or professional (*tertium non dartur*). Players of both categories must be registered with an association to be eligible to participate in organised football (Article 5 para. 1). In this respect, players who have another regular working activity or employment besides their remunerated football activity (so-called semi-professionals) shall also be considered as professionals if they comply with the requirements of Article 2 para. 2 (see also Commentary on the RSTP, p. 11).

The RSTP contain an identical version of Article 2 on the Status of players; it also has to be noted that Article 20 on training compensation is, in essence, identical to Article 20 of the 2008 RSTP. In this respect, the interpretation contained in the Commentary on the RSTP should help us interpreting the identical provisions of the 2008 RSTP.

On the other side, the 2001 RSTP are somewhat different from the most recent RSTP versions. First, the older RSTP used different terms in order to describe the different status of the players, referring to "amateurs" and "non-amateurs" instead of "amateurs" and "professionals"[14]. The categorization of "non-amateurs" was proved to be rather unsuccessful[15]. Furthermore, the modification of the term in the subsequent RSTP versions was explained by the fact that football acquires an increasingly professional character. Apart from the different terminology, Article 2 of the 2001 RSTP provided that reimbursement of the players' actual expenses incurred during the course of their participation in any activity connected with football (travel and hotel expenses for involvement in a match, player's equipment, insurance etc) would not be a criterion for considering a player as non-amateur (see Article 2 paras. 1 and 2 of 2001 RSTP). Finally, the third paragraph of Article 2 was more or less the same as Art. 3 of the most recent RSTP, in that it introduced the remuneration test to be found in the most recent versions ("*any player who has ever received remuneration in excess of the expenses and costs described in par. 2 of this article in respect of participation in an activity connected with association football shall be regarded as non-amateur unless he has reacquired amateur status*").

B. Applicable Regulations for the definition of the status of a Player: FIFA Regulations vs. contrary Regulations of the National Federations

In CAS 2009/A/1895 it was held that the professional player is exclusively defined in the FIFA RSTP and the notion of a professional player is autonomous with respect to other national regulations. In the same case, which concerned training compensation following an international transfer of a player, the Sole Arbitrator disregarded the relevant provisions of the General Regulations of the National Association, which contained a reservation compared to the analogous provision of the FIFA RSTP.

The application of the FIFA RSTP is necessary in those cases because Article 2 RSTP contains a proper definition of the status of the player that does not refer to other national regulations. Furthermore, the RSTP (especially in Article 1 thereof) aim at regulating international transfers of players and contain universal and binding rules concerning the status and the qualification of the players in order to participate in organised football; there is, therefore, no place for the application of national law in case of an international transfer[16].

13. See, for instance CAS 2009/A/1781 (the same argument can also be found, by reference to the amateur contracts, already in CAS 2004/A/691 supra fn. 11, para. 63).

14. See Article 1 of the 2001 RSTP.

15. See also *Das Neue FIFA-Transferreglement* in SpuRT, 5/2005, p. 185.

16. See TAS 2009/A/1895.

Article 1 para. 3 RSTP provides that a number of provisions of the RSTP shall be binding at national level and have to be included without modification in the regulations of the national association. Article 2 RSTP is part of those provisions[17]. It is therefore equally applicable in case of a national transfer, as the Commentary provides: "*Associations are responsible for regulating domestic transfers, i.e. transfers between clubs affiliated to the same member association. This autonomy allows associations to adapt their own regulations to the particular conditions and circumstances of the country concerned. As a general rule, FIFA does not interfere in the day-to-day business of the associations, provided that severe infringements of the FIFA Statutes and/or regulations do not occur. 2 The autonomy of the associations is, however, limited by the basic principles of the Regulations that have to be observed at all times and in particular by those provisions that are in particular binding at national level and have to be included without modification in the association's regulations*"[18].

Article 2 RSTP is therefore applicable as it is at national level. It must be applied as it is for the definition of the status of player, in all cases where the question of an international transfer arises. What is more, according to Article 5 para. 1 RSTP, "*A player must be registered with an Association to play for a club as either a Professional or an Amateur in accordance with the provisions of Art. 2. Only registered players are eligible to participate in Organised Football. By the act of registering, a player agrees to abide by the Statutes and regulations of FIFA, the confederations and the Associations*".

This provision makes clear that the intention of FIFA is to render the content of Article 2 RSTP binding, since a player cannot be registered unless he fulfils the criteria of this provision.

The definition of the status of the player according to the FIFA RSTP was first highlighted in CAS 2009/A/1781: as seen above, the Sole Arbitrator did not apply Brazilian law for a case of international transfer of a player and held that the FIFA RSTP prevailed over the national regulations[19]. The primacy of the RSTP with regard to national regulations (which might contain contrary provisions) equally stems from the fact that the national members are bound to respect the FIFA Regulations, according to Article 1 of the FIFA Statutes: this provision would be meaningless if the national associations could simply insert and apply contrary national provisions[20].

17. So according to Article 1 al. 3 let. a RSTP.

18. See FIFA Commentary, para. 2 § 2 ad art. 1 RSTP.

19. See CAS 2009/A/1781, para. 8.16 – 8.17.

20. CAS 2009/A/1781, para. 8.17.

C. Interpretation of the FIFA Regulations through the CAS case law

The role of CAS Panels, as also stated in CAS 2008/A/1521 & CAS 2008/A/1533, is not to revise the content of the applicable FIFA rules, but only to interpret and apply them. As to the interpretation of the rules, Swiss law provides, under art. 1 of the Swiss Civil Code, that a rule must be interpreted according to its wording and its purpose. In this regard, the historical background of the rule is of some relevance only when such rule is not clear or incomplete.

Furthermore, in CAS 2009/A/1810 & 1811, the Sole Arbitrator repeated that the interpretation of the statutes and of the rules of a sport association has to be objective and always begin with the wording of the rule, which is the object of the interpretation[21]. The deciding body has to verify the grammatical meaning of the rule, looking at the ordinary meaning of the language used, at the syntax of the norm. It can further take into account historical elements by identifying, if possible, the intentions of the association when establishing the rule at scrutiny. What is more, the interpretation of the rules has to be in conformity with the context of the whole regulation[22].

1. The existence of a written contract

As seen above, FIFA RSTP divides players participating in organised football into two categories, i.e. amateurs and professionals. The definition includes two criteria (the written contract and the remuneration of the player) which, according to a literal interpretation, have to be cumulatively fulfilled in order to classify a player as professional, and, in case one of those conditions is not met, the player is considered to be amateur[23]. The criterion of the written contract was made after the modification of the provision subsequent to the 2005 RSTP version and this should not be disregarded by the CAS Panels[24].

The first element that appears decisive in this respect is the existence of a "*written employment contract with a club*"; as stated in CAS 2004/A/691 there is no "amateur" contract but rather a written contract that is also mentioned as "*contract as a Professional*"[25] or as

21. See CAS 2009/A/1810 & CAS 2009/A/1811.

22. See also CAS 2008/A/1673.

23. The cumulative application of the two criteria was also established in TAS 2009/A/1895.

24. See TAS 2009/A/1895.

25. See also Article 20.

"*professional contract*"[26]. Oral arrangements between a club and a player, even if they are admissible according to national labour law, are not in line with the mandatory nature of the conditions of Article 2 para. 2. What is more, a contract shall provide for the remuneration due to the player and shall be concluded for a predetermined period of time. Moreover, in line with the FIFA practice, "*whenever a dispute has occurred between a player and a club on the basis of an oral agreement, the DRC has decided that the player was entitled to sign and register for a new club immediately as he was not bound to the former club by a written employment contract but only by the registration form deposited with the relevant league or federation*"[27].

The form and the specific character of the contract foreseen in Article 2 of the 2005 and 2008 RSTP was described already in some early CAS Awards, although, as seen above, the 2001 version of the RSTP did not contain, in Article 2, a formal condition of a "*written contract*" for the "non-amateur" status of the player (but only an informal description in Article 4); the existence of a written contract as an explicit condition for qualifying a player as professional was only inserted in the 2005 and 2008 versions of the RSTP.

One of the first CAS cases dealing with the issue of training compensation and the status of the player was the procedure CAS 2007/A/1027, where the CAS Panel found that an important criterion in favour of the "non-amateur" status of the player was a contract where the existence of an employer-employee relationship between the club and the player was highlighted. In the specific case, the player agreed, from the moment he signed the contract, to perform services exclusively for the club. This was described by the CAS Panel as a clear "*situation of directional control*", on the part of the club, and subordination, on the part of the player[28].

Moreover, the written employment agreement with the club was, to the Panel's view, an indicator that the club was paying economic value to the player for the obligations which the Player assumed under the employment contract. On the contrary, and in order to prove the "amateur" status of the player prior to his transfer, the Panel referred to the absence of a written employment agreement and the fact that, due to such absence, the ability of the player to leave his previous club and join the new one. In this respect, nothing hindered the player from being engaged in other professional activities or occupations.

In CAS 2007/A/1177, under the application of the 2001 RSTP, the CAS Panel found that remuneration of a player was the only criterion that should be taken into consideration when deciding on the status of the player, whereas the existence of an employment agreement was not a relevant criterion to determine the status of the player for the purposes of RSTP 2001, by arguing that remuneration, as the only element included in the definition of Article 2, could also be received outside an employment relationship. Inversely, as recognised in CAS 2004/A/691, a player could have the status of an amateur player even within a contractual relationship with a club[29]. This was true, if one was to take by letter Article 2 of the 2001 RSTP; however, according to Article 4 para. 1 of the 2001 RSTP "*every player designated as non-amateur by his national association shall have a written contract with the club employing him*". The Panel found that this article provided for the consequence of non-amateur status but it was not part of its definition. This apparently led FIFA to modify the text of the RSTP, by explicitly inserting the existence of a written contract as a *conditio sine qua non* for the qualification of a player as a "professional" in the 2005 (and the 2008) RSTP.

Since the two conditions have to be cumulatively met, the existence of a written employment contract does not suffice in order to qualify a player as a "professional". As to the burden of proof for the existence of the employment contract, the Club that contests that it has to pay training compensation to the previous Club on the basis that the Player already had the professional status when he was registered with his old Club has to prove this. This was established in CAS 2009/A/1810 & CAS 2009/A/1811 (and later in CAS 2009/A/1895); the case concerned a Player who had evolved within two different Argentinian clubs, in which he was registered as an amateur, and who was subsequently transferred to a German club. The latter contested that it had to pay training compensation to the two Argentinian Clubs. However, the German club did not bring proof concerning the professional status of the player, although it had the burden of proof to do so. For this reason, in the absence of proof to the contrary, the Panel considered the registration of the player as an amateur in the sense of Article 5 RSTP and held that the Player had amateur status prior to his registering with the German club[30].

In CAS 2009/A/1895 the parties did not produce any written contract to the Panel. The Panel held that it could only be based on the alleged facts and facts proven by the parties and that each party bears the proof of its allegations in accordance with

26. See also Article 7 in Annex 6.

27. FIFA Commentary, fn. 12

28. See CAS 2006/A/1027, para. 16.

29. See CAS 2004/A/691, para. 66.

30. CAS 2009/A/1810 & CAS 2009/A/1811.

Article R51 and R55 – R 57 of the CAS Code). In the case at hand, the Club should have produced a written contract showing that the player was in reality professional already when he was playing for his old Club. The Club, however, could not establish the fact that the Player had a written contract and did not invite the Player to be heard as a witness before the CAS hearing. The Panel rejected the argument raised by the Club that it was not possible to obtain such information and to possess such written contract because this kind of information could only be obtained by the player himself.

Finally, in CAS 2010/A/2069 the Panel examined the content of the contract and held that the content of the written contract between the player and the club can give certain indications to the Panel as to the status of the player, especially in cases where there are no other documents, evidences or witnesses apart from the contract. In casu, the contract contained terms such as "professional", "salary", "taxes", which indicated that the intention of the parties was to sign a professional contract. The Panel concluded that both the "*content of the contract*" and the Player's salary are elements that indicate the professional status[31].

2. The single remuneration test as confirmed through the CAS case law

The second element for qualifying a player as a professional is, always according to Article 2 of the 2010 RSTP, the remuneration; a professional player "*is paid more than the expenses he effectively incurs in return for his footballing activity. All other players are considered as Amateurs".* As seen above, an amateur is a player who pursues sport just for fun or as a hobby, without any material gain, and who has never received any remuneration other than for the actual expenses incurred.

The first time that the status of the player was dealt with in a CAS Award (with relation to the training compensation) was in the CAS 2005/A/838. Although the CAS Panel applied the 2001 RSTP, the Award was quite radical in that it employed the single remuneration test by stating that the player can still be considered as a non-amateur, even if he agrees to perform services for a meagre wage, since FIFA did not stipulate a minimum wage[32].

In 2005/A/878, the CAS Panel had to deal with the status of a minor player, whose parents had signed an employment contract on his behalf. The Panel found that the club's payment of USD 16,500 to the player's parents did not produce a professional sport relationship, because, according to the agreement between the club and the player, this amount was paid to the player's parents in consideration of the registration of the Player with the club and the economic rights related to any future transfer of the Player. Thus, the fact that the club did not pay this money to the player as "a salary" was a sufficient criterion for the amateur status of the player.

The importance of remuneration as the only pertinent criterion for deciding on the status of a player was highlighted in CAS 2006/A/1177 and in the following CAS 2007/A/1207 & CAS 2007/A/1213, where the Panels found that remuneration is what alone distinguishes an amateur from a non-amateur player, without paying any attention to the existence of the written contract, since, in principle, remuneration is possible also in the absence of an explicit employment agreement.

In CAS 2006/A/1177, the Panel detached the remuneration criterion from other conditions, such as the fact that the club benefitted from the player's activity, since this condition could not be found in the relevant FIFA rules. The Panel also confirmed the CAS 2005/A/838 in that very poor remuneration may suffice in order to qualify a player as non-amateur even in cases where such remuneration falls short of a living wage and obliges the player to find other sources of income in order to subsist in the country.

In CAS 2007/A/1027 & CAS 2007/A/1213[33], the Panel applied the 2001 RSTP and found that the player had a non-amateur status because he was entitled not only to a weekly wage and appearance bonuses pursuant to an established payment scheme, but also enjoyed other rights such as holidays, disability benefits for a limited time and payment of accommodation. The Panel deemed that all these advantages clearly exceeded the category of cost reimbursements provided by Art. 2 para. 2 of the 2001 RSTP (and later on, as an interpretation tool in the Commentary on the RSTP). The Panel concluded that such a player should be considered as a non-amateur, even if the remuneration received by the player was not sufficient for him to make a living.

In both CAS 2007/A/1207 & CAS 2007/A/1213, the Panel repeated that the 2001 RSTP foresee a single and clear remuneration-related test, and that there is no need to have recourse to national legislation in order to interpret the nature of the specific contractual agreement between the player and his club[34]. *"Given the existence of the single remuneration-related test, the Panel considers that it is not necessary to enquire any further on the*

31. See CAS 2010/A/2069.

32. CAS 2005/A/838.

33. See CAS 2007/A/1207 & CAS 2007/A/1213, para. 87.

34. Ibid.

classification of the agreement between the Player and Fiorenzuola under Italian law and sporting regulations". In both awards, the Panel found that the classification of the agreement under national law had no impact on the classification of the status of the player according to the RSTP. Indeed, and although Article 3 RSTP 2001 provided that the status of the player shall be determined by the national association with which the player is registered, national legislation should comply with the RSTP; in case of divergence between national legislation and the RSTP, the latter prevails over the former[35].

The first time that a CAS Panel applied the RSTP 2005 was in CAS 2009/A/1781: the Sole Arbitrator applied the RSTP, whose respective provisions are formulated in exactly the same way as in the 2008 RSTP. In the particular case, the core of the dispute concerned the status of the player that left his first club for another club (second club), always under the "amateur" status according to its registration, and was subsequently transferred to a third club, registering for the first time as a "professional". In the case at stake, a crucial point for the Sole Arbitrator's decision was the actual status of the player while he was registered with the second club, since a confirmation of the player's status as an amateur would entitle the player's first club to training compensation. The opposite conclusion would release the player's new club (Appellant before the CAS proceedings) from such obligations towards his first club (Respondent).

In CAS 2009/A/1781, the status of the Player while playing for the second club was examined in light of Article 2 of the RSTP. Once the Sole Arbitrator concluded that the existence of a written contract was undisputedly fulfilled, he tried to find whether the remuneration condition set in Article 2 of the RSTP was equally met. In this particular case, according to the written contract between the player and his second club, the athlete was entitled to an *"apprenticeship allowance in the amount of R$620 for his living costs and as an incentive to the practice of football"*. The athlete was further entitled to free medical, dental and psychological aid, as well as to expenses for transportation, board, accommodation, school lessons, nutritionist, physical therapist and insurance. The Sole Arbitrator took into consideration all these expenses – which were already covered by the Club – and concluded that the amount that the player received for his "living costs" was equivalent to a salary, and not to the *"expenses he effectively incurs in return for his footballing activity"* (since all those expenses were already provided for by the club). Inversely, the Sole Arbitrator did not take into consideration arguments that the money received was too low and that it could be considered as "a salary" and confirmed the previous CAS jurisprudence on the matter[36].

As to the different terminology employed in the two versions of the RSTP, namely the "amateur" and "non-amateur" contained in the 2001 RSTP versus the "amateur" and "professional" players of the 2005 and the 2008 RSTP, the Sole Arbitrator noted that the principle of the two categories of football players remains the same in the latest RSTP versions (and, consequently, earlier CAS case law may indeed be employed as precedence albeit the different formulation).

3. Registration of the player as amateur/ professional with the national authorities

According to Article 20 of 2008 RSTP *"Training compensation shall be paid to a player's training club(s): (1) when a player signs his first contract as a professional (…)"*. Article 2 para. 1 of Annex 4 of RSTP foresees that *"training compensation is due when: i) a player is registered for the first time as a professional (…)."*

In 2009/A/1810 & 1811, the Sole Arbitrator repeated that any party which asserts facts to support its rights has the burden of establishing them according to Article 8 of the Swiss Civil Code and the jurisprudence of the Swiss Federal Tribunal[37]. In light of the fact that the CAS Code sets forth an adversarial system of arbitral justice, a party wishing to establish certain facts and persuade the deciding body, must actively substantiate its allegations with convincing evidence[38].

In the particular case, the (second) club that was obliged to pay training compensation according to the FIFA decision asserted that the player was already a professional before he was registered with it, and this was made in the absence of any evidence to ascertain a plausible labour employment contract between the player and his former club or the fact that the player was effectively paid by the former club for his footballing activity. Since the second club failed to submit any evidence as to the payment of the player by his former club, the Sole Arbitrator concluded that the amateur status of the Player with the former club was sufficiently demonstrated by his registration as amateur with the national association[39].

35. See both CAS 2006/A/1177, para. 7.4.8 and CAS 2007/A/1207 & CAS 2007/A/1213, para. 86.

36. See CAS 2006/A/1177, para. 7.4.6 and 7.4.11; see also CAS 2006/A/1207, para. 90-91.

37. ATF 123 III 60, ATF 130 III 417.

38. CAS 2003/A/506, para. 54.

39. See CAS 2009/A/1810 & 1811.

In CAS 2009/A/1781, the Sole Arbitrator dealt with a similar argument raised by one of the parties, asserting that the RSTP refer to the registering of the player as a professional[40]. Therefore, according to the club's assertion, only the formal registration of the player (done by his national federation) should be taken into consideration for deciding on the player's status. In this respect, the fact that the Player was registered with the national association as an amateur and was only formally registered for the first time as a professional when he joined his second club was sufficient for confirming the (amateur) status of the player with his former club.

This argument was not endorsed by the Sole Arbitrator, who highlighted the inconsistency in the wording used in the RSTP, in the sense that, while Article 20 refers to the *signing* of the first professional agreement as the element that triggers the payment of training compensation, Article 2 para. 1 and Article 3 para. 1 of Annex 4 refer to the *first registration* as a professional as the element that triggers the payment of the training compensation. Yet, the provisions contained in the Annex 4 are mainly focused on the procedure for payment and therefore refer to *registration*, as an easily identifiable element. The principle can be found by reading Article 20 together with Article 5 of the RSTP: according to Article 5, the registration should reflect the true status of the player, and thus adhere to the criteria of Article 2. The assumption of the regulations is that a Player will indeed be registered in a manner that complies with the criteria contained in Article 2 and therefore, under this assumption, there can be no distinction between the signing of the first professional contract and the registration for the first time as a professional.

Furthermore, the Sole Arbitrator stressed that, according to Article 1 para. 3 of the RSTP, the national federation is obliged to literally transpose Article 2 of the RSTP[41]. Under Article 26 para. 3 of the RSTP, Article 1 para. 3 should have been implemented in the national regulations from 1 July 2005. The mere fact that the national federation registered the player in a way inconsistent with the requirements of the FIFA RSTP (i.e. albeit the existence of a salary etc) should not affect the decision as to the true status of the player and should not remove the player from the scope of the FIFA Regulations and the criteria established in Article 2 of the RSTP[42].

4. Incorrect transposition of the FIFA RSTP into the Regulations of the national federation

According to Article 3 of the 2001 RSTP "*A player's status shall be determined by the national association with which he is registered (2) Any dispute regarding the status of a player involved in an international transfer shall be settled by the FIFA Player's Status Committee.*" This means that, in principle, the national association with which the player is registered has the responsibility (and the authority) to determine the status of the player. However, in CAS 2007/A/1207 & 2007/A/1213, the Panel stated that such determination must be made in accordance with the applicable FIFA Regulations and is subject to review by the FIFA Players' Status Committee. If the status of the player has to be determined in the context of a dispute concerning training compensation fees, the competent bodies, i.e., the DRC and the CAS, must also determine such status in accordance with applicable FIFA rules and are therefore not bound by the classification made by the national federation.

In CAS 2005/A/838 and in CAS 2006/A/1177[43], the Panel drew attention to Article 2 of the preamble of RSTP 2001, according to which the principles under Chapter I of the Regulations, including Article 2, *"are also binding at a national level"*. The Panel thus confirmed that the criteria set by FIFA governing the definition of a player as amateur or non-amateur are also binding at national level, and the national associations are themselves required to apply those criteria within their "Jurisdiction".

In 2009/A/1781 (para. 8.16), the Sole Arbitrator stressed that, according to Article 1 para. 3 of the RSTP ("*The following provisions are binding at national level and have to be included, without modification, in the Association's regulations: Art. 2 – 8, 10, 11 and 18*"), the national federation is obliged to literally transpose Article 2 of the RSTP. Under Article 26 para. 3 of the RSTP, Article 1 para. 3 should have been implemented in the national regulations from 1 July 2005. The mere fact that the national federation registered the player in a way inconsistent with the requirements of the FIFA RSTP (i.e. albeit the existence of a salary etc) should not affect the decision as to the true status of the player and should not remove the player from the scope of the FIFA Regulations and the criteria established in Article 2 of the RSTP (CAS 2007/A/1370 & 1376 (no. 87).

The conclusion is that, as confirmed inter alia in 2008/A/1370 & 1376 (para. 105) and in CAS 2009/A/1781 (para. 8.17), national associations are obliged to correctly transpose the FIFA RSTP into

40. Article 3 para. 1 of Annex 4 of the RSTP, according to which "*when a player is registering as a Professional for the first time, the club for which the player is being registered is responsible for paying Training Compensation*".

41. See also above, under *"Incorrect transposition of the FIFA RSTP into the Regulations of the national federation"*.

42. See CAS 2007/A/1370 & 1376, no. 87.

43. CAS 2005/A/838, para. 29; CAS 2006/A/1177.

their national regulations for transfers between clubs belonging to different associations, and, in case of inconsistency between a provision of a national association and a FIFA provision, the FIFA provision prevails. Otherwise, the deference to international sports rules and the obligation assumed by national associations in their own statutes (and accepted by its clubs, players, etc.) to comply with FIFA rules would no longer make sense.

CAS Award	Applicable Regulations	Status of the player	Remuneration test	Written contract	Registration and national Regulations
2004/A/691	RSTP 2001	"Amateur contract"	No remuneration received by the club	Yes but: the mere existence of a written agreement is not sufficient to consider the player as professional	Amateur
2005/A/838	RSTP 2001	Non-amateur	Yes ("even meagre wages are considered as salary")	"Pre-contract"	Registered as amateur but this is not binding for FIFA nor for CAS
2007/A/1027	RSTP 2001	Non-amateur	Yes ("more than reimbursement of costs incurred")	Yes (subordinate relationship)	Registered as non-amateur
2007/A/1177	RSTP 2001 exclusively– no space for national law	Non-amateur	Yes ("more than reimbursement of costs incurred")	The existence of a contract is not a pertinent criterion (!)	No national legislation if different to the FIFA RSTP
2007/A/1207	RSTP 2001	Non-amateur	Yes	Yes ("financial agreement")	Registered as amateur
2007/A/1213	RSTP 2001	Non-amateur	Yes	Yes ("financial agreement")	Registered as amateur
2009/A/1781	RSTP 2005 exclusively, no space for national law	Professional	Yes ("apprenticeship allowance")	Yes ("amateur contract")	Registered as amateur but this is not binding for FIFA nor for CAS
2009/A/1810 & 1811	RSTP 2005	Amateur	No	No contract produced by the parties	Registered as amateur
2009/A/1895	RSTP 2005 (transfer)	Amateur	No	No written contract produced by the parties	Registered as amateur
2010/A/2069		Professional	Yes ("minimum salary subject to taxes")	Yes – content of the contract as pointer for the status of the player	Registered as professional

Selected issues related to CAS jurisdiction in light of the jurisprudence of the Swiss Supreme Court

Dr Despina Mavromati, Counsel to the CAS

I. Introduction

A. Authority of the Swiss Supreme Court to annul a CAS Award on jurisdictional grounds

CAS is an arbitral institution with its seat in Lausanne, Switzerland; being an arbitral institution, its jurisdiction is not automatically granted but there has to be a valid arbitration clause or an arbitration agreement between the parties. CAS may accept or deny its jurisdiction, following the specific circumstances surrounding the case. According to the provisions of the Swiss Private International Law Act (Swiss PILA, PILA), the parties may appeal against such decision to the Swiss Supreme Court, which has the last word – not only but also – in cases of CAS' jurisdiction and indirectly draws the limits of such jurisdiction on a case-by-case basis. The decisions of the Swiss Supreme Court therefore establish (not only through their *rationes decidenti* but also through their *obiter dicta*) important jurisprudential principles that can be very helpful for future CAS Panels when dealing with the issue of jurisdiction.

An appeal against a CAS award is admissible under the conditions exhaustively enumerated in Articles 190-192 of the Swiss PILA (*Appel, Beschwerde*), in accordance with Article 77 para. 1 of the Federal Act on the Swiss Supreme Court (BGG)[1]. The grounds that are admissible are exhaustively set out in Art. 190 para. 2 PILA[2], whereas the Supreme Court does not review criticisms of appellatory nature[3] but only the grounds pleaded and substantiated in the appeal[4]. In principle, the Supreme Court bases its judgment on the facts as they have been established by the CAS, and it may not correct the facts even if they were obviously incorrect or violated the law within the meaning of Article 95 BGG[5].

One of the grounds for annulment of the arbitral award according to Article 190 para. 2 PILA is the

1. Art. 176 para. 1 and 2 of the Swiss PILA, see also DFT 4A_424/2008 para. 2.1.

2. DFT 134 III 186 E.5; 128 III 50 E. 1 a p. 53; 127 III 279 E. 1a p. 282.

3. DFT 119 II 380 E. 3b p. 382.

4. DFT 4A_424/2008, *X. v. Fédération Internationale de Hockey (FIH)*, judgment of 22 January 2009, at 2.2.

5. See *inter alia* DFT 4P_105/2006 at 6, see below under fn. 42.

lack of jurisdiction of the panel that ruled on the matter (the arbitral award can be attacked only *"... (b) if the arbitral tribunal erroneously held that it had or did not have jurisdiction..."*). As to the cases where the arbitral tribunal has ruled on its own jurisdiction through a partial award[6], the award can be appealed on the grounds of lack of jurisdiction only through an immediate appeal against the partial award, in accordance with Articles 186 para. 3 and 190 para. 3 PILA[7]. In all other cases, the party must contest CAS' jurisdiction when submitting its answer to the merits at the latest, otherwise the ground will be rejected[8].

The first issue that the Supreme Court has to examine is the applicability of the provisions of the 12th Chapter of PILA. Although not of great practical importance, the Supreme Court must check whether the parties have excluded the application of the Swiss PILA and decided to submit their dispute to national law. Indeed, an arbitral award issued by a Panel which has declared itself competent to decide on the basis of the PILA and has not applied Swiss (national) law (contrary to such choice made by the parties) can be set aside on the basis of Article 190 para. 2 (b) PILA[9]. Again, this has little practical importance for CAS awards since parties almost never exclude the applicability of the PILA and the CAS panels do examine whether PILA is applicable or not before deciding on their jurisdiction[10]. In any event, the applicability of the PILA is systematically controlled not only by the CAS but also by the Supreme Court before examining the grounds of Article 190 PILA.

The second – and far more important in practice – issue that the Supreme Court is often called to examine is the existence, the validity and the scope of the arbitration agreement[11]. In cases where the arbitral tribunal has accepted its jurisdiction, it can be brought forward that the disputed matter was not arbitrable or that there was no valid arbitration agreement[12]. In this respect, the defence of inarbitrability of the subject of the dispute is a ground for the panel's lack of jurisdiction, and such defence should therefore be raised prior to any other defence on the merits[13]. Furthermore, the scope of the arbitration agreement is another element of the control of the panel's jurisdiction[14]. It should be noted that the parties basing their appeals on Article 190 para. 2 (b) PILA should be careful when invoking factual elements: as will be shown below, while the Supreme Court examines freely the legal questions related to jurisdiction, it does not review the factual elements unless this has explicitly been raised by the parties or where there are exceptionally new elements (*nova*)[15]. More specifically, the control of factual elements is only admissible if it is a prerequisite for the control of the panel's jurisdiction[16].

Another question that the Supreme Court is frequently asked to examine is whether the arbitral tribunal has jurisdiction *ratione materiae* to involve a party in the proceedings[17]. Questions related to the so-called "*group of companies doctrine*" also fall within the scope of Article 190 para. 2 (b) PILA[18]. What is more, an appeal based on the fact that the CAS Panel admitted its jurisdiction while the internal remedies of the federation had not been exhausted also falls within the scope of Article 190 para. 2 (b) PILA[19].

Lastly, a party that is not included in a (valid) arbitration agreement (according to Articles 177 para. 1 and 178 PILA) can be deemed to have tacitly agreed to be bound by the arbitration agreement if it entered into the merits without having raised the defence for lack of jurisdiction ("*Einlassung*", "*rügelose Einlassung*"): this issue can also constitute a ground for appeal on the basis of Article 190 para. 2 (b) PILA[20]. In the following pages we will examine some examples of the aforementioned grounds from judgements rendered by the Swiss Supreme Court in appeals against CAS Awards.

B. Validity of the arbitration agreement according to Article 178 PILA

The form and the material conditions for the validity of the arbitration agreement are regulated in Article 178 PILA: "*1. As to the form the arbitration agreement shall be valid if it is made in writing, by telegram, telex, telecopier, or any other means of communication that establishes the terms of the agreement by a text*". The material conditions set out in Article 178 PILA need to be fulfilled whenever there is an arbitration clause in favour of an arbitral tribunal seated in Switzerland, and, therefore,

6. See CAS 2000/A/262, in Reeb M., *Digest II*, p. 377; see Rigozzi A., N. 1361.

7. See DFT 121 III 495; see DFT 4P.230/2000 of 7 February 2001, *Roberts v. FIBA*, Bull ASA 2001, p. 523, 527.

8. See 4P.105-2006, para. 6.3, see below under fn. 42.

9. See also DFT 115 II 391, where the Supreme Court enumerated the conditions for the non-applicability of the 12th chapter of the PILA in detail.

10. See *inter alia*, CAS 2009/A/1996, para. 2; CAS 2009/A/1910, paras. 2-3.

11. See Berger/Kellerhals, N. 1551; DFT 117 Ib 94 E. 5.b.

12. See DFT 130 III 129 f. E. 2.1.2.

13. Berti/Schnyder, Art. 190 N. 36; see, however, Rigozzi A., N 700 and N 701)

14. See DFT 116 II 641 E. 3a.

15. See also Rigozzi A., N 1364; see DFT 133 III 139 E. 5 p. 141; DFT 129 III 727 E. 5.2.2. p. 733 with further references; 4A_42/2007, 5.1.

16. DFT 117 II 97; see also Berti/ Schnyder, Art. 190 N. 36 and N 51.

17. DFT 129 III 733 ff.

18. See also Poudret/Besson, p. 221 f.

19. See Rigozzi A., N. 1363; see also DFT 4P.149/2003 of 31 October 2003, *Roux v. UCI & FFC*, paras. 2.2.1, below.

20. See Berti/ Schnyder, Art. 190 N. 50.

whenever parties have conferred jurisdiction to the CAS[21].

However, even in the Swiss PILA there is no definition of the "*arbitration agreement*" or details as to the essential features and the necessary content of an arbitration clause[22]. Generally, an arbitration agreement is a bilateral – or multilateral – contract, according to which two – or more – parties bindingly agree to submit one or more, existing or defined future disputes before an arbitration panel / or an arbitral institution, in accordance with a directly or indirectly defined legal system and to the exclusion of the state courts[23]. The provisions related to the form aim at providing the legal certainty related to the admission of jurisdiction[24].

The arbitration agreement does not have to be signed by the parties, but suffices to have a written agreement[25]. This "*forme écrite simplifiée*" or "*forme documentaire*" comprises any written expression of the parties[26]. With regard to the formal validity of the arbitration agreement, the Panel held in CAS 2008/O/1483 that, since Swiss law is very liberal when determining the criteria for the "written form", any party's written expression will be considered to meet the requirements of Article 178 para. 1 PILS. Furthermore, the parties' written statements can be expressed in one or several documents.

Apart from the formal requirements for the validity of the arbitration clause, Article 178 para. 2 Swiss PILA foresees some additional, this time material, requirements: First, the arbitration agreement is valid "*if it complies with the requirements of the law chosen by the parties (...)*": accordingly, parties can refer to a law different from the Swiss law, however parties do rarely subordinate the arbitration clause to a law different from the rest of the contract[27].

Neither Article 178 nor any other provision of the PILA analyses the substantial content of the arbitration agreement[28]. In case of application of Swiss law, the conclusion of the agreement and possible deficiencies that may exist is regulated by the Swiss CO (Article 1 ff.). Accordingly, it is necessary to have a consistent and mutual agreement about the *essentialia negotii*, with two principal points: the consensus that all possible disputes that might arise will be resolved by means of arbitration and the determination of the dispute in question, the venue of arbitration and the arbitral tribunal itself[29]. In the case of institutional arbitration like the CAS, it suffices to copy the model arbitration clauses which can be found on the CAS website to the specific circumstances of the case.

II. Selected issues related to CAS jurisdiction according to the jurisprudence of the Swiss Supreme Court

A. Legal interest of the National Federation appealing against the CAS award to the Swiss Supreme Court on the basis of CAS' lack of jurisdiction

Sports federations that were not parties in the CAS proceedings cannot appeal to the Supreme Court against an award where the CAS Panel accepted its jurisdiction without establishing their legal interest: although the Supreme Court did not examine the specific jurisdictional issue because it first declared the case inadmissible, the case 4A_566/2009 is interesting because the Supreme Court dealt with the issue of legal interest of the federation that contests CAS' jurisdiction before the Supreme Court. In this case, the ordinary & appeal procedures were conducted in Turkey and concerned the termination of an employment contract between a football player and his club[30]. According to the arbitration clause contained in the contract "*Disputes arising from this agreement are in competence of Board of Directors of Turkish Football Federation (TFF) & Arbitration Council*". Notwithstanding the existence of such clause in favour of the TFF bodies, the athlete filed an appeal against the second-instance decision of the TFF to the CAS, and the CAS admitted its jurisdiction not on the basis of an arbitral agreement in favour of the CAS but rather because none of the parties had contested the jurisdiction of the CAS in the written submissions.

In the appeal of the TFF to the Supreme Court for lack of jurisdiction of the CAS[31], the Supreme Court held that the subject matter of the case was the termination of an employment contract and this concerned merely the two parties to the case brought before the CAS and therefore not the TFF. National Federations (NFs) should establish that their authority is questioned through such decisions rendered by the

21. See also TAS 2002/A/431, in Reeb M. (ed.), *Digest of CAS Awards Vol. III*, p. 410 f.

22. See DFT 4P.253-2003, 5.1; see also Honsell et al., Art. 178, N. 3.

23. See DFT 130 III 66 ff., 70; DFT P_253/2003 of 25.03.2004, at E. 5.1; Volken P., Art. 178 N. 12.

24. See Reeb M., *Digest of CAS Awards Vol. I*, p. 589 f.; see also DFT 119 II 391 ff., 395.

25. See Honsell et al. N. 15; see also DFT 4P_124/2001 judgement of 7.08.2001, Bull ASA 2002, 88 ff. 92.

26. See Poudret/Besson *Comparative law of international arbitration*, 2nd ed., Sweet & Maxwell, 2007 n°193, p. 161 f.

27. See Honsell et al., Art. 178, N. 27; DFT 129 III 675 ff., 679.

28. See DFT 130 III 66 ff., 70.

29. See Honsell et al., Art. 178 N. 30 ff.

30. DFT 4A_566/2009 *X v. A & Y*, judgement of 22 March 2010.

31. DFT 4A_566/2009.

CAS, and how the longer waiting time for a final decision could harm the operation of the games. The mere fact that the national federation was the issuing body of the first – and second instance decisions is not an element sufficient enough to establish the legal interest of the national federation for purely contractual issues[32].

B. Late submission of the defence motion on lack of jurisdiction

In CAS 2007/A/1395, the Panel held that "*an agreement to arbitrate may be concluded explicitly or tacitly and may result from the content of the pleadings submitted by the parties. The submission by a party of numerous pieces of correspondence to the CAS which never raises or suggests any objection to the prospective jurisdiction of the CAS and contain arguments concerning the rights of the parties in a dispute may constitute responsive pleadings that do not object to the CAS's jurisdiction and therefore constitute an agreement to arbitrate before the CAS*"[33].

Therefore, parties who object to a tribunal's jurisdiction have to make their position very clear in order to avoid such "tacit" acceptance of the CAS' jurisdiction; an example therefore is the Pakistan Cricket Board case, where the Pakistan Cricket Board, in delivering its pleadings on jurisdiction, expressly stated that the pleadings were "*solely for the purpose of determining whether or not CAS have jurisdiction in this case*," and for no other reason[34]. Jurisdictional objections should be made before entering into the merits of the dispute[35].

In another case brought before the Supreme Court contesting *inter alia* the jurisdiction of CAS, the Supreme Court found that the appellant's defence of lack of jurisdiction was no longer admissible because the appellant should have contested CAS' jurisdiction until its answer on the merits at the latest (in accordance with Article 186 para. 2 PILA)[36]; the party who challenges the jurisdiction should therefore do this before entering into the merits of the CAS proceedings: once it has submitted its answer and expressed itself on the merits of the case, it is deemed to have accepted the jurisdiction and is therefore no longer admitted to raise the defence of lack of jurisdiction[37].

C. Exhaustion of the internal legal remedies prior to the appeal to CAS

An appeal based on the fact that the CAS Panel admitted its jurisdiction while the internal remedies of the federation had not been exhausted also falls within the scope of Article 190 para. 2 (b) PILA[38]. In the case *A. v. UCI & FFC* the initial CAS proceedings involved the International Cycling Union (UCI), who filed an appeal to the CAS against the decision of a national cycling federation (FFC) not to suspend a professional rider (found positive to a prohibited substance) due to violation of the national public policy[39]. In the specific case, the out-of-competition anti-doping control after which the rider was found positive to a prohibited substance was requested by the UCI, whereas, according to Article 3 of the national federation's regulations, this was only permitted upon request of the sports ministry or the national federation.

The UCI filed an appeal against the FFC decision to CAS, on the basis of art. 155 ff. of the Anti-Doping Regulations of the UCI (RCAD). The rider formally contested CAS' jurisdiction on the basis that such appeal would be illegal according to French anti-doping legislation and that the rider had never accepted CAS' jurisdiction on the first place. CAS rendered an award accepting its own jurisdiction, upholding the UCI appeal and suspending the rider for four years. Subsequently, the rider appealed against the CAS Award to the Swiss Supreme Court submitting that CAS erroneously accepted its jurisdiction and that the appeal should have been lodged, according to imperative national law, with the federal appeals' council of the national federation. By failing to do so, UCI had not exhausted the internal legal remedies and could not appeal to CAS, while the first-instance decision rendered by the disciplinary committee of the national federation had become final and binding.

The Supreme Court examined the RCAD and the rider's arguments, according to which the UCI could not directly appeal to the CAS, but was obliged to seize the federal appeals' council first: it held that the rider should have clearly indicated the provisions of the decree on which he based his case, but this argument would have been rejected in any case: Article 109 of the internal regulations of the NF exhaustively enumerated the persons/organisations that had the right to appeal, and UCI was not listed in this article. According to the Supreme Court, the rider should have cited a precedent where the federal

32. See DFT 4A_566/2009 at 1.2.2.

33. CAS 2007/A/1395.

34. CAS 2006/A/1190, at para. 6.4.

35. CAS 2007/A/1395, para. 7.

36. DFT 4P.105/2006, at 6.3 see below under fn. 32.

37. "*Einlassung auf das Verfahren*", see also Berti/Schnyder in Honsell et al., *IPRG Kommentar*, Art. 190 N. 32; see also DFT 120 II 155 at c.3a; DFT 121 III 495 at c.6d; Poudret/Besson, *Comparative law of international arbitration*, 2nd ed., Sweet & Maxwell, para. 796.

38. See Rigozzi A., N. 1363.

39. DFT 4P_149/2003, *A. v. Union du Cyclisme International (UCI) and Fédération Française de Cyclisme (FFC)*, judgement of 31 October 2003, at 2.2.1.

appeals' council accepted an appeal lodged by the UCI or by the national federation acting by delegation of the UCI against a decision taken by a disciplinary committee under comparable conditions; under the specific complex conditions of the case the Supreme Court held that CAS had correctly accepted its jurisdiction and that there were no internal remedies for UCI to exhaust prior to the appeal to CAS[40].

D. Limits in the review of factual questions with relation to lack of jurisdiction of the arbitral tribunal brought before the Swiss Supreme Court

Criticisms of appellatory nature are not admissible before the Swiss Supreme Court. Although this is largely known and confirmed by numerous decisions rendered by the Supreme Court overall, the distinction between what constitutes a legal criticism and what constitutes appellatory criticism is not always very clear when the parties contest the jurisdiction of the arbitral tribunal. An interesting example can be found in CAS 2005/A/895[41].

Y., an equestrian athlete who was disqualified through a CAS award appealed against such award to the Swiss Supreme Court and contested, *inter alia*, the jurisdiction of the CAS[42]. The athlete supported that CAS had no jurisdiction over the dispute and that according to Article 13 WADA Code (WADC) and Art. 145 of FEI General Regulations there was no right to appeal against a decision rendered by the FEI Judicial Committee. The Swiss Supreme Court held that the right to appeal counts to the specific material conditions that have to be fulfilled, in order to appeal against a decision. A question whether the party had a right to appeal to the CAS is not a question of jurisdiction *stricto sensu*, but rather a question of admissibility of the appeal: CAS had based its jurisdiction on Article 170 FEI General Regulations because they could establish a legitimate interest. The interpretation of Article 170 FEI General Regulations and Article 13 WADC/ Article 145 FEI General Regulations, which rule the right to appeal was considered by the Supreme Court as "*appellatory criticism*" inadmissible in an appeal before the Swiss Supreme Court. It therefore held that it could no longer examine whether the CAS correctly applied the right on which it based its decision and rejected the appeal[43].

Another case where the Swiss Supreme Court treated the issue of inadmissible factual questions in an appeal contesting the jurisdiction is the AWF case[44]. The Swiss Supreme Court dealt with an appeal filed by the AWF and an athlete against the International Weightlifting Federation (FILA) and WADA, asserting that the CAS ought to have denied its jurisdiction on the matter. The Appellants supported that according to Article 13.2.1 of the FILA ADR the only decisions that could be appealed to the CAS were the ones of the FILA Federal Appeal Commission and therefore not decisions by the FILA President, as in this particular case.

The Supreme Court held that it was bound by the findings of the CAS (Art. 105 para. 1 BGG) and that the question of who issued the challenged decision (i.e. whether it was the FILA Federal Appeal Commission or the FILA President) was not a legal question ("*Rechtsfrage*") but rather a factual question ("*Tatfrage*"): the CAS examined the files and found that the letter which shortened the ineligibility period of the athlete was issued by the FILA Federal Appeal Commission and was merely communicated by the FILA President to the parties. Since the Swiss Supreme Court was bound by the factual findings of the CAS, it could only examine the legal questions related to jurisdiction, while the Appellant could only – and exceptionally – bring new factual evidence in accordance with previous case law[45].

In another case, the Supreme Court held that the finding that an appeals tribunal of the national federation is an organ of this federation also falls within the scope of the factual findings and, once considered by the CAS, can no longer be reviewed by the Swiss Supreme Court. In an appeal before the Swiss Supreme Court on the basis of lack of jurisdiction, the Appellant (player) supported that the second-instance decision rendered by the appeals tribunal of the national federation (STJD) was final and binding since this tribunal was an independent sports court and its decisions should not be considered to be appealable decisions of a member (according to Article 61 of the FIFA Statutes)[46]. The Swiss Supreme Court held that it was bound by the findings of the CAS Award which had concluded that the STJD was an organ of the national federation[47]. Since the player had not raised any complaint within the meaning of Art. 190 (2) Swiss PILA about this factual finding

40. DFT 4P.149/2003, *A v. UCI & FFC,* judgement of 31 October 2003, at 2.2.2.

41. See CAS 2005/A/895, as well as the subsequent Judgement of the Swiss Supreme Court (4P_105/2006 paras. 6 ff.).

42. See DFT 4P_105/2006, *Y, FFE, EIER v. FEI*, judgement of 4 August 2006, at 6).

43. In accordance with 4P_314/2005, *A. v. X.*, judgement of 21 February 2006, at E. 3.2.

44. DFT 4A_416/2008, *A & AWF v. WADA & Fédération Internationale de Luttes Associées (FILA)*, judgment of 17 March 2009.

45. See DFT 4A_416/2008, at 5.1; see also DFT 134 III 565 E. 3.1; 133 III 139 E. 5 p. 141; 129 III 727 E. at 5.2.2. p. 733; 4A_392/2008, *UEFA v. Z*, of 22 December 2008, at 3.2.

46. DFT 4A_460/2008, judgement of 9 January 2009, *A. v. FIFA & WADA,* see also below.

47. CAS 2008/A/1370 & CAS 2008/A/1376.

before the CAS he should therefore be considered bound by this finding[48].

E. CAS jurisdiction through a global reference to the CAS contained in the Statutes of the Federation (existence and scope of the valid arbitration agreement)

The issue of validity of an arbitration agreement according to Article 178 PILA was first examined in the Nagel case[49]. A rider, who had been suspended by the FEI judicial committee, had already appealed against a decision rendered by the FEI judicial committee to the CAS; the rider had equally signed, prior to his participation in the German riding team, a specimen agreement engaging himself to respect the FEI rules and statutes; what is more, the player was enrolled, through his national federation, in a major FEI competition, according to the number 6 of the "*General Rules, Regulations and Conditions*" of which "*An arbitration procedure is provided for under the FEI Statutes and General Regulations as referred to above. In accordance with this procedure, any appeal against a decision rendered by the FEI or its official bodies is to be settled exclusively by the CAS in Lausanne, Switzerland*".

First, the Supreme Court examined to what extent the signature of the specimen agreement by the rider could constitute a global reference in conformity with the conditions set out in Article 178 PILA: the specimen agreement simply referred to the regulations of the FEI but not to the arbitration clause existing therein. The Supreme Court also held that in those cases there is a problem of consent rather than a problem of form and applied the principle of trust for the interpretation of such agreements.

According to the principle of trust, an arbitration clause through a global reference must be held valid and binding on a party that is aware of its existence and does not raise any objections but rather considers himself bound by this clause. In other words, the rider was deemed to have accepted to be bound by the arbitration agreement, validly giving his consent from a formal point of view through his signature of the specimen agreement and through the signature of the entry form to the major FEI competition, whose regulations expressly contained the arbitration clause[50].

In its case *X. c. Club Y & FIFA*, the Supreme Court repeated many of the legal findings of the Nagel case[51]. X, a football player, concluded a contract with one football club (Club Y) and a subsequent contract with another club (Club S). When the player requested an International Transfer Certificate (ITC) from FIFA, it expressly contested FIFA's jurisdiction; following two decisions rendered by FIFA (PSC and DRC, respectively) imposing a suspension and a fine on the player, the latter appealed to the CAS, but contested the jurisdiction of the CAS[52]. The CAS accepted its jurisdiction on the basis of article 22 FIFA RSTP (2008 version)[53].

The Supreme Court[54] held that the player, by requesting an ITC from FIFA and invoking the relevant RSTP provisions, could no longer put forward any reservations as to the jurisdiction of FIFA and that such reservations were not valid since such behaviour would be contradictory to his ITC request from FIFA. The player, by referring to the RSTP provisions without any reservation as to the arbitration clause in favour of the CAS was deemed to have accepted CAS' jurisdiction: by signing the contract between Club S & Y, the parties accepted to subject themselves to the FIFA jurisdictional power[55]. Even if the contract of employment between the player and his club contained no arbitration clause referring to the FIFA procedure and the contract between the player and Club S contained such clause but was not applicable to the relation between the player and his club, the player had however adopted a behaviour through which he was submitted to the regulation of FIFA in order to resolve the disputes of such nature.

The same approach had been followed by the Swiss Supreme Court in one of its previous rulings, namely in *Stanley Roberts v. FIBA*[56]. The Supreme Court held that a sportsman recognizes the regulations of a federation with which he is familiar if he applies to that federation for general competition or playing permit: in this respect, although the player Stanley Roberts (Appellant) was not a member of the federation (FIBA), the latter had imposed a playing ban on him through a letter, offering him the opportunity to appeal against such ban before its Appeals Commission and informing him of the regulations governing such appeals: the player, by appealing before the Appeals Commission under

48. DFT 4A_460/2008, at 6.3.

49. DFT 4C_44/1996 judgement of 31 October 1996, *Nagel v. FEI*, also reported in Reeb M., CAS Digest I; see also DFT 119 II 271 at. 3a.

50. The interpretation of the arbitration clause according to the principle of trust see also DFT 4P_230/2000, *Stanley Roberts v. FIBA*, at 2.b, judgement of 7 February 2001.

51. See DFT 4A_548/2009,*X c. Club Y & FIFA,* judgement of 20 January 2010.

52. TAS 2009/A/1881.

53. DFT 4A_548/2009 above, at 3.2.1.

54. See DFT 4A_358/2009 of 6 November 2009 at. 3.3.2.

55. See also DFT 4P.230/2000 *Roberts v. FIBA.*

56. DFT 4P.230/2000 at 2.b.

those regulations, without entering any reservation regarding the arbitration clause, signified his consent to that clause. What is more, in the Stanley Roberts case the Supreme Court found that the fact that the Order of Procedure (which the Appellant had signed) did not contain any arbitration clause was not of practical significance since the Appellant's consent had been sufficiently established through the unreserved written appeal[57].

In another case[58], a Brazilian football player was tested positive to a prohibited substance during a match held at a national level. After the first and second instance decisions at national level, FIFA and WADA appealed to the CAS against the national decision exonerating the player[59]. CAS accepted its jurisdiction based on the fact that the Brazilian Football Confederation (CBF) is a member of FIFA and thereby bound by the FIFA Statutes. Pursuant to Article 61 (5) and (6) of the FIFA Statutes, FIFA and WADA are entitled to appeal to the CAS against final (last-instance) doping-related decisions by members. The CBF argued that the case was purely national, without any international connecting factor and that there was no statutory basis in the CBF's statutes for CAS' jurisdiction.

The Supreme Court held that the FIFA Rules are binding on both the CBF and the player and that the player (an international player) is a member of the CBF, which in turn is a member of FIFA. Consequently FIFA's rules on jurisdiction of the CAS also apply to the player: Since Article 1 (2) of the CBF's statutes provide that the athletes who are members of the CBF should comply with FIFA's regulations, there is a valid global reference to FIFA's regulations[60].

Furthermore, the Supreme Court held that to the extent that there is no point in differentiating between disciplinary and contractual character of the dispute as long as we have a direct or even express submission of a party to the procedure established by a sports federation and the substance as to the jurisdiction is the same[61].

F. Limits to the CAS jurisdiction

The judgement A v. WADA was the first judgement rendered by the Swiss Federal Tribunal that annulled a CAS award based on Article 190 para. 2 (b) PILA[62]. The case concerned a professional ice hockey player (the athlete), who had taken part in various international competitions and had refused to undertake an out-of-competition sample collection organised by his National Anti-doping Agency (NADA). Subsequently, the national ice hockey federation (NF) sanctioned the athlete by issuing a public warning. WADA appealed first to the national bodies and subsequently to the CAS and requested a two-year sanction for the athlete[63].

The CAS accepted its jurisdiction on the basis of the "Player Registration Form" that the athlete had signed prior to the previous World Championship; it held that the IF letter, against which WADA appealed, was an appealable decision in the sense of Article R47 of the CAS Code. In terms of jurisdiction, the Panel considered that the athlete was bound by the IF's Statutes and had to recognize the final and binding decision power of the IF. The athlete was notably bound by the IF rules by signing the player Entry Form prior to an IF championship or event, which read as follows: "*I, the undersigned, declare, on my honour that a) I am under the jurisdiction of the National Association I represent. (...) (1) I agree to abide by and observe the IIHF Statutes, By-Laws and Regulations (including those relating to Medical Doping Control) and the decisions by the IIHF and the Championship Directorate in all matters including disciplinary measures, not to involve any third party whatsoever outside of the IIHF Championship and/or the Statutes, By-Laws and Regulations and decisions made by the IIHF relating thereto excepting where having exhausted the appeal procedures within the IIHF in which case I undertake to submit any such dispute to the jurisdiction of the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, for definitive and final resolution*".

The athlete appealed against the CAS Award to the Supreme Court on the basis of lack of jurisdiction. The Supreme Court held that when the athlete had signed the Entry form in order to participate in the IF Championship, the venue and date as well as the player's team, along with a description of the competition, were explicitly mentioned[64]. The athlete should not anticipate that, by signing an Entry Form with a view to participating in a specific event, he is automatically submitted to the jurisdiction of an arbitral tribunal generally and without any connection to the particular sports event[65]. In accordance with the principle of good faith, by signing the player Entry Form prior to a specific tournament, the athlete was not supposed to assume that he would enter into a broader arbitration agreement outside the scope of

57. DFT 4P.230/2000 at 2.b.

58. DFT 4A_460/2008, *A. v. FIFA & WADA*, judgement of 9 January 2009.

59. CAS 2008/A/1370.

60. DFT 4P.230/2000 of 7th February 2001 at E. 2a, ASA Bull. 2001 pp. 523 et seq., 528 et seq., *Roberts v. FIBA*.

61. See DFT 4A_358/2009 of 6 November 2009 at 4.2.2.

62. DFT 4A_358/2009, *A. v. WADA*, judgement of 6 November 2009.

63. See CAS 2008/A/1564.

64. Also in accordance with DFT 133 III 61 at 2.2.1 p. 67; DFT 132 III 268 at 2.3.2, p. 274 f.; DFT 130 III 417 at 3.2 p. 424, 686 at 4.4.1 p. 689.

65. DFT 4A_358/2009, at 3.2.3, *A. v. WADA,* judgement of 6 November 2009.

the event. One could therefore not deduce a "general consent" or "blanket consent" from the Player's participation in a specific event[66]. The Supreme Court therefore limited the binding power of those Entry Forms to the exact event which they foresee[67].

The second time that a CAS Award was annulled by the Supreme Court for the reason that the CAS Panel wrongly accepted its jurisdiction was in the ruling *X. v. Y*[68]. A long-distance runner was tested positive to a prohibited substance following an in-competition doping control and his National Federation (NF) issued a decision establishing a doping violation. The athlete appealed against the NF decision to the CAS. The CAS Panel found that it had jurisdiction not on the basis of the Statutes and Regulations of the NF but rather based on a letter sent by an anti-doping official of the IF (the IF letter), which constituted a "*specific arbitration agreement*" foreseen under Article R47 of the CAS Code. Finally, the CAS Panel annulled the NF decision and raised the sanction.

The NF, which had challenged the jurisdiction of the CAS already in the CAS proceedings, appealed against the CAS Award to the Swiss Supreme Court. The latter examined the IF letter, on which the Panel had based its jurisdiction: said letter was sent to the legal representative of the athlete in order to persuade him to settle the matter and accept the two-year ban: "*I would remind you that the decision that will ultimately be taken by the relevant disciplinary commission of [the national athletics federation] after 16th May will still be subject to an appeal to the Court of Arbitration for Sport in Lausanne, on your initiative if you disagree with it or on the initiative of IAAF, if the decision is not in accordance with the IAAF Rules. This will inevitably lead to a costly and lengthy arbitration procedure until the final award is rendered by the CAS*"[69].

The CAS Panel found that the athlete, based on the principle of trust, could have reasonably relied on an offer to enter into an arbitration agreement by the IAAF and that by appealing to the CAS he had accepted such offer. According to the Supreme Court, however, the CAS should first have determined whether a statement of intent existed at all[70]. It then examined the specific statement contained in the IF letter in order to see whether such statement could be understood in good faith by the recipient as the expression of an intent to activate a legal transaction and to enter into a legally binding commitment towards him. An offer (according to Article 39 ff. Swiss Code of Obligations – OR) can only be established as long as the statement evidences a sufficient intent to be bound by the party making it, along with the intent to be bound by such offer should the latter be accepted[71].

The Supreme Court held that the letter sent by the IF Official merely reminded the athlete that the decision taken by the NF could be appealed to the CAS ("*I would remind you that*"): this could not be considered as a statement of willingness to enter into a commitment towards the recipient but merely a reference to the legal means available.

G. Arbitration clause contained in a FIFA circular letter

In another judgement, the Supreme Court confirmed the CAS Award in which the Panel held that it lacked jurisdiction. The case occurred prior to the amendment of the FIFA Statutes and insertion of an arbitration clause in favour of the CAS[72]. The dispute concerned an employment contract concluded between Nevio Scala and the Club Besiktas: the contract foresaw that all disputes would be submitted to FIFA, whose decision would be final and binding. The coach was dismissed without notice because, at the time of the drafting of the contract, he had concealed the fact that he was suffering from an illness. While the Club filed the case with the Turkish State Courts, the Coach submitted the dispute to FIFA's players' Status Committee (PSC) in Switzerland, and the Club appealed against its decision to the FIFA's Executive Committee. The latter dismissed the appeal on the ground that the 20-day deadline had not been complied with. The Club further appealed against FIFA's decision to the CAS, requesting that the FIFA's PSC decision be stayed until the competent appeal court in Instanbul decides on the matter, while the Coach (respondent) challenged the jurisdiction of the CAS.

The CAS Panel, by means of a preliminary decision on jurisdiction, found that it had no jurisdiction to rule on the matter because the FIFA Circular Letter No. 827 of 11th November 2002 did not have a constitutive effect and did not give rise to jurisdiction on the part of CAS as the last appeal instance for FIFA disputes. It further held that an amendment of the FIFA Statutes would be necessary in order for the CAS to establish its jurisdiction on these issues. The Club appealed against this decision to the Supreme

66. See Tschanz/ Fellrath, *Chronique de jurisprudence étrangère,* Revue de l'arbitrage, N° 4/ 2010, p. 883.

67. In this respect, see the Nagel judgment under . 41

68. DFT 4_456/2009, *X. v. Y.,* judgement of 3 May 2009.

69. See DFT 4_456/2009 at 3.1, *X. v. Y.,* judgement of 3 May 2009.

70. See Gauch/Schluep/Schmid, *Schweizerisches Obligationenrecht*, Allg. Teil, Bd. I, 9. Ed. 2008, Rz. 208 and further references, see DFT 4_456/2009 at 3.3.1.

71. See DFT 4_456/2009 at. 3.3.1, *X. v. Y.,* judgement of 3 May 2009.

72. DFT 4P_253/2003, *A. v. B.,* judgment of 25th March 2004.

Court, submitting that the CAS wrongly held that there was no valid arbitration agreement.

The Supreme Court found that according to clause 10 of the employment contract between the parties disputes arising out of said contract could be submitted by either party to FIFA, whose decision would be final and binding on both parties[73]. The Court subsequently examined the FIFA Statutes (which, at the time, had not yet inserted an arbitration clause in favour of the CAS) and could find no reference to the CAS. The Circular Letter No 827 informing the FIFA Members that the CAS was now in a position to deal with decisions passed after November 2002, as an appeal body, was not sufficiently qualified as an arbitration clause for the CAS.

H. Lack of CAS jurisdiction due to lack of an appealable decision

In the CAS 2006/A/1171 (*T. Club v. Sudan Football Association, SFA*), the Panel found that the "decision" appealed against by T. Club was not a decision within the meaning of Article R47 of the CAS Code or Article 61 para. 1 of the FIFA Statutes, but a simple procedural step taken by a party, and there was therefore no appealable decision in this respect. The CAS further held that the internal regulations of the SFA do not contain a provision providing for the possibility to appeal to the CAS and the parties had not entered into a specific arbitration agreement. Such an appeal was therefore not admissible even if, according to Article 61 para. 1 of the FIFA Statutes, a decision taken by the members of FIFA can be appealed to the CAS.

The Appeal of the Sport Club to the Supreme Court was dismissed and the Supreme Court held that the CAS had not violated Article R47 of the CAS Code or Article 61 of the FIFA Statutes: the fact that one took the decision to submit an appeal constituted a decision in that it constituted the acceptance to do something, but this had nothing to do with the decision under the procedural terms[74].

III. Conclusions and general remarks

When challenging a CAS award before the Swiss Supreme Court, the issue of disputed jurisdiction arises pretty often: according to Article 190 para. 2 (b), a party may request the annulment of the award on the ground that the Panel "*erroneously held that it had or did not have jurisdiction*". The field of sports arbitration has some inherent particularities compared to the "traditional" commercial arbitration: first, there are two different procedures (i.e. ordinary and appeal procedures, according to Article S20 of the CAS Code); second, the arbitration agreement on which CAS bases its jurisdiction is often included in the Statutes/Regulations of the sports federation (see, for instance, Article R47 of the CAS Code), so that the formal requirements of Article 178 PILA as well as the consent to arbitrate are not always clearly established, especially in cases where the arbitration clause is contained in standard clauses prior to major sporting events ("Player Entry Forms").

The Supreme Court has carefully delimited the binding power of the Player Entry Forms forms and held that they cannot be deemed as arbitration clauses validly and generally binding the players for events outside the competition which they foresee, to the extent that they are valid arbitration clauses at all. By the same token, a mere statement by an IF official cannot constitute a statement of intent and a valid arbitration clause in favour of the CAS.

On the other side, one could generally assert that the Swiss Supreme Court has given, up to the present, a favourable consideration to the resolution of sports disputes by the CAS[75]. In fact, the Supreme Court acknowledged already at an early stage of CAS' existence its focus on the rapid resolution of sports disputes, by means of specialized panels with sufficient guaranties of independence and impartiality. As an offset to such liberalism, the Supreme Court held that the right to appeal against a CAS award to the Supreme Court should equally be granted for athletes and IFs. In this respect, the Swiss Supreme Court has widely accepted the validity of an arbitration clause by reference, through the interpretative tool of the principle of trust.

From all the above it becomes evident that the jurisdictional issue has not yet been definitively resolved: although the Swiss Supreme Court has significantly helped establishing important jurisprudential principles drawing the limits of CAS' jurisdiction, this remains a case-by-case solution, not least due to the particularities of each IF and the different regulations among federations, with different facts and circumstances surrounding each case.

Federations should therefore be careful when drafting their statutes/regulations in order to clearly establish their arbitration clauses and regularly inform their member federations/athletes of their

73. See DFT 3P_253/2003, at 5.1, *A. v. B.,* judgment of 25th March 2004.

74. Such as, for instance, Article 5 of the Swiss Federal Law on the administrative procedure, RS 172.01; see DFT 4A_160/2007, *X. v. Y.,* judgement of 28 August 2007, at 3.4.

75. See Rigozzi A., N. 396; see DFT 133 III 235 at. 4.3.2.3; see also 4A_548/2009 at. 4.1, X. v. Y. & FIFA, judgement of 20 January 2010.

rights and the dispute resolution methods available. Both the annulment of CAS awards and the dismissal of appeals to the Supreme Court on the basis of lack of jurisdiction entail a significant loss of money, time and energy; all three elements having been the *cause causans* for the creation of the CAS in the first place, almost 27 years ago.

Arbitration CAS 2007/A/1396 & 1402
World Anti-Doping Agency (WADA) & Union Cycliste Internationale (UCI) v. Alejandro Valverde & Real Federación Española de Ciclismo (RFEC)
31 May 2010

Cycling; blood Doping; no explicit prohibition in the CAS Code for the Appeal Brief to go beyond the Request for Relief; decision not to open disciplinary proceedings as an appealable decision before the CAS; de novo review and procedural defects occurred at the initial stage; establishment of an anti-doping rule violation to the comfortable satisfaction of the Panel; use of evidence illegitimately collected in case of an overriding public interest; requirements for the protection of good faith under Swiss law

Panel:
Mr. Otto L.O. de Witt Wijnen (the Netherlands), President
Prof. Richard H. McLaren (Canada)
Prof. Miguel Angel Fernandez Ballesteros (Spain)

Relevant facts

The World Anti-Doping Agency (WADA) is the international independent organization that promotes, coordinates, and monitors the anti-doping programs in sports. It is responsible for the worldwide harmonization and implementation of national and international anti-doping programs in sport. WADA is a Swiss private law foundation with its seat in Lausanne, Switzerland and its headquarters in Montreal, Canada.

The Union Cycliste Internationale (UCI) is the international federation responsible for the organization of the sport of cycling worldwide. It is an association of national cycling federations. The purpose of the UCI is to direct, develop, regulate, control and discipline all forms of cycling. The UCI is a Swiss private law association with its seat in Aigle, Switzerland.

The Real Federación Española de Ciclismo (RFEC) is the Spanish national federation in charge of cycling and is endowed with a disciplinary capacity at a national level. The RFEC is a member of the UCI and its headquarters are in Madrid, Spain.

Mr Alejandro Valverde Belmonte (Mr Valverde) is an elite Spanish road racing cyclist and currently races for Caisse d'Epargne. Mr Valverde is licensed by the RFEC.

This case arises as a result of the Spanish criminal investigation commonly referred to "Operacion Puerto" which began in May of 2004.

The Operacion Puerto proceedings focused on Dr. Eufemiano Fuentes, and on 23 May 2006, Dr. Fuentes and other individuals were arrested and charged with violating Spanish Public Health Legislation. This was the "final step" of the "Operacion Puerto" investigation and prosecution that had begun in May 2004 by the Spanish Guardia civil and the *Juzgado de Instruccion no. 31 de Madrid*.

On 29 August 2007, the UCI by way of letter requested, *inter alia*, the RFEC to initiate disciplinary proceedings against Alejandro Valverde Belmonte. This request was based on the UCI's review of the file and evidence gathered within the Operacion Puerto proceedings, including the blood bag labelled Blood Bag no. 18, the blood from which was purported to belong to Mr Valverde.

On 7 September 2007, the Comite Nacional de Competicion y Disciplina Deportiva (CNCDD), the competent body for doping matters within the RFEC rendered a decision not to open a disciplinary file against Mr Valverde.

Similarly, on 7 September 2007, the President of the RFEC also resolved to deny UCI's request and refused to open disciplinary proceedings against Mr Valverde.

It is these two actions of 7 September 2007 which WADA and the UCI appeal in this case.

On 30 January 2009 the Spanish court closed the criminal investigations and held that the complaints against several of the incriminated individuals, including Dr. Fuentes, and his sister Yolanda shall be filed. As of the date of this award, the Operacion Puerto proceedings are continuing.

At the same time as the proceedings were going on in Spain, the Italian authorities were also pursuing Mr Valverde.

In an effort to pursue Mr Valverde the Italian authorities issued Letters Rogatory to the Spanish court requesting the release of Blood Bag no. 18.

On 22 January 2009, Spanish Judge Sra. Jimenez Valverde (Judge Jimenez) issued a Court Order granting the request contained in the Letters Rogatory issued by the Italian authorities and authorizing the collection by Italian officials, for their use, of samples from Blood Bag no. 18.

On that same date, Judge Jimenez also ordered the Director General of the hospital of which the Barcelona Laboratory forms part to facilitate the collection of the samples to be taken from Blood Bag no. 18.

On 28 January 2009, the Italian Olympic Committee's prosecuting officer (CONI-UPA) sent a letter to the Italian Ministry of the Interior, Department of Public Safety, identifying the two representatives of the Italian Olympic Committee (CONI) and the two officers of the Italian police who would travel to Barcelona on 30 January 2009 to collect samples from Blood Bag no. 18.

That same day, the CONI wrote to Dr. Jordi Segura, the Director of the Barcelona laboratory to inform him of the identity of the individuals who would travel to Barcelona to collect the samples. Those individuals would be Dr. Marco Arpino, former Head of the CONI Anti-doping Office; Dr. Sra Tiziana Sansolini, Haematologist and Doping Control Officer; Captain Angelo Lano, Police Officer, Criminal Investigation Department; and Marshall Renzo Ferrante, Police Officier, Police Forensics Laboratory.

On 30 January 2009, those individuals attended at the Barcelona laboratory to collect the samples.

Dr Segura as well as the CONI and Italian police officials present during the sample collection signed the Record of Delivery of Material evidencing the collection of samples taken from Blood Bag no. 18.

On or about 11 February 2009, CONI commenced proceedings against Mr Valverde and summoned him for questioning regarding his involvement in Operacion Puerto and the possible related anti-doping rule violations associated with same.

Subsequent announcements further revealed that the Italian judicial authorities had also commenced separate criminal proceedings against Mr Valverde for certain violations of Italian criminal law.

On 11 February 2009, the CONI informed the Italian Public Prosecutor of its decision to commence anti-doping proceedings against Mr Valverde on the basis of evidence which it had in its possession, including a sample and DNA analysis of the blood from Blood Bag. No. 18.

On 1 April 2009, the CONI filed an official summons against Mr Valverde, setting out the factual and legal grounds of CONI's case against him.

On 11 May 2009, the hearing against Mr Valverde in the CONI matter took place in Rome before the Italian *Tribunale Nazionale Antidoping* (TNA).

WADA and the UCI were parties to these proceedings, as permitted by the applicable CONI Anti-doping Rules.

On 10 June 2009, TNA ruled that Mr Valverde had committed, among other anti-doping rule violations, a violation of Article 2.2 of the WADC which pertains to "*Use or Attempted Use of a Prohibited Substance or a Prohibited Method*." As a result, Mr Valverde was banned for two-years from participating in or attending athletic events organized under the auspices of CONI or related national sport organizations in Italy.

Mr Valverde appealed the TNA Decision to the CAS.

On 16 March 2010, the CAS Panel, in what this Panel shall call Valverde-II, issued its ruling, wherein the Court of Arbitration for Sport, ruling unanimously: *Declares the appeal filed by Alejandro Valverde Belmonte against Decision no. 42/2009 rendered May 11, 2009 by the Tribunale Nazionale Antidoping (TNA) of CONI is admissible;*

Upholds, based on the reasons of this award, Decision no. 42/2009 rendered May 11, 2009, by the TNA sentencing Alejandro Valverde Belmonte to a ban from assuming duties or offices within CONI, Italian national sport Federations or Disciplines, and participating in sporting events or competitions organized by the above organizations on Italian territory for a period of two years as of May 11, 2009;

(…)

Dismisses all other applications or conclusions of the parties.

Both WADA and UCI appealed against the decision reached on 7 September 2007 by the CNCDD and the President of the RFEC to the CAS.

Extracts from the legal findings

A. Is there an appealable decision?

The main issue to be decided is whether or not the Appellants' Requests for Relief should be granted.

This hinges on the general question of what should be decided with regard to the decisions against which the Appeals were addressed. These were:
the CNCDD-decision of 7 September 2007 not to bring a disciplinary file against Mr Valverde.

the "Resolution" of the RFEC of the same date to reject UCI's requests of 29 August 2007.

More precisely, in its said Resolution, the RFEC ruled to "*Rejeter les demandes déduites par la Commission Anti-Dopage de l'UCI*" addressed to it by the (Anti-doping Committee of) the UCI on 29 August 2007 which request comprised the following.

"Ouverture du dossier disciplinaire à l'encontre du coureur Alejandro Valverde ou faire suivre le dossier à l'instance compétente.

Examen de la documentation jointe, ainsi que des pièces qui parviendront plus tard et que nous ferrons suivre.

Informer immédiatement l'UCI de toute mesure d'instruction de sa fédération et des moyens de défense du coureur.

Demander au coureur de se soumettre à un test d'ADN conformément à la déclaration signée par ce dernier le 3 juillet 2007 afin de procéder à une comparaison avec le sang contenu dans le sac nº. 20 (sic) 1e 242 23/5.

Ne pas considérer que l'instruction est terminée ou fixer une date d'audience sans :

Informer l'UCI de l'état de la procédure et de ses conclusions

Demander l'avis de l'UCI".

The first question in this regard is whether there is an appealable decision in the sense of the applicable rules, more specifically in the sense of art. 280 of the 2004-Rules. Also with regard to this question, it could be said that it was never raised by a Party until after the Partial Award on jurisdiction and admissibility and therefore as such, is raised too late. However, even if the question should be considered, the answer is in the affirmative.

Article 280 of the 2004-Rules provides as follows.

"The following decisions may be appealed to the Court of Arbitration for Sport:

a) the decisions of the hearing body of the National Federation under article 242;

b) a decision that a Rider shall be banned from participating in Events under article 217 if the ban is for more than 2 (one) month;

c) the decisions concerning Therapeutic Use Exemptions as specified under articles 67, 68, 70 and 72.

d) the final decision at the level of the National Federation regarding a license-Holder that was referred to his National Federation according to article 183.

No other form of appeal shall be permitted".

Sub-article a) is relevant in the present context: was there a decision in the sense of this provision?

As noted above, the Appellants' Request for Relief addressed two documents:

The CNCDD-decision of 7 September 2007 not to open a disciplinary file against Mr Valverde.

The resolution of the RFEC of the same date to deny UCI's requests of 29 August 2007.

At the Hearing, it was explained by the Appellants that they were, at the time of their Statement of Appeal and their Appeal Briefs, not quite certain whether these two documents constituted two decisions or only one and that, for completeness' sake, they formally addressed the appeal to both.

The following was then explained by counsel for the RFEC.

The RFEC has delegated all power regarding disciplinary decisions to the CNCDD, a body of the RFEC, the chairman of which body, Mr Ricardo Huesca Boadihla, signed the CNCDD-letter.

A separate document, a resolution signed by the President and the Secretary-General of the RFEC, Messrs Fulgencio Sánchez Montesinos and Eugenio Bermúdez González, gave a further reasoning to this decision, which should be considered as an explanation to the CNCDD-decision.

On the basis hereof, the conclusion of the Panel is that, although there are two documents – hereafter

to be referred to respectively as: "the CNCDD-decision" and "the RFEC-reasoning" - there is only one decision legally, viz. the CNCDD-decision, of which the RFEC-reasoning forms an integral part. This ties in also with what was said by the RFEC and Mr Valverde earlier on this issue, viz. in their "Requête d'Arbitrage" in TAS 2007/O/1381, ("*the Stuttgart-proceedings")* where, without exception or limitation, reference is made to one decision only ("*… la decision du 7 septembre 2007*").

This CNCDD-decision, in the opinion of the Panel, is an appealable decision in the light of article 280, a) of the 2004-Rules.

As one learned writer concluded:

"… an appealable decision of a sport association is normally a communication of the association directed to a party and based on an "animus decidendi", i.e. an intention of a body of the association to decide on a matter , being also only the mere decision on its competence (or non-competence). A simple information, which does not contain any "ruling", cannot be considered as a decision.(Bernasconi M., *When is a "decision" an appealable decision?* in *The Proceedings before the Court of Arbitration for Sport*, (eds. Rigozzi/ Bernasconi, Schulthess, 2007), p. 273.)

The CNCDD-decision which certainly reflects an "*animus decidendi*", is far more than a simple information.

And in TAS 2009/A/1869, the following was said:

"Selon la définition du Tribunal fédéral , une décision est un acte de souveraineté individuel adressé au particulier, par lequel un rapport de droit administratif concret, formant ou constatant une situation juridique, est réglé de manière obligatoire et contraignante. Les effets doivent se déployer directement tant à l'égard des autorités qu'à celui du destinatoire de la décision (ATF 101 Ia 73, JdT 1977 I 67). Il s'agit donc d'un acte unilatéral adressé à un ou plusieurs destinataires déterminés et destiné à produire des effets juridiques (BOVAY B., Procédure administrative, Berne 2000, p. 253 s.).

Bien que les règles de procédure administrative ne soient pas directement applicables aux décisions émanant d'associations de nature privée, la jurisprudence du TAS considère que les principes qui en émanent définissent de manière adéquate les éléments principaux d'une décision (cf. TAS 2007/A/1293, para 29 ; CAS 2005/A/899, para 60).

En l'occurrence, il est constant que l'ordonnance de classement du 27 mai 2009 constitue une décision au sens de la définition ci-dessus rappelée. Il s'agit en effet d'un acte unilatéral de l'Autorité de recours SFL adressé au FCC La Chaux-de-Fonds SA et destiné à produire des effets juridiques dans la mesure où il met fin à la cause et confrère un caractère définitif à la décision de la Commission des licences de la SFL.

En ce qui concerne la prise de position du 4 juin 2009, la jurisprudence du TAS a déjà eu l'occasion d'établir que l'existence d'une décision n'était pas tributaire de la forme en laquelle elle était rendue. Ainsi, une communication sous forme de lettre peut parfaitement constituer une décision susceptible de faire l'objet d'un appel au TAS (cf. notamment CAS 2007/A/1251, para 30 ss ; CAS 2005/A/899, para 63 ; CAS 2004/A/748, para 86 ss).

Toutefois, seule une communication affectant la situation juridique de ses destinataires ou de tiers peut constituer une décision" (cf. CAS 2008/A/1633, para. 31 et les réf. citées ; CAS 2004/A.748, para 91).

The CNCDD-decision meets all these legal requirements: The CNCDD-decision not to open disciplinary proceedings against Mr Valverde was clearly intended to affect the legal position of a number of addressees, including but not limited to the UCI, which request pertaining to taking a number of legal decisions was rejected, and of Mr Valverde.

It is noted that the decision was not only sent to the UCI but also to Mr Valverde and his team.

B. Is there an anti-doping violation?

The Appellants assert that the evidence shows that Mr Valverde has committed an anti-doping rule violation, notably a violation of art. 15.1 and 15.2 of the applicable UCI-ADR. In summary: use or an attempted use of a Prohibited Substance or Prohibited Method.

Art. 15.1 and 15.2 of the 2004-Rules provide as follows.

"The following constitute anti-doping rule violations:

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

It is each Rider's personal duty to ensure that no Prohibited Substance enters his body. Riders are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Rider's part be demonstrated in order to establish an anti-doping violation under article 15.1.

Warning:

Riders must refrain from using any substance, foodstuff, food supplement or drink of which they do not know the composition.

It must be emphasized that the composition indicated on a product is not always complete. The product may contain Prohibited Substances not listed in the composition.

Medical treatment is no excuse for using Prohibited Substances or Prohibited Methods, except where the rules governing Therapeutic Use Exemptions are complied with.

Excepting those substances for which a threshold concentration is specifically identified in the Prohibited List, the detected presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a Rider's Sample shall constitute an anti-doping rule violation.

As an exception to the general rule of article 15.1, the Prohibited List may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously.

Use or Attempted Use of a Prohibited Substance or a Prohibited Method.

The success or failure of the Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed".

As has been held in several CAS-cases, an anti-doping rule violation has to be established to the comfortable satisfaction of the Panel, bearing in mind the seriousness of the allegation which is made. It is common ground that this standard is greater than a mere balance of probability, but less than the criminal standard of proof beyond a reasonable doubt. This standard of proof is to be applied, irrespective of whether allegations of anti-doping rules violations are based on Adverse Analytical Findings or other reliable evidence. In several cases, it has been said that doping offences can be proved by a variety of means (CAS 2004/O/645, award of 13 December 2005. CAS 2004/O/649, award 13 December 2005).

These principles are laid down in Articles 16 and 17 of the applicable UCI-ADR which read as follows:

Proof of doping - Burdens and standards of proof

16. The UCI and its National Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI or its National Federation 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. Where these Anti- Doping Rules place the burden of proof upon the Rider or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

Methods of establishing facts and presumptions

17. Facts related to anti-doping rule violations may be established by any reliable means, including admissions.

The next (sub) issue is therefore whether there is sufficient evidence in the case at hand to conclude that there is anti-doping violation. But before coming to that, a preliminary question has to be answered.

C. Can the evidence that was introduced be used?

In its Order of 22 December 2009, the Panel has considered the effects – if any – of the Serrano-Orders on the use of the evidence collected in the course of the Operacion Puerto for this arbitration. Its conclusion was, for the reasons referred to in paras 30-46 of that Order, which should be deemed to be incorporated herein that, in the light of these considerations, this Panel did not regard the Serrano-Orders as prohibitive for the production and use of Operacion Puerto-documents in this arbitration.

In its letter of 9 March 2010, the Panel asked the Parties to address this issue at the occasion of the Hearing, notably as to whether the orders issued by the Judge Serrano are based on Spanish mandatory law or public order and, in the affirmative, whether such law could be binding on an arbitral tribunal sitting in Switzerland, when it is reviewing a decision issued by a Spanish body such as the RFEC.

In this respect, there has been no further evidence produced by any Party and no convincing argument was brought forward which should lead to a conclusion different from the Panel's conclusion in its said Order.

It is noted that, in TAS 2009 A/1879, - hereafter also Valverde II - the Panel came to a similar conclusion.

This Panel agrees with the reasoning leading thereto, in addition to what it considered in its said Order.

Further, as mentioned in the said Order, Mr Valverde, by letter of 15 October 2009, announced that he would produce the full report of Messrs Alfonso and Hernandez. This has never been done, so the Panel continues to rely on the conclusions of Prof. Garcia.

It was confirmed at the Hearing that Mr Valverde is not one of the license holders facing criminal charges.

Even if the Operacion Puerto evidence should be deemed to have been collected illegitimately (quod non) it is noted that, under Swiss law – as Swiss counsel for the Appellants and the REC agreed at the Hearing - such evidence can be used, even if it was collected with violation of certain human rights, if there is an overriding public interest at stake. In the case at hand, the internationally accepted fight against doping is a public interest, which would outweigh a possible violation of Mr Valverde's personal rights (cf. also TF, 17 December 2009, 8 C 239/2008, para 6.4.2.).

The Panel cannot find that the Appellants ever renounced their right to use the Operation Puerto-documents.

D. Is there sufficient evidence in the case at hand to conclude that there is an anti-doping violation?

As mentioned above, the evidence on which the Appellants rely is partly documentary, and partly scientific.

Generally, on this issue, the Appellants make the same submissions, support each other's submissions and rely on the same evidence. With regard to the evidence on which they rely WADA elaborates notably on what will be called the scientific evidence and the UCI on what will be called the documentary evidence.

Therefore, for the sake of efficiency, unless stated otherwise, the Panel will refer to WADA and the UCI's arguments and submissions with respect to the commission of an Anti-Doping Rule violation collectively.

The scientific evidence consists in essence, in their view, of the following.

Blood Bag no. 18, as identified in the Guardia Civil Report.

(Undisputed) scientific evidence that this blood contains EPO.

DNA evidence that clearly demonstrates that Blood Bag no. 18 contains Mr Valverde's blood.

WADA and the UCI's position is that the evidence clearly demonstrates that the blood in Blood Bag no. 18, which the Spanish authorities long ago determined contains EPO, is Mr Valverde's. In particular, the Appellants state that the scientific evidence establishes the following:

The Barcelona Laboratory confirms that the blood in Blood Bag no. 18 contains recombinant (exogenous) EPO, a prohibited substance.

From this blood bag samples were taken - Samples no. 278920 and no. 278833 - by the Italian authorities, under the supervision of the Director of the Barcelona Laboratory, with the express consent and on the explicit instructions of the Spanish judiciary and subsequently tested in Rome;

Analytical results of DNA testing of the blood contained in Blood Bag no. 18 and comparison of that DNA with the DNA in sample no. 278350, which is a sample collected from Mr Valverde on 21 July 2008 in Chiusa di Pesio during the Tour de France show a positive match, establishing that the blood in Blood Bag no. 18 is Mr Valverde's.

WADA and the UCI contend that the sample collection procedure by which the samples were collected from Blood Bag no. 18 was reliable and the documentation establishes that there was no break in the chain of custody. Sra Sansolini and Captain Lano who attended at the sample collection in the Barcelona lab signed the Chain of Custody Form dated 30 January 2009, recording the transfer of custody of the samples taken from the blood bag.

The Chain of Custody form also establishes that the samples originally received by the Barcelona Lab from the Guardia Civil was transferred to a sealed plastic contained on 19 August 2008, was identified at "18-1 242 – code IMIM GC", and remained frozen and not tampered with until Thursday, 29 January 2009, when it was moved to a refrigerator in order to permit the planned sample collection on the following day.

WADA and the UCI further contend that the evidence and documentation establishes that the samples were then transported from the Barcelona Laboratory to the Rome Police Forensics Laboratory under police escort.

WADA and the UCI submit that the DNA analysis and comparison which was conducted by the Rome Police Forensics Laboratory is reliable, and indisputably establishes that the DNA in Blood Bag no. 18 is a match to the sample collected from Mr Valverde during the Tour de France.

The RFEC does not address the scientific evidence. As mentioned previously, the RFEC limited their position to the appropriateness of the decision not to open up disciplinary proceedings against Mr Valverde. In the submissions of the RFEC it was of the opinion that because the decision of this Panel should be limited to the correctness of the RFEC's

decision only, it would not enter into a discussion on the merits of the case.

Generally, Mr Valverde takes issue with this scientific evidence as mentioned above as follows:

Plasma bags may not be considered blood doping, nor their possible transfusion a blood transfusion banned by applicable anti-doping regulations, as it does not improve the transfer of oxygen. Blood Bag no. 18 only contains plasma and does not contain red blood cells.

Blood extractions may not a priori be considered banned by anti-doping rules. There are blood extractions designed to analyse the blood in question, to give the blood to sick people, and even to carry out blood transfusions for therapeutic purposes. The list of banned substances and methods permits the use of blood, red blood cells or similar products in cases of proven medical need.

The transfusion of that blood, which may be carried out subsequently, must also not a priori be considered as being in breach of the Anti-Doping Regulation, as any of the athletes could have requested authorisation for the therapeutic use of that blood which, as also stated by Dr. Fuentes, could be advisable e.g. in case of an accident.

It is completely irrational that the plasma of the bag had the purpose of being transfused to some athlete with prohibited purposes. Blood transfusions can be used by the athletes as a prohibited method in competition, for which reason that bag, if used for illicit motives, would have been transfused during the competition. Plasma is a part of the blood that does not improve sports performance, for which reason there is no motive for using it as a competition or outside a competition. Moreover, if we assume that it is established that there is EPO in this plasma, the transfusion of this plasma in competition would entail the detection of this prohibited substance in the urine or blood of this athlete.

The Guardia Civil report states that the bags of plasma were not used for doping purposes.

There is inequality between athletes anti doping violation committed by other riders, which were not sanctioned by the competent authorities which was accepted by WADA and the UCI.

Mr Valverde's general objections against the scientific evidence are rejected. Quite apart from the question whether those objections were correct, in fact and/or in law - there is no evidence that supports the speculative assertions as being fact. The crucial point is that Mr Valverde does not deny that EPO is a prohibited substance. As follows from the UCI-ADR, the mere presence of exogenous EPO in the blood of an athlete is an anti-doping violation and Mr Valverde's general observations need only be addressed if the Panel would conclude that there is more than this "simple" anti-doping violation. As will be set out hereafter, there is overwhelming evidence for such anti-doping violation and for a sanction thereon.

With regard to Mr Valverde's reference to other possible anti-doping violations dealt with by other competent anti-doping organizations, the Panel refers to its Order of 22 December 2009: only if it could be established that, in identical circumstances, Mr Valverde, without justification, has been treated differently by the anti-doping authorities competent in this regard, there might be ground to consider whether the equality principle has been violated. There is no evidence to this effect. Likewise, there is no evidence that the Appellants have violated any equality rights. There is no evidence either that any other personal rights of Mr Valverde were violated as alleged by him. But even if this were different, the overriding interest of the fight against doping would warrant this.

With respect to Mr Valverde's arguments related to the principle of good faith (venire contra factum proprium), that is recognized by Swiss law (article 2 of the Swiss Civil Code), such principle would be part of the Swiss public policy and would have been breached by the Appellants, who, by challenging the appealed decision and by sustaining that the documents related to the Operacion Puerto can be used, would act against their own action, the Panel deems that they are also ill-founded. While Swiss law does indeed protect good faith, it however disapproves the fact to act venire contra factum proprium, only under certain circumstances: as underlined in a comment on the Swiss Civil Code (Scyboz/Gilliéron Scyboz/Braconi, CC & CO annotés, 8 eme ed., Basel, 2008, ad. Art. 2 CC, p. 11) "*l'ordre juridique ne réprouve le fait de* venire contra factum proprium *que si le comportement antérieur a motivé une confiance digne d'être protégée et a déterminé à des actions qui, vu la nouvelle situation, entraînent un dommage ATF 116 II 700 JT 1991 I 643, ATF 121 III 350 JT 1996 I 187, ATF 127 III 506 JT 2002 I 306, ATF 133 I 149 SJ 2007 I 421*" ; such conditions are clearly not fulfilled here.

With regard to Mr Valverde's more specific defenses against the scientific evidence, the Panel's view is as follows:

It is common ground that the blood in Blood Bag no. 18 was not collected by way of an anti-doping test, but as forensic evidence. The Tour de France-sample blood was however collected by way of an anti-doping test.

Consequently, the first mentioned sample, and what happened with it after collection by way of transport and analysis, is formally not subject to the same rules, regulations and guarantees for the athlete as the latter mentioned sample is. That does not mean however that such forensic evidence cannot be used as evidence in a doping offence-case. Also Dr. de Boer testified that, if certain standards are met, such evidence can be used, also in non-criminal cases of a doping offense. And reference is made to the CAS-jurisprudence quoted at 5.3 above and to the similar conclusion in the Valverde-II case.

In the situation at hand, the question to be answered is whether both samples, and their history – the manner in which they were collected, transported, stored, analyzed and reported upon – constitute convincing evidence to the Panel's comfortable satisfaction.

Mr Valverde asserts that this cannot be the case. His objections against the use of the Tour de France-sample as evidence is that there is a lack in the chain of custody, notably as regards the transport of the sample to the laboratory in Rome and until the analysis started there. With regard to the forensic sample, his objections are in essence equally that there are lacunae in the chain of custody, and also that the test carried out at the Barcelona laboratory is not reliable.

On these objections, a number of witnesses were heard at the Hearing. All of them testified in Valverde II as well, and it was accepted by all Parties that the parts of the Transcripts of their oral testimony in that case would be considered as their written testimony in the present arbitration. All witnesses heard in the present arbitration confirmed those statements before they gave oral testimony.

It follows from the evidence given by those witnesses that also Mr Valverde's more specific objections are to be rejected.

E. The witness/expert testimony on the scientific evidence

Dr. Sansolini testified that she was involved in this matter on two occasions. She was part of the team, with Messrs Arpino, Lano and Ferrante, that was sent to Barcelona in order to collect the sample for Blood Bag no. 18 in January 2009, and she was involved in the taking of the blood samples from Mr Valverde during the Tour de France in Italy in July 2008 (as well as a sample of urine). She was the responsible person for the sample taken during the Tour de France.

It follows from her testimony regarding the latter that:

She was the responsible officer from the time the sample was taken during the Tour de France on 21 July 2008 until its reception in the Rome laboratory.

She took the sample from Mr Valverde, all in conformity with the applicable rules; he was very cooperative and friendly.

There were no irregularities when the blood sample was taken.

This sample was handed to the official courier for these purposes, TNT, on 22 July, 00:45 a.m , for transportation it to the laboratory in Rome for further analysis.

The transport was carried out in optimal conditions.

The chain of control was guaranteed between the moment the sample left the place where it was taken until its arrival at the Rome laboratory.

This laboratory is WADA accredited, very strict and would have reported any irregularities which would have made the sample unfit for properly analyzing it, if it had noticed such irregularities on arrival of the sample and/or during the time the sample was analyzed.

With regard to her role in collecting the sample in Barcelona, it follows from her testimony that:

Dr. Sansolini was appointed as an auxiliary to the criminal investigation division of the police and was authorized to take sample from Blood Bag no. 18 in Barcelona;

Dr. Sansolini attended at the lab in Barcelona to collect the sample on 29 January 2009. She was accompanied by Dr. Arpino, Dr. Ferrante and Captain Lano;

When they arrived at the lab Dr. Segura had defrosted the blood bag to enable Dr. Sansolini to take the samples.

The blood bag was actually kept in a jar and it was opened before all the people present;

With the equipment that Dr. Sansolini had brought with her from Rome, she took out 8 small samples from Blood Bag no. 18 and these samples were then sealed and packaged as per the protocol;

Dr. Sansolini's actions in taking this sample were consistent with her normal practice in carrying out such activities;

The samples collected had the identification numbers 278920 and 278833 and compounded with the Guardia Civil Nr. 18-1/242.

The boxes in which the samples were kept, were sealed.

The Appellants have produced a "Record of delivery of material" signed by i.a. Dr. Sansolini and Dr Jordi Segura, the Director of the Barcelona laboratory which states:

"Record of delivery material

In compliance with the instructions issued by Court No. 31 of Madrid (according to the Letters Rogatory No. 447/08), Messrs, Marco Arpino, Angelo Lano, Renzo Ferrante and Ms. Tiziana Sansolini have been authorized to take aliquot part of biological samples.

The aliquot parts so delivered correspond to portions of a plasma sample originally contained in a plastic bag received from the Civil Guard on August 1, 2006 in connection with Preliminary Proceedings No. 4293/06. The original sample received from the Civil Guard was transferred to a capped plastic container on August 18, 2006. Said sample was then kept in the freezer and never tampered with until Thursday, January 29, 2009 when it was moved to a fridge in order to facilitate its liquid condition on the date the aliquot parts were to be retrieved. Therefore, today eight aliquot parts have been taken from the plasma contained in the plastic contained in the plastic container and have been delivered to the above-mentioned persons".

Captain Lano testified that he, along with Officer Ferrante, received the samples taken in Barcelona from Dr. Sansolini and Dr. Arpino in accordance with the applicable rules – i.e. in a cooled container – on 30 January 2009. And further:

The procedure under which the CONI obtained the evidence in Blood Bag no. 18 was penal procedure 5599/2008, on behalf of the Prosecutor in Rome;

he was given his mandate and directed by M. Ferraro of the Public Prosecutor's office in Rome;

from the moment the samples were taken by Dr. Sansolini, they were placed inside a control temperature container which had been sealed with a mechanism to ensure safety

that at all times he respected the chain of custody in a very precise manner;

that he personally carried and delivered the samples to the laboratory in Rome on 31 January 2009;

that the samples were received by him in a sealed container;

that he received a declaration from the laboratory at Barcelona for the chain of control, covering the time since the Guardia Civil took possession and until the arrival at the Barcelona laboratory, until he took over when receiving the samples;

after that, the chain of custody was not interrupted.

Dr. Arpino testified that he went to Barcelona with his colleagues Dr. Sansolini, Mr Ferrante and Captain Lano in order to collect the samples from the Barcelona laboratory pursuant to the letter rogatory. His evidence is further summarized as follows:

Dr. Arpino was nominated as an auxiliary for the judicial police by the judicial authorities, as such he took part in various stages of the collection of a sample from Blood Bag no. 18;

The request to the Spanish court clearly emanated, not only from CONI's office ("*officio di procura anti-doping*") but also from the judiciary. This is clear from the stamps and the text and signature on the said request of 6 November 2008. The stamp bottom left is from the Procura della Republica, the round stamp bottom right is from the judge's (Judge Ferrano's) office.

He attended at the Barcelona lab at an earlier occasion to collect blood samples as it turned out, from cyclist Ivan Basso. This cyclist was coded, in Dr. Fuentes' records, as Birillo, Basso's pet dog. Dr. Fuentes had a practice of using mainly names of dogs for his codes.

He confirmed that courier services for the transport of samples be used and that the couriers that are normally used – such as TNT in Italy- are reliable. If anything would go wrong during a transport it is reported to CONI. Nothing was reported with regard to the blood sample taken from Mr Valverde during the Tour de France in July 2008 and transported to Rome by TNT.

Dr. Biondo testified that there was no indication of tampering with the samples he received in Rome; they pay attention to the slightest details on changes, if they would find anything worth noting they would report it (such as a broken seal). His evidence is further summarized as follows:

There was no degradation of the blood samples and Dr. Caglia and Dr. Castella confirm this in the sense that the result that Dr. Caglia obtained showed that the sample was not degraded.

He also confirmed that plasma can be used for DNA-testing (also confirmed by Castella) and that the samples, when received the evening before the analyzing was made, were left in the appropriate department of the laboratory and at proper conditions.

DNA-analyzing is high quality evidence, clear and final. (Dr. Caglia confirms this.)

While it is theoretically possible to construct an artificial DNA profile, it would be nearly impossible to create an artificial blood sample in which to insert the DNA profile.

Dr. Caglia testified that she received 2 ampoules/ flacons with blood, constituting sample ARA 278350, A and B, of which the A-sample was subjected to a DNA analysis by her. This sample had not been manipulated, it was sealed until tested. The B-sample, which was not tested, is still sealed. She checked whether the samples received had been tampered with; that was not the case. If the seals had been broken she would have noticed it. It follows from p. 4 of her Report that also the storing had been good. Castella agrees, de Boer saying that he is not an expert on DNA-analysis.

She did the DNA-analysis, and had at that time no idea whose blood it was and where it came from. The analysis was performed manually, by experienced and highly specialized persons, working diligently in order to prevent contamination. The reliability of the test was not compromised by the fact that the tests were manual, not automatic (also in Valverde II). Dr. Biondo confirms this. She then also compared the plasma and the blood; she had a sufficient quality of plasma for that purpose.

She referred to the Technical Report on the analyses conducted at her laboratory, confirming the following information:

A description of the samples which were received and analyzed, viz. (inter alia) sample 3 (39236-01-003), a test tube containing a blood sample marked A-278350 which was analyzed; and a B-Sample (sealed) marked B-278350 which was not analyzed.

Samples 4 (39236-01-004) and 7 (39236-01-007), test tubes containing blood plasma marked A-278920 and A-278833, which were equally analyzed. The B-samples were not analyzed.

A description of the method used.

An overview (p. 4 of 21) of the genetic profiles deducted from the analyses. The genetic profile of Sample 3A-278350 was identical to those of Samples 4 and 7, A-278920 and A 278833.

It follows from the Record that Sample A-278350 was the Tour de France sample, the other two were the Barcelona samples.

Dr. Castella, director of the DNA-analyses centre of Lausanne, Switzerland, by telephone, testified as follows.

As a DNA-expert he found the (Caglia-report) convincing and he had no doubts with regard to the methods used with the results as indicated in that report.

Storage conditions have no effect on the DNA-profile. Some genetic features may differ as a result of inadequate storage, but there is no influence there on genetic features that are discovered.

There was no degradation of the sample, it had good quality also the quantity was sufficient.

He confirmed that the DNA, showing 16 loci, was of good quality. 10 loci would have sufficed. The chance that these profiles can be attributed to different persons is very, very low. There is only such possibility with identical twins. If the blood would have been contaminated, it would have been seen in this table.

Dr. De Boer testified that he has never conducted an EPO-analysis himself, but has observed them during B-sample analysis. He considers himself to be an EPO-analysis expert, and has some experience in and knowledge of forensic law. He agrees to the statements made by Biondo and Caglia with regard to the forensic aspects. And further:

The analysis made at Barcelona was not performed in accordance with the WADA Code or a code in International Standards of Laboratories, i.e. there is not enough information with regard to the quality of the analysis made;

The same is true with regard to the specific anti-doping ISO-norm;

It was difficult to review the report of the EPO analysis that he was provided with because the copy was of very poor quality;

The poor quality of the copy caused him to have some reservations about the method used and results obtained in this case;

Therefore he considers this report is not sufficient to give a conclusion according to anti-doping rules;

As far as he remembers, it is normal for an EPO-analysis that a second opinion is obtained from a certain number of experts;

Storage conditions i.e. with regard to temperature are very important as they can influence the pattern of the final result. However, he had not seen any samples where (wrong) storage conditions had caused a false positive;

The Barcelona laboratory usually tested EPO using urine-samples. Blood testing was probably new for it at the time, and therefore its method had to be adapted. The method in itself is good, but good quality control is required. He cannot judge whether that was the case.

In Valverde II, he was unexpectedly confronted with a scientific article. After that Hearing he read this article more carefully. This reinforced the doubts that he expressed already at the other hearing.

He repeated the difference between WADA-accredited laboratories and tests performed there, notably with regard to guaranteeing certain rights of control for the athletes, and forensic tests in other laboratories, such as the Barcelona laboratory, which do formally not grant the same rights.

In his view, this entails that test results of the latter should give maximum information, beyond the minimum information required by the WADA Code.

He confirmed that the Barcelona laboratory used ISA-norm 17025, which also served as the basis for the WADA Code but then specially adopted for anti-doping laboratories. This means that it did work according to certain quality standards, also in the case at hand.

Consequently, there is no reason not to accept the result of the Barcelona test. Even laboratories not working according to the ISO-standard can deliver a good result. But he maintains his reservations as to whether the maximum information regarding the test in the case at hand was given or not; also because the athlete cannot check the process, e.g. on the chain of custody.

It is impossible to add EPO to a blood sample afterwards.

He accepts that storage conditions cannot entail a false positive, except in hypothetical circumstances that have not been studied yet. He did not know the actual storage conditions for the Valverde-samples.

His reservations are not on the contamination of EPO reflected in the publication in the Barcelona-report, his reservations are on the question whether there was sufficient peer control in the publication, e.g. in a check whether immunopurification could have caused a shift in the position of the bands.

With the consent of all Parties, **Dr. Rabin**, Science Director of WADA, was heard as well, as the scientific counsel of a party. Also he had testified in the other Valverde-case and confirmed his testimony as transcripted that occasion. The following follows from his testimony.

At the hearing in the other case, he had discussed with Dr. de Boer a publication that has been produced by the group of Dr. Jordi Segura and his team, the experts in his group. The title was "*Recombinant Erythropoietin found in seized blood bags for sportsmen*".

This publication was about blood samples, more precisely, on the presence of EPO in blood samples which had been analyzed as part of the activities of the Barcelona-laboratory in this operation.

The Barcelona-laboratory is WADA-accredited. If a laboratory is not WADA accredited or not officially classified under the ISO-norm, it can very well carry out a proper analysis.

WADA accredited laboratories are required to furnish a document on the chain of control with regard to samples kept and analyzed in order to prevent manipulation.

In 2006, it was not usual to ask a second opinion from another laboratory on analyses made elsewhere, but it was possibly (strongly) recommended.

The fact that this laboratory used the methods of isoelectrofocalisation, which it normally used for urine testing, is fully acceptable, provided that certain conditions are fulfilled.

8 Columns in the publication refer to samples with R-EPO: 5, 6, 7, 8, 9, 10, 11 and 12 (Col. 10 is Valverde).

The dotted line separates the upper part, reflecting exogenous EPO, and the lower part reflecting endogenous EPO.

Col. 10 shows a heavy construction of exogenous EPO. The number of 38 at the bottom, indicating the EPO concentration, is beyond 30 and therefore bad.

In the Barcelona-report Mr Valverde is "18-1°242" on p. 6/49. The EPO-concentration reflected there (40, 95 (37, 29) differs only slightly from the retest in the publication.

Col. 4 reflects the test of a person with no exogenous EPO.

The publication was peer reviewed, which implies i.a. that immunopurification could not have caused a shift in the bands.

It was argued by Mr Valverde's counsel that the report of the Barcelona laboratory cannot be used as evidence because its author, Dr. Segura, did not appear as a witness. This is rejected. First, article 5.5 of the IBA-Rules on the Taking of Evidence in International Arbitration does not apply, as Dr.

Segura is not a party appointed expert. Second, Dr. Segura has not produced a written witness statement either, so that article 4.7 of the said Rules does not apply either. In view of the above and of the importance of this article that has been demonstrated at the hearing, the Panel rules, in application of Article R44.3 of the Code (applicable by reference contained under Article R57) that his report is part of the documentary evidence. If Mr Valverde would have considered it useful, if not necessary, to have Dr. Segura's testimony, he could have called him as a witness.

F. The Panel's conclusion on the scientific evidence

Having carefully considered the scientific evidence on record, the Panel is satisfied that the result of both the tests carried out at the Barcelona-laboratory and those carried out in Rome meet the required standard of proof. There is no convincing evidence merely speculative arguments that there was anything wrong with the samples that were tested, with the taking of the blood for those samples, with the transport of those samples to the said laboratories and/or the storage and handling of those samples there and/or with the analyses for EPO and or DNA respectively.

The fact that Dr. de Boer may have some doubts, notably with regard to the analysis as performed in Barcelona, is insufficient to prove the contrary, also in the light of his statement that, given e.g. the ISO-standard according to which this laboratory works, there is no reason not to accept the result.

G. Documentary evidence

Although the Panel considers the scientific evidence to be decisive for a conclusion that there was an anti-doping violation, it will, for the sake of completeness, also consider the documentary evidence.

To that end, the Appellants argue that the following demonstrates conclusively that Mr Valverde committed an anti-doping rule violation:

Report no. 116 of the Guardia Civil clearly establishes Dr. Fuentes practice of blood doping, Dr. Fuentes himself explained that he manipulated athletes' blood values. Dr. Fuentes further confirmed that each blood bag referred to in the file was intended for the person who originally donated it.

Report no. 116 clearly shows that Dr. Fuentes established a "code system".

The Code "18 VALV.(Piti)" appear on documents 114 and 116 of Report no. 116.

VALV. is visibly an abbreviation of the name Valverde.

The Operacion Puerto documentation links other cyclists to the case.

Dr. Fuentes was the team doctor for the professional cycling team Kelme (of which Valverde had been a member) and has intense contacts with the professional cycling team Liberty Seguros via Manolo Saiz.

Dr. Fuentes was found in the possession of a business card of a hotel on which he had written by hand the name "Valverde".

Dr. Fuentes himself declared that the "blood operations were essentially meant for athletes, cyclists as well as other athletes".

In the Spring of 2006, a Spanish journalist E. Iglesias spent a day with Valverde and wrote an article about it. In that article E. Iglesias reported that when they arrived back at Valverde's after a training ride "Piti una perra pastor aleman, nos da la bienvenida" – translated to "We're welcomed by Piti, a German shepherd bitch."

Another article in December 2006 was published wherein Valverde states that he has two dogs, "Sara" and "Piti."

Other riders in the Operacion Puerto documents were similarly referred to by their dog's name.

Dr. Fuentes' calendar shows an appointment for code number 18 on 7 April for a treatment "R." "R" stands for the Spanish word "reinfusion", meaning the reinjection of blood.

Document 87 to the Guardia Civil file is a list of riders and the number 18 in on the list.

A tapped telephone conversation between Dr. Fuentes and Ignacio Labarta records them speaking about Alejandro Valverde.

Jesús Manzano, a former cyclist and client of Dr. Fuentes admitted to having doped and further commented that Valverde would "get the same things as me."

The reliability of the documents presented was even acknowledged by counsel for Mr Valverde in an interview in September 2007.

Mr Valverde submits more specifically:

The documentary evidence of the Appellants is speculative and not based on specific evidence. The identification the UCI has made of Valverde within the context of the Operacion Puerto filed is based on mere press clippings.

It has yet to be proven that the lists of names or of banned substances found in the Operacion Puerto file are reliable.

In no event, according to Report no. 116, did Dr. Fuentes use a code name to identify athletes together with the initials of their

surname.

Valverde does not have a dog called Piti.

Dr. Fuentes' calendar shows that Valverde had a blood transfusion on 7 April 2005. However, 7 April 2005, Valverde was taking part in the "Vuelta Ciclista al Pais Vasco." On 6 and 7 April 2005, Valverde won the stage and as such was submitted to mandatory doping tests which were determined to be negative.

Valverde's performance declined after 7 April 2005 which is incompatible with the carrying out of blood transfusion to improve performance.

Following what is stated in Report no. 116, the letter "R" in Dr. Fuentes' calendar referred to a blood transfusion of blood extracted three or four weeks at most before the transfusion. However, in reviewing Dr. Fuentes' calendar there is no blood extraction attributed to Valverde in that period of time.

Document no. 87 in the Operacion Puerto file is unreliable and does not make it possible to affirm that Mr Valverde was a client of Dr. Fuentes, or that he used banned substances, or engaged in banned methods.

The Business Card with the word "Valverde" on it, found on Dr. Fuentes' person when he was first arrested does not make it possible to affirm that Valverde was a client of Dr. Fuentes or that he used banned substances or engaged in banned methods. In fact, the name on the card does not correspond with Dr. Fuentes' usual practice and as such, points one to the opposite conclusion, that Valverde was not a client of Dr. Fuentes.

The alleged conversation between Mr Labarta, an associate of Dr. Fuentes, and Dr Fuentes where they refer to Valverde does not make it possible to confirm that Mr Valverde was a client of Dr. Fuentes or that he committed an anti-doping rule violation.

The statements of Mr Manzano are not reliable. Not a single document has appeared in the context of Operacion Puerto that confirms his statements.

Before concluding on the weight of the documentary evidence, the Panel will deal with some of the other evidence that was offered. *Inter alia* with regard to the issue of the Code name Piti (or Pity), other witnesses were heard.

Mr Jesús Manzano testified that several times in the past, Mr Valverde and his wife spoke of his dog Piti. In his view, that must be the same dog as was mentioned in 2006.

On record is an extract of a press article written by a journalist Mr Enrique Iglesias which corroborates this evidence ("*Un Dia con Valverde*"of 23 June 2006).

Equally, at the Hearing, another journalist, Mr Jon Riva testified that he was at Mr Valverde's home in December 2005 and heard Mr Valverde called his dog – a puppy German shepperd – by its name Pity.

H. Conclusion on documentary evidence

On the basis of the evidence on record, the Panel also accepts the documentary evidence as convincing. Notably:

The reference to Valverde Piti and (nr.) 18 in the Guardia Civil-report, in the light of the testimony of Messrs Manzano and Riva, and of the article written by Mr Iglesias. It is noted that no alternative explanation of these data was given by Mr Valverde. Whether this was Piti or Pity is not relevant in this context.

The relation between Dr. Fuentes and the Kelme-team, of which Mr Valverde was a member until 1 January 2005.

There is sufficient evidence of Dr. Fuentes using code names, i.e. with regard to the riders Basso ("Birillo") and Jörg Jaksche ("Bella") and Michele Scarponi ("Zapatero").

The fact that no other documents were found to show the relation between Dr. Fuentes and Mr Valverde (such as payment receipts) does not outweigh the other evidence.

I. Other evidence

Other evidence is on record as well. Insofar as that other evidence, notably of other witnesses testifying at the hearing is not dealt with in this Award, it means that the Panel has considered it not relevant or in any event not decisive for its conclusion in the light of the evidence that it has specifically referred to.

It should be mentioned that Mr Manzano testified on a possible doping offence by Mr Valverde already in the beginning of this century. He stated as follows:

He visited, during the Vuelta 2003, a certain Dr. Merino Batres; his, Manzano's blood was taken then, and, although he did not see that Valverde's blood was taken as well, Valverde, and all the other riders, went there for the same reason, i.e. that their blood be taken by Dr. Batres; he saw though that Valverde entered a cabin, with another rider named Sevilla, where the blood was to be taken and that he left this cabin with his arm folded.

Winter 2002, at the hotel Patilla à Santa Paula, "*ampulles*" inter alia of EPO were distributed to the members of the team of which Valverde and Manzano formed part., in different quantities in syringes with different colours EPO was named '*pelas*" ; it was Dr. Fuentes who said that this was "*pela*". At the same occasion, he saw Valverde using a patch of testosterone.

During the 2002 Vuelta, at the hotel Reconquista, he saw Valverde being injected by Dr. Fuentes with 2000 pela, in the room that he shared with Mr Valverde that day; he even saw, several times, syringes as well as injections of cortisone or corigina.

That situation however was different from what was done at the hotel Patilla; the syringes that were given to the riders then were for medical treatment at home, and different from what was administered during competition.

In his world, the letter "*R*" stands for "*Reinjection*" and the letter "*E*" for "*Extraction*".

In his calendar, an "*E*" would generally precede an "*R*".

The reinjection of blood would take between 35 and 45 minutes.

He did not know whether Dr. Fuentes added EPO to the blood before such transfusion. The EPO treatment would take place some 12 days earlier.

On the other hand **Mr Arrieta** denied that, on 7 April 2005, Mr Valverde received a blood transfusion. According to Mr Arrieta, he and Valverde spent the entire day together and on the few occasions they were not together, there would have been no opportunity or time to undergo one.

It also transpired that Mr Manzano may have been mistaken with regard to the hotels mentioned by him.

J. Conclusions with regard to an anti-doping violation

On the basis of the foregoing there is, in the Panel's view, sufficient evidence that an anti-doping violation was committed by Mr Valverde in 2006, more precisely on 6 May 2006 when Mr Valverde's blood was discovered by the Guardia Civil and, as was established later, this blood contained EPO, a prohibited substance as meant in article 15 of the UCI-ADR. At least of article 15.2: "*Use or Attempted Use by a Rider of a Prohibited Substance or Prohibited Method*".

for which, pursuant to article 15.2.1, Mr Valverde is responsible. It might also be considered to be a violation of Article 15.1. But the Panel needs not go into this as the violation of article 15.2 – and of Article 2.2 of the World Anti-Doping Code - is sufficient for its further conclusions.

On the strength of this finding it is not necessary to go into other possible offences that were alleged by the Appellants, such as whether there was also an attempt to an anti-doping violation by Mr Valverde at any point in time, or an anti-doping violation already before 2006 as might follow from Mr Manzano's evidence.

K. Double jeopardy or ne bis in idem?

Two days before the Hearing in the present case, the Award was rendered in what in the said Hearing was referred to as "the Other Valverde-case" (TAS 2009/A/1879) , and above as "Valverde-II".

That Award triggered the question whether there could be a double jeopardy or a "ne bis in idem", as the suspension imposed on Mr Valverde in that Award was based on the same facts – in essence: EPO-contaminated blood in Blood Bag no. 18 which was proved to be his blood – that play a role in the present case.

It is noted that this argument has not been duly brought forward by any Party in the present case. Mr Valverde has argued that, if an anti-doping violation would be established and he would be suspended for a period of 2 years, he would in fact be suspended for a total period of 3 years, having taken into account his suspension in the other case. That is, in the opinion of this Panel, a different argument.

The ne bis in idem principle is defined in Article 14.7 of the International Convention on Civil and Political Rights as follows:

"No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

And Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Liberties, (ETS No. 117), of 22 November 1984, Art. 4.1 provides:

"No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted

or convicted in accordance with the law and penal procedure of that State."

These provisions refer to criminal or penal proceedings and are not applicable here. They could however be considered in proceedings like the one at hand here, as it can be argued that a severe sanction imposed in disciplinary proceedings should be subject to the same principle.

It is noted that, in one handbook on Swiss criminal law, it is said that there are three specific requirements to be fulfilled for this principle to apply: an identity of the object, of the parties and of the facts (Piquerez G., *Traité de procédure pénale suisse*, 2nd ed. p. 1541).

The identity of the object is described as follows:

"1º. L'identité d'objet. L'objet, c'est-à-dire ce qui est recherché, est toujours, en matière répressive, l'application d'une peine ou d'une mesure à l'auteur de l'infraction. Il est donc nécessaire que la décision revêtue de l'autorité de la chose jugée soit identique quant à son objet. Tel ne sera pas le cas si l'auteur d'une infraction a été soumis à une enquête disciplinaire qui a conduit à un prononcé disciplinaire : avertissement, amende, suspension, révocation. Dans cette situation, il n'y a pas identité d'objet entre une poursuite et un prononcé disciplinaires et une poursuite pour infraction pénale, en raison des mêmes faits. De par leurs buts différents, la procédure pénale et la procédure disciplinaire sont en principe indépendantes l'une de l'autre. Aussi, rien ne s'oppose à ce que les mêmes faits soient punis pénalement et sanctionnés disciplinairement".

The identity of the parties, as described in this handbook, focuses in part on the identity of the person subject to the proceedings.

"2º. L'identité de parties. La deuxième condition requise pour qu'une décision répressive ait l'autorité de la chose jugée est celle de l'identité de la personne poursuivie. Il faut en effet que, dans les deux procès, le prévenu soit le même".

The identity of the facts is described as follows.

"Le même fait, c'est donc le même fait matériel. Si la juridiction acquitte, c'est que le fait poursuivi n'était punissable sous aucune qualification; si elle condamne sous une qualification donnée, c'est qu'aucune autre qualification ne pouvait être retenue. L'identité de fait pourfonder l'exception de la chose jugée, doit être niée lorsque les faits nouvellement poursuivis sont matériellement distincts les uns des autres. Ainsi, par exemple, la réitération du même fait, après un premier jugement d'acquittement ou de condamnation, ou la persistance du même fait, mais une première condamnation, permet de nouvelles poursuites".

It is noted that the same criteria were referred to in CAS 2008/A/1677.

Interestingly, the same criteria seem to be applied in Swiss civil law. In one leading handbook it is said that, also in civil law, the relief sought is essential:

"Il faut alors se reporter aux motifs de la demande et aux motifs du précédent jugement pour déterminer si les prétentions sont identiques.

……..

Par contre, il n'y a pas identité d'objets :

Lorsque les conclusions sont différentes.

Ainsi, l'action en revendication fondée sur la propriété n'est pas identique à celle fondée sur le droit de gage (ATF 84 I 221 p. 224)." (Hohl F. , *Procédure civile,* Tome I, Ed. Staempfli, Bern, 2001,nrs 1300 and 1304).

In the two Valverde-cases, there is clearly an identity *"… de la personne poursuivie …."* and of the facts. In both cases, Mr Valverde is involved as well as WADA and the UCI. The fact that the RFEC was not a party to "Valverde II" is not decisive, as the sanction which could possibly be imposed twice was not directed against the RFEC.

The question is whether there is identity of the object as well. This is not the case in the sense that, in the present case, "*ce qui est recherché*" or *"(les motifs de) la demande*" are more far reaching than in Valverde II.

What was sought – and ruled – in Valverde II was a suspension for the protection of Italian sporting competition only for Italy. What is sought in the present case is the punishment of the athlete for violation of the rules of his sport, thus justifying a worldwide ban against his participation in his sport.

Thus, there is no "ne bis in idem". With regard to double jeopardy, the Tribunal has the impression from Mr Valverde's racing activities that he did not participate in any race in Italy already before the first decision in the other case, of May 2009.

In any event, the importance of a worldwide ban if there is an anti-doping violation would outweigh the fact that an earlier, more limited ban was imposed.

L. The sanctions to be imposed

Article 261 of the UCI-ADR provides as follows:

"Except for the specified substances identified in article 262,

the period of Ineligibility imposed for a violation of article 15.1 (presence of Prohibited Substance or its Metabolites or Markers), article 15.2 (Use or Attempted use of Prohibited Substance or Prohibited Method) and article 15.6 (Possession of Prohibited Substances and Methods) shall be:

First violation: 2 (two) years' ineligibility

Second violation: Lifetime ineligibility

However, the License-Holder shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in articles 264 and 265."

Article 275 of the UCI-ADR provides as follows:

"The period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed. Any period during which provisional measures pursuant to articles 217 through 223 were imposed or voluntarily accepted shall be credited against the total period of Ineligibility to be served. Where required by fairness, such as delays in the hearing process or other aspects of Doping Control not attributable to the License-Holder, the hearing body imposing the sanction may start the period of Ineligibility as on earlier date commencing as early as the date of the anti-doping violation.

(text modified on 26.06.07: amendment applicable on any case not finally decided on 26 June 2007)".

Mr Valverde has not contested the sanction pursuant to Article 261 in case of a violation of Articles 15.1 and 15.2 as such, but he has argued, notably at the Hearing, that, in the light of the two year-suspension imposed on him in Valverde- II, a two year-suspension in the present case, would amount to a suspension of three years or more in total, counting from, respectively, the day on which the sanction in the other case takes effect – 11 May 2009 – and the date of this present Award.

This is incorrect. The suspension in Valverde-II was limited to the Italian territory, and it is widely known that Mr Valverde has participated in many races elsewhere since that suspension was imposed; accordingly, that sanction had no, or limited, impact outside Italy.

It is, however, the view of this Panel that this arbitration has been subject to delays, even major delays. These proceedings have been ongoing for nearly three 3 years now. Those delays were mainly caused by – in summary:

a) the requests by WADA and the UCI that further evidence should be sought, notably by making formal requests, through the appropriate Swiss channels, to the Spanish judiciary, to release Blood Bag no. 18 or a sample thereof.

b) the delay that, unfortunately, occurred after the CAS request pertaining thereto, to the Tribunal Cantonal de Vaud ("TC"): Due to circumstances beyond either of the parties' control, or the CAS', this formal request was delayed for lack of translation of the request by the TC into Spanish. The formal request was thus not re-transmitted to the Spanish authorities in the appropriate form until 1 September 2008. In the light thereof, the Panel extended the stay for a second time by way of its Order of 24 December 2008.

c) the fact that, owing to one of the Panel members being prevented from attending the Hearing scheduled for November 2009, this Hearing had to be postponed until March 2010.

Mr Valverde opposed all of the Appellants' requests for extension, urging the Panel to continue the proceedings and not grant any further extensions.

Further delay was caused by the appeal in Valverde-II. One day before the expiration of the extension granted by the Panel's Order of 24 December 2008, on 27 February 2009, WADA and the UCI requested a further stay of the proceedings based on the fact that the Italian proceedings had just commenced. Also this request was opposed by Mr Valverde and was, after further discussion, denied by the Panel on 15 June 2009.

It could be argued that the delays caused by the Appellants' requests for further evidence, which were accepted by the Panel until its Order of 15 June 2009, resulted from the fact that Mr Valverde did not cooperate in making such evidence available himself, notably by refusing, in actual fact, to make Blood Bag no. 18 available and to submit himself to further testing.

As a matter of principle, an athlete has the right to refuse such cooperation. But in the case at hand Mr Valverde has specifically committed himself to a certain cooperation, in his Rider's Commitment to a New Cycling, in which he avowed that he would make a contribution to putting the situation right and making cycling clean by signing the said statement, to demonstrate that he fully adheres to principles defended by the International Cycling Union (UCI). That statement read:

"I declare to the Spanish Law, that my DNA is at its disposal, so that it can be compared with the blood samples seized in the Puerto affair. I appeal to the Spanish Law to organize this test as soon as possible or allow the UCI to organize it".

Having regard to Mr Valverde's conduct throughout this arbitration, it is clear that no attempt was ever made on his part to follow through with this commitment.

On the other hand, it equally follows from the record that Mr Valverde has always strongly opposed any request from the Appellants for extensions, stating that it was in his interest to have these proceedings terminated as quickly as possible. It is also noted that the delays enabled WADA and UCI to gather more evidence (particularly the CONI evidence) to which they would not have access to had the proceedings not been delayed.

Weighing all the circumstances, the Panel considers it fair to let the period of Ineligibility referred to in Article 275 start on 1 January 2010.

Article 274 of the UCI-ADR provides as follows:

"In addition to the automatic Disqualification of the results in the Competition pursuant to article 256, all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition, or other doping violation occurred, through the commencement of any Ineligibility period, shall, unless fairness required otherwise, be Disqualified.

Comment: it may be considered as unfair to disqualify the results which were not likely to have been affected by the Rider's anti-doping rule violation".

There is no evidence that any of the results obtained by Mr Valverde since 6 May 2006 until now was through doping infraction. Thus, the Appellants' Request to annul those results should be denied.

Arbitration CAS 2008/A/1545
Andrea Anderson, LaTasha Colander Clark, Jearl Miles-Clark, Torri Edwards, Chryste Gaines, Monique Hennagan, Passion Richardson v. International Olympic Committee (IOC)

18 December 2009

Athletics; disciplinary sanctions against a relay team due to a doping offence of one member of the team; power of a body to revise its own decisions; decisions concerned by the three-year rule of the Olympic Charter; awarding of medals

Panel:
Prof. Massimo Coccia (Italy), President
Mr. Yves Fortier (Canada)
Mr. Hans Nater (Switzerland)

Relevant facts

Ms Andrea Anderson, Ms LaTasha Colander Clark, Ms Jearl Miles-Clark, Ms Torri Edwards, Ms Chryste Gaines, Ms Monique Hennagan and Ms Passion Richardson (the "Appellants" or the "Athletes") are all track and field athletes from the United States of America. The Athletes participated in the Sydney Olympic Games in 2000 as members of the U.S. Olympic team sent by the United States Olympic Committee (USOC).

The International Olympic Committee (IOC; the "Respondent") is the organisation responsible for the Olympic movement, having its headquarters in Lausanne, Switzerland.

On 30 September 2000, during the Sydney Olympics, the finals of the women's 4x100 meters and 4x400 meters relay track and field races took place.

The Athletes, together with Ms Marion Jones ("Ms Jones"), were the members of the U.S. women relay teams for these races. The U.S. women relay teams won the bronze and gold medals for the 4x100 meters race and the 4x400 meters race respectively.

The closing ceremony of the Sydney Olympic Games took place on 1 October 2000.

On 8 October 2007, Ms Marion Jones signed in front of the United States Anti-Doping Agency (USADA) a document entitled *"Acceptance of Sanction"*, confessing that she had committed a *"doping offense arising from [her] use of a prohibited substance known as the 'clear' beginning on or about September 1, 2000 to July 2001"*. In particular, Ms Jones admitted that she had *"used the prohibited substance known as the 'clear' prior to, during and after the 2000 Olympic Games"*. As a consequence of her violation of anti-doping rules, Ms Jones accepted various sanctions.

By letter of 28 November 2007, the President of the International Association of Athletics Federations (IAAF) informed the President of the IOC that the IAAF Council had confirmed, with regard to IAAF-sanctioned events, the annulment of all the individual results achieved by Ms Jones on or after 1 September 2000 and of all the relay teams' results in which Ms Jones had competed on or after 1 September 2000.

On 12 December 2007, the IOC Disciplinary Commission decided to disqualify Ms Marion Jones from the athletics events in which she had competed at the 2000 Sydney Olympic Games, among which the 4x100 meters and 4x400 meters relay races.

On 9 April 2008, the IOC Disciplinary Commission sent the following recommendations to the IOC Executive Board:

"I. The USOC relay teams to be disqualified from the following events in which they competed at the 2000 Sydney Olympic Games in the sport of athletics:

- *4 x 100 meters relay-women-USOC relay team, where the team placed third; and*
- *4 x 400 meters relay-women-USOC relay team, where the team placed first.*

II. The USOC to be ordered to return to the IOC all medals and diplomas awarded to all members of both USOC relay teams in the above noted events, it being acknowledged that USOC has already returned to the IOC the medals won by Ms Jones in such events.

[…]".

On 10 April 2008, upon consideration of the IOC Disciplinary Commission's recommendations, the IOC Executive Board decided to adopt, without any modifications, the said recommendations (the "Appealed Decision"). The Appealed Decision was notified to the Athletes on the same day.

On 30 April 2008, the Athletes filed an appeal with the Court of Arbitration for Sport (CAS) requesting the CAS to overturn the Appealed Decision.

On 22 October 2008, the Athletes filed their Appeal Brief, submitting that Rule 25.2.2.4 of the 2000 Olympic Charter according to which *"no decision taken in the context of the Olympic Games can be challenged after a period of three years from the day of the closing ceremony of such Games"* prevented further proceedings. The Athletes also submitted their position on the merits of the case.

On 22 December 2008, the CAS Court Office informed the parties that the Panel had determined that the issues related to the interpretation and application of the three-year rule could be severed from the other legal issues and be decided on a preliminary basis.

Extracts of the legal findings

In view of the above, this partial award is concerned solely with the three-year rule issue.

In order to resolve on the three-year rule issue, the Panel must determine the following sub-issues:

A. Which version of the Olympic Charter is applicable to the present case?

B. Does the three-year rule impose a limitation only to challenges brought by third parties or also to the power of the IOC to change its own decisions?

C. Does the three-year rule only apply to decisions taken by the IOC?

D. Under the relevant rules, was a decision reached in the context of the 2000 Olympic Games with regard to the distribution of medals to the Appellants?

A. Which version of the Olympic Charter is applicable to the present case?

The Appealed Decision makes reference to sporting events (the 4x100 and 4x400 relays) which took place on 30 September 2000 at the Sydney Olympic Games. The Panel notes that, in comparison with the current version of the Olympic Charter, at that time, the three-year rule was drafted differently, and was inserted in a different part of the Olympic Charter.

Rule 25 of the 2000 Olympic Charter provides as follows:

"Rule 25.– IOC Ethics Commission – Measures and Sanctions

1. An IOC Ethics Commission is charged with developing and updating a framework of ethical principles, including a Code of Ethics, based upon the values and principles enshrined in the Olympic Charter. In addition, it investigates complaints raised in relation to the non-respect of such ethical principles, including breaches of the Code of Ethics, and if necessary proposes sanctions to the Executive Board.

2. The measures or sanctions which may be taken by the Session or the Executive Board are:

2.1 In the context of the Olympic Movement:

2.1.1 with regard to IOC members and honorary members:

a) a reprimand, pronounced by the Executive Board;
b) suspension, for a specific period, pronounced by the Executive Board. The suspension may be extended to all or part of the rights, prerogatives and functions deriving from the membership of the person concerned.

Sanctions may be imposed on IOC members or honor ary members who, by their conduct, jeopardize the interests of the IOC.

The measures and sanctions provided above may be combined.

By decision of the Executive Board, the member or honorary member concerned may, throughout the disciplinary inquiry conducted into his case, be deprived of all or part of the rights, prerogatives and functions deriving from his membership.

The expulsion of a member or honorary member is governed by Rules 20.3.4 and 20.3.5.

2.1.2 with regard to IFs:

a) withdrawal from the programme of the Olympic Games of:
- *a sport (Session);*
- *a discipline (Executive Board);*
- *an event (Executive Board);*

b) withdrawal of recognition (Session);

2.1.3 with regard to associations of IFs: withdrawal of recognition (Session);

2.1.4 with regard to NOCs:

a) withdrawal of the right to enter competitors in the Olympic Games (Executive Board);
b) suspension (Executive Board); in such event, the Executive Board determines in each case the consequences for the NOC concerned and its athletes;
c) provisional or permanent withdrawal of recognition (Session); in the case of permanent withdrawal of recognition, the NOC forfeits all rights conferred on it in accordance with the Olympic Charter;
d) withdrawal of the right to organize a Session or an Olympic Congress (Session);

2.1.5 with regard to associations of NOCs: withdrawal of recognition (Session);

2.1.6 with regard to a host city, an OCOG or an NOC: withdrawal of the right to organize the Olympic Games (Session).

2.2 In the context of the Olympic Games:

2.2.1 with regard to individual competitors and teams: temporary or permanent ineligibility or exclusion from the Olympic Games; in the case of exclusion, any medals or diplomas obtained shall be returned to the IOC (Executive Board);

2.2.2 with regard to officials, managers and other members of any delegation as well as referees and members of the jury: temporary or permanent ineligibility or exclusion from the Olympic Games (Executive Board);

2.2.3 with regard to all other accredited persons: withdrawal of accreditation (Executive Board);

2.2.4 no decision taken in the context of the Olympic Games can be challenged after a period of three years from the day of the closing ceremony of such Games.

3. Before applying any measure or sanction, the competent IOC organ may issue a warning.

4. Any individual, team or any other individual or legal entity has the right to be heard by the IOC organ competent to apply a measure or sanction to such individual, team or legal entity. The right to be heard in the sense of this provision includes the right to be acquainted with the charges and the right to appear personally or to submit a defence in writing.

5. Any measure or sanction decided by the Session or Executive Board shall be notified in writing to the party concerned.

6. All measures or sanctions shall be effective forthwith unless the competent organ decides otherwise".

[Emphasis added]

Rule 6 of the 2004 and 2008 Olympic Charters reads as follows:

"6 Olympic Games

1. The Olympic Games are competitions between athletes in individual or team events and not between countries. They bring together the athletes selected by their respective NOCs, whose entries have been accepted by the IOC. They compete under the technical direction of the IFs concerned.

2. The Olympic Games consist of the Games of the Olympiad and the Olympic Winter Games. Only those sports which are practised on snow or ice are considered as winter sports.

3. The authority of last resort on any question concerning the Olympic Games rests with the IOC.

4. Notwithstanding the applicable rules and deadlines for all arbitration and appeal procedures, and subject to any other provision of the World Anti-Doping Code, no decision taken by the IOC concerning an edition of the Olympic Games, including but not limited to competitions and their consequences such as rankings or results, can be challenged by anyone after a period of three years from the day of the Closing Ceremony of such Games".

[Emphasis added]

The Panel notes that it is common ground between the parties that the 2000 Olympic Charter is applicable to all facts, events and circumstances which took place during the 2000 Olympic Games. This conforms to the general legal principle *"tempus regit actum"*, according to which facts are governed by the law in force at the time they occur (see CAS 2004/A/635, at para. 44). Therefore, the Panel determines that it shall decide the disputed issue on the basis of the 2000 Olympic Charter.

The Panel also notes that both parties have made reference for interpretation purposes to the modified three-year rule included in Rule 6.4 of the 2004 and 2008 Olympic Charters. The Panel is thus of the view that it may also take into consideration, insofar as strictly needed and merely as an ancillary interpretive tool, the text of Rule 6.4 of the 2004 and 2008 Olympic Charters.

B. Does the three-year rule impose a limitation only to challenges brought by third parties or also to the power of the IOC to change its own decisions?

The Panel is not persuaded by the IOC's argument that the expression *"no decision […] can be challenged"* used in Rule 25.2.2.4 of the 2000 Olympic Charter applies only to proper "legal challenges" by third parties and that, thus, the IOC itself is never time-barred by the three-year rule and can always revise its previous decisions concerning Olympic medals or other Olympic matters.

The Panel observes that the French text of Rule 25.2.2.4 of the 2000 Olympic Charter, which must prevail over the English text in case of divergence (Rule 27.3 of the 2000 Olympic Charter), reads as follows:

"aucune décision prise dans le cadre des Jeux Olympiques ne pourra être remise en cause après un délai de 3 ans courant à partir du jour de la cérémonie de clôture de ces Jeux".

[Emphasis added]

The Panel remarks that the French expression *"remise en cause"* is certainly broader than the term *"challenged"* (*"contestée"* in the French text of Rule 6.4 of the 2008 Olympic Charter), in the sense that it may well be read as a reference to the possibility of "reopening a matter" previously decided. While "to challenge" necessarily implies somebody's action against somebody else's decision, "to reopen a matter" may also entail somebody spontaneously reconsidering its own previous decision.

Therefore, the Panel finds that the Athletes' submission that Rule 25.2.2.4 of the 2000 Olympic Charter prevents (time-bars) the IOC from revising its own decisions taken in the context of the Olympic Games three years after the closing ceremony of the pertinent edition of the Olympic Games is well founded.

The Panel notes that in the current French and English texts of the three-year rule (as provided by Rule 6.4 of the 2008 Olympic Charter) there is no such divergence – *"contestée"* and *"challenged"* have analogous meanings – and, therefore, the above Panel's interpretation is strictly related to the 2000 Olympic Charter.

C. Does the three-year rule only apply to decisions taken by the IOC?

The Panel observes that Rule 25.2.2.4 of the 2000 Olympic Charter makes generically reference to a *"decision taken in the context of the Olympic Games"*, without specifying whether the rule applies merely to decisions taken by the IOC or whether it may likewise apply to decisions taken by other entities having some authority (obviously at different levels and in different moments) in the context of the Olympic Games, such as International Federations or National Olympic Committees or the local Organizing Committee.

The Panel notes that the preambular language (the "chapeau") of Rule 25.2 of the 2000 Olympic Charter (of which Rule 25.2.2.4 is a subparagraph) makes reference to *"measures or sanctions which may be taken by the* [IOC] *Session or the* [IOC] *Executive Board"*. In the Panel's view, as the chapeau of Rule 25.2 of the 2000 Olympic Charter exclusively mentions two IOC bodies, the "decisions" to which the three-year rule applies are necessarily decisions taken by the IOC.

The Panel takes comfort from the fact that its interpretation is confirmed by Rule 6.4 of the 2004 and 2008 Olympic Charters, which specifically refers to decisions *"taken by the IOC"*.

Accordingly, the Panel finds that the three-year rule applies only to decisions taken by the IOC, and not to decisions taken by International Federations, National Olympic Committees or other entities.

In addition, the Panel notes that Rule 25.2.2.4 of the 2000 Olympic Charter is included in Rule 25, which deals with *"IOC Ethics Commission – Measures and Sanctions"*. In fact, Rule 25 of the 2000 Olympic Charter lists the sanctions applicable for various violations of the Olympic Charter and allocates the power to apply those sanctions to the IOC Session or the IOC Executive Board (as seen in the above quoted chapeau of Rule 25.2 of the 2000 Olympic Charter).

In particular, the Panel finds that, as both the first sentence of Rule 25.2.2 and Rule 25.2.2.4 of the 2000 Olympic Charter use the identical expression *"in the context of the Olympic Games"*, Rule 25.2.2.4 of the 2000 Olympic Charter may only refer to IOC decisions related to measures and sanctions taken pursuant to Rules 25.2.2.1, 25.2.2.2 and 25.2.2.3 of the 2000 Olympic Charter.

Accordingly, in the Panel's view, Rule 25.2.2.4 of the 2000 Olympic Charter can only refer to decisions taken by the IOC Executive Board concerning: (a) temporary or permanent ineligibility or exclusion of individual competitors or teams from the Olympic Games with, in the case of exclusion, the related withdrawal of any medals or diplomas obtained (Rule

25.2.2.1); (b) temporary or permanent ineligibility or exclusion from the Olympic Games with regard to officials, managers and other members of any delegation as well as referees and jury members (Rule 25.2.2.2); or (c) withdrawal of accreditation with regard to all other accredited persons (Rule 25.2.2.3). The awarding of medals would not seem to represent a decision in terms of this rule.

D. Under the relevant rules, was a decision reached in the context of the 2000 Olympic Games with regard to the distribution of medals to the Appellants?

Before addressing the question as to whether or not a decision was rendered on 30 September 2000, the Panel wishes to state that it considers the parties' respective accounts of the legislative history of Rule 25.2.2.4 of the 2000 Olympic Charter as non conclusive. Indeed, both parties presented possible explanations of how Rule 25.2.2.4 of the 2000 Olympic Charter came to be inserted into the Olympic Charter but neither side submitted sufficiently persuasive evidence in support of its argument. In particular, the minutes of the IOC 107th Session of February 1998 appear to contradict the legislative history suggested by the Appellants insofar as they show that the issue of a time limit for IOC decisions taken on the occasion of the Olympic Games was already being discussed within the IOC many months before the issue of the East German athletes came up (at page 6 of those minutes there is a reference to the proposed *"Introduction of a time limit for appeals against decisions taken on the occasion of the Olympic Games"*). In addition, with regard to the German Democratic Republic's case, there is evidence on file which seems to indicate that the British and U.S. Olympic Committees were not actually asking that medals be stripped from the East German athletes but, rather, that British and U.S. athletes be given duplicate gold medals. Moreover, the Panel finds no evidence on file proving or disproving the IOC's legislative intent to consider the distribution of Olympic medals immediately after the competition as a "decision" taken by the IOC. In view of the above, the Panel's conclusion is that its interpretation of Rule 25.2.2.4 of the 2000 Olympic Charter is not controlled by the legislative history developed by the parties.

The decisive question to be addressed is whether, on 30 September 2000, the IOC actually rendered a decision when it distributed the bronze and gold medals to the Appellants for the results obtained by the USOC teams competing in the women's 4x100 and 4x400 relay races. Indeed, should the Panel find that the IOC did render one or more decisions in awarding those medals, according to Rule 25.2.2.4 of the 2000 Olympic Charter, such decisions could no longer be put into question as of 1 October 2003, *i.e.* more than three years after the closing ceremony of the 2000 Olympic Games in Sydney; as a consequence, the Athletes would necessarily keep their medals. If, on the other hand, the Panel finds that the awarding of medals to the Appellants does not represent a decision pursuant to Rule 25.2.2.4 of the 2000 Olympic Charter, the three-year rule would not apply to the case at stake and the Panel would have to proceed on the merits.

The Panel considers that, undoubtedly, all Olympic competitions are governed and officiated by the competent International Federations, in accordance with the technical rules of each particular sport. This is reflected by the 2000 Olympic Charter, which provides that the International Federations *"assume the responsibility for the technical control and direction of their sports at the Olympic Games"* (Rule 30.1.5) and that each of them *"is responsible for the technical control and direction of its sport; all competition and training sites and all equipment must comply with its rules"* (Rule 57.3).

The Panel remarks that, as an evident consequence of the above quoted Rules 30.1.5 and 57.3, the 2000 Olympic Charter specifically provides that International Federations have the *"rights and responsibilities: […] To establish the final results and ranking of Olympic competitions"* without any deference to the IOC's authority (Bye-laws 1 and 1.2 to Rule 57). In contrast, the International Federations' *"technical jurisdiction over the competition and training venues of their respective sports during the competition and training sessions at the Olympic Games"* is exercised *"[s]ubject to the IOC's authority"* (Bye-law 1.3 to Rule 57). In other words, contrary to what the Appellants submit, under the Bye-laws to Rule 57 of the 2000 Olympic Charter, International Federations are subject the IOC's authority with regard to the Olympic *"venues"* – stadiums, arenas, pitches, courts, ice rinks and the like – whereas their rights and responsibilities to establish the *"final results and ranking"* of Olympic competitions are unfettered.

In addition, Rule 57 of the 2000 Olympic Charter provides *inter alia* as follows:

"[…] 5. The necessary technical officials (referees, judges, timekeepers, inspectors) and a jury of appeal for each sport are appointed by the IF concerned, within the limit of the total number set by the IOC Executive Board upon the recommendation of the IF concerned. They perform their tasks in accordance with the directions of such IF and in coordination with the OCOG.

6. No official who has participated in a decision may be a

member of the jury responsible for making a ruling on the resulting dispute.

7. *The findings of the juries must be communicated to the IOC Executive Board as soon as possible.*

8. *Juries make a ruling on all technical questions concerning their respective sports, and their decisions, including any related sanctions, are without appeal, without prejudice to further measures and sanctions which may be decided by the IOC Executive Board or Session […]".*

[Emphasis added]

In the Panel's view, these rules of the 2000 Olympic Charter demonstrate that the decision-making process regarding technical control, direction, ranking and results of the various sports competitions that take place at the Olympic Games lies solely with the responsibility of the International Federations.

Accordingly, the argument of the Athletes according to which, as the IOC owns and controls the Olympic Games (Rule 11 of the 2000 Olympic Charter), all decisions concerning competitions within the Olympic Games made by International Federations must be considered as decisions *"taken by the IOC"*, must be rejected.

The IOC obviously supplies the administrative and organizational framework for such competitions and may obviously take *"further measures and sanctions"* (Rule 57.8 of the 2000 Olympic Charter, quoted *supra* at para. 32). However, the Panel deems that the Olympic Charter is very clear in leaving to the *"technical officials"* and *"juries"* of each International Federation the exclusive responsibility to decide results and rankings or, in other words, who wins and who loses.

In this perspective, the distribution of medals done by the IOC is merely the implementation of decisions that are taken by the technical officials and juries of each sport. This is after all the common experience of everybody who has witnessed an Olympic competition: once the competent technical officials or juries have decided who has come first, who has come second, and who has come third, the distribution of medals is done by the IOC in full compliance with the ranking communicated by the concerned International Federation. In real life, nobody has ever seen an athlete winning an Olympic race and then refraining from rejoicing while anxiously waiting for the IOC to decide – in the few minutes between the end of the race and the victory ceremony – whether it will give the medals in accordance with the finish order or not.

It is true that, as pointed out by the Appellants, *"[v]ictory ceremonies must be held in accordance with the protocol determined by the IOC"* and the *"medals and diplomas shall be provided by the OCOG for distribution by the IOC, to which they belong"* (Rule 70 of the 2000 Olympic Charter), but the Panel finds that the Olympic Charter leaves no margin of discretion to the IOC in awarding the three medals according to the ranking and results established and communicated by the competent International Federation. As the IOC has correctly stated in one of its briefs, *"the allocations of medals automatically flow as direct consequences of such ranking and results"*. In other words, Rule 70 of the 2000 Olympic Charter and its Bye-laws do not provide that a decision by the IOC must be taken prior to the distribution of the medals. Obviously, there might be a true IOC decision *afterwards*, when on the basis of some incident or occurrence the IOC may decide – for example – to give a second gold medal, as happened in Salt Lake City when the Canadian ice skating pair Salé-Pelletier received a second gold medal.

In this connection, the wording of Rule 6.4 of the 2004 and 2008 Olympic Charters, which makes reference to decisions taken by the IOC *"including but not limited to competitions and their consequences such as rankings or results"*, does not alter the above interpretation because it does not state at all that a competition and its results or rankings are decisions in terms of the three-year rule. In the Panel's view, there is no doubt that the IOC has the authority, as previously mentioned, to take *"further measures and sanctions"* (Rule 57.8 of the 2000 Olympic Charter, see *supra* at paras. 32 and 35) and that those measures and sanctions may involve and affect competitions, rankings and results. However, the Panel underscores that those are *"further"* measures and sanctions, *i.e.* in addition to and beyond those taken by International Federations. In the mere distribution of medals after a competition, the IOC does not exert its authority to take any such "further measures and sanctions" but merely implements what has been decided by the competent International Federation. In the Panel's opinion, if and when the IOC intervenes with a *"further"* measure or sanction concerning competitions, rankings or results (for instance disqualifying an athlete or withdrawing a medal or conferring a second gold medal), this intervention would certainly be a decision under the three-year rule, and it would clearly be seen as such under Swiss law.

As the Olympic Charter fails to clarify what is meant by *"decision of the IOC"*, Swiss law, *i.e.* the law of associations under the Swiss Civil Code, is applicable to decide whether the distribution of medals constitutes a decision or not.

As a matter of fact, in the Panel's opinion, the bottom line of this preliminary issue is that the mere action of putting a medal around an athlete's neck, without exerting any margin of appreciation, may not be qualified as a decision under Swiss law.

Swiss doctrine understands a decision by an association as a uniform declaration of intent determining the will of the association that emerges from multiple aligned declarations of intent (see SCHERRER/TÄNNLER, *When is a "resolution" a resolution?*, Causa Sport 3/2005, 280, at 281). Swiss doctrine distinguishes substantively between a legal act establishing or revoking authority or actions bound by instructions (see SCHERRER/TÄNNLER, at 281). A decision by an association serves its decision-making process and is therefore based on the association's *animus decidendi* (see RIEMER H.M., *Personenrecht des ZGB*, 2nd ed., Berne 2002, at 239). As a result, SCHERRER/TÄNNLER note the following with regard to the acts of individuals who are within an association:

"When an individual from an association substantiates the will of the association or federation through the volition of a legal act, establishing or revoking authority or issuing instructions, in other words, if the intent to make a decision is evident or any such intent may be assumed, a formal challengeable decision exists as a matter of principle. All other cases represent an informal, non-challengeable articulation of all types [...]".

Consequently, association decisions come about through the common formation of intent pursuant to the procedures set forth in the statutes of the association (see Zurich District Court, 7 February 2005, *Galatasaray Spor Kulübü v. FIFA*, Causa Sport 2005, at 254, where the existence of a challengeable association resolution was denied for lack of a common decision-making process as well as for the lack of existence of a decision by the competent body).

In the Panel's opinion, in the light of the applicable Swiss law, a decision can be detected only if the decision-making body makes use of some cognitive process leading to the choice of a course of action among some alternatives. Every decision-making process is related to a margin of appreciation which produces as output a final choice of an action or an opinion.

In fact, the Panel notes that no IOC body follows a decision-making process and exerts a margin of appreciation under Rule 70 of the 2000 Olympic Charter (and its corresponding Bye-laws) regarding the victory ceremony and the awarding of medals (cf. *supra*).

The IOC, in implementing the ranking and presenting the medals within the victory ceremony, simply applies the data established and forwarded to it by the competent International Federation. The publication of the race results, photo-finish and rankings – which in Sydney was done, on the basis of the evidence on file, by the local organizing committee ("SOCOG") and not by the IOC – occurs as a mere public notice of what was decided by the technical officials or juries appointed by the competent International Federation; accordingly, such publication is no legal act of the IOC. It does neither create nor rescind any rights and has no legal effect on anyone. By distributing medals to the winners during the victory ceremony, the IOC officials do not undertake a proper legal act under Swiss law; in short, the IOC does not issue a decision.

Based on the above, the Panel finds that there is *"no decision taken by the IOC"* in distributing the medals at the victory ceremony, in the IOC's own sphere of responsibility. As a consequence, the three-year rule does not prevent (time-bar) the IOC from withdrawing a medal which was merely awarded at the victory ceremony. Contrary to that, the withdrawal of medals is expressly provided for in Rule 25.2.2 of the 2000 Olympic Charter and Rule 23.2 of the 2008 Olympic Charter, as a consequence of a disqualification or of the withdrawal of an accreditation imposed as a sanction by the IOC Executive Board. Obviously, these *"consequences"* imposed by a decision of an IOC body are covered by the three-year rule (see also *supra*). Therefore, the Appellants' argument that the distribution of medals must necessarily be seen as a decision, because otherwise there would never be an IOC decision that would be subject to the three-year rule, fails.

In conclusion, as it is undisputed that on 30 September 2000 the Athletes received their relay medals from the IOC on the basis of and in compliance with the ranking provided by the IAAF and published by the SOCOG, the Panel concludes that the IOC took no decision in the sense of Rule 25.2.2.4 of the 2000 Olympic Charter and Rule 6.4 of the 2008 Olympic Charter. As a consequence, the three-year rule did not preclude the IOC from taking the decision to withdraw from the Appellants the medals awarded for the 4x100 and 4x400 relay races of the Sydney Olympic Games of 2000.

The Panel thus holds that, as the Appellants' preliminary objection based on three-year rule has failed, the present case must proceed on the merits.

Arbitration CAS 2008/A/1545
Andrea Anderson, LaTasha Colander Clark, Jearl Miles-Clark, Torri Edwards, Chryste Gaines, Monique Hennagan, Passion Richardson v. International Olympic Committee (IOC)

16 July 2010

Athletics; disciplinary sanctions against a relay team due to a doping offence of one member of the team; applicable law; principle of legality; principles of "*stare decisis*" or "*collateral estoppel*"; sanctions based on mere logic or on the principle of *lex sportiva*

Panel:
Prof. Massimo Coccia (Italy), President
Mr. Yves Fortier (Canada)
Mr. Hans Nater (Switzerland)

Relevant facts

Ms Andrea Anderson, Ms LaTasha Colander Clark, Ms Jearl Miles-Clark, Ms Torri Edwards, Ms Chryste Gaines, Ms Monique Hennagan and Ms Passion Richardson (the "Appellants" or the "Athletes") are seven athletes from the United States of America. They all competed at the 2000 Sydney Olympic Games in the women's 4 × 100 metres relay event (the "4×100m") and 4 × 400 metres relay event (the "4×400m") as members of the U.S. Olympic track and field team sent by the United States Olympic Committee (USOC).

The International Olympic Committee (IOC; the "Respondent") is the organisation responsible for the Olympic movement, having its headquarters in Lausanne, Switzerland.

The U.S. women relay teams at the 2000 Sydney Olympic Games included the Athletes and Ms Marion Jones ("Ms Jones").

On 30 September 2000, the Olympic finals of the women's 4×100m and 4×400m track and field relays took place in Sydney.

The two U.S. women's relay teams respectively finished in the third place in the 4×100m race, winning the bronze medal, and in the first place in the 4×400m race, winning the gold medal.

On 8 October 2007, as a consequence of the so-called BALCO scandal and of Marion Jones's acknowledgement that she had lied when she had previously denied drugs use, Ms Jones signed in front of the United States Anti-Doping Agency (USADA) a document entitled *"Acceptance of Sanction"*. Ms Jones confessed in that document that she had committed a *"doping offense arising from [her] use of a prohibited substance known as the 'clear' beginning on or about September 1, 2000 to July 2001"*. In particular, Ms Jones admitted that she had *"used the prohibited substance known as the 'clear' prior to, during and after the 2000 Olympic Games"*. As a consequence of her violation of anti-doping rules, Ms Jones accepted various sanctions.

By letter of 28 November 2007, the President of the International Association of Athletics Federations (IAAF) informed the President of the IOC that the IAAF Council had decided, with regard only to IAAF competitions, the annulment of all the individual results achieved by Ms Jones on or after 1 September 2000 and of all the relay teams' results in which Ms Jones had competed on or after 1 September 2000. With regard to the results achieved and medals obtained at the Sydney Olympic Games, the IAAF left any decision to the IOC.

On 12 December 2007, the IOC Executive Board decided to disqualify Ms Marion Jones from all track and field events in which she had competed at the 2000 Sydney Olympic Games, including the 4×100m and 4×400m relay races. No appeal was filed by Ms Jones against this IOC decision, which thus became final.

On 9 April 2008, the IOC Disciplinary Commission sent the following "recommendations" to the IOC Executive Board:

"I. The USOC relay teams to be disqualified from the following events in which they competed at the 2000 Sydney Olympic Games in the sport of athletics:

- *4 x 100 meters relay-women-USOC relay team, where the team placed third; and*

- *4 x 400 meters relay-women-USOC relay team, where the team placed first.*

II. *The USOC to be ordered to return to the IOC all medals and diplomas awarded to all members of both USOC relay teams in the above noted events, it being acknowledged that USOC has already returned to the IOC the medals won by Ms Jones in such events.*

[…]".

On 10 April 2008, upon consideration of the IOC Disciplinary Commission's recommendations, the IOC Executive Board decided to adopt, without any modifications, the said recommendations and, thus, to disqualify the entire USOC 4×100m and 4×400m women relay teams (the "Appealed Decision"). The Appealed Decision was notified to the Athletes on the same day.

On 30 April 2008, the Athletes filed an appeal with the Court of Arbitration for Sport (CAS) requesting the CAS to overturn the Appealed Decision.

On 22 October 2008, the Athletes filed their Appeal Brief, submitting that Rule 25.2.2.4 of the 2000 Olympic Charter according to which *"no decision taken in the context of the Olympic Games can be challenged after a period of three years from the day of the closing ceremony of such Games"* prevented further proceedings. The Athletes also submitted their position on the merits of the case.

On 22 December 2008, the CAS Court Office informed the parties that the Panel had determined that the issues related to the interpretation and application of the three-year rule could be severed from the other legal issues and be decided on a preliminary basis.

On 18 December 2009, the Panel issued a partial award ruling as follows:

"1. Rule 25.2.2.4 of the Olympic Charter in effect in 2000 did not preclude the IOC from taking a decision concerning the medals awarded for the women's 4×100 and 4×400 athletics relay races of the Sydney Olympic Games of 2000.

2. The exception submitted by Ms Andrea Anderson, Ms LaTasha Colander Clark, Ms Jearl Miles-Clark, Ms Torri Edwards, Ms Chryste Gaines, Ms Monique Hennagan and Ms Passion Richardson on the basis of Rule 25.2.2.4 of the Olympic Charter in effect in 2000 and of Rule 6.4 of the Olympic Charter in effect in 2008 is dismissed.

3. The CAS retains jurisdiction to adjudicate on the merits the appeal submitted by Ms LaTasha Colander Clark, Ms Jearl Miles-Clark, Ms Torri Edwards, Ms Chryste Gaines, Ms Monique Hennagan and Ms Passion Richardson against the decision of the IOC Executive Board of 10 April 2008.

4. All further decisions are reserved for the subsequent stages of the present appeal arbitration proceedings.

5. The costs connected with the present partial award shall be determined in the final award".

A hearing took place on 10 May 2010 at the CAS premises in Lausanne, Switzerland.

Extracts of the legal findings

A. Applicable law

Article R58 of the CAS Code provides as follows:

"The Panel shall 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".

The Panel observes that this case arises from a sanction imposed by the IOC on the Appellants' relay teams in connection with an anti-doping rule violation committed by their teammate Marion Jones at the time of the 2000 Sydney Olympic Games. Accordingly, the "applicable regulations" in this case are the IOC rules (the Olympic Charter, the OMAC and the like), which have been accepted by the Athletes when they took part in the Sydney Olympic Games and whose application has been invoked by both sides. The IAAF rules are also applicable insofar as allowed, mandated or referenced by the IOC rules.

The Panel then notes that the Appealed Decision was issued by the IOC. As the IOC is an association constituted under Swiss law and domiciled in Lausanne, Switzerland, pursuant to the above quoted Article R58 of the CAS Code, Swiss law applies subsidiarily to the present dispute.

As to the different versions of the applicable rules, the Panel determines that it must necessarily apply to the Athletes the IOC and IAAF rules in effect during the 2000 Sydney Olympic Games, and not those entered into force at a later stage (such as, for example, the WADA Code). In the Panel's view, intertemporal issues are governed by the general

principle of law *"tempus regit actum"*, which holds that any determination of what constitutes a sanctionable rule violation and what sanctions can be imposed must be done in accordance with the law in effect at the time of the allegedly sanctionable conduct and new rules and regulations do not apply retrospectively to facts occurred before their entry into force.

The Panel takes comfort from the fact that its opinion is consistent with numerous CAS precedents. See e.g.:

"under Swiss law the prohibition against the retroactive application of Swiss law is well established. In general, it is necessary to apply those laws, regulations or rules that were in force at the time that the facts at issue occurred" (CAS 2000/A/274, para. 208);

"as a general rule, transitional or inter-temporal issues are governed by the principle "tempus regit actum", holding that any deed should be regulated in accordance with the law in force at the time it occurred" (CAS 2004/A/635, para. 44);

"The succession in time of anti-doping regulations poses the problem of the identification of the substantive rule which is relevant for the answer to such question. In this respect the Panel confirms the principle that "tempus regit actum": in order to determine whether an act constitutes an anti-doping rule infringement, it has to be evaluated on the basis of the law in force at the time it was committed. In other words, new regulations do not apply retroactively to facts that occurred prior to their entry into force, but only for the future" (CAS 2005/C/841, para. 51).

B. The Appellants' due process rights

The Appellants claim that the IOC seriously infringed their due process rights, in particular not granting them their full right to be heard. As a consequence, the Appellants contend that the Appealed Decision should be annulled.

The Panel does not agree with this Appellants' submission. There is an established CAS jurisprudence based on Art. R57 of the CAS Code (*"The Panel shall have full power to review the facts and the law"*), according to which the CAS appeal arbitration procedure cures any infringement of the right to be heard or to be fairly treated committed by a sanctioning sports organization during its internal disciplinary proceedings. Indeed, a CAS appeal arbitration procedure allows a full *de novo* hearing of a case with all due process guarantees, granting the parties every opportunity not only to submit written briefs and any kind of evidence, but also to be extensively heard and to examine and cross-examine witnesses or experts during a hearing. The Panel harbours no doubt that in the present CAS procedure the Appellants were given ample latitude to fully plead their case and be heard; accordingly, the Panel deems as cured any possible violation that might have occurred during the IOC proceedings, with no need to address the grievances raised by the Appellants.

The Panel can rely on many CAS awards in support of the above position. For instance, in CAS 2003/O/486 the panel clearly stated:

"In general, complaints of violation of natural justice or the right to a fair hearing may be cured by virtue of the CAS hearing. Even if the initial "hearing" in a given case may have been insufficient, the deficiency may be remedied in CAS proceedings where the case is heard 'de novo'" (para. 50).

In the case CAS 2009/A/1880-1881, the panel stated as follows:

"the CAS appeals arbitration allows a full de novo hearing of a case, with all due process guarantees, which can cure any procedural defects or violations of the right to be heard occurred during a federation's (or other sports body's) internal procedure. [...] it is the duty of a CAS panel in an appeals arbitration procedure to make its independent determination of whether the Appellant's and Respondent's contentions are correct on the merits, not limiting itself to assessing the correctness of the previous procedure and decision" (paras. 142, 146).

In TAS 2004/A/549, the Panel stated:

"le TAS jouit, sur le fondement des dispositions de l'article 57 du Code de l'arbitrage, d'un plein pouvoir d'examen. Ce pouvoir lui permet d'entendre à nouveau les parties sur l'ensemble des circonstances de faits ainsi que sur les arguments juridiques qu'elles souhaitent soulever et de statuer définitivement sur l'affaire en cause ainsi d'ailleurs, que le demande l'appelant en l'espèce. Un tel système, où la Formation examine l'ensemble des griefs de fait et de droit soulevés par les parties permet de considérer comme purgés les vices de procédure ayant éventuellement affecté les instances précédentes. Ce principe a été confirmé par le TAS à de nombreuses reprises" (para. 31).

The same notion that violations of due process rights during intra-association disciplinary proceedings do not suffice in and of themselves to annul a disciplinary decision appealed before the CAS – owing to the fact that CAS proceedings do grant those rights – has been repeated over and over by further CAS panels, among which the following can be mentioned: CAS 2006/A/1153 at para. 53; CAS 2008/A/1594 at para. 109; TAS 2008/A/1582 at para. 54; CAS 2008/A/1394 at para. 21; TAS 2009/A/1879 at para. 71.

Therefore, given the authority granted to the Panel by Article R57 of the CAS Code to fully review the facts and the law *de novo*, the Panel considers that any

possible infringements of the Appellants' due process rights committed by the IOC are hereby cured and thus irrelevant. As a result, the Panel may proceed to rule on the merits of the case.

C. The IOC's power to impose the sanctions on the Appellants

Rule 23 of the 2008 Olympic Charter (in force on 10 April 2008, at the moment of the adoption of the Appealed Decision disqualifying the two US women's relay teams) provides as follows:

"In the case of any violation of the Olympic Charter, the World Anti-Doping Code, or any other regulation, as the case may be, the measures or sanctions which may be taken by the [IOC] Session, the IOC Executive Board or the [IOC] disciplinary commission referred to under 2.4 below are:

[…]

2. In the context of the Olympic Games, in the case of any violation of the Olympic Charter, of the World Anti-Doping Code, or of any other decision or applicable regulation issued by the IOC or any IF or NOC, including but not limited to the IOC Code of Ethics, or of any applicable public law or regulation, or in case of any form of misbehaviour:

2.1 with regard to individual competitors and teams: temporary or permanent ineligibility or exclusion from the Olympic Games, disqualification or withdrawal of accreditation; in the case of disqualification or exclusion, the medals and diplomas obtained in relation to the relevant infringement of the Olympic Charter shall be returned to the IOC.

[…]".

In light of this provision, the Panel has no doubts that the IOC Executive Board has the authority to impose on a "team" – in addition to individual competitors – the sanction of disqualification and to order the team members to return their medals and diplomas to the IOC. The Panel thus concurs with the Respondent's opinion that the IOC Executive Board had the power to adopt the Appealed Decision and to disqualify the two US women's relay teams which competed at the 2000 Sydney Olympic Games.

However, a different matter is whether in the present case the IOC properly exerted the disciplinary power granted to it by the Olympic Charter.

In this regard, pursuant to the above quoted Rule 23.2 of the Olympic Charter, the IOC may properly exert such disciplinary power, and adopt *"measures or sanctions"* in *"the context of the Olympic Games"*, only on condition that the sanctioned individual competitor or team:

- has violated any applicable sports regulation or decision *("[…] in the case of any violation of the Olympic Charter, of the World Anti-Doping Code, or of any other decision or applicable regulation issued by the IOC or any IF or NOC […]"),*
- has violated *"any applicable public law or regulation",* or
- has committed *"any form of misbehaviour".*

In the Panel's opinion, this provision of the Olympic Charter is to be properly read in accordance with the "principle of legality" (*"principe de légalité"* in French), requiring that the offences and the sanctions be clearly and previously defined by the law and precluding the "adjustment" of existing rules to apply them to situations or behaviours that the legislator did not clearly intend to penalize. CAS arbitrators have drawn inspiration from this general principle of law in reference to sports disciplinary issues, and have formulated and applied what has been termed as "predictability test". Indeed, CAS awards have consistently held that sports organizations cannot impose sanctions without a proper legal or regulatory basis and that such sanctions must be predictable. In other words, offences and sanctions must be provided by clear rules enacted beforehand.

In the seminal award of 23 May 1995, CAS 94/129, the panel declared the following:

"The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable" (para. 34).

[Emphasis added]

In another well-known award issued on 12 February 1998 by the CAS ad hoc Division at the Nagano Olympic Games (CAS OG 98/002), the panel stated as follows:

"The Panel recognizes that from an ethical and medical perspective, cannabis consumption is a matter of serious social concern. CAS is not, however, a criminal court and can neither promulgate nor apply penal laws. We must decide within the context of the law of sports, and cannot invent prohibitions or sanctions where none appear. [...] It is clear that the sanctions against R. lack requisite legal foundation" (para. 26).

[Emphasis added]

In CAS 2001/A/330, award of 23 November 2001, the panel explicitly stated that the sanctions imposed by sports federations were valid if they could withstand the "predictability test":

"In the present case, the Panel is in no doubt that the sanction imposed was based upon valid provisions of the FISA Rules which were then in force. Those provisions were well-known and predictable to all rowers […]. In the circumstances, therefore, the Panel has no hesitation in finding that the sanction contained in FISA's Rules satisfied what might be called the 'predictability test'" (para. 17).

[Emphasis added]

In CAS 2007/A/1363, award of 5 October 2007, in line with many CAS awards, the sole arbitrator protected *"the principle of legality and predictability of sanctions which requires a clear connection between the incriminated behaviour and the sanction and calls for a narrow interpretation of the respective provision"* (para. 16).

[Emphasis added]

In the present case, therefore, the IOC's case depends on whether there was on 30 September 2000 an express and clear rule providing that the two relay teams could be disqualified if one of their members committed a doping offence.

D. The Olympic Movement Anti-doping Code and its Explanatory Memorandum

It is common ground between the parties that the IOC anti-doping rules in force at the time of the 2000 Olympic Games were set out in the OMAC, whose Chapter II is entitled *"The offence of doping and its punishment"* and sets forth the principal governing rules in this case.

Within Chapter II of the OMAC, paragraphs 3 and 4 of Article 3 deal with the consequences of a doping offence in terms of invalidation of the results obtained in the competition during which the doping offence was committed:

"3. Any case of doping during a competition automatically leads to invalidation of the result obtained (with all its consequences, including forfeit of any medals and prizes), irrespective of any other sanction that may be applied, subject to the provisions of point 4 of this article.

4. In the event that a competitor who is a member of a team is found guilty of doping, the relevant rules of the International Federation concerned shall be applied".

In the Panel's opinion, the OMAC evidently distinguishes between individual results and team results and provides that individual results are automatically invalidated (Article 3, para. 3), while the invalidation of team results depend on the rules of the interested International Federation (Article 3, para. 4). Accordingly, pursuant to the OMAC this case should turn on the IAAF rules applicable at the time.

However, the Respondent argues that the IAAF rules should be left out of the picture because the quoted paragraphs 3 and 4 of Article 3 of the OMAC's Chapter II have been superseded by the following paragraph of the OMAC Explanatory Memorandum, which would provide the IOC with a legal basis to disqualify the team relying only on its own rules:

"For competitors who are members of a team, paragraph 4 refers only to paragraph 3. This means that the rules of the International Federation concerned only govern the question of any invalidation of the result obtained by the team. For everything else, the athlete in question is sanctioned individually, according to the rules of the Code, in the same way as any athlete accused of doping. If the IF concerned has not adopted the implementing provisions of the Code in this area, the events in which the doped athlete has participated are considered lost or the team is disqualified, according to the sports and the competition format".

The Panel does not agree with the Respondent's construction.

First of all, the Panel observes that Article 2 of Chapter VII of the OMAC provides that the OMAC *"may be modified only by the IOC Executive Board, upon recommendation of the Council of the International Independent Anti-Doping Agency [i.e. the WADA] after consultation of the parties concerned".* As acknowledged by the Respondent's counsel at the hearing, the OMAC Explanatory Memorandum was not formally approved or adopted by the Executive Board. By reason of this significant formal deficiency, the Panel finds that the OMAC Explanatory Memorandum, no matter how interpreted, may not be taken as modifying or superseding the OMAC.

Second, by its own language, the OMAC Explanatory Memorandum openly states that it is not meant to *"deal with matters that would require substantive amendments to the Code, but is intended to provide certain interim clarifications pending the development of experience with the new document and formal modifications to the Code based on such experience"* (last paragraph of the OMAC Explanatory Memorandum's Introduction). Therefore, even if one were to disregard the said formal deficiency, the OMAC Explanatory Memorandum is a document

that may merely clarify an OMAC's provision and not modify or supersede it. In this respect, the Panel is not prepared to follow the IOC's interpretation of the last sentence of the quoted paragraph of the OMAC Explanatory Memorandum (*supra* at 39), because such construction would preclude the application of *"the relevant rules of the International Federation concerned"* (*i.e.* the IAAF rules) and this would modify, rather than merely clarify, the OMAC.

Third, the second sentence of the OMAC Explanatory Memorandum's paragraph cited by the IOC specifically and unambiguously states that *"the rules of the International Federation concerned [...] govern the question of any invalidation of the result obtained by the team"* (see *supra* at 39). In the Panel's view, this language, coupled with the above quoted paragraph 4 of Article 3 of the OMAC's Chapter II makes absolutely clear the IOC legislator's wish to leave the matter of the invalidation (or not) of team results to the discretion of the interested International Federations. In this respect, the Panel evokes the generally recognized interpretive principle *"in claris non fit interpretatio"*, meaning that when a rule is clearly intelligible, there is no need of looking for an alternative or imaginative interpretation.

Fourth, the Panel observes that even that last sentence of the above quoted passage of the OMAC Explanatory Memorandum, on which the IOC especially relies, is far from clear in underpinning the IOC's case because: (i) its language, especially if read in the context of the whole paragraph, is obscure and ambiguous; (ii) no evidence whatsoever has been submitted that the IAAF *"has not adopted the implementing provisions of the [OMAC] in this area"*; (iii) it is unclear what the *"area"* is or how it is defined; (iv) the expression *"according to the sports and the competition format"* may be taken to mean that, again, the solution could be different from sport to sport and from competition to competition, depending on the specific rules governing a given sport or a given competition; (v) even the IOC's counsel conceded at the hearing that the OMAC Explanatory Memorandum *"could be drafted better"* and that the quoted paragraph *"is not the easiest rule to interpret"*. In sum, even if one were to ignore the fact that the OMAC Explanatory Memorandum may not lawfully override the OMAC, the lack of clarity of the last sentence of the paragraph invoked by the IOC prevents anyways the Panel from interpreting it in favour of the IOC, in light of the interpretive principle *"contra stipulatorem"* (widely recognized in Swiss law and in CAS jurisprudence) and of the said predictability test.

Finally, the Panel notes that the IOC itself has asserted, in a letter dated 2 July 2004 from the Secretary of the IOC Disciplinary Commission to the President of the IAAF, that the OMAC requires that the issue of team results in case of a doped team member be addressed on the basis of the rules adopted by each International Federation. Contrary to what the Appellants argue, this does not preclude the IOC from making a different case before this Panel: however, this shift from its original stance certainly does not strengthen the Respondent's case.

As a result of the above considerations, the Panel holds that, under the IOC rules in force at the time of the Sydney Olympic Games, the fate of team results in case of a disqualification for doping of a team member depends on the rules of the concerned International Federation. Therefore, the Panel concludes that the matter at issue must be solved in accordance with IAAF rules.

E. The IAAF rules and the precedent of CAS 2004/A/725

The case turns on the interpretation of the relevant IAAF Rules in force at the time of the 2000 Sydney Olympic Games and their application to the gold and bronze medal-winning US teams in the women's 4×400m and 4×100m relay events.

The Panel is mindful of the fact that another CAS panel has already dealt with a similar case with regard to the men's 4×400m relay team of which Jerome Young, later disqualified for a doping offense, was a member (CAS 2004/A/725). In that case the CAS panel decided, on the basis of the IAAF Rules in force at the time of the 2000 Sydney Olympic Games, to overturn the IAAF decision to annul the results of Jerome Young's 4×400m relay team.

The IOC vigorously argued that the present case should be distinguished from the case of Jerome Young's relay team; according to the IOC, particular distinguishing weight should be given to the fact that, contrary to Jerome Young, Marion Jones did run in the two finals and to the fact that she admitted being doped during the Olympic Games while Jerome Young took the prohibited substances prior to the Games.

However, even if the Panel does not consider the Appellants' well founded observation that the CAS 2004/A/725 award did not deal with (and the outcome of the case did not depend on) those circumstances, the Panel does not agree with this Respondent's submission. Firstly, in order to win a medal a relay team must necessarily pass through the qualifying heat and the semi-final, which are quite risky even for the strongest relay teams (considering in particular

how frequently in relay events a team is disqualified because, for instance, the baton is exchanged improperly or dropped). Therefore, the contribution of an athlete who runs only in the qualifying heat or in the semi-final is equally essential and valuable to the final result of the team. Secondly, both Marion Jones and Jerome Young have been found guilty of a doping offence at a later moment and retroactively disqualified from the relay events they had raced in; accordingly, from a legal standpoint the situation is identical, while from a medical standpoint no evidence whatsoever has been presented to show that Marion Jones' cheat improved her performance at the Olympics while Jerome Young's did not.

As a result, the Panel is of the opinion that this case must be adjudicated by addressing exactly the same issue that was already addressed in the case of Jerome Young's relay team, *i.e.* whether the results obtained by a team in a track and field relay event should be annulled because one team member has been subsequently declared ineligible and disqualified from that event due to an anti-doping rule violation.

This does not automatically entail that the Panel is bound to decide in the same way as in CAS 2004/A/725 on the basis of either the *"stare decisis"* or the *"collateral estoppel"* principles, as advocated by the Appellants.

On the issue of the precedential value of CAS awards, the Panel shares the view of other CAS panels. In the case CAS 97/176, award of 15 January 1998, the panel rightly stated as follows:

"in arbitration there is no stare decisis. Nevertheless, the Panel feels that CAS rulings form a valuable body of case law and can contribute to strengthen legal predictability in international sports law. Therefore, although not binding, previous CAS decisions can, and should, be taken into attentive consideration by subsequent CAS panels, in order to help developing legitimate expectations among sports bodies and athletes" (at para. 40).

Similarly, in the case CAS 2004/A/628, award of 28 June 2004, the panel stated as follows:

"In CAS jurisprudence there is no principle of binding precedent, or stare decisis. However, a CAS Panel will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel" (at para. 73).

Therefore, although a CAS panel in principle might end up deciding differently from a previous panel, it must accord to previous CAS awards a substantial precedential value and it is up to the party advocating a jurisprudential change to submit persuasive arguments and evidence to that effect. Accordingly, the CAS 2004/A/725 award is a very important precedent and the Panel will draw some significant guidance from it.

The Panel observes that in the Jerome Young's relay team's case, the CAS panel found that in the IAAF regulations there was no express rule in force at the time of the Sydney Olympic Games which provided for the annulment of results obtained by a relay team, one of whose members was later disqualified because of a doping offence (see award CAS 2004/A/725 at para. 74).

Remarkably, the fact that there was no express IAAF rule regulating that situation, and that a rule for that purpose was enacted only four years later, was acknowledged by the IAAF's own legal counsel in a "briefing note" to the IAAF Council dated 18 July 2004, where the following can be read:

"15. In the 2000 [IAAF] Rules there was still no specific provision for what should happen when a competitor who had been a member of a team (either a relay team or otherwise) was found guilty of doping. […]

16. For the first time, the 2004-2005 Rules make express provision for what happens when an athlete who is a member of a relay team is found guilty of doping.

17. The 2004-2005 IAAF Rules make it clear that: (i) if an athlete (who is subsequently declared ineligible) tests positive in a relay event, the result of the relay team in which he has competed shall be annulled (Rule 39.2);

[…]".

Even the IOC's representative acknowledged at the hearing that *"there is no express rule"* providing for the invalidation of the team results if one team member is disqualified due to a doping offence.

During the case CAS 2004/A/725, in the absence of an express IAAF rule, the IAAF's counsel ingeniously tried to rely on IAAF Rule 59.4 (in force during the Sydney Olympic Games), arguing that this provision could be applied to a relay team and could provide the legal basis for the annulment of the results of the US team. IAAF Rule 59.4 is in the following terms:

"If an athlete is found to have committed a doping offence and this is confirmed after a hearing or the athlete waives his right to a hearing, he shall be declared ineligible. In addition, where testing was conducted in a competition, the athlete shall be disqualified from that competition and the result amended accordingly. His ineligibility shall begin from the date of suspension. Performances achieved from the date on which the

sample was provided shall be annulled".

[Emphasis added]

The CAS panel rejected the IAAF's argument and determined, for very convincing reasons, that Rule 59.4 only concerned the disqualification, ineligibility and annulment of performance results of individual athletes guilty of a doping offence and it did not concern teams or team results (see award CAS 2004/A/725 at paras. 63 *et seq.*).

During the present arbitration, the IOC did not even try to challenge such findings and persuade the Panel that that CAS panel's determination was erroneous. In fact, the Panel concurs with the convincing analysis of the CAS 2004/A/725 panel and sees no reason to reach a different conclusion with regard to IAAF Rule 59.4. This rule simply cannot be applied to the Appellants' relay teams and used to annul such teams' results and withdraw the Athletes' medals.

F. Could the relay teams be sanctioned on the basis of logic and/or of an alleged principle of lex sportiva?

It was urged upon the Panel by the IOC's counsel that it would be absurd and even "monstrous" to uphold the appeal and leave the relay teams' results unaffected while one team member was admittedly doped, and that such an outcome would be a "disaster" and would not be understood by the sports world.

In short, the IOC seems to rely on logic and/or some sort of general principle of *lex sportiva* which, in order to safeguard sports from cheats, would inexorably require to annul any team results whenever a member of the team is found to have competed while being doped. In particular, the IOC insisted at the hearing that a relay race is a very specific competition which cannot be compared with, and should be distinguished from, other team competitions.

The IOC's argument that it would be logical to disqualify a team whose overall performance was boosted in some measure by one doped team member is not without force and is even commonsensical. However, in the view of the Panel, mere logic may not serve as a basis for a sanction because it would not satisfy the said predictability test (see *supra*) and it could lend itself to arbitrary enforcement.

In contrast, the Panel does not discard the theoretical possibility that an established principle of *lex sportiva* might serve as legal basis to impose a sanction on an athlete or a team. Needless to say, the existence of such principle must be convincingly demonstrated and must also pass the mentioned predictability test.

However, no evidence has been submitted to the Panel that could support the notion that *lex sportiva* would invariably require disqualifying not only the individual athlete but also the team to which the doped athlete belongs. To the contrary, the Panel finds that even the current WADA Code – necessarily the starting point for any attempt to demonstrate the existence of a principle of *lex sportiva* in relation to a doping matter – lends no support to such idea. Article 11.2 of the WADA Code so reads:

"If more than two members of a team in a Team Sport are found to have committed an anti-doping rule violation during an Event Period, the ruling body of the Event shall impose an appropriate sanction on the team (e.g., loss of points, Disqualification from a Competition or Event, or other sanction) in addition to any Consequences imposed upon the individual Athletes committing the anti-doping rule violation".

[Emphasis added]

The WADA Code thus provides for team sports – *i.e.*, according to the WADA Code, the sports where the substitution of players is permitted during a single competition – the following two situations: (i) if one or two members of a team are doped, the team suffers no consequences; (ii) if three or more members of a team are doped, there shall be a sanction against the team but that sanction is not necessarily the disqualification of the whole team. So, for example, given that FIFA adopted almost verbatim the above rule (at Article 59 of the FIFA Anti-Doping Regulations), there might be a football team winning the World Cup with two doped players having a crucial impact on the event (say, scoring one or two goals in the semi-final and final matches) with no penalization for the team as such.

Some team sports' international federations have been slightly more severe; for example, in basketball, Article 11.2 of the FIBA Internal Regulations Governing Anti-Doping provides that *"[i]f a member of a team is found to have committed an Anti-Doping Rule violation during an Event period, the result of the game shall remain valid. If more than one member of a team is found to have committed an Anti-Doping Rule violation during an Event period, the team may be subject to Disqualification or other disciplinary action".* Hence, if a basketball team wins an event with one doped player dominating the game (say, averaging 30 points and 15 rebounds) there is no penalization for the team as such; even if two or more members of a basketball team commit a doping offence, disqualification of the team is not mandatory and other sanctions might be adopted.

By the same token, Article 11 of the World Curling Federation Anti-Doping Rules provides – in a team sport where only four athletes are fielded – that if *"one or more members of a team"* are found to have committed a doping offence the sanction might be a lesser one than the disqualification of the whole team.

So, in team sports there is certainly no general consensus that team results must be necessarily annulled if one or more team members are found to be doped. The IOC argues (with no evidence in support of the argument) that one should not look at team sports for comparison purposes, because relays are intrinsically different and the contribution of one athlete to a track and field relay team is much more meaningful than one athlete's contribution in team sports. However, the Panel is not persuaded by this submission. For example, it is notorious that the contribution given by one basketball player to his/her team may sometimes be so momentous that a losing team may become a winning team only because of that player.

In any event, the Panel notes that the current version of the WADA Code provides no express rule for team competitions in sports which are not team sports (such as track and field relays), thus leaving each international federation total discretion as to the rules to adopt for its own sport. Indeed, the WADA Code's official comment to Article 9 merely states that *"[d]isqualification or other disciplinary action against the team when one or more team members have committed an anti-doping rule violation shall be as provided in the applicable rules of the International Federation".*

[Emphasis added]

So the sanctions related to track and field relay teams might end up being different from those related to, say, swimming relay teams or cross-country relay teams, in case one or more team members were found to be doped.

The IOC itself, in its own Anti-Doping Rules enacted for both the 2008 Beijing Olympic Games and the 2010 Vancouver Olympic Winter Games, still avoided to adopt a rule expressly requiring that a team be disqualified if one of its members were to be disqualified for a doping offence, identically providing as follows:

"In Team Sports, if more than one team member is found to have committed an anti-doping rule violation during the Period of the Olympic Games, the team may be subject to Disqualification or other disciplinary action, as provided in the applicable rules of the relevant International Federation.

In sports which are not Team Sports but where awards are given to teams, if one or more team members have committed an anti-doping rule violation during the Period of the Olympic Games, the team may be subject to Disqualification, and/or other disciplinary action as provided in the applicable rules of the relevant International Federation" (Article 10 of the 2008 Bejing Anti-Doping Rules and Article 9 of the 2010 Vancouver Anti-Doping Rules).

[Emphasis added]

Therefore, if in the future a similar case arises with regard to a team event which occurred at the Beijing or Vancouver Olympic Games, the outcome of the case will still entirely depend not on an (inexistent) IOC rule but on the specific rules on this matter of the concerned International Federation (which, as the just quoted IOC rules allow, might merely provide for *"other disciplinary action"*).

In conclusion, the Panel sees no definite pattern in international sports law that could support the argument that a general principle of *lex sportiva* has nowadays – let alone in 2000 – emerged and crystallized to the effect that a team should inevitably be disqualified because one of its members was doped during a competition. The matter is still subject to the multifarious rules that can be found in the regulations of the various International Federations.

The submission on behalf of the IOC that the Panel should sanction the Appellants' teams on the basis of logic and/or some general principle thus fails.

G. Conclusion on the merits

In view of the above discussion, the Panel finds that at the time of the Sydney Olympic Games there was no express IOC rule or IAAF rule that clearly allowed the IOC to annul the relay team results if one team member was found to have committed a doping offence.

In this connection, the Panel concurs with the following passage of the CAS 2004/A/725 award, a statement that this Panel, *mutatis mutandis*, adopts as its own:

"The rationale for requiring clarity of rules extends beyond enabling athletes in given cases to determine their conduct in such cases by reference to understandable rules. As argued by the Appellants at the hearing, clarity and predictability are required so that the entire sport community are informed of the normative system in which they live, work and compete, which requires at the very least that they be able to understand the meaning of rules and the circumstances in which those rules apply. […] There was simply no express rule in force at the

time of the Sydney Games which provided for the annulment of results obtained by a team, one of whose members later was found to have been ineligible to compete at the time. As became apparent in these proceedings, such a rule could only be said to have been produced by what the Panel in the Quigley case referred to as "an obscure process of accretion" – here, as the IAAF would have it, a process of complementation and inference".

This Panel does not accept, as the IOC would have it, to impose a sanction on the basis of inexistent or unclear rules or on the basis of logic or of an inexistent general principle. The Panel acknowledges that the outcome of this case may be unfair to the other relay teams that competed with no doped athletes helping their performance; however, such outcome exclusively depends on the rules enacted or not enacted by the IOC and by the IAAF at the time of the Sydney Olympic Games. If the IOC does not wish to see in the future an outcome of this type in disputes arising out of other editions of the Olympic Games, it will have to amend its own rules and make sure that they clearly require that teams be always disqualified if one of the team members is disqualified for an anti-doping rule violation.

As a result, the Panel is unanimously of the opinion that, on the basis of the IOC and IAAF rules applicable at the time of the 2000 Sydney Olympic Games, the Appealed Decision taken by the IOC Executive Board on 10 April 2008 is incorrect and must be set aside. The Panel reaches this conclusion with all due respect to the IOC Executive Board and its fundamental role under the Olympic Charter.

The Panel thus holds that the results obtained by the US teams in the women's 4×400m and 4×100m relay events at the Sydney Olympic Games shall not be disqualified. As a necessary consequence, the Appellants shall not be stripped of their medals and diplomas.

Finally, all other requests, motions or prayers for relief submitted by the parties, even though not expressly mentioned in the award, have been taken into account by the Panel and are herewith rejected.

Arbitrage TAS 2009/A/1828 & 1829
Olympique Lyonnais c. US Soccer Federation (Sonia Bompastor) & US Soccer Federation (Camille Abily)

18 mars 2010

Football; délivrance d'un Certificat International de Transfert (CIT); jonction de procédures; absence de qualité pour faire appel d'un club à l'encontre d'une décision du Juge Unique de la FIFA relative à la délivrance d'un CIT; qualité pour défendre dans le cadre d'un appel dirigé contre une décision du juge unique de la FIFA

Formation:
Me Olivier Carrard (Suisse), Président
Prof. Jean-Pierre Karaquillo (France)
Me Jean-Jacques Bertrand (France)

Faits pertinents

L'association Olympique Lyonnais ("OL" ou "l'appelante") est un club de football disposant d'une équipe féminine qui évolue dans le championnat de France, dans la Coupe de France et dans la coupe de l'UEFA.

L'US Soccer Federation ("USSF" ou "l'intimée") est l'organisation faîtière regroupant les clubs de football aux Etats-Unis.

Mmes Camille Abily et Sonia Bompastor ("les deux joueuses") sont actives en tant que joueuses de football.

Après avoir évolué au sein de l'OL, elles jouent depuis février 2009 dans deux équipes américaines.

Les circonstances dans lesquelles ces deux joueuses ont quitté l'OL ont donné naissance au présent litige.

Mme Camille Abily, née le 5 décembre 1984, a été recrutée au sein de l'OL dans le courant de l'été 2006. En effet, Mme Abily a été engagée par l'OL tout d'abord par une lettre du 14 juin 2006, contresignée par elle, puis par un "contrat de travail à durée indéterminée" du 1er août 2006, accompagné d'un avenant du même jour.

Quant à Mme Sonia Bompastor, née le 8 juin 1980, elle a été recrutée par l'OL à la même période. Ainsi, Mme Bompastor a également été engagée par l'OL tout d'abord par une lettre du 14 juin 2006, contresignée par elle. Ensuite, les parties ont signé un "contrat de travail à durée indéterminée" du 1er août 2006, accompagné d'un avenant du même jour. De plus, Mme Bompastor a également été engagée par la société SAS OL Images par contrat séparé du 1er août 2006, accompagné d'un avenant.

Les lettres et contrats susmentionnés ont un contenu identique, dont les points suivants doivent être relevés.

Dans ses lettres du 14 juin 2006, l'OL confirme *"les propositions contractuelles que nous avons évoquées en date du 6 juin lors de notre rendez-vous"* et précise que les joueuses sont engagées *"dans le cadre du statut de joueuse amateur pour respecter la réglementation en cours pour le football féminin"*.

En outre, l'OL demande des deux joueuses un "engagement minimum de trois saisons".

Enfin, l'OL propose par ces lettres *"un contrat de travail à durée indéterminée à temps partiel au sein de l'Association Olympique Lyonnais avec pour mission d'assurer la préparation physique et athlétique des sections sports études ouvertes aux joueuses de la section féminine du club"* à Mme Abily et, pour ce qui est de Mme Bompastor, l'OL lui offre *"un contrat de travail à durée indéterminée à temps partiel au sein de la filiale 'Olympique Lyonnais Image'* (OL TV)" et *"un contrat de travail à durée indéterminée à temps partiel au sein de l'Association Olympique Lyonnais avec pour mission de participer aux travaux de secrétariat de la section amateur du club"*.

En outre, Mme Abily peut poursuivre son cursus universitaire.

Il est enfin prévu dans le courrier du 14 juin 2006 qui lui a été adressé que Mme Abily reçoive un salaire mensuel brut de € […] une indemnité de logement de € […] ainsi qu'une prime annuelle de € […] et ce malgré le fait que son activité salariée soit uniquement à temps partiel.

Quant à Mme Bompastor, il est prévu dans la lettre du 14 juin 2006 qu'elle reçoive un salaire mensuel brut de € […] au total (€ […] par poste), de même qu'une indemnité de logement de € […] ainsi qu'une prime annuelle de € […].

Ces rémunérations sont relatives à l'activité salariée des deux joueuses et non pas à leur activité footballistique.

Les contrats du 1er août 2006 détaillent l'accord des parties.

Le contenu des contrats concernant les attributions des deux joueuses (art. 2) et leurs salaires (art. 4) est identique à celui des lettres du 14 juin 2006. L'art. 6 des contrats précise que *"le Salarié pourra être amené à effectuer des missions, en tout lieu en France ou à l'étranger, que l'Association lui indiquera"*.

En outre, par l'avenant appelé *"résiliation amiable du contrat de travail à durée indéterminée signé en date du 1er août 2006"*, les parties ont expressément indiqué que l'embauche des joueuses en qualité de salariées *"est liée au recrutement de l'intéressé dans l'équipe de football féminine de l'Olympique Lyonnais et ce afin de lui permettre d'assurer un revenu d'activité professionnelle"*. Par conséquent, les parties ont prévu *que "les relations contractuelles cesseront d'un commun accord à l'issue de la saison de football où le salarié décidera de s'engager avec un autre club"*.

Enfin, cet avenant prévoit également que *"l'Association et le salarié s'engagent l'un envers l'autre à ne pas exercer d'action judiciaire pour tout motif lié à l'exécution et/ou à la rupture par consentement mutuel du contrat de travail"*.

Dans le courant de l'année 2007, les deux joueuses ont été approchées chacune par un club de football des Etats-Unis et ont alors décidé de mettre fin aux contrats les liant à l'OL et de rejoindre ces clubs américains.

Les contrats des joueuses avec les clubs américains ont été signés avec effet au 1er mars 2009.

Pour ce motif, Mme Abily et Mme Bompastor ont résilié les contrats les liant à l'Association Olympique Lyonnais. Elles ont également fait parvenir à l'OL un avis de démission de la Fédération Française de Football (FFF).

L'OL s'est opposé à la démission des deux joueuses et l'a notifié à la FFF.

Par courrier séparé, l'OL a ensuite reproché aux deux joueuses d'avoir violé l'accord du 14 juin 2006 leur octroyant "*des conditions de rémunération nettement supérieures aux normes en vigueur en contrepartie d'une garanti de collaboration professionnelle et sportive de votre part de trois saisons soit au minimum jusqu'au 30 juin 2009*". L'OL a en outre expliqué que la démission en cours de saison violait les avenants aux contrats, qui permettaient le changement de club à l'issue de la saison sportive. Le club a donc refusé la démission, exigé la réintégration du club et, à défaut, a annoncé son désir d'intenter une procédure contre les joueuses en réparation de son préjudice.

Par courriers du 4 mars 2009, l'OL a saisi la FFF du cas des deux joueuses. Il a par conséquent demandé à la FFF, d'une part le refus de délivrance du certificat international de transfert ("CIT"), et d'autre part la condamnation des deux joueuses à la réparation du préjudice de l'OL, évalué à € 500'000,--.

Le 17 février 2009, l'USSF a sollicité de la FFF la délivrance des CIT pour les deux joueuses.

La FFF a déclaré, par courrier du 5 mars 2009, qu'elle ne délivrerait pas les CIT tant qu'elle n'était pas en possession d'une décision du Juge unique de la Commission du Statut du Joueur de la FIFA.

En date du 10 mars 2009, l'USSF a saisi la FIFA (Division Statut du Joueur), afin que celle-ci l'assiste dans l'obtention des CIT.

Par lettre du 17 mars 2009, la FIFA a par conséquent a invité la FFF à délivrer le CIT ou d'indiquer les motifs pour lesquels elle refusait de le faire. La FIFA invitait également la FFF à informer l'OL, son club affilié, de l'existence de la procédure.

La FFF a répondu, en date du 18 mars 2009, en exposant à nouveau les motifs d'opposition soulevés par l'OL dans ses courriers du 11 et 23 février 2009 aux deux joueuses.

Il sied de préciser que l'OL n'était pas partie à la procédure devant le FIFA, qui était constituée par deux litiges opposant l'USSF à la FFF.

Suite au refus de la FFF de délivrer les CIT, le Juge unique du Comité du Statut du Joueur de la FIFA (le "Juge unique"), a rendu deux décisions, en date du 27 mars 2009. Le Juge unique a considéré, sur la base des pièces du dossier, que les motifs de refus invoqués par la FFF de délivrer les CIT ne constituaient pas un litige contractuel au sens du Règlement du Statut et du Transfert des Joueurs, s'agissant de joueuses amateurs. De ce fait, le Juge unique a autorisé l'USSF à enregistrer les deux joueuses de manière provisoire auprès de ses clubs membres.

Par actes du 15 avril 2009, l'OL a interjeté appel auprès du TAS contre la décision du 27 mars 2009 du Juge unique, notifiée le 27 mars 2009.

Informée de l'appel par courrier du TAS du 20 avril 2009, la FIFA a fait savoir, par lettre du 22 mai 2009, qu'elle ne souhaitait pas intervenir dans la procédure devant le TAS. La FIFA a toutefois souligné que l'appel n'étant pas dirigé contre la FIFA, il devrait être rejeté.

En réponse, l'OL a indiqué que la FIFA était implicitement visée par l'appel, puisque la décision attaquée avait été rendue par elle. L'appelant ajoutait, outre divers arguments juridiques, qui seront examinés plus loin par la Formation, qu'en tant que besoin il dirigeait également son appel contre la FIFA.

Invitée le 3 juin 2009 à se prononcer à nouveau à propos de sa participation, la FIFA a répondu le 9 juin 2009 que la déclaration d'appel ne contenant pas son nom, elle ne pouvait être intimée. Elle a également soulevé que le délai d'appel était échu. Par conséquent, la FIFA a maintenu sa position selon laquelle l'appel de l'OL devait être rejeté, du fait de l'omission de la FIFA parmi les parties intimées.

Egalement invitée le 3 juin 2009 à donner sa position concernant la participation de la FIFA, l'USSF a répondu en date du 5 juin 2009 que l'absence de la FIFA justifiait en effet le rejet de l'appel et s'est référée à cet égard à une sentence du TAS dans une autre affaire, au sujet de laquelle il sera revenu ci-après.

En résumé, les positions des parties sont les suivantes.

L'appelante estime que ses appels sont recevables et qu'elle les a dûment dirigés également contre la FIFA.

Quant au fond, l'OL considère que le Juge unique n'a, à tort, pas tenu compte des règlements de la FFF et des contrats des deux joueuses, qui interdisent le départ d'un joueur en cours de saison. En outre, les deux joueuses avaient pris l'engagement de demeurer au sein de l'OL au minimum trois ans, délai qu'elles n'ont pas respecté. De la sorte, il existe, selon l'appelante, un motif légitime de refus de délivrance du CIT. L'OL demande par conséquent la réforme des décisions attaquées.

Quant à l'USSF, elle expose que les appels doivent être rejetés pour vice de forme, en raison de l'absence de mise en cause de la FIFA. A propos du droit applicable, l'intimée est d'avis que les règlements de la FFF ne sont pas applicables.

Quant au fond, l'intimée demande que les décisions prononcées par le Juge unique soient confirmées par le TAS.

Extraits des considérants

A. Recevabilité de l'appel

La Formation examinera la question de savoir s'il est possible de recourir au TAS contre la décision du Juge unique relative au CIT, qui ne constitue qu'une décision intermédiaire, c'est-à-dire une étape dans le litige entre les parties et qui n'est pas une décision au fond.

En effet, l'OL n'a pas formulé de plainte contre les clubs ayant engagé les deux joueuses. A tout le moins, une telle information ne ressort pas des documents produits par les parties au TAS.

Dès lors, il sied d'examiner si une telle décision provisoire peut être portée devant le TAS.

En application de l'art. R47 du Code, le TAS est compétent pour connaître des appels si les statuts ou règlements de l'organisme sportif le prévoient ou si les parties ont conclu une convention d'arbitrage. En outre, l'appelant doit avoir épuisé les voies de droit préalables au niveau dudit organisme sportif.

En l'espèce, les décisions du Juge unique ont été rendues en application de l'art. 23 du RSTJ. L'alinéa 3 de cette disposition prévoit un appel direct au TAS, sans faire de distinction pour les décisions en matière de CIT et de décisions provisoires autorisant l'enregistrement du joueur.

Par ailleurs, il est à noter que, dans l'affaire TAS 2008/A/1639 (sentence du 24 avril 2009), la Formation était entrée en matière à propos d'un appel dirigé contre une décision du Juge unique en matière de CIT, du moins en principe.

Au vu de ces considérations et des dispositions règlementaires, la Formation considère que les appels sont recevables.

B. Jonction des procédures

Sollicitée par l'appelante en début de procédure, la jonction des deux procédures se justifie en effet. Par ailleurs, l'intimée ne s'est pas opposée à une telle mesure et, mis à part l'établissement de deux actes d'appel séparés, les parties ont toujours procédé en considérant ensemble ces deux affaires et en produisant un seul document se référant aux deux procédures.

En effet, les deux procédures étant fondées sur des faits identiques et les deux décisions attaquées ayant le même contenu, sous réserve de quelques spécificités mineures, il se justifie que la Formation se détermine au sujet des deux litiges en une seule sentence.

Cette manière de procéder n'est certes pas prévue expressément par le Code, mais elle répond à un impératif d'économie de procédure, qui est un principe général du droit suisse, applicable à titre subsidiaire.

Au vu de ce qui précède, la jonction des procédures TAS 2009/A/1828 Olympique Lyonnais c. US Soccer Federation (Sonia Bompastor) et TAS 2009/A/1829 Olympique Lyonnais c. US Soccer Federation (Camille Abily) est admise.

C. Absence de qualité pour appeler de l'OL

Même si les appels sont formellement recevables, la Formation doit examiner la question de l'absence de participation de l'OL aux procédures précédentes devant le Juge unique et sa légitimation pour appeler (ou qualité pour appeler) des décisions du Juge unique. L'absence de cette qualité doit en effet conduire au rejet de l'appel. Il s'agit là de questions de fond et non pas de recevabilité, puisque la légitimation active d'une partie constitue le fondement matériel de l'action et son absence entraîne le rejet de celle-ci (Sentence TAS 2008/A/1639, sentence du 24 avril 2009 et les arrêts et sentences cités au consid. 11.2).

En effet, l'OL a fait appel contre les décisions du Juge unique, alors même qu'il n'avait pas été partie à la procédure devant le celui-ci, qui a tranché sur demande de l'USSF et dans le cadre d'une procédure dirigée contre la FFF.

Ainsi, la lettre de plainte de l'USSF du 10 mars 2009 adressée au Comité du Statut du Joueur de la FIFA a été suivie par une lettre dudit Comité, réclamant copie des contrats liant les deux joueuses à leur nouveau club américain respectif. Après réception de ces contrats le 13 mars 2009, le Comité a prié la FFF, par courrier du 17 mars 2009, d'établir les CIT requis. Suite au refus de la FFF manifesté par courrier du lendemain, les décisions litigieuses ont été rendues par le Juge unique, le 27 mars 2009.

La décision du Juge unique, comme l'indique d'ailleurs la première page de ce document, a été rendue sur seule requête de l'USSF, concernant l'affiliation provisoire des deux joueuses. Le dispositif de la décision vise d'ailleurs l'USSF seule, qui est autorisée à affilier les joueuses provisoirement.

Certes, les autorisations de transfert provisoires ont frustré l'appelante, selon ses allégations, du contrat existant avec les deux joueuses. L'OL est donc touché dans les faits par les décisions attaquées.

Les règlementations de la FIFA applicables en l'espèce ne définissent pas clairement quelle entité doit revêtir la qualité d'appelant dans une procédure d'appel contre une décision du Juge unique. En effet, les art. 62 ss des Statuts et les art. 22 ss du RSTJ ne prévoient rien à ce sujet.

Dans la procédure TAS 2008/A/1639 sentence du 24 avril 2009), l'appelant était aussi l'ancien club du joueur, agissant contre le nouveau club et l'association nationale du nouveau club. Dans cette affaire, la Formation ne s'est pas prononcée sur la qualité pour agir de l'ancien club ou la qualité pour défendre des deux entités intimées, puisqu'elle a écarté l'appel en raison de l'absence de la FIFA (cf. *infra*).

Malgré ce qui précède, la légitimation active (ou qualité pour appeler) de l'OL est douteuse.

En effet, les clubs de football ne sont pas autorisés à requérir des CIT, cette fonction étant réservée aux fédérations par l'art. 9 du RSTJ et l'Annexe 3 du RSTJ, notamment l'art. 2 al. 2 (pour les joueurs professionnels) et l'art. 3 al. 2 (pour les joueurs amateurs).

En outre, ce n'est qu'en cas de joueurs professionnels que les clubs ont la qualité pour s'adresser à la FIFA au moyen d'une plainte (art. 2 al. 6 Annexe 3 du RSTJ). Or, en l'espèce, comme l'a constaté le Juge unique, les deux joueuses concernées étaient des amateurs.

En effet, les deux joueuses évoluaient dans le championnat de football féminin en France, qui, notoirement et de l'aveu de toutes les parties, ne compte que des joueuses amateurs. En outre, la qualité d'amateur des deux joueuses ressort également des lettres d'engagement du 14 juin 2006 de l'OL, ainsi que des fiches des joueuses remises à la FIFA par la FFF en date du 19 mars 2009, avec l'indication "*joueuse amateur*". Enfin, l'OL a admis, dans son mémoire d'appel, que le football féminin français est amateur et que les deux joueuses revêtaient également cette qualité.

Ainsi, la procédure d'émission des CIT est clairement définie dans le RSTJ comme se déroulant entre fédérations nationales. De ce fait, le club ne peut pas participer à la procédure devant le Juge unique. Il n'y a donc aucun motif que ce même club puisse ensuite faire appel de la décision de ce Juge unique.

Pour ces motifs, l'OL n'a pas la qualité pour appeler des décisions attaquées.

En outre, même à considérer qu'il existe une lacune dans les réglementations de la FIFA au sujet de la qualité pour appeler, l'OL n'aurait pas cette qualité. Il pourrait en effet être considéré que le RSTJ ne contient pas de règle expresse sur la qualité pour appeler contre les décisions du Juge unique.

En cas de lacune, il sied de se fonder sur le droit suisse, applicable à titre subsidiaire, en particulier les règles applicables aux associations (art. 60 ss du Code civil suisse ("CC")).

En vertu de l'art. 75 CC, "*tout sociétaire est autorisé de par la loi à attaquer en justice, dans le mois à compter du jour où il en a eu connaissance, les décisions auxquelles il n'a pas adhéré et qui violent des dispositions légales ou statutaires*". Ainsi, en droit suisse, chaque membre de l'association ("*sociétaire*") peut agir contre les décisions de celle-ci.

Selon la jurisprudence du Tribunal fédéral suisse, dans le cas d'associations faîtières, dont seules des associations ou d'autres personnes morales peuvent devenir membres, le membre indirect peut aussi attaquer les décisions de l'association (ATF 119 II 271, JT 1994 I 384).

Toutefois, comme retenu par des sentences antérieures du TAS, la qualité de membre indirect ne peut être attribuée à des clubs de football, en cas de réglementations claires de l'association prévoyant la qualité des membres, qui n'admettent que les fédérations nationales en leur sein (TAS 98/200, sentence du 20 août 1999, consid. 52.)

En l'espèce, il est clair que les membres de la FIFA sont les associations nationales de football (art. 10 des Statuts FIFA).

Dans les cas soumis à la Formation, les associations nationales membres de la FIFA sont la FFF et l'USSF. Au contraire, l'OL n'est pas membre de la FIFA, mais uniquement membre de la FFF. A ce titre, il n'a pas qualité pour appeler contre une décision de la FIFA.

D'ailleurs, l'OL admet lui-même n'avoir pas été partie à la procédure devant le Juge unique, dans un courrier de son Conseil du 15 mai 2009, qui indique: "*d'un point de vue procédural, les décisions rendues par le Juge Unique l'ont été dans le cadre d'un différend expressément désigné par ses soins comme opposant 'US Soccer Federation / France Football Federation'*".

De plus, lesdites décisions précisent, en pied de page, le nom de la procédure qui est *"US Soccer Federation/ France Football Federation"*. En outre, les décisions sont intitulées: "*decision […] on the request made by the US Soccer Federation (USSF) for the provisional registration of the player Camille Abily / Sonia Bompastor* .

Enfin, la Formation doute que l'OL dispose d'un quelconque intérêt concret à agir en l'espèce. En effet, même en cas de décision lui donnant raison, il n'obtiendra pas d'indemnisation au sens du RSTJ. De plus, l'OL ne semble pas avoir déposé de plainte au sens du RSTJ.

Ainsi, une simple invalidation de l'enregistrement provisoire des deux joueuses n'est d'aucun secours à l'OL. En effet, une telle invalidation ne permettrait pas à l'OL de récupérer les deux joueuses ou d'obtenir une quelconque réparation pour le préjudice subi.

En tout état de cause, l'OL ne dispose pas de la qualité pour former appel contre les décisions du Juge unique, raison pour laquelle la Formation rejette les appels.

D. Absence de la FIFA dans les procédures d'appel

Outre la question qui vient d'être examinée plus haut, la Formation doit encore examiner à titre subsidiaire un autre argument, dont la FIFA et l'USSF arguent qu'il devrait conduire au rejet des appels de l'OL. Il s'agit de la question de l'absence de la FIFA en tant qu'intimée dans les appels.

En effet, la FIFA n'a pas été désignée comme intimée par l'appelante. Dès lors, il est nécessaire d'examiner si les appels doivent également échouer pour ce motif.

Il est utile, à ce titre, de se référer à l'affaire TAS 2008/A/1639, qui impliquait également un transfert de joueur qui aurait agi contrairement aux règles en la matière. Le Juge unique avait rendu une décision, accordant le CIT et le transfert provisionnel du joueur. Le club appelant avait donc attaqué cette décision par un appel devant le TAS, dans lequel le club "débauchant", ainsi que la Fédération anglaise de football (The Football Association) étaient intimés.

Dans cette affaire, la Formation a examiné l'argument soulevé par le Club intimé, relatif au fait que l'appelant n'avait pas dirigé son appel contre la FIFA en tant qu'intimée. La Formation a retenu que l'appel aurait dû être dirigé contre la FIFA également, ce qui a conduit à son rejet.

Dans les présentes procédures, les parties ont eu l'occasion de se prononcer à propos de cette sentence.

Le cas d'espèce est certes similaire au litige qui s'est présenté dans l'affaire TAS 2008/A/1639. Toutefois, la Formation ne peut suivre que partiellement les motifs et conclusions de la sentence rendue dans ladite cause.

La Formation précise que la question de la nécessité de la participation de la FIFA relève non pas de la recevabilité des appels, mais du fond du litige (TAS 2008/A/1639, consid. 11.2).

La Formation constate ensuite que ni l'art. 23 du RSTJ, ni les Statuts de la FIFA, en particulier les art. 62 et suivants des Statuts, ne précisent qui a la qualité d'intimé dans un appel dirigé contre une décision du Juge unique. En l'absence de règles expresses dans les réglementations de la FIFA, l'art. 62 al. 2 des Statuts de la FIFA prévoit l'application du droit suisse à titre supplétif.

L'art. 75 du CC prévoit le recours d'un membre contre les décisions d'une association. Dans un tel cas, le défendeur est l'association elle-même (TAS 2008/A/1639, consid. 11.5 et 11.6 et les références doctrinales citées. Voir aussi TAS 2008/A/1517, consid. 23, les références doctrinales citées et l'ATF 122 II 283).

Toutefois, selon la doctrine (Bernasconi/Huber, Appeals against a decision of a (Sport) Association: The Question of the Validity of Times Limits stipulated in the Statutes of an Association, SpuRt, 2004/6, p. 268 ff.) et certaines sentences rendues sous l'égide du TAS (TAS 2008/A/1517, consid. 24 – 26 et cas cités; TAS 2006/A/1192, consid. 41-48), une décision prise par l'association afin de trancher un différend entre deux clubs (membres) ne tombe pas dans la catégorie des décisions qui relèvent de l'art. 75 CC. En effet, dans un tel cas, l'association ne tranche pas une question relative à elle-même dans ses relations avec l'un de ses membres, mais agit en tant qu'organe décisionnel de première instance (TAS 2008/A/1639, consid. 11.6.1).

La Formation est d'avis que tel est le cas en l'espèce, puisque la FIFA agissait dans les présentes procédures comme autorité décidant de l'autorisation ou non d'enregistrer les deux joueuses de manière provisionnelle. La FIFA n'a elle-même rien entrepris dans ces affaires, mais s'est contentée d'autoriser l'USSF à procéder aux enregistrements provisoires.

Ainsi, la FIFA ne semble pas devoir être partie aux présentes procédures d'appel. La Formation est ainsi d'avis de s'écarter du raisonnement de la sentence du 24 avril 2009 dans l'affaire TAS 2008/A/1639, qui avait retenu que la FIFA aurait dû être partie à la procédure.

Cette conclusion s'impose également en vertu de la définition générale de la légitimation passive (qualité pour défendre) en droit suisse.

En droit suisse, il existe un principe général, selon lequel la qualité pour défendre appartient à celui qui est l'obligé du droit litigieux. Pour déterminer cette personne, il sied de rechercher la disposition légale qui fonde le droit invoqué et désigne l'obligé. Le défaut de qualité pour défendre entraîne le rejet de l'action (Fabienne Hohl, Procédure civile, Berne, 2001, Tome I, n°437 – 447).

Cette définition a été appliquée dans de nombreux cas au TAS (TAS 2007/A/1329 – 1330 et TAS 2008/A/1517, consid. 22) et peut par conséquent être considéré comme un principe général de procédure, également devant le TAS.

En l'espèce, le CIT doit être émis par l'ancienne association du joueur (art. 9 du RSTJ et Annexe 3 du RSTJ). Quant à la FIFA et le Juge unique instauré par celle-ci, ils interviennent dans le litige en cas de refus de l'ancienne association d'émettre le CIT (art. 22 et 23 du RSTJ).

Ainsi, l'obligation d'émettre le CIT appartient bien à l'ancienne association et la FIFA joue le rôle d'une autorité de premier degré. Ainsi, la FIFA ne semble pas nécessairement être partie à la procédure d'appel devant le TAS, en application du droit suisse.

Toutefois, au vu de la conclusion précédente de la Formation, qui rejette l'appel pour défaut de qualité pour appeler de l'OL, la question de la réalisation de cette exception à l'application de l'art. 75 CC et de la qualité pour défendre de la FIFA peut rester ouverte en l'espèce.

Les appels devant être rejetés pour les motifs formels qui viennent d'être développés, la Formation n'estime pas nécessaire d'examiner les arguments des parties relatifs au fond des litiges, c'est-à-dire le bien-fondé des décisions du Juge unique.

Arbitration TAS 2009/A/1879
Alejandro Valverde Belmonte c. Comitato Olimpico Nazionale Italiano (CONI) & Agence Mondiale Antidopage (AMA) & Union Cycliste Internationale (UCI)
16 mars 2010

Cyclisme; recours ou tentative de recours à une méthode interdite; compétence du TAS à juger de novo; compétence d'un CNO à l'encontre d'un athlète non affilié; administration de la preuve devant le TAS; coopération judiciaire en matière d'administration de la preuve; condition de validité d'une ordonnance de révocation d'une commission rogatoire; recevabilité de la preuve devant le TAS en tant qu'autorité arbitrale; protection de la personnalité dans le cadre de l'administration de la preuve; utilisation du résultat de l'analyse ADN d'échantillons dans le cadre de l'administration de la preuve; régularité de la chaîne de garde; preuve du recours à une méthode interdite

Formation:
Me Romano Subiotto (United Kingdom), Président
Me Ruggero Stincardini (Italie)
Prof. Ulrich Haas (Allemagne)

Faits pertinents

Alejandro Valverde Belmonte (l' "Athlète" ou l' "Appelant") est un coureur cycliste professionnel de nationalité espagnole, titulaire d'une licence délivrée par la fédération de cyclisme espagnole, la Real Federación Española de Ciclismo (RFEC).

Le Comitato Olimpico Nazionale Italiano (CONI) rassemble les fédérations sportives nationales italiennes. Il est chargé de réglementer et d'encadrer l'organisation des activités sportives en Italie. En particulier, le CONI adopte des mesures de prévention et de répression à l'égard de la prise de substances altérant les prestations physiques des athlètes durant leur activité sportive. L'Ufficio di Procura Antidoping du CONI (l' "UPA-CONI") est l'organisme chargé d'enquêter sur les violations des normes antidopage italiennes (NSA), adoptées par le CONI conformément au Code Mondial Antidopage (CMA) de l'Agence Mondiale Antidopage (AMA). Le Tribunale Nazionale Antidoping (TNA) est l'instance suprême du CONI en matière de dopage.

L'Union Cycliste Internationale (UCI) est l'association des Fédérations Nationales de cyclisme.

L'AMA est une fondation de droit privé suisse, chargée de la promotion, la coordination et la supervision de la lutte contre le dopage. Dans le cadre de ses activités, l'AMA a adopté le CMA, fournissant un encadrement des pratiques et règlements antidopage des organisations sportives et des autorités publiques.

A. Procédure en Espagne

La présente affaire trouve son origine dans l'enquête connue sous le nom d' "Opération Puerto" qui a débuté en 2004 en Espagne dans le cadre d'une investigation coordonnée entre le Juzgado de Instrucción n. 31 de Madrid (le "Juge d'Instruction n. 31") et la Garde Civile espagnole. Cette procédure pénale avait pour objet des pratiques de dopage par les docteurs et autres responsables pouvant constituer des "délits contre la santé publique" tels que définis à l'Article 361 du Code Pénal espagnol. En effet, comme signalé *infra*, le dopage par un athlète ne constituait pas un délit par l'athlète en Espagne au moment des faits incriminés.

La Garde Civile a effectué des écoutes téléphoniques ainsi que plusieurs perquisitions, à l'issue desquelles plusieurs personnes furent arrêtées, notamment le Dr Eufemiano Fuentes, coordinateur présumé d'un réseau clandestin de dopage à échelle internationale.

Lors de son arrestation le 23 mai 2006, le Dr Fuentes portait une carte de l'hôtel Silken au dos de laquelle se trouvait une liste de pseudonymes ainsi que le nom "Valverde".

Dans le cadre de l'enquête, la Garde Civile a saisi une grande quantité de documents, de machines, de produits dopants (hormones, stéroïdes, etc.) ainsi que des poches de sang et de plasma. La plupart des quelques 200 poches de sang saisies comportaient chacune un numéro de code devant permettre l'identification de l'athlète propriétaire du sang. Ainsi que cela a été confirmé par le Dr. Fuentes, les poches de sang identifiées par des codes étaient destinées à être re-injectées aux athlètes correspondants.

Le 30 mai 2006, la RFEC se porta partie civile dans le cadre de la procédure d'enquête conduite par le Juge d'Instruction n. 31. Par la suite, l'UCI et l'AMA se portèrent également parties civiles dans la même procédure.

La Garde Civile a rédigé un rapport ("Rapport n. 116") daté du 27 juin 2006, décrivant l'organisation et le fonctionnement du réseau de dopage du Dr Fuentes et faisant référence, lors de la description des sacs retrouvés, à une poche de plasma pourtant la mention "18 VALV. (PITI)" (la "Poche n. 18"; voir documents n. 114 et 116 repris dans le Rapport n. 116, p. 3).

Le Rapport n. 116 contenait également une liste d'athlètes soupçonnés d'être impliqués dans l'Opération Puerto. Le nom de l'Athlète ne figurait pas dans cette liste.

Suite à une requête du Procureur Public, le Juge d'Instruction n. 31 a ordonné le 29 juin 2006 qu'une copie conforme du Rapport n. 116 soit transmise au Consejo Superior de Deportes (CSD), de sorte que ce dernier puisse prendre les mesures administratives et disciplinaires appropriées.

Le même jour, le CSD a envoyé une copie du Rapport n. 116 à la RFEC avec instruction d'en transmettre une copie à l'UCI. A son tour, la RFEC a transmis une copie du Rapport n. 116 à l'UCI ainsi que la quasi-totalité des annexes.

Suite à une décision du Juge d'Instruction n. 31, la Garde Civile a envoyé le 31 juillet 2006 une partie des poches saisies dans le contexte de l'enquête (et jusque-là conservées à Madrid sous la responsabilité de la Garde Civile) au Laboratoire de l'Instituto Municipal d'Investigación Medica (IMIM- Hospital del Mar) de Barcelone (le "Laboratoire de Barcelone"), pour qu'elles y soient stockées et analysées. Le jour suivant, le 1 août 2006, le Laboratoire de Barcelone reçut 99 poches de plasma, y compris la Poche n. 18, et procéda à leur analyse. Comme indiqué ci-après, les analyses du Laboratoire de Barcelone ont révélé que 9 poches de plasma, y compris la Poche n. 18, contenait de l'erythropoïétine recombinante ("EPO"), substance interdite par la législation antidopage.

Le Juge d'Instruction n. 31 a rendu une ordonnance datée du 3 octobre 2006, interdisant l'usage des éléments issus des procédures pénales dans des procédures administratives (l'"Ordonnance du 3 octobre 2006"). En particulier, l'Ordonnance interdit l'utilisation des pièces issues des procédures pénales relatives à certaines personnes pour entamer des procédures administratives, en raison de l'impossibilité de déterminer la qualité et le degré de l'implication des personnes soupçonnées à un stade préliminaire de la procédure pénale.

Le Juge d'Instruction n. 31 a fait droit le 9 octobre 2006 à la demande de l'UPA-CONI (*Exhorto* n. 713/2006) et a autorisé le prélèvement des échantillons de la poche de sang n. 2 qui était considérée comme appartenant au cycliste Ivan Basso. A l'issue de la procédure italienne, Ivan Basso a été condamné à 2 ans de suspension après avoir avoué – après qu'il allait être confronté à un test ADN des échantillons de la poche de sang n. 2 avec son propre sang - qu'il avait eu du sang prélevé dans le but d'une autotransfusion pour des fins de dopage et que le pseudonyme "Birillo" dans les documents du Dr. Fuentes se referait à lui, correspondant au nom de son chien.

Le 8 mars 2007, le Juge d'Instruction n. 31 a rendu une première ordonnance de clôture de la procédure pénale concernant l'Opération Puerto motivée par la circonstance que le dopage ne constituait pas encore un délit au moment des faits incriminés.

L'UCI, l'AMA et la RFEC ont fait appel de cette ordonnance de clôture devant la Cour d'Appel de Madrid, laquelle a ordonné la réouverture du dossier pénal le 11 février 2008. Le Juge d'Instruction n. 31 a classé à nouveau l'affaire le 26 septembre 2008 mais, suite aux pourvois des parties, la Cour d'Appel de Madrid a ordonné à nouveau la réouverture du dossier le 12 janvier 2009.

En tenant compte des développements de la procédure italienne (voir *infra*), la RFEC a demandé qu'un accès aux preuves du dossier relatif à l'Opération Puerto lui soit accordé, mais le Juge d'Instruction n. 31 a rejeté la requête dans une décision du 15 avril 2009. Suite à un pourvoi déposé par l'AMA, cette décision a été confirmée par la Cour d'Appel de Madrid par jugement en date du 26 novembre 2009.

Enfin, sur les procédures disciplinaires sportives en Espagne à l'encontre de l'Athlète, l'UCI a invité la RFEC, le 29 août 2007, à ouvrir une procédure disciplinaire pour enquêter à ce sujet, mais le Comité Nacional de Competición y Disciplina Deportiva a décidé de ne pas ouvrir de procédure à l'encontre de M. Valverde, en classant le dossier.

L'AMA et l'UCI ont déposé un recours contre cette décision devant le TAS respectivement dans les affaires CAS 2007/A/1396 *WADA v. RFEC & Alejandro Valverde* et CAS 2007/A/1402 *UCI v. RFEC & Alejandro Valverde*, qui sont encore pendantes à ce jour. Dans le cadre de ces affaires, l'UCI et l'AMA ont demandé au TAS de bien vouloir reconnaître la

responsabilité de l'Athlète pour violation de l'Article 15 du Règlement UCI et de lui imposer une suspension de deux ans valable à l'échelle mondiale.

B. Procédure en Italie

Après avoir enquêté sur l'Opération Puerto et avoir reçu le Rapport n. 116 du Juge d'Instruction n. 31 le 1 mars 2007, l'UPA-CONI a communiqué le 24 avril 2007 la réouverture du dossier relatif à l'Opération Puerto à la *Procura della Repubblica presso il Tribunale di Roma* (le "Parquet de Rome") concernant certains athlètes affiliés à la Federazione Ciclistica Italiana (FCI).

Dans le cadre de cette enquête (dénommée "Opération Puerto-bis"), et suite aux requêtes du Parquet de Rome, l'UPA-CONI lui a envoyé à plusieurs reprises les copies des actes de procédure. Le 9 janvier 2008, l'UPA-CONI a indiqué au Parquet de Rome que des éléments de preuves apparaissaient également à l'encontre d'autres sujets, non affiliés à la FCI mais participant à des compétitions sportives en Italie. Dans la liste des personnes soupçonnées figurait le nom de l'Athlète.

Le 21 juillet 2008, lors du passage du Tour de France en Italie (à Chiusa di Pesio), le CONI a effectué des contrôles antidopage sur plusieurs cyclistes, y compris l'Athlète. L'Athlète a consenti au prélèvement sanguin et les échantillons ont été envoyés au Laboratoire Antidopage de Rome par courrier du même jour, comme indiqué dans le formulaire pour la chaîne de garde. L'Athlète a signé le formulaire standard du prélèvement d'échantillon du CONI lorsqu'il a consenti au prélèvement sanguin. Le formulaire comprenait l'avertissement selon lequel l'Athlète pourrait être sanctionné pour *"violation de la charte de l'organisation"*. Le logo du CONI est le caractère visuel le plus saillant sur le formulaire de prélèvement d'échantillon et il est évident à la lecture du document que l'organisation mentionnée par le formulaire est le CONI. Le formulaire n'indique aucune limite ou restriction sur ce que le CONI est autorisé à faire avec l'échantillon aux fins de contrôle antidopage, bien qu'il spécifie que *"toute information relative au contrôle antidopage, y compris mais sans s'y limiter, les résultats de laboratoires et les sanctions éventuelles, doit être partagée avec l'organisme compétent, conformément aux Règles Antidopage"*.

Le 6 novembre 2008, à la suite de certains échanges d'information avec le Parquet de Rome, l'UPA-CONI a envoyé une lettre au Juge d'Instruction n. 31 lui demandant, sur le fondement de la commission rogatoire déjà établie pour l'athlète Basso (*Exhorto* n. 713/2006), un échantillon de sang contenu dans la Poche n. 18.

Le 7 novembre 2008, en marge de la lettre du 6 novembre 2008, le Parquet de Rome a fait parvenir à l'UPA-CONI son *nulla-osta* ou autorisation tout en se réservant la procédure de prélèvement des échantillons de sang.

Le 10 novembre 2008, l'UPA-CONI a envoyé au Juge d'Instruction n. 31 la communication du Parquet de Rome du 7 novembre 2008 en clarifiant dans la lettre d'accompagnement qu'il s'agissait d'une décision de l'Autorité judiciaire pénale italienne.

Le 27 novembre 2008, le Magistrat de Liaison Italie-Espagne, M. D'Agostino, a informé l'UPA-CONI et le Parquet de Rome que le Juge d'Instruction n. 31 avait reçu la requête concernant le prélèvement d'échantillons de la Poche n. 18 et, considérant qu'il s'agissait d'une nouvelle commission rogatoire, le Juge d'Instruction n. 31 l'avait envoyée au Ministère Public espagnol pour avis. M. D'Agostino a également précisé que cet avis n'avait pas encore été rendu.

Le 16 décembre 2008, suite à une décision du Parquet de Rome, la police effectua le séquestre des échantillons prélevés lors du passage en Italie du Tour de France et conservés auprès du Laboratoire Antidopage de Rome.

Le 22 janvier 2009, à travers le Magistrat de Liaison Italie-Espagne, l'UPA-CONI a reçu une copie de l'*Exhorto* n. 447/08 (c'est-à-dire la Commission rogatoire n. 447/08) par laquelle le Juge d'Instruction n. 31 acceptait la requête provenant du Parquet de Rome ("comisión rogatoria procedente de la Fiscalia de Roma") et ordonnait au Directeur du Laboratoire de Barcelone de prester sa collaboration pour le prélèvement des échantillons de la Poche n. 18.

Le 30 janvier 2009, les membres de la police judiciaire nommés par le Parquet de Rome (Cap. Angelo Lano et M.A. Renzo Ferrante) et les auxiliaires de police judiciaire (Dr. Tiziana Sansolini et M. Marco Arpino) ont prélevés des échantillons de la Poche n. 18 et ont reçu un certificat de remise de matériel de la part du Laboratoire de Barcelone, relatif à la chaîne de garde à partir de la réception des sacs de la Garde Civile jusqu'au prélèvement des échantillons.

Le 2 février 2009, suite à une décision du Parquet de Rome (en date du 29 janvier 2009), le Service de Police Scientifique – Section de Génétique Médico-Légale a procédé à l'analyse ADN des échantillons prélevés à Barcelone et a confronté les résultats avec ceux de l'analyse ADN de trois des échantillons (anonymes, mais identifiés par un code) prélevés lors du Tour de France.

L'analyse a permis d'établir une correspondance positive entre l'ADN du plasma de la Poche n. 18 et l'ADN d'un des trois échantillons du Tour de France (portant le code A-278350). En particulier, l'analyse a permis d'établir une correspondance de 16 marqueurs génétiques entre les deux échantillons, un nombre élevé et supérieur à celui considéré comme suffisant pour des fins d'identification dans le cadre des procédures pénales au sein de différent pays.

Dans la note en date du 10 février 2009, la Gendarmerie pour la Tutelle de la Santé – Service Analyse a informé le Parquet de Rome de la correspondance positive et a demandé au CONI de fournir la documentation nécessaire pour l'identification du sujet dont l'échantillon portait le numéro A-278350.

Cette demande a permis d'établir que l'échantillon A-278350 prélevé lors du Tour de France, dont l'ADN correspondait à celui de la Poche n. 18, appartenait à l'Athlète.

Au terme de cette vérification et sur seule base du résultat de l'analyse établissant que l'ADN de l'échantillon de la Poche n. 18 correspondait à celui de l'Athlète, l'UPA-CONI a convoqué l'Athlète.

Le 18 février 2009, suite à un mémoire déposé par l'Athlète, le Juge d'Instruction n. 31 a adopté une nouvelle ordonnance qui révoquait celle faisant droit à la commission rogatoire ("Ordonnance de Révocation"). En particulier, le Juge d'Instruction n. 31 a conclu que (i) le CONI n'est pas une autorité judiciaire et, partant, ses décisions ne sont pas susceptibles de faire l'objet d'un recours devant les tribunaux ordinaires; (ii) selon l'Article 3 de la Convention d'entraide judiciaire du 29 mai 2000 (la "Convention de 2000") l'ordre public agit comme limite à la coopération internationale; (iii) l'utilisation de preuves telles que les poches de sang dans d'autres procédures concernant un délit différent est nulle; (iv) la procédure de coopération judiciaire établie par le CONI est donc nulle. Suite à l'appel interjeté par le CONI, le 18 janvier 2010 la Cour d'Appel de Madrid a confirmé la validité de l'Ordonnance de Révocation (la "Décision sur l'Ordonnance de Révocation").

Le 18 février 2009, l'UPA-CONI a reçu par le biais de l'UCI le Rapport détaillé des analyses du Laboratoire de Barcelone en date du 15 novembre 2006, relevant que 9 poches de plasma, y compris la Poche n. 18, contenaient de l'EPO recombinante, substance interdite par la législation antidopage (le "Rapport du Laboratoire de Barcelone").

Le 19 février 2009, l'Athlète a comparu devant l'UPA-CONI. A cette occasion, l'Athlète a contesté la compétence du CONI et a défendu la légitimité de sa conduite.

Le même jour, les Brigades de la Police Scientifique Italiennes (Nucleo Antisofisticazione ou "NAS") ont informé l'Athlète en personne de sa mise en examen ("informazione di garanzia") dans la procédure pénale introduite par le Parquet de Rome.

Dans le cadre de la procédure devant le TNA, ce dernier a décidé qu'"*au vu de l'Article 7.1 du Document Technique d'application du Programme Antidopage de l'AMA, approuvé par le Conseil National du CONI le 30 juin 2005, de l'Article 17.8 de la délibération n. 615 du Comité Nation du CONI en date du 22 décembre 2005, des Article 9, 10 e 11 du Règlement UCI, de l'Article 2.2 du CMA*, [d'imposer à Valverde], *comme mesure de précaution, une sanction d'inhibition pour une période de deux ans, lui interdisant de revêtir des fonctions dans le CONI, les Fédérations Sportives Nationales et les Disciplines Sportives Associées ou de participer ou prendre part à toutes compétitions organisées par celles-ci sur le territoire national*"(la "Décision").

En particulier, tel qu'indiqué dans les motifs de la Décision, le TNA a décidé que:

- En Italie, le dopage est un délit aux termes du droit pénal et du droit sportif et les procédures pénale et sportive sont initiées et gérées de manière indépendante par les organes compétents. Les enquêteurs collaborent et échangent des informations sur les preuves récoltées dans les procédures respectives;

- Les contestations de M. Valverde quant à l'utilisation de preuves prétendument issues d'une procédure illégale sont sans fondement;

- En premier lieu, le document portant la liste des codes, y compris celui se référant à "Valv. (PITI)", est une pièce jointe au Rapport n. 116, que l'UCI a reçu et transmis à la Fédération Italienne de Cyclisme et à l'UPA-CONI;

- Les Ordonnances du 3 et 10 octobre 2006 du Juge d'Instruction n. 31, qui ne portent pas d'interdiction absolue d'utiliser les documents, doivent être considérées au regard de (i) la précédente autorisation qui autorisait le prélèvement des échantillons de la poche contenant le sang d'un cycliste italien (Ivan Basso) et de (ii) l'utilisation de cette preuve à l'encontre de l'athlète, qui n'a pas été contestée par le Juge d'Instruction n. 31. De plus, les décisions du Juge d'Instruction n. 31 n'ont aucun effet dans l'ordre juridique sportif italien car les documents ont été acquis légalement par l'UCI et transmis aux autorités italiennes;

- En deuxième lieu, l'acquisition et l'utilisation de la Poche n. 18 sont valides et l'Ordonnance de Révocation n'est pas conforme au droit pour plusieurs raisons. La requête de coopération provenait d'une autorité judiciaire (le Parquet de Rome), et non pas du CONI ou d'un autre organe non judiciaire. Les échantillons ont étés prélevés au Laboratoire de Barcelone par des policiers et auxiliaires de police judiciaire. Cette procédure a été explicitement autorisée par le Juge d'Instruction n. 31 le 22 janvier 2009, qui a fait référence à la commission rogatoire du Parquet de Rome. Enfin, l'Ordonnance de Révocation, qui a été adoptée en violation des garanties procédurales, est nulle;

- En troisième lieu, un ancien collègue de M. Valverde (M. Jesus Manzano) avait témoigné que l'Athlète se livrait à des pratiques de dopage;

- L'échantillon du sang de l'Athlète prélevé lors du Tour de France avait été analysé par la police italienne, qui avait établi la correspondance avec l'ADN de la Poche n. 18. L'échantillon de sang peut être conservé jusqu'à 8 ans selon le Standard International AMA 2008 des Laboratoires Antidopage;- Au regard de la correspondance entre l'ADN de la Poche n. 18 et celui de l'échantillon prélevé à l'Athlète lors du Tour de France, l'utilisation ou la tentative d'utilisation d'une substance ou d'une méthode interdite est établie;

- Les contestations de M. Valverde quant à l'absence - au moment de la violation - d'une législation italienne sanctionnant les violations antidopage commises par des athlètes étrangers ne sont pas fondées. En effet, la violation a eu lieu entre le mois de mai 2004 et le 23 mai 2006, quand la Garde Civile a saisi les poches de sang et de plasma. A l'époque, les règles antidopage italiennes prévoyaient l'imposition de "mesure de précaution" à l'encontre de personnes non-affiliées, y compris des athlètes étrangers. Ces mesures incluent déjà la sanction de l'"inhibition". Les normes successives (Article 2.11 du *Regolamento* du 23 décembre 2008) ont seulement rendu ce principe encore plus explicite;

- D'après l'Athlète, les Articles 9, 10 et 11 du Règlement UCI seraient applicables et, donc, l'UCI aurait compétence pour juger l'affaire et non pas le CONI. Or, c'est bien le CONI qui a découvert la violation et qui a, selon le Règlement UCI, compétence pour connaître de l'affaire aux termes du Règlement UCI;

- Par rapport au prétendu manque de lien de connexité avec l'Italie, l'Athlète a participé à des courses en Italie et peut probablement y participer encore dans le futur. Ce fait peut être considéré comme un lien suffisant pour l'adoption de la sanction de l' "inhibition";

- Dans ses allégations, l'Athlète n'a fourni aucune défense valable sur le fond qui serait relative à la violation des règles antidopage.

C. Procedure devant le TAS

Ce résumé ne mentionne que les principales étapes procédurales et les arguments clefs des parties. La Formation arbitrale a toutefois naturellement tenu compte de toutes les soumissions des parties, y compris de celles auxquelles il n'est pas fait expressément référence.

L'Athlète a interjeté appel contre la Décision du CONI dans une déclaration d'appel datée du 17 juin 2009 et a déposé son Mémoire d'Appel le 16 juillet 2009.

Selon l'Athlète:

- L'UCI, et non pas le CONI, serait compétent pour juger de l'affaire selon les Articles 9 et 10 du Règlement UCI. De plus, il n'y aurait pas de lien de connexité entre la compétence du CONI et la violation présumée des règles antidopage;

- La procédure du CONI porterait atteinte aux droits de la défense de l'Athlète (tels que le principe de l'égalité de traitement, le droit d'être informé de la mise en accusation; le droit de ne pas apporter des éléments contre soi-même; le droit d'interroger des témoins; etc.) et violerait plusieurs conventions internationales ainsi que le CMA;

- Suite aux Ordonnances du 3 et 10 octobre 2006, les preuves issues de la procédure pénale espagnole ne pourraient pas être utilisées;

- A titre subsidiaire, les preuves utilisées par le CONI ne seraient pas valables ou suffisantes pour sanctionner l'Athlète. En particulier, (i) certains documents du dossier (comme le document n. 114, le calendrier du Dr. Fuentes et l'analyse du Laboratoire de Barcelone) ne seraient pas authentifiés par l'autorité judiciaire ou policière compétente; (ii) l'analyse du Laboratoire de Barcelone révélant de l'EPO dans la Poche n. 18 ne serait pas valable car la chaîne de garde des poches saisies par la Garde Civile n'aurait

pas été respectée et le Laboratoire de Barcelone ne serait pas agréé pour le dépistage d'EPO dans le sang; (iii) le CONI ne serait compétent pour réaliser des contrôles antidopage durant le Tour de France; (iv) les échantillons prélevés auraient du être détruits et l'analyse de l'ADN aurait du se faire avec le consentement exprès de l'Athlète; (v) l'analyse de l'ADN réalisée par la police dans l'investigation pénale ne pourrait pas être utilisée dans une procédure sportive; (vi) afin de connaître la véritable implication d'une personne dans l'opération Puerto, il faudrait pouvoir consulter l'ensemble du dossier pénal afin d'avoir connaissance tant des éventuelles preuves à charge qu'à décharge; (vii) les déclarations de M. Manzano seraient contradictoires et démenties par celles d'un autre coureur de la même équipe. Enfin, parmi les centaines de documents du dossier, il n'existe aucune preuve de paiement, analyse de sang, plan de traitement médical susceptible d'établir un lien entre l'Athlète et le Dr. Fuentes. Le CONI n'aurait ainsi nullement prouvé ni l'utilisation, ni la tentative d'utilisation, d'une substance interdite.

Au vu de ce qui précède, l'Athlète a demandé à la Formation arbitrale, à titre principal, d'annuler la décision recourue et de déclarer le CONI incompétent et, subsidiairement, d'annuler la décision recourue et de le déclarer innocent, sous suites de frais et dépens.

Le 4 septembre 2009 le CONI a déposé son Mémoire en Réponse, formulant une demande d'appel en cause de l'AMA et de l'UCI.

Au vu de ce qui précède, le CONI conclut, sous suite de frais et dépens, au rejet de l'appel et à la confirmation de la sanction d'inhibition émise par le TNA.

Le 12 octobre 2009 et après avoir dûment consulté l'AMA, l'UCI et l'Athlète, la Formation a rendu une décision préliminaire sur appel en cause, enjoignant l'AMA et l'UCI à la présente procédure en qualité de co-intimés.

Lors de l'audience, la Formation a rendu une décision préliminaire sur les requêtes déposées par l'UCI et l'AMA de suspendre l'Athlète au niveau mondial pour une période de deux ans. La Formation a considéré que le TAS ne pouvait pas entrer en matière étant donné que ces requêtes sortaient du cadre de la présente procédure d'arbitrage.

Etant donné les contestations de l'Athlète concernant la correspondance de son ADN avec celui du plasma de la Poche n. 18, et sans préjudice à la fiabilité reconnue des tests ADN, la Formation a invité les parties à s'accorder sur un moyen de procéder à un nouveau test ADN et a fixé un délai supplémentaire de 2 semaines pour communiquer une telle procédure à la Formation. Les parties n'ayant trouvé aucun d'accord, la Formation statue sur la base du dossier.

Extraits des considérants

A. Pouvoir d'examen et loi applicable

L'arbitrage sportif est régi par le Code du TAS, et plus spécifiquement par ses Articles R27 à R37 et R47 et suivants.

Selon l'Article R58 du Code du TAS, une 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 l'application est jugée appropriée par la Formation. Dans ce dernier cas, la décision de la Formation doit être motivée.

La Formation relève que l'AMA, soutenue par l'UCI, considère que, en sus des NSA, le CMA ainsi que le Règlement de l'UCI sont également applicables dans les circonstances présentes. Pour les raisons énoncées au paragraphe suivant, la Formation rejette les conclusions de l'AMA et déclare applicable en l'espèce le Règlement du CONI.

Les conclusions de l'AMA font référence à l'Article R57 du Code du TAS, selon lequel la Formation *"revoit les faits et le droit avec plein pouvoir d'examen"*. En effet les Tribunaux du TAS ont conclu à plusieurs reprises que l'Article R57 les habilitait à juger les procès *de novo*. Selon l'AMA, le droit de juger *de novo* signifie que la Formation a le droit de se référer à toute règle antidopage qu'il considère applicable. Toutefois, les conclusions de l'AMA ne prennent pas en compte la jurisprudence qu'elle cite elle-même au soutien de ses propres arguments. Selon cette jurisprudence, la compétence du TAS à juger de novo doit être *"fondée sur les règlements de la fédération intéressée"*, limite à laquelle souscrit ce Tribunal (CAS 2008/A/1700 et CAS 2008/A/1710, décision du 30 avril 2009, para. 66). En tant qu'instance arbitrale privée, la compétence du TAS se trouve limitée par la compétence de la procédure arbitrale sur laquelle est fondé l'appel. Le TAS n'a pas la compétence pour prendre des mesures relatives à la compétence de sa propre initiative, y compris en soumettant les athlètes à des règles de droit sportif différentes de celles auxquelles ils étaient soumis en première instance. Une formation du TAS n'est autorisée à appliquer des règles différentes

que dans des circonstances exceptionnelles selon l'Article R58 – ces circonstances exceptionnelles se présentant quand les parties ne peuvent se mettre d'accord sur les règles applicables et que, selon le TAS, d'autres règles sont *"appropriées"* en l'espèce. Dans le cas présent, l'AMA ne prétend pas que les NSA du CONI soient inappropriées. Elle se contente de soutenir que les NSA devraient s'appliquer au même titre que le CMA et le Règlement de l'UCI. En l'absence d'une telle prétention, les règles que ce Tribunal estime applicables sont les règles appliquées en première instance, c'est-à-dire les NSA du CONI. En conclusion le Règlement de l'UCI et le CMA ne sont applicables que dans les limites où les NSA y font référence.

Ceci étant établi, il s'agit d'identifier quelle version des NSA est applicable dans le cas d'espèce et, en particulier, quelle est la version en vigueur au moment de la violation.

Le principe selon lequel nul ne peut être poursuivi pour une infraction qui n'était pas définie comme telle au moment des faits représente un principe général, reconnu par l'art. 7 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales du 4 novembre 1950 ainsi que par la jurisprudence du TAS (TAS 2000/A/274 et TAS 2007/A/1433). Ce principe trouve à s'appliquer pour les normes de fond, qui comprennent notamment les normes en matière de sanctions (cf., *ex multis*, Cass., sez. III, 15.12.1995, e Cass., sez. I, 04-07-1994; voir *infra* sur l'application du droit italien au fond à titre subsidiaire).

Les règles entrées en vigueur après les faits peuvent être appliquées rétroactivement si elles sont plus favorables à l'Athlète selon le principe de la *lex mitior*, reconnu également par la jurisprudence du TAS (voir TAS 2001/A/318).

Dans le cas d'espèce, il convient donc d'appliquer les NSA dans la version en vigueur le 23 mai 2006, c'est-à-dire au moment de la saisie des poches de sang par la Garde Civil.

En effet, la violation (ou la tentative de violation) a, par hypothèse, duré jusqu'à la saisie des poches de sang par la Garde Civile, saisie qui a interrompu la possession par le Dr. Fuentes et donc la possible utilisation de celles-ci à des fins de dopage.

Comme indiqué *infra*, dans la version en vigueur en mai 2006, les NSA prévoyaient la possibilité d'imposer des "mesures conservatoires" à l'encontre des personnes non affiliées. Etant donné que les versions successives des NSA (y compris la version actuellement en vigueur) imposent une sanction plus importante, incluant même la possibilité d'imposer une sanction monétaire (voir Article 2.11 des NSA dans la version approuvée le 28 juillet 2009 et actuellement en vigueur), le principe de la rétroactivité *in mitius* ne trouve pas à s'appliquer dans le cas d'espèce.

Afin d'éviter toute confusion, il est ici précisé que toute référence au CMA dans la présente sentence doit être considérée comme une référence aux normes NSA correspondantes, qui seules trouvent à s'appliquer directement.

Le droit italien est également applicable à titre supplétif.

Sur le plan procédural, la Formation applique les dispositions de la Loi fédérale suisse sur le droit international privé ("LDIP") sur l'arbitrage international et le Code du TAS qui a été choisi par les parties conforment à l'Article 182 alinéa 1 LDIP. Finalement, la Formation est aussi liée par les dispositions procédurales qui font parties de l'ordre public international.

B. Compétence du CONI

L'Athlète a contesté la compétence du CONI de pouvoir appliquer une sanction pour violation des normes antidopage à l'encontre d'un athlète affilié à une fédération étrangère et qui aurait commis une violation en dehors du territoire italien.

Dans la version en vigueur en mai 2006, les NSA prévoient l'application de mesures conservatoires à l'encontre des sujets non affiliés. En particulier, l'Article 7.1, alinéa 2, du "*Documento Tecnico attuativo del Programma Antidoping WADA*", approuvé le 30 juin 2005, prévoyait que "*l'UPA peut aussi demander, à l'encontre d'individus non affiliés ayant commis une quelconque violation du Règlement, des mesures préventives, également dans le but d'empêcher des récidives*" ("*l'UPA è altresì legittimata a richiedere, qualora soggetti non tesserati abbiano posto in essere un qualunque comportamento vietato dal Regolamento, provvedimenti cautelativi, anche al fine di impedire reiterazioni*"). De plus, selon l'Article 17.8 du délibéré n. 615 de la Giunta Nazionale du CONI du 22 décembre 2005, "*si, dans le courant d'une enquête, la responsabilité d'un individu non affilié est établie, l'UPA prend toute mesure nécessaire pour entamer des procédures préventives devant les organes de justices des Fédérations et Disciplines sportives nationales ou devant le [TNA] afin que ceux-ci adoptent des décisions d'inhibition d'exercer des fonctions ou offices au sein du CONI, des Fédérations ou Disciplines sportives nationales ou d'être présent lors des manifestations ou évènements sportifs organisés par eux*" ("[s]*e nel corso di un'indagine si afferma la responsabilità di un soggetto non*

tesserato, l'UPA adotta tutte le misure necessarie per avviare procedimenti cautelativi dinanzi agli organi di giustizia delle F.S.N o D.S.A. interessate ovvero dinanzi al GUI affinché assumano provvedimenti di inibizione a rivestire cariche o incarichi in seno al CONI, alle F.S.N. o alle D.S.A. stesse ovvero a presenziare allo svolgimento delle manifestazioni od eventi sportivi organizzati sotto la loro egida").

Comme il a déjà été souligné par le TAS (TAS 2008/A/1478), l'expression "*sujet non affilié*" contenue dans ces règles doit raisonnablement faire référence aux individus qui ne sont pas affiliés aux fédérations italiennes (destinataires des règles générales), c'est-à-dire aux individus qui (i) soit ne sont affiliés à aucune fédération, (ii) soit, comme dans le cas d'espèce, sont affiliés à des fédérations étrangères.

En effet, ces normes se justifient et doivent être interprétées dans le contexte du système juridique sportif italien, selon lequel le CONI est l'organe chargé d'adopter des mesures d'ordre préventif mais également répressif à l'encontre du dopage. Par conséquent, ces normes ont pour but d'empêcher les individus ayant commis des violations, y compris ceux qui sont affiliés à des fédérations étrangères, de participer à des activités sportives en Italie et d'en fausser les résultats, et ce au détriment d'une compétition sportive juste et de la santé des athlètes.

La présente interprétation des règles se justifie aussi à la lumière du CMA, que les NSA incorporent pour le territoire italien. Selon le CMA, la définition d' "Athlète" inclut "*n'importe quel individu qui, en ce qui concerne les contrôles antidopage, participe à une activité sportive au niveau international* […] *ou au niveau national*", sans prévoir d'exceptions par rapports à des individus affiliés à une fédération différente de celle en charge d'appliquer le Code dans le cas d'espèce.

M. Valverde est un athlète soumis à la réglementation antidopage italienne (dans la mesure où il a participé à des compétitions sportives en Italie), y compris aux normes qui prévoient des sanctions (limitées au territoire italien) pour des individus qui ne sont affiliés à aucune fédération italienne.

Comme cela a été souligné par le TAS dans l'affaire TAS 2008/A/1478, une interprétation différente aurait pour conséquence aberrante de soustraire les athlètes affiliés à des fédérations étrangères à la compétence du CONI en matière de dopage, compétence qui est d'ailleurs limitée au territoire italien.

Quant à la prétendue absence d'un lien de connexité entre la violation présumée et le CONI, cette Formation rappelle que, sur le plan de l'interprétation littérale, les normes concernées ne prévoient pas de limitations quant au lieu où la violation aurait été commise. Au contraire, le législateur italien a entendu donner un champ d'application très vaste à la norme, en prévoyant la possibilité d'imposer des mesures conservatoires pour "*n'importe quel comportement prohibé*", dans l'esprit de pouvoir empêcher toute conduite ou récidive contraire aux normes antidopage.

D'ailleurs, comme cela a déjà été souligné, l'Athlète a participé dans le passé et pourrait très probablement participer dans le futur à des compétitions se déroulant sur le territoire italien, ce qui justifie l'intérêt du CONI à adopter la mesure restrictive dont il est question. De plus, sur la base des informations disponibles, l'Athlète faisait l'objet d'une investigation pénale en Italie au moment où l'UPA-CONI a adopté l'acte formel d'accusation (*atto di deferimento*) à l'encontre de l'Athlète le 1 avril 2009. En effet, les deux procédures d'investigation – pénale et sportive - se déroulaient en parallèle, ce qui était également le cas au moment où le TNA a adopté la Décision. La procédure pénale est encore ouverte à ce jour.

Sur la base de ce qui précède, la Formation reconnaît que le CONI est compétent dans le cas d'espèce.

C. Admissibilité des preuves

L'Athlète a contesté l'admissibilité des preuves tant devant le TNA que dans la présente procédure en se fondant en particulier sur les points suivants:

- Les analyses ayant permis d'établir une correspondance entre l'ADN du plasma de la Poche n. 18 et celui des échantillons prélevés lors du Tour de France ne seraient pas utilisables. D'une part, les échantillons provenant de la Poche n. 18 ne seraient pas utilisables en application de l'Ordonnance de Révocation, qui serait une décision valide et définitive. D'autre part, l'utilisation des échantillons prélevés lors du Tour de France afin de procéder à l'analyse ADN serait contraire aux droits fondamentaux de M. Valverde, qui n'en aurait pas été informé et n'aurait pas donné son consentement;

- Les documents issus du dossier criminel de l'Opération Puerto ne seraient pas validés par les autorités compétentes et ne pourraient pas être utilisés en application des Ordonnances du 3 et 10 octobre 2006, qui en prohibent l'usage dans les procédures autres que la procédure pénale espagnole. De toute manière, le code "Valv. (Piti)" ne se référerait pas à l'Athlète, ce qui est démontré par le fait que son chien ne s'appellerait pas Piti et que l'Athlète n'aurait pas reçu de re-injections de sang le 7 avril 2005;

- Les déclarations de M. Manzano seraient contradictoires et auraient fait l'objet d'une enquête de la part de la justice espagnole, qui aurait décidé de classer le dossier;

- La carte de visite retrouvée sur le Dr. Fuentes ne constituerait pas preuve d'un lien avec l'Athlète.

Les intimés ont contesté ces arguments en faisant valoir que:

- Les analyses de l'ADN des échantillons représenteraient un moyen de preuve valable. L'Ordonnance de Révocation serait erronée et, en tout cas, ne pourrait pas produire d'effets en dehors du territoire espagnol. Les analyses d'ADN auraient été ordonnées par le Parquet de Rome et seraient donc valables. La chaîne de garde de tous les échantillons aurait été respectée;

- Les documents du dossier criminel ont été transmis par le même Juge d'Instruction n. 31 à l'UCI et au CONI et seraient désormais connus du grand public. D'ailleurs, d'autres Formations du TAS auraient déjà déclaré que les Ordonnances du 3 et 10 octobre 2006 ne lient pas le TAS.

1. Les règles régissant l'admissibilité de la preuve devant le TAS

La question de l'admissibilité d'une preuve est de nature procédurale et est donc soumise aux règles de procédure applicables devant cette Formation (Poudret/Besson, Comparative Law of International Arbitration, 2ème ed. 2007, no 643). Par conséquent, la Formation n'est pas liée par les règles régissant l'admissibilité et le choix de la preuve applicables devant les cours étatiques du siège du tribunal arbitral (Poudret/Besson, *op-cit*).

La procédure arbitrale est régie en premier lieu par les Articles 176 ss LDIP. Ces règles donnent un cadre procédural à l'arbitrage. A l'intérieur de ce cadre, il appartient aux parties – en premier lieu – de prévoir des règles plus détaillée (Antonio Rigozzi, Arbitrage International, 2006, no. 478). Les parties exercent l'autonomie procédurale qui leur est accordée – comme dans le cas présent – par l'adoption d'un règlement d'arbitrage institutionnel. La plupart de ces règlements institutionnels ne remplissent toutefois qu'une partie du cadre et laissent un certain nombre de questions ouvertes. Il incombe alors aux arbitres d'y répondre, et de combler toute lacune.

Selon l'Article 184 alinéa 1 LDIP "*le tribunal arbitral procède lui-même à l'administration des preuves*". Cette disposition donne aux arbitres le pouvoir de statuer sur l'admissibilité d'une preuve soumise par une des parties (Antonio Rigozzi *op-cit*, no. 464). Le pouvoir de la Formation de statuer sur l'admissibilité de la preuve est repris dans le Code TAS (cf. l'Article R44.2). Il découle de l'Article 184 alinéa 1 LDIP (ainsi que des articles du Code TAS) que la Formation dispose ainsi d'un certain pouvoir d'appréciation pour déterminer la recevabilité ou l'irrecevabilité de la preuve (Antonio Rigozzi *op-cit*, no. 478).

Le pouvoir discrétionnaire de la Formation de combler toute lacune est – en l'absence de règles expresses dans les Articles 176 ss LDIP et le Code TAS – limité que par l'ordre public procédural et les droits procéduraux des parties (Antonio Rigozzi *op-cit*, no. 464). Selon la jurisprudence du Tribunal Fédéral l'ordre public procédural n'est pas facilement violé. Selon le Tribunal Fédéral, l'ordre public procédural n'est violé que "*lorsque des principes fondamentaux et généralement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit*" (TF Bull ASA 2001, 566, 570).

2. Les échantillons de la Poche n. 18

Selon l'Athlète, les analyses des échantillons de la Poche n. 18 ne sauraient être recevables comme moyen de preuve en raison des vices relatifs à la procédure d'entraide judiciaire.

En particulier, sur la procédure d'entraide judiciaire, la commission rogatoire serait nulle car contraire non seulement aux normes de procédure applicables en matière d'entraide judiciaire, mais aussi aux normes en matière de protection de la vie privée, qui empêchent le traitement et la diffusion de données tels que le profil génétique.

Comme il le sera expliqué *infra*, la Formation considère comme non fondés les arguments de l'Athlète, mais, à titre préliminaire, estime pertinent d'identifier au préalable les règles relatives à la coopération judiciaire applicables au cas d'espèce afin d'évaluer le cas échéant la validité des procédures de coopération mises en oeuvre.

2.1. Les règles relatives à la coopération judiciaire

La coopération judiciaire en matière pénale entre l'Italie et l'Espagne est régie, à titre principal, par la Convention européenne d'entraide judiciaire en matière pénale du 20 avril 1959 (la "Convention de 1959"). La Convention de 1959 est entrée en vigueur pour l'Espagne le 16 novembre 1982, date à partir de laquelle cette convention s'applique donc aux

rapports entre l'Espagne et les autres Etats parties à la Convention, y compris l'Italie.

L'Article 26, premier alinéa, de la Convention de 1959 prévoit que "*la présente convention abroge, en ce qui concerne les territoires auxquels elle s'applique, celles des dispositions des traités, conventions ou accords bilatéraux qui, entre deux Parties contractantes, régissent l'entraide judiciaire en matière pénale*". Par conséquent, la Convention bilatérale Italie-Espagne du 22 mai 1973, entrée en vigueur le 1 décembre 1977, a été implicitement abrogée par la Convention de 1959, qui est entrée en vigueur ultérieurement.

La Formation souligne enfin que la Convention relative à l'entraide judiciaire en matière pénale entre les États membres de l'Union européenne du 29 mai 2000 ne pouvait pas s'appliquer à la coopération entre l'Italie et l'Espagne, étant donné qu'elle n'a pas encore été ratifiée par l'Italie.

La législation applicable à l'entraide judiciaire entre l'Italie et l'Espagne étant identifiée, il est possible d'examiner les contestations de l'Athlète quant à (aa) la commission rogatoire et à (bb) l'Ordonnance de Révocation.

2.1.1 La commission rogatoire

Selon l'Athlète, conformément à la Convention de 1959 la coopération judiciaire d'entraide est réservée à aux autorités judiciaires, à l'exclusion de tout autre organe. Au moment de sa ratification, l'Espagne a indiqué que les autorités considérées comme des autorités judiciaires au sens de la convention sont: (i) les juges et tribunaux de droit commun; (ii) les membres du Ministère Public; et (iii) les autorités judiciaires militaires. Etant donné que la commission rogatoire proviendrait d'un organe non juridictionnel, tel que l'UPA-CONI, la requête ne bénéficierait pas de l'entraide judiciaire et serait illégitime. Toutefois, même si le Parquet de Rome a géré les phases successives de la coopération, son "nulla-osta" du 7 novembre 2008 serait ultérieur à la requête initiale qui provenait de l'UPA-CONI. En effet, le Parquet de Rome aurait ouvert l'enquête pénale à l'encontre de M. Valverde en février 2009, ce qui témoignerait du fait qu'il ne pouvait pas demander de commission rogatoire en novembre 2008 et que l'UPA-CONI en serait le véritable auteur. En tout état de cause, la commission rogatoire serait incomplète, étant donné qu'elle ne contiendrait pas les éléments requis par l'Article 13 de la Convention de 1959, tel que l'inculpation, l'identité de la personne en cause et un exposé sommaire des faits.

La Formation, se prononçant à l'unanimité, estime que, même si l'UPA-CONI avait pris l'initiative de demander les échantillons de la Poche n. 18 dans le contexte de la précédente commission rogatoire, le "nulla-osta" du Parquet de Rome rend la commission rogatoire valable. En effet, par décision rendue en marge de la communication de l'UPA-CONI, le Parquet de Rome s'est associé à cette requête, corrigeant ainsi les éventuels vices de procédure ou manque de légitimation de l'UPA-CONI. De plus, même si la commission rogatoire faisait initialement référence à une précédente procédure d'entraide judiciaire (Exhorto n. 713/2006), le Juge d'Instruction n. 31 a ouvert une nouvelle procédure et a demandé l'avis du Ministère Public espagnol sur la base d'un dossier complet, comprenant également la communication du Parquet de Rome. L'Exhorto n. 447/08 relatif à la Poche n. 18 a donc été sollicité et adopté de façon légitime.

Quant à la prétendue absence des conditions prévues par la Convention de 1959, l'on remarque que la commission rogatoire *de qua* spécifiait l'autorité requérante (le Parquet de Rome), l'objet et le motif de la demande ainsi que le délit qui faisait l'objet de l'investigation (les échantillons de la Poche n. 18 étaient requis dans le contexte d'une procédure ayant pour objet le délit prévu par les lois n. 401/89 et n. 376/2000). Quant à l'identité de la personne en cause, selon l'Article 2 de la Convention de 1959, celle-ci doit être indiquée uniquement "*dans la mesure du possible*", ce qui exclut l'illégitimité automatique de la commission rogatoire en cas d'absence de référence à la personne en cause. De plus, dans le cas d'espèce la requête concernait le prélèvement d'échantillon d'une poche de sang dont le propriétaire était inconnu, justifiant l'absence de toute référence à l'Athlète.

D'ailleurs, la Convention de 1959 ne prévoit aucune sanction de nullité pour des demandes incomplètes et, à l'Article 2, la liste des circonstances pouvant justifier un refus d'entraide judiciaire n'inclut pas l'absence d'éléments dans la demande. Dans un esprit de coopération entre les autorités, plutôt que de refuser de coopérer, celles-ci devraient être libres de demander les informations complémentaires qu'elles estiment nécessaires.

Dans le cas d'espèce, aucune objection ou requête d'informations complémentaires n'a été soulevée quant au contenu de la commission rogatoire.

La régularité de la procédure est par ailleurs confirmée par l'absence de contestations de la part du Ministère Public espagnol, qui a émis un avis positif, ainsi que par le juge en charge des relations entre l'Italie et l'Espagne, qui a supervisé les correspondances et a informé le Parquet de Rome de l'évolution

de la procédure (voir communication du juge, M. D'Agostino, en date du 28 novembre 2008).

En outre, il ne peut être contesté que le Parquet de Rome a entrepris valablement toutes les démarches nécessaires pour le prélèvement des échantillons, telles que la nomination des membres de la police judiciaire et la nomination des auxiliaires de police judiciaire pour le prélèvement des échantillons. Ces démarches ont été entreprises dans le cadre d'une investigation pénale au cours de l'année 2008 (comme indiqué par le numéro de dossier: n. 5599/08) et qui a débouché, le 19 février 2009, dans l'information qui a été faite à l'Athlète de sa mise en examen.

Il est donc établi que la requête ainsi que le prélèvement des échantillons de la Poche n. 18 se sont déroulés dans le cadre d'une investigation conduite par le Parquet de Rome et non pas par l'UPA-CONI.

2.1.2. Ordonnance de Révocation

Selon l'Athlète, l'Ordonnance de Révocation interdirait à la présente Formation d'utiliser les résultats des analyses des échantillons provenant de la Poche n. 18 comme moyens de preuve.

Cette affirmation est dénuée de tout fondement dans la mesure où: (i) l'Ordonnance de Révocation ne peut pas lier la Formation dans l'appréciation des preuves; et (ii) l'Ordonnance de Révocation est mal-fondée et a été prise en violation des garanties procédurales.

2.1.3 La portée de l'Ordonnance de Révocation

Un principe fondamental de droit international est celui de la territorialité des actes: les actes étatiques, y compris les jugements, ne peuvent produire d'effets juridiques que dans le territoire du pays auquel appartient l'autorité qui les a émis, à moins qu'une disposition d'un traité prévoit la possibilité de les reconnaître et de les faire exécuter dans un autre pays. En d'autres termes, "[a]*s an act of government* [a judgment's] *effects are limited to the territory of the sovereign whose court rendered the judgement, unless some other state is bound by treaty to give the judgment effect in its territory, or unless some other state is willing, for reasons of its own, to give the judgment effect*" (Hilton v. Guyot, 159 U.S. 113, 163 (1895). Voir aussi Born, International Civil Litigation in United States Courts, Kluwer, 1996, "*in most circumstances, the judgment of a national court has no independent authority outside the forum's territory*" (p. 935)).

L'Ordonnance de Révocation a été prise uniquement le 18 février 2009, c'est-à-dire après que les échantillons aient été prélevés de la Poche n. 18, aient quitté le territoire espagnol et aient été analysés par le laboratoire de police italien en date du 2 février 2009. Par conséquent, il faut vérifier si l'Ordonnance de Révocation pouvait produire des effets juridiques en dehors de l'Espagne en vertu de la Convention de 1959 ou d'autres conventions concernant la reconnaissance et l'exécution des décisions en matière pénale. A ce propos:

- Même si l'Etat requis peut refuser de coopérer dans certains cas spécifiquement identifiés (art. 2), la Convention de 1959 ne prévoit pas la possibilité de révoquer (les effets d') une procédure qui est déjà complétée et n'indique pas non plus les effets juridiques des décisions rendues dans le cadre de la procédure d'entraide judiciaire et adressées aux autorités requérantes. Etant donné qu'il existe une obligation de coopération découlant de la Convention de 1959, une fois qu'un juge compétent a autorisé la procédure d'entraide et que l'autre partie a agi sur la base de cette autorisation, le juge compétent ne peut retirer son autorisation en l'absence de dispositions conventionnelles sur ce sujet ou de consentement du pays requérant. Par conséquent, une fois que la coopération est complétée (avec le prélèvement des échantillons), le Juge d'Instruction n'a pas de fondement juridique pour révoquer son autorisation.

- Quant aux dispositions concernant la reconnaissance et l'exécution des décisions en matière pénale, l'Ordonnance de Révocation tombe en dehors du champ d'application des ces conventions, qui ne concernent que les décisions prononçant une condamnation à l'encontre d'une personne physique.

- En tout état de cause, la question des éventuels effets juridiques découlant de la reconnaissance des décisions ne se pose pas, étant donné que personne n'a demandé la reconnaissance de l'Ordonnance de Révocation ou de la Décision sur l'Ordonnance de Révocation en dehors de l'Espagne.

Mis à part l'absence d'effets juridiques, il est possible de rappeler que, selon une jurisprudence constante du TAS, la Formation n'est pas liée par les décisions d'un autre organe juridictionnel en tant que *forum* indépendant. En effet, au regard de ses pleins pouvoirs de révision des faits et du droit, "*the Panel is not bound by decisions taken by any other jurisdictional body*" (TAS 2001/A/354 et TAS 2001/A/355, para. 6; et CAS 2002/A/399, para. 13). De plus, spécifiquement sur l'admissibilité des preuves, la Formation "[is] *not bound by the rules of evidence and may inform* [itself] *in such a manner as the arbitrators think fit*" (TAS 2008/A/1574, para. 23).

En outre, la sentence du TAS dans le cas 2008/A/1528 et 2008/A/1546, qui se prononça sur les effets des Ordonnances du 3 et 10 octobre 2006, a affirmé que la Formation "*is not bound by the orders of a Spanish judge* […] *Secondly, it is completely unclear what the consequences are of any – alleged – failure to comply with the judicial order*" (para. 9.3). De plus, "[t]*he "full power" granted the deciding Panel under the CAS Code precludes any notion that the Panel must abide by restrictions on evidence which may or may not have been adduced in previous proceedings before a national or international disciplinary tribunal.*» Enfin, dans une ordonnance délivrée le 22 décembre 2009 dans les affaires CAS 2007/A/1396 *WADA v. RFEC & Alejandro Valverde* et CAS 2007/A/1402 *UCI v. RFEC & Alejandro Valverde*, la Formation a pris une position similaire, toujours à propos des Ordonnances du 3 et 10 octobre 2006, en affirmant que "*this Panel does not regard the Serrano-Orders prohibitive for the production and use of the Operation Puerto documents in this arbitration*" (para. 47).

Par conséquent, également en vertu de la jurisprudence constante du TAS, la Formation, se prononçant à l'unanimité, estime que son pouvoir discrétionnaire quant à la non-admissibilité des preuves n'est limitée ni par l'Ordonnance de Révocation, ni par la Décision sur l'Ordonnance de Révocation.

2.1.4 L'Ordonnance de Révocation est erronée

L'Ordonnance de Révocation est par ailleurs fondée sur des interprétations des faits et du droit incorrectes.

En premier lieu, l'Ordonnance de Révocation considère que l'UPA-CONI a participé seul à la procédure de coopération et ne mentionne pas le rôle du Parquet de Rome. La décision d'annulation de la commission rogatoire est donc prise sur la base du fait que l'UPA-CONI n'est pas un organe judiciaire auquel les conventions sur la coopération judiciaire s'appliquent. Contrairement à l'ordonnance qui avait initialement autorisé la collaboration (faisant référence à la "*Fiscalia de Roma*", le Parquet de Rome), l'Ordonnance de Révocation a confondu l'UPA-CONI et le Parquet de Rome. Or, comme évoqué *supra*, le Parquet de Rome s'est bien associé à la requête initiale de l'UPA-CONI et s'est chargé de toutes les procédures relatives au prélèvement des échantillons dans le cadre de la procédure pénale. D'ailleurs, cette confusion est d'autant plus surprenante car l'UPA-CONI avait envoyé le "nulla-osta" du Parquet de Rome avec une lettre d'accompagnement expliquant qu'il s'agissait d'une décision de l'Autorité judiciaire pénale italienne.

En deuxième lieu, l'Ordonnance de Révocation fonde également son raisonnement juridique sur la Convention de 2000 qui, comme cela a été vu *supra*, n'est pas applicable à une requête d'entraide judiciaire entre l'Italie et l'Espagne.

En troisième lieu, l'Ordonnance de Révocation viole aussi des garanties procédurales minimales: le Juge d'Instruction n. 31 a adopté cet acte en ne consultant ni l'autre partie à la coopération (le Parquet de Rome ou même l'UPA-CONI), en violation du principe de collaboration qui inspire la Convention, ni le Ministère Public qui avait participé à la procédure de coopération et avait rendu un avis positif.

En quatrième lieu, l'Ordonnance de Révocation se fonde sur le fait qu'en droit espagnol les moyens de preuve dans une procédure pénale pendante ne peuvent être utilisés dans une procédure différente concernant des violations autres que celles qui font l'objet de la procédure pénale. A cet égard, la Formation observe que l'échantillon de la Poche n. 18 a été utilisé par les instances pénales italiennes afin de procéder à un test ADN pour comparer cet échantillon avec trois échantillons anonymes prélevés lors du Tour de France 2008. Le CONI n'a fait qu'utiliser le résultat de ce test ADN entrepris par les instances pénales italiennes, qui a établi une correspondance de 16 marqueurs génétiques entre l'échantillon prélevé sur M. Valverde lors du Tour de France 2008 et l'échantillon de la Poche n. 18, pour le considérer comme une preuve suffisante d'une violation des NSA. En tout état de cause, et à titre surabondant, comme il est expliqué ci-après, l'art. 2, alinéa 3 de la loi italienne n. 401/1989 admet que les preuves dans une procédure pénale pendante en Italie puissent être utilisées à n'importe quel moment dans une procédure sportive, en raison de l'indépendance de ces procédures.

La Formation considère que la Décision sur l'Ordonnance de Révocation de la Cour d'Appel de Madrid n'apporte aucun élément nouveau, dans la mesure où celle-ci repose son jugement sur l'observation, que la Formation considère être erronée, que la lettre rogatoire proviendrait du CONI et non du Parquet de Rome, et sur le principe de droit espagnol de l'interdiction d'utiliser des preuves provenant d'une procédure pénale pendante dans une autre procédure. Or, pour les raisons déjà évoquées, la Formation considère que ce principe n'est pas pertinent dans le cas d'espèce. Enfin, la Formation rappelle le principe de territorialité des actes nationaux qui empêche, sauf dispositions contraires, que les jugements produisent des effets juridiques en dehors du territoire national.

2.1.5 Subsidiairement: l'admissibilité des preuves acquises de façon illégitime

Même si – contrairement à ce qui vient d'être dit auparavant – les règles relatives à la coopération judiciaire avaient été violées ou si l'Ordonnance de Révocation pouvait avoir pour effet de priver de validité l'acquisition des échantillons de la Poche n. 18, la Formation estime qu'elle serait libre d'apprécier les analyses de la Poche n. 18.

2.1.6 La situation relative aux procédures devant les tribunaux civils étatiques

Les conséquences juridiques des preuves obtenues de façon illégitime sont bien établies par la jurisprudence et la doctrine suisses pour les procédures se déroulant devant les tribunaux civils étatiques. En principe, on distingue entre une preuve irrégulière et la preuve illicite. En substance, est une preuve irrégulière celle qui a été recueillie en violation d'une règle de procédure dans le cadre de l'enquête (par exemple, un témoin fait un témoignage sans avoir été instruit sur son droit de refuser de témoigner). Est, en revanche, illicite la preuve qui a été recueillie en violation d'une autre règle de droit. Dans le cas présent, nous serions, par hypothèse, face à ce dernier cas de figure.

L'ordre juridique interne suisse n'établit pas de principe général selon lequel des preuves illicites seraient généralement inadmissibles dans une procédure devant les cours civiles étatiques. Au contraire, le Tribunal Fédéral, dans une jurisprudence constante, est d'avis que l'admissibilité ou la non-admissibilité d'une preuve illicite est le résultat d'une *mise en balance* de différents aspects et intérêts juridiques (TF 18.12.1997 – 5C.187/1997; 17.2.1999 – 5P.308/1999 et TF 17.12.2009 – 8C_239/2008). Sont pertinents, par exemple, la nature de la violation, l'intérêt à la manifestation de la vérité, la difficulté de preuve pour la partie concernée, le comportement de la victime, les intérêts légitimes des parties et la possibilité d'acquérir les (mêmes) preuves de façon légitime (Frank/Sträuli/Messmer, Kommentar zur zürcherischen Zivilprozessordnung, 3. ed. 1997, vor § 133 ff no.6; Vogel/Spühler, Grundriss des Zivilprozessrechts, 9. ed. 2008, 10. Kap. No. 101. La doctrine suisse prédominante suit cette jurisprudence du Tribunal Fédéral (Spühler ZZZ, 2002/2, p. 148; Staehelin, Der Beweis im schweizerischen Zivilprozessrecht, in: Der Beweis im Zivil- und Strafprozess der Bundesrepublik Deutschland, Österreichs und der Schweiz, Mittelbarer oder unmittelbarer Beweis im Strafprozess**,** 1996; Rüedi, Materiellrechtswidrig beschaffte Beweismittel im Zivilprozess, 2009, p. 35 ss. L'approche adoptée par le Tribunal Fédéral et la doctrine dominante a, par ailleurs, été codifiée dans le nouveau CPC suisse (Article 152 alinéa 2), qui entrera en vigueur le 1er janvier 2011.

2.1.7 Pertinence de ces principes pour l'arbitrage international

Les principes qui viennent d'être décrits ne constituent qu'une faible source d'inspiration pour la pratique des tribunaux arbitraux. Certes, l'appréciation par un tribunal arbitral d'une preuve illicite pourrait (légalement) faire l'objet d'une enquête devant un tribunal étatique afin de déterminer si elle pourrait constituer une violation de l'ordre public. C'est toutefois ici que s'arrêtent les points communs. En particulier, l'interdiction de se fonder sur une preuve illicite dans une procédure étatique ne lie pas en soi un tribunal arbitral. Selon le droit de l'arbitrage international un tribunal arbitral n'est pas lié par les règles applicables à l'administration de la preuve devant les tribunaux civils étatiques du siège du tribunal arbitral (Poudret/Besson, *op-cit*, no. 644: "*The arbitral tribunal is not bound to follow the rules applicable to the taking of evidence before the courts of the seat*". Comme l'on a vu *supra*, le pouvoir discrétionnaire de l'arbitre de décider sur l'admissibilité de la preuve n'est limité que par l'ordre public procédural. L'utilisation de preuves illicites ne relève par ailleurs pas automatiquement de l'ordre public suisse, car ce dernier est seulement atteint en présence d'une contradiction insupportable avec le sentiment de justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit.

La Formation considère, à l'unanimité, que les (présumées) violations des règles relatives à la coopération judiciaire ne sont pas de nature d'ordre public et ne font donc pas obstacle à la possibilité pour la Formation d'apprécier le résultat des analyses de la Poche n. 18. La Formation parvient à ces conclusions après avoir mis en balance les différents intérêts juridiques concernés. En particulier, la Formation rejette l'idée que les violations alléguées par l'Athlète constitueraient, même si elles étaient avérées, une atteinte insupportable au sentiment de justice et ce, notamment au vu du comportement du CONI qui n'a – en aucun cas - violé des dispositions relatives à la coopération judiciaire, mais – au contraire - a obtenu les analyses de la Poche n. 18 en toute conformité avec les dispositions de la loi italienne n. 401 du 13 décembre 1989. En effet, selon l'art. 2, alinéa 3 de la loi n. 401/1989, les organismes disciplinaires sportifs peuvent demander une copie des actes de la procédure pénale, même si l'enquête est encore en cours.

2.2. Les règles relatives à la protection de la personnalité

L'Athlète fait valoir que les règles relatives à la protection de sa personnalité seraient atteintes si les analyses de la Poche n. 18 étaient admises dans la présente procédure, car les normes en matière de protection de la vie privée empêcheraient le traitement et la diffusion de données telles que le profil génétique. Le profil génétique d'une personne est protégé – entre autre – par l'Article 28 du Code Civil Suisse (CCS). Il est incontesté que les règles relatives à la protection de la personnalité, en particulier l'Article 28 CCS font partie de l'ordre public et que cet article peut imposer des limites au droit de l'administration des preuves. Il est également incontesté que la personnalité individuelle ne jouit pas d'une protection absolue. Selon l'Article 28 alinéa 2 CCS, n'est pas considéré comme illicite une atteinte à la personnalité qui est justifiée par le consentement de la victime, par un intérêt prépondérant privé ou public ou par la loi.

La Formation, se prononçant à l'unanimité, estime que l'admission du résultat des analyses de la Poche n. 18 dans la présente procédure ne saurait être qualifiée d'atteinte illicite à la personnalité de l'Athlète. En premier lieu, un consentement préalable de l'Athlète pour analyser l'échantillon était impossible à obtenir car la correspondance du contenu de la Poche n. 18 avec l'Athlète était inconnue à l'époque. En plus, la Formation considère qu'un consentement préalable n'était pas nécessaire, car l'analyse dans le cadre de la procédure pénale était justifiée par la loi italienne. La Poche n. 18 a été analysée par les autorités pénales italiennes, qui l'ont obtenue sur la base des règles relatives à la coopération judiciaire avec les autorités espagnoles. L'analyse a été ordonnée par le Parquet de Rome dans le cadre d'une investigation pénale. Le CONI, pour sa part a obtenu le résultat des analyses de la Poche n. 18 en toute conformité avec les règles de la loi italienne n. 401 du 13 décembre 1989.

Finalement, la Formation considère qu'une quelconque atteinte à la personnalité de l'Athlète serait aussi justifiée par un intérêt prépondérant. Peut constituer un intérêt prépondérant, tant un intérêt de nature privé que public (Aebi-Müller, in Handkommentar zum Schweizer Privatrecht, 2007, Art. 28 no. 32; *Meili*, in Basler Kommentar zum ZGB, 3ème ed., Art. 28 no. 46. Le Tribunal Fédéral a décidé – par exemple - que l'intérêt d'une compagnie d'assurance à détecter une escroquerie à l'assurance (grâce aux observations d'un détective privé) est digne de protection et peut justifier l'atteinte à la personnalité de l'assuré (ATF 129 V 323 E 3.3.3). Dans le cas d'espèce la Formation considère qu'une lutte efficace contre le dopage constitue en tout état de cause non seulement un intérêt privé de l'association mais aussi un intérêt public. Cela est également mis en évidence par des Conventions, dont la Suisse est état contractant (Convention contre le dopage du Conseil de l'Europe no. 135, Convention internationale contre le dopage dans le sport de l'UNESCO). L'intérêt de lutter contre le dopage est – selon l'opinion unanime de la Formation – dans le cas d'espèce prépondérant à celui de l'athlète à ne pas voir les analyses effectuées dans le cadre d'une enquête pénale transmise à une autorité sportive compétente.

3. Les échantillons prélevés lors du Tour de France

L'Athlète conteste le droit du CONI d'utiliser le sang prélevé le 21 juillet 2008 lors du Tour de France à des fins de test ADN. L'Athlète a deux objections principales concernant l'utilisation de son échantillon sanguin. Premièrement, le sang prélevé lors du Tour de France 2008 ne pourrait être utilisé que pour déterminer si l'Athlète a commis une infraction liée au dopage lors de cette compétition, à l'exclusion de toute autre utilisation. Deuxièmement, la conservation de l'échantillon sanguin de l'Athlète prélevé lors du Tour de France de 2008 serait une violation de la protection de la vie privée garantie par le droit italien ainsi que par la CEDH. Selon l'Athlète, cela prouverait que cet échantillon n'est pas recevable en tant qu'élément de preuve dans cette procédure.

La Formation rejette la première objection de l'Athlète. A l'occasion du Tour de France 2008, l'Athlète a signé un formulaire standard concernant le prélèvement d'échantillons par le CONI. Il a déjà été relevé que ce formulaire n'imposait aucune restriction sur l'utilisation que le CONI pouvait faire de cet échantillon après le prélèvement. En revanche, le formulaire mentionnait que l'échantillon serait soumis aux règles antidopage applicables (en l'espèce, celles du CONI). Les NSA applicables restreignent l'utilisation par celui-ci des échantillons biologiques prélevés sur les athlètes, interdisant au CONI d'utiliser les échantillons biologiques à des fins autres que la recherche de substances interdites ou l'existence de méthodes interdites (voir Article 6 des NSA dans leur version approuvée le 23 janvier 2008 et applicable à l'époque des faits, faisant référence à l'art. 6.2. du CMA de 2003). Etant donné que l'échantillon prélevé lors du Tour de France 2008 a servi à comparer l'ADN de l'Athlète avec l'ADN contenu dans la Poche n. 18, et ce afin de confirmer le recours à une méthode interdite, l'utilisation de l'échantillon prélevé lors du Tour de France 2008 ne s'écartait pas des utilisations autorisées par les NSA, de sorte que cette objection de l'Athlète doit être rejetée.

La Formation doit également rejeter la seconde objection de l'Athlète. Le délai de prescription prévu par l'art. 5.2.2.6 du Standard International pour les laboratoires en vigueur aux moments des faits est de huit ans. Aucune disposition n'impose la destruction des échantillons après leur utilisation et avant l'expiration du délai de prescription. Plus généralement, les lignes directrices de l'AMA concernant la gestion des résultats n'excluent pas la possibilité de procéder à de nouveaux tests sur les échantillons au cours du délai de prescription de huit ans (Article 2.4). Il est constant que la lutte contre le dopage sportif serait perturbée par la reconnaissance du droit des athlètes de faire détruire leurs échantillons après un test négatif – la destruction empêcherait en effet (i) l'établissement de profils biologiques satisfaisants et (ii) la détection de substances de dopage nouvelles et innovantes et de méthodes inconnues des autorités de lutte antidopage à l'époque du test.

En tout état de cause, l'échantillon de sang a été utilisé par les autorités pénales italiennes, et non par le CONI. En effet, l'analyse ADN a été effectuée par le Service de la Police Scientifique – Section de Génétique Médico-Légale, à la demande du Parquet de Rome. Or, l'investigation de la part des autorités pénales italiennes ne saurait être limitée par une quelconque restriction établie par une autorité sportive sur l'utilisation de moyens de preuve, tels que l'échantillon de sang prélevé le 21 juillet 2008 lors du Tour de France (Articles 192 et 193 du code de procédure pénale). Le CONI n'a fait qu'utiliser le résultat de cette analyse, établissant l'appartenance du contenu de la Poche n. 18 à l'Athlète, conformément à l'art. 2, alinéa 3 de la loi n. 401/1989, selon lequel les organismes disciplinaires sportifs peuvent utiliser tous les actes de la procédure pénale, même si celle-ci est encore en cours.

Quant à la prétendue violation des normes sur la protection de la vie privée découlant de l'absence de consentement lors de l'analyse, l'art. 53 du Code italien sur la protection de donnés personnelles (d. lgs. 30 juin 2003, n. 196) prévoit que le traitement des données privées par la police lors d'une investigation pénale ne requiert pas le consentement de l'intéressé (Voir aussi la décision de l'Autorité italienne sur la protection de la vie privée du 5 novembre 2003 n. 1053828).

Or, étant donné que l'analyse a été ordonnée par le Parquet de Rome dans le cadre d'une investigation pénale, le traitement des échantillons prélevés lors du Tour de France sans le consentement explicite de l'Athlète ne peut constituer une violation des normes applicables en matière de protection de la vie privée.

Ce Tribunal ne se prononce pas sur l'applicabilité de l'Article 8 de la Convention Européenne des Droits de l'Homme (CEDH), qui contient le droit au respect de la vie privée. Toutefois, à supposer que cet article soit applicable, le Tribunal n'hésiterait pas à conclure que la conservation par le CONI des échantillons biologiques de l'Athlète après le test initial et pour une durée de huit ans est justifiée par la nécessité de protéger la santé et la morale, comme cela est prévu à l'art. 8, alinéa 2, de la CEDH.

Par conséquent, l'échantillon sanguin prélevé lors du Tour de France de 2008 est un élément de preuve recevable aux fins de la procédure.

4. Les documents issus de la procédure pénale espagnole

L'Athlète a fait valoir que les documents issus de la procédure pénale espagnole ne pourraient pas être utilisés dans le cadre de la procédure sportive italienne, conformément aux Ordonnances du 3 et 10 octobre 2006. Comme il a été expliqué supra quant à l'Ordonnance de Révocation, les Ordonnances du 3 et 10 octobre 2006 ne lient pas la présente Formation en relation avec ces moyens de preuve.

C. L'appréciation des preuves

Selon l'Athlète, les preuves présentées n'ont pas de force probatoire. En particulier l'Athlète se prévaut des faits suivants:

- Les analyses des échantillons de la Poche n. 18 ne sauraient être pertinentes en raison de la conservation de la chaîne de garde;

- le CONI n'aurait pas établi le maintien d'une chaîne de garde de l'échantillon sanguin du Tour de France 2008 et cela prouverait que l'intégrité de l'échantillon ne peut être garantie;

- Les analyses du Laboratoire de Barcelone qui ont révélé la présence d'EPO dans la Poche n. 18 ne seraient pas valables, car le Laboratoire n'est pas agréé pour traiter le dépistage d'EPO dans le sang et l'Athlète n'aurait pas pu demander de contre-analyse;

- Les déclarations de M. Manzano seraient contradictoires et auraient fait l'objet d'une enquête de la part de la justice espagnole, qui aurait décidé de classer le dossier;

- La carte de visite retrouvée sur le Dr. Fuentes ne constituerait pas une preuve d'un lien avec l'Athlète.

Les intimés ont contesté ces arguments en faisant valoir que:

- Les analyses du Laboratoire de Barcelone démontreraient la présence d'EPO dans la Poche n. 18 et une contre-analyse ne serait pas requise dans un contexte tel que le cas d'espèce;

- Les déclarations de M. Manzano seraient fiables et auraient été confirmées par les développements ultérieurs de l'Opération Puerto;

- La carte de visite démontrerait que l'Athlète avait eu des contacts avec le Dr. Fuentes.

Selon l'Article 184 alinéa 1 LDIP, la Formation arbitrale n'a pas seulement le pouvoir de statuer sur l'admissibilité des preuves mais également sur leur pertinence (Rigozzi, *op.-cit*, no. 478).

1. La chaîne de garde entre la saisie des poches par la Garde Civile espagnole et la livraison des poches au Laboratoire de Barcelone

Alors que l'Athlète a reconnu à l'audience ne pas avoir de réserve sur la chaîne de garde entre le Laboratoire de Barcelone et le laboratoire de Rome, il a néanmoins contesté la régularité de la chaîne de garde pour la période précédente, celle comprise entre la saisie des poches par la Garde Civile espagnole et la livraison des poches au Laboratoire de Barcelone. En particulier, l'Athlète a contesté les modalités d'envoi des poches, qui seraient arrivées en nombre inférieur au Laboratoire de Barcelone (qui aurait reçu que 99 poches au lieu des 100 envoyées par la Garde Civile) et seulement le jour après la réception des poches par le courrier privé, ce qui ne permettrait pas d'exclure la possibilité qu'elles aient été manipulées.

Or, cette Formation estime que les contestations à cet égard sont mal-fondées: la Garde Civile a agi sous la direction stricte du juge en charge de l'enquête et a envoyé 99 poches de plasma au Laboratoire de Barcelone par courrier privé en prenant les garanties nécessaires à leur conservation, et le Laboratoire de Barcelone n'a soulevé aucune objection quant à la conservation correcte des échantillons. De plus, comme expliqué ci-après, l'envoi d'échantillons par courrier privé est expressément admis par les lignes directrices de l'AMA sur la gestion des échantillons de sang, qui n'imposent pas un temps maximal pour le transport des échantillons (mais recommandent simplement un temps de 24 heures pour la livraison au laboratoire, voir paragraphe 5.13.10 des lignes directrices actuellement en vigueur). Enfin, la différence entre le nombre de poches lors de la réception au Laboratoire de Barcelone et lors de l'envoi s'explique par le fait qu'un sac avait été compté deux fois lors de l'envoi.

Par conséquent, la Formation estime que la chaîne de garde des poches saisies par la Garde Civile et, en particulier, de la Poche n. 18 est également valide pour la période allant de la saisie par la Garde Civile jusqu'au Laboratoire de Barcelone.

Par ailleurs, pour ce qui est des tests ADN, qui recherchent une empreinte génétique, spécifique à chaque individu, la Formation observe, comme l'ont d'ailleurs confirmé les experts, Dr. Caglia et Dr. Castella lors de l'audience, que les conditions de la chaîne de garde (par opposition à la continuité de la chaîne elle-même) ne sont pas aussi importantes que pour déceler la présence de substances interdites dans le sang. Ceci est confirmé par le fait que les tests ADN sont souvent utilisés en matière pénale pour résoudre des crimes, et plus récemment, en matière archéologique, par exemple, afin de déterminer la généalogie de certains pharaons, où les preuves ADN sont préservées dans des conditions bien plus précaires. De plus, la chaîne de garde n'a, en l'espèce, évidemment pas modifié le profil génétique de la Poche n. 18, puisque l'analyse effectuée par le Service de la Police Scientifique – Section de Génétique Médico-Légale a permis d'établir une correspondance de 16 marqueurs génétiques entre la Poche n. 18 et l'échantillon prélevé sur l'Athlète lors du Tour de France 2008.

2. Les échantillons prélevés lors du Tour de France

L'Athlète conteste la force probatoire de l'analyse du sang prélevé le 21 juillet 2008 lors du Tour de France. L'Athlète fait valoir que le CONI n'aurait pas établi le maintien d'une chaîne de garde de l'échantillon sanguin du Tour de France 2008 alors que cela était nécessaire afin de convaincre le Tribunal que l'échantillon n'avait pas été contaminé notamment lors de l'administration des tests de contrôle antidopage en 2008. Selon l'Athlète, cela prouverait que l'intégrité de l'échantillon ne peut être garantie.

La Formation rejette cette objection à l'unanimité. Malgré les efforts de l'Athlète, aucune preuve crédible n'a été apportée permettant de faire naître un doute crédible quant à la préservation d'une chaîne de garde de l'échantillon sanguin prélevé lors du Tour de France 2008. En particulier, l'échantillon a été envoyé au laboratoire antidopage de Rome en respectant les procédures d'emballage et d'identification applicables (voir les *"Guidelines for blood sample collection*" dans la version de juin 2008). Le laboratoire n'a soulevé aucune objection quant à la conservation des échantillons (comme il était tenu de le faire en cas d'irrégularité).

Le fait que les échantillons aient été confiés à une entreprise de transport est spécifiquement admis par les lignes directrices susmentionnées et ne peut donc pas être critiqué (selon le paragraphe 5.14.3 "[s]*amples may be taken directly to the Laboratory by the DCO, or handed over to a third party for transportation. This third party must document the chain of custody of the samples. If an approved courier company is used to transport the samples, the DCO shall record the waybill number*"). De plus, même si d'autres échantillons peuvent avoir subi des dommages lors du transport, ceci ne peut avoir aucune influence sur la conservation des échantillons prélevés lors du Tour de France de 2008, qui sont arrivés scellés et intègre*s* au laboratoire antidopage de Rome.

3. La crédibilité de l'analyse ADN

L'Athlète cherche également à mettre en doute la crédibilité de l'analyse ADN opérée par le laboratoire médico-légal. Cette affirmation n'est cependant soutenue par aucune preuve crédible et constitue par conséquent une simple spéculation (CAS 2006/A/1067). En effet, la défense de l'Athlète n'a pas apporté d'élément permettant de douter de la fiabilité des résultats de l'analyse de l'ADN. En particulier, les déclarations de la Dr. Caglia et du Dr. Castella lors de l'audience ont confirmé le traitement et l'analyse corrects des échantillons, en clarifiant que le traitement manuel (plutôt que mécanique) des échantillons n'a pas de conséquences sur la fiabilité des résultats et que les conditions de conservation n'affectent pas les résultats des tests ADN.

4. La correspondance du profil ADN

En février 2009, le Service de Police Scientifique, Section Génétique Médico-Légale, a confirmé la correspondance entre l'ADN contenu dans la Poche n. 18 et l'un des trois échantillons anonymes mais différents prélevés sur des athlètes au cours du Tour de France le 21 juillet 2008. Peu après, le CONI a confirmé que l'échantillon correspondant et identifié par le laboratoire de police appartenait à l'Athlète.

En plus de son objection à la recevabilité des éléments de preuve physiques sous-jacents, l'Athlète conteste la recevabilité des résultats de l'analyse ADN en tant qu'éléments de preuve. L'Athlète affirme que cela constituerait une violation de ses droits en tant que sportif, étant donné qu'il n'a pas été autorisé à demander l'analyse d'un échantillon B.

La Formation rejette cet argument. L'analyse d'un échantillon B est requise en cas de violation supposée des normes en matière d'utilisation d'une substance interdite et non pas pour celles concernant l'usage, ou la tentative d'usage, d'une méthode interdite, comme dans le cas d'espèce. Cette conclusion est justifiée aussi par la fiabilité du test ADN et s'appuie sur les NSA applicables, qui font référence au CMA, distinguant – d'une part – la violation pour présence d'une substance interdite (éventuellement confirmée par l'analyse de l'échantillon B) et – d'autre part – la violation pour usage d'une méthode interdite, qui ne prévoit pas nécessairement la présence d'une substance interdite dans le sang de l'athlète. D'ailleurs, cette distinction est reproduite encore plus clairement dans la version du CMA actuellement en vigueur (entrée en vigueur le 1er janvier 2009).

Se prononçant à l'unanimité, la Formation accepte donc la conclusion de l'analyse ADN selon laquelle le sang contenu dans la Poche n. 18 correspond à l'échantillon sanguin fourni par l'Athlète lors du Tour de France de 2008. D'autres Formations du TAS ont déjà reconnu qu' "*étant donné qu'un profil génétique n'appartient qu'à un individu, il ne peut être falsifié*" (Affaires jointes CAS 2008/A/1718-1724, décision du 18 novembre 2009, para. 179). Cet élément de preuve est admissible et de grande qualité, il démontre que l'Athlète a commis certains agissements dont le fait de laisser le Dr. Fuentes accéder à son sang. L'Athlète n'a fourni aucune autre raison alternative et légitime quant à la possession de son sang par le Dr. Fuentes.

Enfin, la Formation tient à rappeler que le CONI ne s'est référé qu'aux résultats de l'analyse ADN entreprise par les autorités pénales italiennes à la demande du Parquet de Rome, que le CONI a reçus sur base de la loi italienne en matière d'échanges d'informations entre autorités judiciaires et sportives.

5. Remarques finales sur la preuve d'une violation des règles relatives au dopage par le recours ou à la tentative de recours à une méthode interdite

A la lumière des éléments de preuve examinés ci-dessus, la Formation parvient à la conclusion que le CONI a établi au-delà de ce qui est exigé la recevabilité des preuves relatives au recours ou à la tentative de recours de l'Athlète à une méthode interdite.

L'identification d'un plasma correspondant à l'ADN de l'Athlète suffit à prouver la tentative de recours à une méthode interdite. Comme cela a été expliqué à l'audience, le plasma peut être utilisé pour influer sur les niveaux d'hématocrites, ce qui constitue une technique de dopage sanguin. Il est donc possible d'en conclure que le plasma était destiné à être utilisé pour des pratiques de dopage sanguin. Il ressort de l'audience que la quantité de plasma trouvée dans la poche est incompatible avec l'hypothèse d'une extraction ou collecte involontaire provenant d'échantillons plus petits. Dès lors, la Formation

peut en déduire que l'Athlète a donné son accord à cette extraction, en vue de sa réinjection à des fins de dopage. Le Dr. Fuentes et d'autres athlètes ont admis avoir utilisé des techniques de dopage sanguin par le biais de réinjections de sang et de plasma.

De plus, l'Athlète n'a proposé aucune justification pour expliquer pourquoi son sang avait été retrouvé dans le laboratoire du Dr Fuentes.

En tout état de cause, dans les circonstances de l'espèce, le simple prélèvement de sang pour usage non-thérapeutique est interdit et constitue une violation des NSA du CONI (qui transpose les règles contenues dans le CMA), au moins sur le fondement de la prohibition des tentatives d'usage d'une méthode interdite.

La Formation conclut que le résultat du test ADN suffit à prouver de manière satisfaisante que M. Valverde a - à tout le moins - essayé de se livrer à des pratiques de dopage interdites.

6. Conclusion sur la violation des normes antidopage

Au vu de ce qui précède, la Formation conclut que l'Athlète est coupable d'une violation des NSA applicables qui interdisent l'usage ou de la tentative d'usage d'une méthode interdite et prévoient que "*l'UPA peut aussi demander, à l'encontre d'individus non affiliés ayant commis une quelconque violation du Règlement, des mesures préventives, également dans le but d'empêcher des récidives*" et que "*si, dans le courant d'une enquête, la responsabilité d'un individu non affilié est établie, l'UPA prend toute mesure nécessaire pour entamer des procédures préventives devant les organes de justices des Fédérations et Disciplines sportives nationales ou devant le [TNA] afin que ceux-ci adoptent des décisions d'inhibition d'exercer des fonctions ou offices au sein du CONI, des Fédérations ou Disciplines sportives nationales ou d'être présent lors des manifestations ou évènements sportifs organisés par eux*".

L'Athlète n'ayant présenté aucune défense quant à l'absence de négligence ou de faute (ou de négligence ou faute significatives), qui aurait pu annuler ou réduire la sanction applicable, la Formation n'a pas à prendre position quant à la réalisation des conditions énoncées à cet égard.

Arbitration CAS 2009/A/1880 & 1881
FC Sion & E. v. Fédération Internationale de Football Association (FIFA) & Al-Ahly Sporting Club
1 June 2010

Football; unilateral termination of an employment contract without just cause; alleged violation of due process rights; standing to appeal; link between the release of an ITC and the related claims for a contractual breach; wrong designation of a party; extent of the liability according to Art. 17 para. 2 of the RSTP; primacy of the liquidated damages provisions; scope of discretion of the adjudicating body when determining the amount of compensation due; principle of the "positive interest"; law of the country concerned; loss of a possible transfer fee; Protected Period; specificity of sport; sporting sanction.

Panel:
Prof. Massimo Coccia (Italy), President
Mr Olivier Carrard (Switzerland)
Prof. Ulrich Haas (Germany)

Relevant facts

The Football Club Sion is an amateur football club with registered office in Sion, Switzerland ("FC Sion Association" or the "First Appellant" or, sometimes, the "amateur club" and, when referred to together with E., the "Appellants"), constituted as an association in the sense of Art. 60 *et seq.* of the Swiss Civil Code (CC). FC Sion Association is affiliated with the Swiss Football Association (SFA) as member club no. 8040 and its first team takes part in an amateur championship under the authority of the "Association Valaisanne de Football", the so-called "Fourth League", which is the sixth-tier national division in Switzerland.

It is to be noted that, at the same time, "FC Sion" is the name regularly used by a professional football club competing in the Swiss top championship "Super League" and constituted as a limited company (*société anonyme*) under Art. 620 of the Swiss Code of Obligations (CO) with the corporate name Olympique des Alpes SA, having its registered office in Martigny-Combe, Switzerland ("FC Sion/Olympique des Alpes SA" or, sometimes, the "professional club"). At the beginning of the 2005-2006 season, further to a rule enacted by the Swiss Football League (SFL) obliging all top Swiss clubs to be organized as limited companies, FC Sion/Olympique des Alpes SA became a member of the SFL and of the SFA (as member no. 8700) and took the place of the historical club FC Sion Association, taking over the whole professional sector and the position in the Super League held hitherto by the latter. In the common use by the SFA, the SFL, the media, the fans and the public at large, the professional club FC Sion/Olympique des Alpes SA keeps being referred to simply as FC Sion. Even FC Sion/Olympique des Alpes SA regularly tags itself merely as FC Sion in its own documents, such as in its letterhead, in the letters of its executives to third parties, in its internet site, and the like.

E. (the "Second Appellant" or the "Player" and, when referred to together with FC Sion Association, the "Appellants") is an Egyptian football player born in 1973. He is a goalkeeper who has successfully experienced on various occasions international club competitions. He has been international more than a hundred times with the Egyptian national team.

The Fédération Internationale de Football Association (FIFA or the "First Respondent" and, when referred to together with Al-Ahly Sporting Club, the "Respondents") is the world governing body for the sport of football, having its headquarters in Zurich, Switzerland.

Al-Ahly Sporting Club ("Al-Ahly" or the "Second Respondent" and, when referred to together with FIFA, the "Respondents") is a professional football club with registered office in Cairo, Egypt. It is affiliated with the Egyptian Football Association (EFA).

On 1 January 2007, the Player and Al-Ahly signed an Egyptian employment contract, effective until the end of the 2009-2010 football season.

On 14 February 2008, a meeting took place in Cairo between, amongst others, the Player, representatives

of Al-Ahly and representatives of FC Sion/Olympique des Alpes SA, with a view to negotiating the possible transfer of the Player from Al-Ahly to FC Sion/Olympique des Alpes SA. No document of any kind was signed by the parties at the end of the meeting. According to the position taken before FIFA by the Swiss club and the Player a verbal arrangement on the transfer was reached, whereas Al-Ahly denies such alleged circumstance.

On 15 February 2008, Mr Christian Constantin, signing the letter as President of FC Sion/Olympique des Alpes SA, wrote to Al-Ahly making reference to the previous day's meeting and informing the Egyptian club that FC Sion/Olympique des Alpes SA had reached an agreement with the Player. Mr Constantin proposed to Al-Ahly's President to meet in Geneva in order to *"find a friendly settlement between our clubs"*.

On the same day, the Player and FC Sion/Olympique des Alpes SA signed a Swiss employment contract effective until the end of the 2010-2011 football season.

Still on the same day, which was the last date for registering players in Switzerland, FC Sion/Olympique des Alpes SA filed a "Request for Transfer" ("Demande de transfert") with the SFA for the Player to be registered as a non-amateur player with the first team of FC Sion/Olympique des Alpes SA. The SFA then requested from the EFA the issuance of the International Transfer Certificate (ITC) for the Player in favour of FC Sion/Olympique des Alpes SA.

On 20 February 2008, the Player took part in an Egyptian championship game for Al-Ahly.

On 21 February 2008, the Player travelled to Switzerland in order to undertake the required medical examination.

On 22 February 2008, FC Sion/Olympique des Alpes SA wrote again to Al-Ahly in order to obtain an answer regarding the transfer of the Player.

On the same day, the Player also wrote to Al-Ahly to urge the latter to keep the promise that, allegedly, the Egyptian club had made to let him continue his career with a European club after the Africa Cup of Nations held in January 2008.

On 23 February 2008, the EFA refused to issue the ITC. The EFA asserted that the player was contractually bound to its affiliated club Al-Ahly until the end of the season 2009-10.

On 24 February 2008, Al-Ahly replied to the letters of 15 and 22 February from FC Sion/Olympique des Alpes SA and stated that it had never agreed to the transfer of the player during the meeting in Cairo. It further emphasized that the player was under contract until the end of the season 2009-2010.

On 25 February 2008, the Player informed Al-Ahly in writing that he was terminating his contract with the Club.

On the same day, FC Sion/Olympique des Alpes SA sent a fax to Al-Ahly which contained a final offer in relation to the transfer of the Player.

On 27 February 2008, FC Sion/Olympique des Alpes SA sent an urgent letter to FIFA requesting its assistance for the issuance of the ITC to allow the Player to be registered with the SFA as a player of FC Sion/Olympique des Alpes SA. The Player himself signed the letter at the bottom: *"Signé le 27 février 2008 pour accord, pour valoir exactitude des informations contenues et pour valoir confirmation qu'il est impossible pour le joueur d'envisager un retour au pays. E."*.

On 28 February 2008, FIFA attributed a reference number (08-00194/maj) to the matter and answered to FC Sion/Olympique des Alpes SA, indicating that it needed a request from the SFA with some documentation. On the same day, the SFA, prompted by FC Sion/Olympique des Alpes SA, sent the request for the ITC to FIFA.

On 14 March 2008, FIFA faxed a letter to the SFA asking *"for the sake of good order"* to receive *"a power of attorney authorizing the legal representative of the club FC Sion to act on its behalf in the present matter"*.

On 19 March 2008, the attorney at law Mr Alexandre Zen-Ruffinen wrote to FIFA indicating that *"FC Sion"* had released a power of attorney in his favour and attached the following power of attorney issued by FC Sion/Olympique des Alpes SA, authorizing him to represent such club before FIFA or any other competent authority in connection with the transfer of the Player:

"Procuration

Le FC Sion/Olympique des Alpes SA confirme avoir donné mandat à Me Alexandre Zen-Ruffinen, avocat à Neuchâtel, pour défendre ses intérêts dans le cadre du dossier relatif au transfert du jouer Essam El Haddary (Egypte). La présente procuration est valable devant toute institution ou autorité, que ce soit la FIFA, l'ASF ou des instances civiles

Martigny, le 19 Mars 2008

Pour Olympique des Alpes SA
Domenicangelo Massimo, directeur général".

On 27 March 2008, the attorney Mr Zen-Ruffinen wrote to FIFA stating the position of his client (*"le FC Sion prend position comme suit sur l'affaire…"*) and insisting that FIFA grant the ITC in order to allow the Player to work and the club to field him.

On 4 April 2008, both FC Sion/Olympique des Alpes SA and the Player, through their attorneys, wrote to FIFA insisting that Al-Ahly's contentions be ignored and that the ITC be delivered immediately.

On 11 April 2008, the Single Judge of the FIFA Players' Status Committee (the "Single Judge") granted a provisional ITC, authorising the Swiss Football Association to provisionally register the Player and allowing him to play for FC Sion with immediate effect. The Single Judge emphasised that the decision was *"without prejudice and pending the outcome of a contractual labour dispute between the player and the Egyptian club as to the substance of the matter, which would have to be dealt with by the Dispute Resolution Chamber. (…)".*

On 12 June 2008, Al-Ahly, lodged a claim against the Player and *"the Swiss club FC Sion"* for, respectively, breach of contract and inducement to breach of contract.

On 18 June 2008, FIFA wrote to the SFA, FC Sion/ Olympique des Alpes SA and the Player (c/o the Swiss club), forwarding a copy of Al-Ahly's claim. FIFA's communication included the same reference number (08-00194/maj) used by FIFA during the proceedings leading to the Single Judge's decision.

On 23 June 2008, Mr Zen-Ruffinen, being the attorney already empowered by FC Sion/Olympique des Alpes SA, wrote to FIFA stating that *"FC Sion"* had forwarded him Al-Ahly's claim and had asked him to defend the club on the basis of the power of attorney already on file with FIFA.

On 10 July 2008, Mr Zen-Ruffinen requested FIFA to provide a copy of the contract between the Player and Al-Ahly, reminding that this was essential in order to respect the procedural rights of his client: *"le FC Sion ne peut exercer son droit d'être entendu valablement s'il n'a pas connaissance du contrat supposément violé"*. Mr Zen-Ruffinen also specified that his letter was not to be considered as addressing the merits of the case and that, for reasons that were going to be stated at a later stage *"le FC Sion déclinera toute qualité pour défendre à la présente affaire et juge quoi qu'il en soit la demande irrecevable en ce qu'elle le concerne"*.

On 15 July 2008, both the Player's attorney at law Mr Léonard A. Bender and Mr Zen-Ruffinen, on behalf of their respective clients, filed with FIFA the answers to the claim lodged by Al-Ahly. In particular, Mr Zen-Ruffinen, in addition to the defence on the merits, argued on a preliminary basis that Al-Ahly had made a mistake in designating "FC Sion" as a defendant in the FIFA procedure because "FC Sion" was an amateur club which was not a member of the SFL and, therefore, the claim had to be rejected for *"défaut de légitimation passive"*, i.e. for lack of "standing to be sued":

"Al Ahly a dirigé sa demande contre le FC Sion.

Le FC Sion est:

- *d'une part, le "nom sportif" donné à une équipe de football professionnel évoluant en Super League (1ère division suisse), sans existence juridique propre et donc ne disposant d'aucune qualité pour défendre, la dite qualité appartenant exclusivement à Olympique des Alpes SA (club n° 8700), pas mis en cause dans la présente procédure ;*

- *d'autre part une association au sens des articles 60ss du Code civil suisse (club n° 8400), membre de l'Association valaisanne de football (AVF), mais non pas de la Swiss Football League (SFL), dont l'équipe la mieux classée en 6ème division suisse et qui ne possède donc pas la légitimation passive dans la présente affaire.*

A titre préalable, c'est donc à tort que Al-Ahly désigne le FC Sion comme partie défenderesse à la présente action. Le défaut de qualité pour défendre entraîne l'irrecevabilité de la demande alors que le défaut de légitimation passive entraîne le rejet au fond de la demande".

On 26 November 2008, FIFA forwarded the answers to Al-Ahly, which filed its reply on 10 December 2008. In particular, with regard to the issue of standing to be sued, Al Ahly stated as follows in the relevant part:

"FC Sion asserts not having standing to be sued in this matter and that only the limited company Olympique des Alpes SA has. The club that has however requested through the Swiss Football Association the registration of the Player is FC Sion and the club for which the Player is eligible to play is again FC Sion. The assertion that FC Sion has no standing to be sued are [sic] therefore unfounded and to be rejected. In any event, and in order to please the representatives of FC Sion, the present claim is enlarged in order to also comprise beside FC Sion also Olympique des Alpes SA as respondent. The terminology FC Sion used in the claim includes hence also Olympique des Alpes SA".

On 5 February 2009, Mr Zen-Ruffinen filed a rejoinder on behalf of the Swiss club whereby, besides

submitting arguments on the merits, he confirmed his position as to the issue of standing to be sued. In particular, he contested the possibility of Al-Ahly to extend the procedure to a third party arguing that, in accordance with general procedural principles, it is the introductory statement which creates the procedural link between the parties without any possibility of subsequent alterations, so stating in the relevant part:

"Le club demandeur croit pouvoir "étendre" la procédure à Olympique des Alpes SA; il est formellement contesté qu'une partie qui se trompe en désignant l'adverse partie puisse simplement déclarer, en milieu de procédure, qu'il élargit la cause à une entité tierce. Conformément au droit général de procédure, c'est en effet l'ouverture de la procédure qui crée le lien d'instance entre les parties. Olympique des Alpes SA n'est pas partie à la présente procédure".

On 16 April 2009, the DRC rendered a decision (the "Appealed Decision") stating as follows in the ruling part (*"dispositif"*):

"1. The claim of the Egyptian club Al Ahly Sporting Club is partially accepted.

2. *The Egyptian player E. has to pay the amount of EUR 900,000 to Al Ahly Sporting Club within 30 days of notification of the present decision.*

3. *The Swiss Club FC Sion is jointly and severally liable for the payment of the aforementioned compensation.*

4. *Al Ahly Sporting Club is directed to inform the player E. and the club FC Sion directly and immediately of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.*

5. *If this amount is not paid within the aforementioned time limit, a 5% interest rate per annum as of the expiry of the said time limit will apply and the matter will be submitted, upon request, to the FIFA Disciplinary Committee for its consideration and decision.*

6. *A restriction of four months on his eligibility to play in official matches is imposed on the player E. This sanction shall take effect as of the start of the next season of the player's new club following the notification of the present decision.*

7. *The club FC Sion shall be banned from registering any new players, either nationally of internationally, for the two next entire and consecutive registration periods following the notification of the present decision.*

8. *Any further request filed by the club Al Ahly Sporting Club is rejected".*

On 17 April 2009, both Mr Bender and Mr Zen-Ruffinen wrote on behalf of their clients stating that, to their surprise, the internet site of Al-Ahly had given the news – then spread by the Egyptian media – that the case had been decided in Al-Ahly's favour, sanctioning their respective clients and imposing them to pay EUR 900,000 as compensation to Al-Ahly. As consequence, they both argued that Al-Ahly had an improper access to some members of the DRC and asked for the recusal of all the members of the DRC.

On 30 April 2009, FIFA wrote to the parties stating that from FIFA's side no communication regarding the outcome of the matter had been made to any of the parties.

On 18 June 2009, FC Sion Association filed a Statement of Appeal with the Court of Arbitration for Sport (CAS) against the Appealed Decision (CAS 2009/A/1880 FC Sion v. FIFA & Al-Ahly Sporting Club), together with some exhibits. It submitted the following request for relief (free translation from the original French text):

"<u>As a provisional measure</u>:

1. *To grant an interim stay of the effects of the Appealed Decision.*

2. *To decide that the costs and the legal expenses of the provisional measure will follow the decision on the merits.*

<u>As to the merits</u>:

3. *To quash the decision of 16 April 2009 by the FIFA Dispute Resolution Chamber.*

4. *To order the Respondents to jointly bear the costs incurred with the present arbitration and to pay to the Appellants an equitable contribution towards their legal fees and expenses".*

On the same day, the Player filed a Statement of Appeal with the CAS against the Appealed Decision (CAS 2009/A/1881 E. v. FIFA & Al-Ahly Sporting Club), together with some exhibits. It submitted the following requests for relief (free translation from the original French text):

"1. The appeal is upheld; as a consequence, the decision of 16 April 2009 by the FIFA DRC is quashed.

2. *To order the Respondent to bear the costs incurred with the present arbitration.*

3. *To order the Respondent to pay to the Appellant an equitable contribution towards its legal fees and expenses".*

The Player also requested an interim stay of the effects of the Appealed Decision and contested the jurisdiction of the CAS.

On 7 July 2009, the Deputy President of the Appeals Arbitration Division granted the interim stay of the effects of the Appealed Decision sought by the First Appellant until a decision of the Panel on the merits of the case. On the same day, he also granted the interim stay of the effects of the Appealed Decision sought by the Second Appellant until a decision of the Panel on the merits of the case.

On 10 July 2009, FC Sion Association submitted its Appeal Brief, confirming the request for relief sought in its Statement of Appeal.

On the same day, the Player submitted his Appeal Brief, seeking the following requests for relief (free translation from the original French text):

"1. The appeal is upheld.

2. *Principally, the CAS has no jurisdiction to entertain the case.*

3. *Subsidiarily, the appeal is upheld and the case is reverted to FIFA for new proceedings and a new decision.*

4. *More subsidiarily, the appeal is upheld and the FIFA decision of 16 April 2009 is quashed.*

5. *The legal expenses and the costs of the arbitration are borne by the Respondents".*

By Partial Award on Lis Pendens and Jurisdiction dated 7 October 2009, the Panel dismissed the request of the Second Appellant to stay the arbitration CAS 2009/A/1881 on grounds of *lis pendens*. It also decided that CAS retained jurisdiction to adjudicate on the merits the appeal submitted by the Player against the Appealed Decision.

On 6 November 2009, the Player lodged an appeal before the Swiss Federal Tribunal (the "Federal Tribunal") against the Partial Award on Lis Pendens and Jurisdiction.

By judgement of 20 January 2010, the Federal Tribunal dismissed the appeal of the Second Appellant and thereby confirmed the jurisdiction of the CAS.

Extracts of the legal findings

A. Violation by FIFA of the Appellants' due process rights and de novo ruling

The Appellants claim that FIFA seriously infringed their due process rights, in particular not granting them their full right to be heard, being biased in favour of Al-Ahly and committing a denial of justice by not deciding on the challenge against the members of the DRC. As a consequence, the Appellants contend that the Appealed Decision should be annulled.

However, the Panel must point out that there is a long line of CAS awards, even going back many years, which have relied on Art. R57 of the CAS Code (*"The Panel shall have full power to review the facts and the law"*) to firmly establish that the CAS appeals arbitration allows a full *de novo* hearing of a case, with all due process guarantees, which can cure any procedural defects or violations of the right to be heard occurred during a federation's (or other sports body's) internal procedure. Indeed, CAS appeals arbitration proceedings allow the parties ample latitude not only to present written submissions with new evidence, but also to have an oral hearing during which witnesses are examined and cross-examined, evidence is provided and comprehensive pleadings can be made. This is exactly what happened in the present CAS proceedings, where the Appellants were given any opportunity to fully put forward their case and to submit any evidence they wished.

For instance, among the many that could be quoted in this connection, in CAS 2003/O/486, the Panel clearly stated:

"*In general, complaints of violation of natural justice or the right to a fair hearing may be cured by virtue of the CAS hearing. Even if the initial "hearing" in a given case may have been insufficient, the deficiency may be remedied in CAS proceedings where the case is heard "de novo"*" (para. 50).

As another example, in TAS 2004/A/549, the Panel stated:

"le TAS jouit, sur le fondement des dispositions de l'article 57 du Code de l'arbitrage, d'un plein pouvoir d'examen. Ce pouvoir lui permet d'entendre à nouveau les parties sur l'ensemble des circonstances de faits ainsi que sur les arguments juridiques qu'elles souhaitent soulever et de statuer définitivement sur l'affaire en cause ainsi d'ailleurs, que le demande l'appelant en l'espèce. Un tel système, où la Formation examine l'ensemble des griefs de fait et de droit soulevés par les parties permet de considérer comme purgés les vices de procédure ayant éventuellement affecté les instances précédentes. Ce principe a été confirmé par le TAS à de nombreuses reprises" (para. 31).

Among the numerous CAS panels that have expressed the same notion, the following examples can also be mentioned: CAS 2006/A/1153 at para. 53; CAS 2008/A/1594 at para. 109; TAS 2008/A/1582 at para. 54; CAS 2008/A/1394 at para. 21; TAS 2009/A/1879 at para. 71.

The Panel observes that the CAS does not act as an administrative court reviewing an act of an administrative authority where, usually, the scope of review is characterised by minimum standards of scrutiny, mostly procedural, and the administrative court may not substitute its own judgement for that of the administrative authority. Typically, administrative courts may only control the fairness and correctness of the previous procedure, the way in which the decision was arrived at, the reasons given for the decision, the competence of the body adopting the decision and the like. In contrast, it is the duty of a CAS panel in an appeals arbitration procedure to make its independent determination of whether the Appellant's and Respondent's contentions are correct on the merits, not limiting itself to assessing the correctness of the previous procedure and decision. Accordingly, the Panel deems as not relevant to CAS proceedings the Swiss jurisprudence quoted by the Appellants with reference to appeals against decisions of administrative authorities.

As a consequence, given the complete power granted by the CAS Code to fully review the facts and the law, the Panel considers as irrelevant any defects of the DRC proceedings and any infringements of the Appellants' procedural rights committed by FIFA bodies or FIFA staff; accordingly, the Panel proceeds to rule on the case *de novo* superseding the Appealed Decision.

B. FC Sion Association's standing to appeal

The Panel agrees with the Appellants that, as testified at the hearing by Mr Breiter (of the SFA) and Mr Schäfer (of the SFL), FC Sion Association and FC Sion/Olympique des Alpes SA are two formally distinct legal entities. While both entities are commonly known under the identical label of FC Sion, the former is an amateur club (registered with the SFA as member no. 8040) while the latter is a professional club (registered with the SFA as member no. 8700), as explained above.

The Panel has also no doubt that the party appealing to the CAS against the Appealed Decision and participating in the present arbitration has been FC Sion Association and not FC Sion/Olympique des Alpes SA. This was made very clear by counsel for the First Appellant both at the hearing and in the written briefs. In particular, the decisive element is the power of attorney dated 28 August 2009 appointing as attorneys for this arbitration Messrs Zen-Ruffinen and Dreyer, which was clearly released by FC Sion Association, stating *inter alia* as follows:

"FC Sion Association donne mandat, avec faculté de substitution et élection de domicile à son étude, à Me Dominique Dreyer/Me Alexandre Zen-Ruffinen aux fins de le représenter devant le TAS, suite à la décision de la CRL-FIFA dans l'affaire E./Al Ahly Sporting Club. […]".

This said, given the doubts arisen in the Panel's mind from the undisputed fact that the club that hired the Player and obtained from FIFA the provisional ITC was FC Sion/Olympique des Alpes SA and not FC Sion Association (see *supra*), the Panel must ascertain on a preliminary basis whether FC Sion Association has any legal interest and standing to appeal the decision adopted by the DRC on 16 April 2009 (see the Appealed Decision's ruling *supra*).

In order to solve such issue, the Panel must necessarily determine whether FC Sion Association was a party to the FIFA proceedings and whether the Appealed Decision (holding *inter alia* that *"FC Sion is jointly and severally liable* [with the Player] *for the payment of the aforementioned compensation"* and that *"FC Sion shall be banned from registering any new players, either nationally of internationally, for the two next entire and consecutive registration periods"*) was in fact directed against FC Sion Association.

Indeed, if the Panel were to find that FC Sion Association was not a party to the FIFA proceedings or that, even if it were a party, FC Sion Association was not affected at all by the ruling (*"dispositif"*) of the Appealed Decision, FC Sion Association would not have a cause of action or legal interest (*"intérêt à agir"*) to act against the Appealed Decision and to ask (as FC Sion Association did) to quash it. Accordingly, the First Appellant would have no standing to appeal on the basis of the well-known general procedural principle that if there is no legal interest there is no standing (*"pas d'intérêt, pas d'action"*). In such a case, the appeal filed by FC Sion Association would have to be declared inadmissible.

1. The "aggrievement requirement"

The Panel is in fact of the view that only an aggrieved party, having something at stake and thus a concrete interest in challenging a decision adopted by a sports body, may appeal to the CAS against that decision. In this connection, the Panel notes that in the CAS award 2006/A/1189, the French Football Federation was declared not to have any procedural standing

in the case because it had *"nothing at stake"* in the dispute (para. 6.5 of the award). The same principle was applied in CAS 2007/A/1329-1330 (paras. 27-31 of the award). Similarly, in CAS 2006/A/1206 the panel stated that a party has no standing if it *"is not directly affected by the decision appealed from"* (para. 31 of the award).

The Panel is of the opinion that the above described "aggrievement requirement" is an essential element to determine the legal interest and the standing of a party to appeal before the CAS a sports body's decision, because the duty assigned to a panel by the CAS Code rules governing the appeal arbitration procedure is that of solving an actual dispute and not that of delivering an advisory opinion to a party that has not been aggrieved by the appealed decision (in fact, the "consultation proceedings", yielding CAS advisory opinions, are governed by different provisions of the CAS Code).

2. The First Appellant's twofold assumption

Mindful of the importance of this preliminary matter for the position of the First Appellant, on 6 November 2010, and then again on 13 and 19 November 2010, the Panel drew the parties' attention on the issue of the exact identity of the parties to the FIFA proceedings and specifically requested FC Sion Association to clarify the following:

"What would be its legal interest and standing to appeal in this CAS arbitration, should the Panel determine that FC Sion/ Olympique des Alpes SA (and not FC Sion Association) was a party to the FIFA proceedings".

In its letter dated 3 December 2009 FC Sion Association answered as follows:

"Quant à l'intérêt juridique et à la qualité pour agir du FC Sion Association dans la présente procédure, c'est une question sur laquelle portera l'administration des preuves et qui fera l'objet des plaidoiries. A ce stade, je rappelle que la décision de la FIFA condamnant au paiement de € 900'000.- est dirigée contre l'appelante, ce qui fonde déjà son intérêt juridique et sa qualité pour faire appel".

At the hearing (as well as in its other written submissions), the First Appellant argued that FC Sion Association was in fact the only party that Al-Ahly had called as defendant in the FIFA proceedings because the professional club only uses FC Sion as a "sporting name" which has no legal personality (and thus no legal capacity to be summoned in court as such), and that the legal interest of FC Sion Association was self-explanatory in view of the sanctions imposed on it by FIFA. In the First Appellant's view, on the one hand, the Appealed Decision may not produce any effect against FC Sion/Olympique des Alpes SA since this professional club was not correctly summoned by Al-Ahly in the FIFA proceedings and, on the other hand, the Appealed Decision must be set aside by the CAS because it wrongly inflicts sanctions on an amateur club (FC Sion Association) which did not have standing to be sued by Al-Ahly in the FIFA proceedings.

With regard to this legal interest and standing issue, the Panel observes that, in essence, the entire case of FC Sion Association rests on the following twofold assumption:

a) that Al-Ahly, in naming as defendant *"the Swiss club FC Sion"* in its petition to FIFA dated 13 June 2008, wrongly directed the claim against the amateur club and not against the professional club, and

b) that the subsequent Al-Ahly's communication dated 10 December 2008 clarifying that the *"the terminology FC Sion used in the claim includes hence also Olympique des Alpes SA"* could not validly specify that the claim was directed against FC Sion/ Olympique des Alpes SA because this should have been done at the start of the FIFA proceedings and could not be done once these proceedings had been initiated.

However, the Panel does not share the First Appellant's view with regard to both facets of the above assumption.

3. The addressee of Al-Ahly's petition to FIFA

As to the first facet of the assumption (*supra* at a)), the First Appellant submits that Al-Ahly's imprecise designation of the defendant in its petition to FIFA – the lack of specific reference to the corporate name "Olympique des Alpes SA" – is an unjustifiable and fatal error that inevitably and irremediably brought into the FIFA case the amateur club and left out the professional club. In the Panel's opinion, the First Appellant's argument is captious and misplaced for several reasons, expounded hereinafter.

First of all, the Panel finds that a *bona fide* reading of Al-Ahly's petition to FIFA leads inevitably to reckon that Al-Ahly actually meant to name as defendant the professional club and not the amateur club. Indeed, the Egyptian club states in its petition that the claim is brought against the player E. for breach of contract and against *"the Swiss club FC Sion for inducement of contractual breach"* because on *"15 February 2008 the Player and FC Sion signed an employment*

contract valid until 30 June 2011 without the knowledge or the permission of Al Ahli" and making reference to the fact that the Single Judge had *"provisionally authorized the registration of the Player for FC Sion"*. As the club that hired the Player and that obtained the provisional ITC was undoubtedly FC Sion/Olympique des Alpes SA, and not FC Sion Association, there could be no misunderstanding that, by making reference to FC Sion, Al-Ahly summoned in the case the professional club and not the amateur club (given that the latter had nothing to do with the transfer of E.).

Second, the Panel finds that a considerable confusion on their exact legal identity and proper designation has been generated by the two Swiss clubs themselves because, on the basis of the evidence on file, the Panel has ascertained:

a) that there is a substantial connection between the two legally distinct entities (the professional club and the amateur club), as exemplified *inter alia* by the following coincidences:

   - same address: (…),
   - same telephone number: (…),
   - same fax number: (…),
   - same internet site and domain name: "fc-sion.ch",
   - same logo: the white and red shield with two stars on the left, a large "S" on the right and the inscription "FC Sion" on top,
   - same top officers: Mr Christian Constantin and Mr Domenicangelo Massimo;

b) that the professional club, in its own documents, correspondence and internet site, recurrently identifies itself merely as "FC Sion" without further qualifications and often acts without clearly representing to third parties who is who and which is which or the exact designation of the legal entity with whom the third parties are dealing;

c) that not only the general public and the media but also competent Swiss football authorities, such as SFA officers (even on formal occasions, such as communications to FIFA), routinely use the plain name FC Sion when they in fact make reference to the professional club FC Sion/Olympique des Alpes SA.

Third, the Panel notes that in the FIFA procedure leading to the release of the provisional ITC the plain name "FC Sion" was constantly used in the correspondence sent by all concerned parties, including FC Sion/Olympique des Alpes SA and its legal counsel (as FIFA accurately pointed out with abundant exemplification in its Answer Brief of 4 August 2009). As a matter of course, when the Single Judge authorised the SFA to provisionally register the Player with its *"affiliated club FC Sion"* (see *supra*), no party – especially not FC Sion/Olympique des Alpes SA, who benefitted from the decision – had any difficulty to understand that the Player was authorised to play for the professional club FC Sion/Olympique des Alpes SA. Logically, in writing its petition to FIFA claiming sanctions and compensation for the loss of the Player, Al-Ahly labelled the Swiss club with the same name that up to that moment had been used by everybody involved in the FIFA proceedings.

Fourth, the Panel notes – in line with the decision of the Federal Tribunal dated 20 January 2010 (4A_548/2009 at para 4.2.2, see *supra*) – that under FIFA rules there is a close link between the release of an ITC and the related claims for a contractual breach. Under Article 22(a) of the FIFA Transfer Regulations, FIFA is competent to hear *"disputes between clubs and players in relation to the maintenance of contractual stability (articles 13-18) where there has been an ITC request and a claim from an interested party in relation to said ITC request, in particular regarding the issue of the ITC, sporting sanctions or compensation for breach of contract"*. In the Panel's opinion, this provision makes clear that the FIFA procedure related to the release of an ITC and the FIFA procedure related to the sanctions or compensation for breach of contract are strictly linked because they essentially deal with the same transfer dispute and, thus, they can be viewed as two sides of the same coin (as the Panel already stated in its Partial Award dated 7 October 2009, at para. 79).

In this respect, the Panel observes that the Single Judge, in his decision granting the provisional ITC, clearly warned the Player and FC Sion/Olympique des Alpes SA that there could have been a second stage of the proceedings with regard to the breach of contract *"as well as on the possible consequences thereof, i.e. financial compensation and/or sporting sanctions"* (see *supra*). In addition, significantly, FIFA has attributed the same reference number (08-00194/maj) both to the procedure related to the ITC and to the procedure related to the contractual breach and the consequences thereof, thus confirming that it considered them as two stages of the same case. Accordingly, it was logical to assume that, throughout the entire FIFA proceedings, the parties would keep being named in the same way. Given that the professional club FC Sion/Olympique des Alpes SA had been constantly tagged merely as "FC Sion" during the first stage of the FIFA proceedings, it is unreasonable and contrary to the prohibition of *venire contra factum proprium* to argue that Al-Ahly, in naming as defendant "FC Sion" for the second stage of the same proceedings,

meant to summon into the case – out of the blue – the amateur club FC Sion Association rather than the professional club FC Sion/Olympique des Alpes SA.

Fifth, the Panel finds that, contrary to Mr Zen-Ruffinen's assertion in his submission to FIFA dated 5 February 2009 that FC Sion/Olympique des Alpes had not been notified of Al-Ahly's petition and had not been put in a position to defend itself (*"Olympique des Alpes SA n'est pas partie à la présente procédure. Elle n'a ni reçu de courrier de la FIFA ni eu l'occasion de répondre à la demande de Al-Ahly et ne saurait devenir partie à la procédure sans le savoir et sans avoir l'occasion de se déterminer"*), FIFA correctly communicated the petition on 18 June 2008 to the fax number indicated in the letterhead and in the official internet site of the professional club FC Sion/Olympique des Alpes and, above all, already used by FC Sion/Olympique des Alpes SA itself in order to request FIFA to grant the provisional ITC.

What's more, the Panel finds in the letter dated 23 June 2008 from Mr Zen-Ruffinen to FIFA the decisive evidence that the party duly summoned in the FIFA procedure that yielded the Appealed Decision was in fact FC Sion/Olympique des Alpes SA and not FC Sion Association. In that letter, in order to inform FIFA – in compliance with art. 6.2 of the FIFA Procedural Rules (*"Parties may appoint a representative. A written power of attorney is to be requested from such representatives"*) – that he had been empowered to represent "FC Sion" with regard to Al-Ahly's claim, Mr Zen-Ruffinen expressly stated that FC Sion had transmitted the petition to him and that a power of attorney was already in FIFA's file:

"Le FC Sion m'a transmis votre fax du 18 juin 2008 et m'a chargé de défendre ses intérêts dans ce litige (une procuration figure déjà à votre dossier)".

[Emphasis added]

In this letter, Mr Zen-Ruffinen made reference to and availed himself of the power of attorney previously filed with FIFA in relation to the request for the Player's ITC, i.e. the already quoted *"procuration"* dated 19 March 2008 and signed by Mr Domenicangelo Massimo, expressly acting on behalf of FC Sion/Olympique des Alpes SA in his capacity as Director-General (*"Le FC Sion/Olympique des Alpes SA confirme avoir donné mandat à Me Alexandre Zen-Ruffinen, avocat à Neuchâtel, pour défendre ses intérêts dans le cadre du dossier relatif au transfert du joueur Essam El Haddary"*; see the full text of the power of attorney *supra*.

This means that the same power of attorney, indisputably issued by FC Sion/Olympique des Alpes SA, was used for both stages of the FIFA proceedings and that no power of attorney issued by FC Sion Association was ever filed with FIFA. As a consequence, the Panel must conclude that the club tagged as *"FC Sion"* which on 18 June 2008 transmitted the Al-Ahly's petition to its lawyer Mr Zen-Ruffinen (*"FC Sion m'a transmis votre fax du 18 juin 2008"*) and which, thus, took part in the FIFA proceedings leading to the Appealed Decision was no one else but the professional club FC Sion/Olympique des Alpes SA.

Accordingly, the Panel holds that the mere indication by Al-Ahly of "the Swiss club FC Sion" as the defendant club was wholly justifiable and perfectly understandable by any reasonable person looking at it in good faith, and it reached the intended objective of putting on notice the professional club FC Sion/Olympique des Alpes SA that it had to defend itself before the competent FIFA body because of the previously obtained transfer and hire of E. The first facet of the First Appellant's assumption is thus groundless.

4. Admissibility of Al-Ahly's subsequent clarification

As to the second facet of the First Appellant's twofold assumption (*supra* at b)), the First Appellant submits that, in any event, the imprecise designation of the defendant was a fatal procedural error which could not be remedied by the subsequent clarification by Al-Ahly that *"the terminology FC Sion used in the claim includes hence also Olympique des Alpes SA"* because of a general procedural principle which precludes any such amendment to the initial petition (*"Conformément au droit général de procédure, c'est en effet l'ouverture de la procédure qui crée le lien d'instance entre les parties"*; see *supra*). The Panel finds this argument to be also captious and misplaced for the following reasons.

First of all, the First Appellant does not explain from which legal principles it derives its view. The Panel notes that a wrong denomination of a party can – according to some cantonal Codes of Civil Procedure – be corrected even after a court judgement has been handed down (see Guldener, *Zivilprozessrecht*, 3. ed., 1979, p. 124; see also Vogel/Spühler, *Grundriss des Zivilprozessrechts*, 8th ed., 2006, § 13 no. 103; Staehlin/Sutter, *Zivilprozessrecht*, 1992, § 21 no. 115 *et seq.*). The Panel fails to understand, therefore, why as a matter of principle a clarification of the party's true identity in an internal procedure of an association should not be possible during the course of this procedure. In this connection, the Panel notes that Al-Ahly clarified that it meant to sue FC Sion/Olympique des Alpes SA on the first occasion where it could reply to the defendant's objection that the wrong entity (i.e. the amateur club) had been named as defendant. In the

Panel's view, Al-Ahly did not extend the procedure to a third party, but simply specified that by saying "FC Sion" it meant to name as defendant the same entity (i.e. the professional club) that had hired the Player a few months before.

Second, the FIFA Procedural Rules do not preclude a party from specifying the exact name of the defendant at a later stage or even from extending the procedure to a third party during the course of the proceedings. Quite the reverse, Article 9.2 of the FIFA Procedural Rules explicitly allows a party – upon invitation by FIFA and thus, *a fortiori*, also spontaneously – to *"redress"* an incomplete petition and submit it again if it was originally lacking some of the information or data required under Article 9.1.

Third, the Panel observes that FIFA proceedings are not court proceedings, and not even arbitral proceedings. Rather, they are "intra-association proceedings", based on the private autonomy of the association, which by definition lack the procedural rigour that one can find in true court proceedings. In the Panel's view, general procedural principles that may apply to court proceedings or arbitral proceedings do not automatically apply to intra-association proceedings. Their possible application to intra-association proceedings must be demonstrated in each specific case by the party invoking them. Lacking this demonstration, it would be an excessive formalism to deem that a party to an intra-association dispute settlement procedure might not be allowed to specify the exact name and identity of the defendant as soon as an objection is raised in this respect.

Therefore, the Panel holds that, even if Al-Ahly's indication of "the Swiss club FC Sion" as the defendant club could be deemed as imprecise, its subsequent clarification that its claim was unmistakably directed against the professional club FC Sion/Olympique des Alpes SA cured any such imprecision. The second facet of the First Appellant's assumption is thus groundless as well.

5. FC Sion Association's lack of legal interest and standing to appeal

Given that the First Appellant's twofold assumption is unfounded, the Panel must necessarily dismiss the First Appellant's submission that Al-Ahly's complaint should have been rejected by FIFA because it had summoned in the proceedings a party (the amateur club FC Sion Association) which did not have standing to be sued.

The Panel remarks that, while FC Sion Association is correct in asserting that it did not have standing to be sued by Al-Ahly in front of the DRC, it is incorrect in assuming and contending that it was actually sued by Al-Ahly and summoned to participate in the FIFA proceedings. All communications sent to FIFA by Mr Zen-Ruffinen during the FIFA proceedings – contrary to his allegations – were in fact sent on behalf of FC Sion/Olympique des Alpes SA and not on behalf of FC Sion Association because, as previously emphasised, the required power of attorney was undeniably released by the former and not by the latter club (see *supra*).

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 thus 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.

The Panel finds that this is what was meant by the DRC when it stated the following in the Appealed Decision (at the end of para. 4):

"the Dispute Resolution Chamber lent emphasis to the fact that the player's new employment contract names "the club of the Swiss Football League: FC Sion – Olympique des Alpes SA" […] as his counterparty. On account of these circumstances, the members of the Chamber concluded that the designation of "FC Sion" as the defending club in the present matter is correct and that the respective argumentation of the Swiss club in order to avoid its participation in the present proceedings must be rejected".

In the Panel's opinion it is irrelevant that, a few lines before the above quotation, the DRC stated that the club for which the Player *"has been registered […] 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"*. The Panel is of the view that this DRC's dictum, albeit confusing, must be necessarily read in light of the above quoted conclusion of the reasoning (at the end of the same para. 4 of the Appealed Decision) as directed at solving the issue of the *"designation"* used by Al-Ahly to identify the defendant club. The Panel has no hesitation in finding that the DRC meant to consider as party to its proceedings, and as addressee of its ruling, the professional club and not the amateur club. In any event, as already observed, a CAS panel does not act as an administrative court controlling the reasoning of the challenged decision, but it determines any disputed issue *de novo* (see *supra*). Accordingly, the wording used by the DRC in a dictum of its ruling is clearly irrelevant. What matters is the above finding by this Panel that FC

Sion Association was not summoned by Al-Ahly in the FIFA proceedings, was not a party to the FIFA proceedings, and was not affected by the Appealed Decision.

In this regard, incidentally, the Panel notes that if the SFA or the SFL gave a different interpretation of the Appealed Decision their understanding was clearly erroneous, and it is a matter for those sports bodies (which are not parties to this arbitration and are not under the jurisdiction of this Panel) to spontaneously revise that interpretation.

In conclusion, as the Panel has found that FC Sion Association was not a party to the FIFA proceedings and that it was not affected by the ruling of the Appealed Decisions, the Panel finds that FC Sion Association does not meet the above illustrated aggrievement requirement (see *supra*). As a result, the Panel holds that the First Appellant FC Sion Association lacks legal interest and, thus, standing to appeal, with the consequence that the Panel may not entertain the First Appellant's appeal. Accordingly, as its appeal is inadmissible, the Panel must disregard the First Appellant's submissions on the merits of the case and decline to adjudicate its related motions.

6. Legal consequences for FC Sion/Olympique des Alpes SA

A necessary consequence of this Panel's holding is that FC Sion/Olympique des Alpes SA was a party to the FIFA proceedings and was clearly affected by the Appealed Decision. It would have had, therefore, an obvious legal interest and standing to bring an appeal against the Appealed Decision. However, insofar as FC Sion/Olympique des Alpes SA has not appealed the Appealed Decision in the context of this case and is not a party to the present arbitration (as made abundantly clear by the First Appellant), the Panel may not issue a decision vis-à-vis FC Sion/Olympique des Alpes SA.

Incidentally, the Panel remarks that, as a further consequence, item 3 and item 7 of the Appealed Decision's ruling (which affect only FC Sion/Olympique des Alpes SA), i.e. the ban from registering any new players for the two registration periods (which was provisionally lifted further to a CAS Order dated 7 July 2009, an Order which has become ineffective with the notification of the present award) and the joint and several liability imposed (see *supra*), might be considered by this time as binding insofar as they have not been appealed by FC Sion/Olympique des Alpes SA within the provided deadline. The consequences for failing to meet the prescribed deadline for appeal would seem to be that FC Sion/Olympique des Alpes SA is estopped from invoking any procedural or material flaws of the Appealed Decision. FC Sion/Olympique des Alpes SA – in other terms – might be deemed to have waived the right to claim that the FIFA decision is contrary to the statutes and regulations or other applicable principles of law (cf. Heini/Scherrer, Basler Kommentar, 3rd ed. 2006, Art. 75 ZGB no. 22; Riemer, Berner Kommentar, 1990, Art. 75 ZGB no 62).

However, the Panel notes that, even though FC Sion/Olympique des Alpes SA might be estopped from challenging the Appealed Decision, the applicable rules and regulations may provide that – under certain conditions – the content of said decision is altered because of new facts and circumstances. In the Panel's view, this is true with respect to the *amount* of the pecuniary liability imposed on FC Sion/Olympique des Alpes SA because of the Player's contractual breach vis-à-vis Al-Ahly. Indeed, it is the Panel's understanding that, according to the applicable regulations (Art. 17.2 of the FIFA Transfer Regulations), the pecuniary liability of the professional club has a subsidiary character and its extent necessarily depends on the amount of compensation determined to be owed (or not owed) by the Player to Al-Ahly. As this amount was determined by item 2 of the Appealed Decision's ruling (see *supra*), and item 2 was validly challenged by the Player, any decision of this Panel with regard to this issue, i.e. any decision concerning the Player's contractual liability (and, should he be liable, the extent of such liability) will necessarily have repercussions on FC Sion/Olympique des Alpes SA's position as joint and several obligor (*"codébiteur solidaire"*). The Panel's view is backed also by previous CAS jurisprudence (see paras. 54-58 of the award rendered in the joined cases TAS 2009/A/1960 and TAS 2009/A/1961). In other terms, even not being a party to the present arbitration, FC Sion/Olympique des Alpes SA might end up indirectly benefitting of the arbitral award.

However, since FC Sion/Olympique des Alpes SA is not a party to these proceedings, the aforementioned possible consequences of this Panel's decision are expressed herein only as *obiter dicta* and cannot be part of the *dispositif* of the present award.

C. E.'s contractual breach and consequences thereof

1. Absence of a mutual termination agreement

With regard to the merits, the first question that must be addressed by the Panel is whether the employment relationship between the Player and Al-Ahly was

terminated by mutual agreement or whether the Player breached his employment contract with Al-Ahly in order to play for FC Sion/Olympique des Alpes SA.

The Player submits that the Second Respondent released the Player when it gave him the authorisation to sign an employment contract with FC Sion/ Olympique des Alpes SA; therefore, the employment contract with Al-Ahly was terminated by mutual agreement. According to the Player, the lack of agreement between the two clubs on the amount of the transfer fee is not relevant for the question of the termination of the contract.

The Panel does not share the opinion of the Player. In order to find for the Player on this count, the Player should have presented much more persuasive evidence that Al-Ahly had expressly agreed to terminate the contract with the Player even without having any assurance of receiving some consideration in exchange for the Player's transfer to Switzerland. Indeed, it is common experience in the football world that transfer agreements need necessarily the full consent of the three parties involved, i.e. the two clubs and the footballer. Very strong evidence – possibly written evidence – is needed to demonstrate such consent, given that the loss of a player (let alone an important player) always creates difficulties to the club losing him.

Even the deposition of Mr Zeaf (the only witness of the tripartite meeting of 14 February 2008 in Cairo on which the Player relies) is not so clear-cut to persuade the Panel that Al-Ahly truly waived, for free, any contractual right over the Player. On the contrary, the Panel finds that the deposition of Mr Zeaf lends some credence to Al-Ahly's contention that an agreement on the amount of financial compensation for the release of the Player was one of the *essentialia negotii* of the transfer deal.

Mr Zeaf attested indeed that the two clubs had come close to an agreement on the amount of the transfer fee but had never in fact agreed on such amount. He also stated that, although Al-Ahly had allowed the Player and the Swiss club to negotiate between themselves with a view to agreeing on an employment contract, the Egyptian club had always been clear that, afterwards, a negotiation was needed between the two clubs with regard to the amount of the transfer fee. According to Mr Zeaf's testimony at the hearing, Mr Elkeie, who was the representative of Al-Ahly during the tripartite meeting, stated: *"puisque le temps presse, mettez-vous d'abord d'accord avec le joueur, et nous, entre clubs, on va trouver une solution, puisque malgré tout on n'est pas loin, on va faire un geste, vous vous faites un geste et on trouve une solution"*. Mr Zeaf testified that the Player and FC Sion/Olympique des Alpes SA went in another room to separately negotiate the terms of a possible employment agreement and that, when they came back after reaching such agreement, the Player had another talk with a representative of Al-Ahly (Mr Zeaf did not specify his name), whose words were: *"Ecoute, tu ne pars pas maintenant, d'abord il faut que l'on trouve une solution entre les deux clubs, et tu fais avec nous un match comme un match d'adieu […]"*. Finally, Mr Zeaf explained that Mr Elkeie had told the Player that *"vu les douze années que vous avez passées au Club, vu les 29 titres que vous avez gagnés avec nous, c'est pas aujourd'hui qu'on va vous embêter pour partir, il n'y a pas de problème, mais le chiffre de USD 400,000, c'est très peu pour un joueur de votre valeur, même un jeune joueur que j'irais chercher en Egypte coûte beaucoup plus cher que ces USD 400,000. Il faut qu'ils [le FC Sion/Olympique des Alpes SA] nous donnent un peu plus et on va trouver un chemin d'entente, pas de problème"*.

In brief, even the words of Mr Zeaf cannot lead the Panel to find, on the balance of probability, that Al-Ahly expressed its assent to the transfer prior to agreeing on the transfer fee. Considering that Al-Ahly would have lost all its bargaining chips vis-à-vis the Swiss club if it had authorized the Player to freely rescind his employment contract, the Panel – judging by a standard of reasonableness – finds that the attitude expressed by Al-Ahly at the Cairo meeting meant that that a potential release of the Player from its contractual obligations was linked to an agreement on the financial compensation, which could allow Al-Ahly to hire another goalkeeper. It is true that the Swiss club may possibly have been comforted by the cooperative attitude of Al-Ahly during the tripartite meeting that the latter would eventually allow the Player to transfer to Switzerland. However, the Panel is not persuaded by the available evidence that a definite meeting of the minds of all three parties was reached in Cairo, to the effect that the Player was allowed to terminate the contract with Al-Ahly before the financial aspects of the transfer were settled between the two clubs.

In particular, the Player was not able to invoke any persuasive written evidence supporting his position. Quite the opposite, it seems to the Panel that the correspondence exchanged between the two clubs on 15, 22 and 26 February 2008 (see *supra*) lends support to its view that the transfer deal was not perfected and that Al-Ahly by no means had agreed to let the Player go unconditionally.

It seems to the Panel that the available oral and written evidence shows that any possible assent given by Al-Ahly to the transfer was, anyhow, subject to the condition of an agreement on the transfer fee.

In other terms, the Panel is of the opinion that, even assuming in the Player's favour that Al-Ahly did promise the Player to let him go, such promise was conditional upon the payment by FC Sion/Olympique des Alpes SA of an acceptable compensation. The non-occurrence of the condition had the effect that the Player was not liberated from his contractual obligations vis-à-vis Al-Ahly.

In view of the above the Panel finds that, on the balance of probability, the Player did not satisfy his burden of proving that the employment contract with Al-Ahly was terminated by mutual agreement in the sense of Article 13 of the FIFA Transfer Regulations. Therefore, as the Panel does not see any convincing evidence that the contract was terminated by the Player for "just cause" or "sporting just cause" (Articles 14 and 15 of the FIFA Transfer Regulations), the Player must be deemed to have unilaterally terminated his employment contract with the Second Respondent without just cause. The financial and disciplinary consequences of such breach are set out in Article 17 of the FIFA Transfer Regulations.

2. Compensation for the breach

Article 17.1 of the FIFA Transfer Regulations sets the principles and the method of calculation of the compensation due by a player or a club because of a breach or unjustified unilateral termination of a football employment contract.(aa) Absence of a liquidated damages clause

First of all, the Panel observes that Article 17.1 of the FIFA Transfer Regulations sets forth the principle of the primacy of the contractual obligations concluded by a player and a club: *"[…] unless otherwise provided for in the contract […]"*. The same principle is reiterated in Article 17.2. Therefore the Panel must preliminarily verify whether there is any provision in the employment contract between the Player and the Second Respondent that does address the consequences of a unilateral termination of the contract by either of the parties. Such kinds of clauses are, from a legal point of view, liquidated damages provisions (see, among others, CAS 2007/A/1358, at para. 87; CAS 2008/A/1519-1520, at para. 68).

In this regard, the Panel notes that the employment contract between the Player and Al-Ahly does not include any provision setting forth the amount of compensation to be paid in case of breach or unilateral termination. Accordingly, the compensation due by the Player must be calculated in accordance with the criteria set forth by Article 17.1 of the FIFA Transfer Regulations.

2.1. The criteria set forth by Article 17.1 of the FIFA Transfer Regulations

According to art. 17.1 of the FIFA Transfer Regulations, if the parties have not agreed a specific amount of liquidated damages, the compensation for a unilateral breach and a premature termination shall be calculated with due consideration for:

- the *"law of the country concerned"*,
- the *"specificity of sport"*,
- and *"any other objective criteria"*, including 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"*.

The Panel notes that Article 17.1 of the FIFA Transfer Regulations is an attempt by FIFA to give some directions on how to calculate the damage suffered. Accordingly, the calculation of the compensation due under art. 17 FIFA Transfer Regulations *"shall be diligent and there is no power for the judging authority to set the amount due in a fully arbitrary way"* (CAS 2008/A/1519-1520, at para. 89).

However, the Panel wishes to emphasize that, when determining the amount of compensation due, the judging authority has a wide margin of appreciation (*"a considerable scope of discretion"* according to CAS 2008/A/1519-1520, at para. 87). In particular, the Panel is of the view that each of the factors listed in Article 17.1 is relevant, but that any of them may be decisive on the facts of a particular case.

Indeed, Article 17.1 does not require the judging authority – be it the DRC or the CAS – to necessarily evaluate and give weight to any and all of the factors listed therein. Depending on the particular circumstances of each case and on the submissions of the parties, any of those factors may be relevant or irrelevant to the final decision, influencing or not the discretionary assessment of the compensation due. Therefore, it is up to each party to stress the factors which it believes could be in its favour in order to discharge its burden of persuasion. In particular, as the CAS Code sets forth an adversarial system of arbitral justice and not an inquisitorial one, a CAS panel has no duty to analyse and give weight to any specific factor listed in Article 17.1 if the parties do not actively substantiate their allegations with evidence and arguments based on such factor.

Therefore, in line with other CAS panels, in its analysis of the relevant criteria the Panel does not feel bound to give weight to all of the listed criteria or to follow exactly the order by which those criteria are set forth by Article 17.1 of the FIFA Transfer Regulations.

The Panel also remarks that, given that the compensation to be granted derives from a breach or unjustified termination of a valid contract, it will be guided in calculating the compensation due by the principle of the so-called "positive interest" or "expectation interest"; accordingly, the Panel will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if no contractual breach had occurred (see CAS 2008/A/1519-1520, at para. 86; CAS 2006/A/1061, at para. 40; see also the decisions of the Swiss Federal Tribunal ATF 97 II 151, ATF 99 II 312; in the legal literature, see Streiff/von Kaenel, Arbeitsvertrag, Art. 337b no. 4 and Art. 337d no. 4; Staehelin, Zürcher Kommentar, Art. 337b no. 7 and Art. 337d no. 7; Wyler, Droit du travail, 2nd ed., p. 522).

2.2 The law of the country concerned

Article 17.1 of the FIFA Transfer Regulations requires the judging body to take into consideration the *"law of the country concerned"*.

The law of the country concerned is the law governing the employment relationship between the player and his former club, that is the law with which the dispute at stake has the closest connection. This will be under ordinary circumstances the law of the country of the club whose employment contract has been breached or terminated (cf. CAS 2008/A/1519-1520, at para. 144; CAS 2007/A/1298-1299-1300, at para. 89). The Commentary to the FIFA Transfer Regulations published by FIFA (the "FIFA Commentary") confirms that the provision is referring to the law of the country *"where the club is domiciled"* (cf. FIFA Commentary, fn 74). In the present case, the law concerned is thus Egyptian law. As a consequence, the Panel finds that the Player's arguments based on Swiss employment law (such as the employer's obligations to take action within thirty days or to disclose immediately the request for damages) are not pertinent to the case at stake.

The Player submits that the compensation of EUR 900,000 has been established by the DRC in violation of Article 17.1 of the FIFA Transfer Regulations, since neither the former club nor the DRC have addressed the question of the law in the country concerned although it is the first criterion mentioned. The Player contends that his appeal must be upheld for the sole reason that Al-Ahly, in its petition before the DRC, did not make any argument in this regard. In light of the Panel's opinion expressed above, this Player's submission is not correct.

Accordingly, the Panel notes that the law of the country concerned may be relevant in favour of the player or in favour of the club, or be utterly irrelevant. It is up to the party which believes that such factor could be in its favour to make sufficient assertions in this regard. If it does not, the judging authority will not take that factor into account in order to assess the amount of compensation. In no way does this mean that the judging authority failed to properly evaluate the matter.

This said, the Panel finds that none of the parties have made any submissions or produced any evidence to the effect that Egyptian law could have an impact on the calculation of the compensation due. Therefore, the Panel finds that this criterion is not relevant for the determination of the compensation due to Al-Ahly.

2.3 Other objective criteria

Article 17.1 of the FIFA Transfer Regulations allows the Panel to take into consideration *"any other objective criteria"*, not limiting its evaluation to those which are expressly specified. Indeed, as this FIFA provision uses the meaningful language *"include, in particular"*, the Panel is of the opinion (comforted by unanimous CAS jurisprudence) that the list of objective criteria set out therein (*"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 [...] and whether the contractual breach falls within a protected period"*) is illustrative and not exclusive. The Panel feels thus unrestrained in resorting, if needed in light of the specific circumstances of this case, to other objective criteria.

2.3.1 Player's remuneration

Taking into consideration the Player's remuneration under the former contract, it is undisputed that the Player's contract with Al-Ahly provided a total remuneration of EGP 720,000 for each of the seasons 2007-2008, 2008-2009 and 2009-2010. As the Player was indisputably paid until March 2008, the Panel finds that the remaining value of the Player's contract is the amount corresponding to his remuneration for two seasons and three months, i.e. EGP 1,620,000 (at that time, i.e. on 15 February 2008, equivalent to approximately USD 292,000).

With regard to the Player's remuneration under his new contract, it is not contested that, according to Annex 3 of the employment contract with FC Sion/Olympique des Alpes SA of 15 February 2008, the annual remuneration amounted to CHF 240,000. Consequently, the amount corresponding to the remuneration due to the Player under his new employment contract for the same period of two seasons and three months is CHF 540,000 (at that time, i.e. on 15 February 2008, equivalent to approximately USD 488,500). This amount reflects the value that FC Sion/Olympique des Alpes SA gave to the services of the Player and, thus, the amount that Al-Ahly would have to spend on the football employment market in order to hire a player of analogous value.

In this connection, the Panel finds the Player's argument based on the fact that, in principle, the cost of life is higher in Switzerland than in Egypt to be misplaced, because the football players' transfer market is wholly transnational and because no specific evidence (e.g. housing invoices) has been provided that the Player's actual living expenses in Switzerland were higher than his actual living expenses in Egypt.

2.3.2 Fees and expenses paid or incurred by the former club

Within the other objective criteria, Article 17.1 of the FIFA Transfer Regulations provides for the criterion relating to the non-amortised part of the fees and expenses possibly paid by the former club for the acquisition of a player's services.

However, as Al-Ahly itself stated in its Answer Brief, the Player had joined the Club in 1996 already. Therefore, given that Al-Ahly provided no evidence to the contrary, the Panel assumes that Al-Ahly did not pay any fees or incur in any expenses when it obtained the services of the Player with the employment contract effective from 1 January 2007 until the end of the 2009-2010 season.

2.3.3 Loss of the Player's services and replacement value

It has been debated over various CAS awards whether it is possible to consider, as part of the damage to be compensated by the player, the claim of his former club for the opportunity to receive a transfer fee that has gone lost because of the premature termination of the employment contract. This possibility was admitted in the case TAS 2005/A/902-903, at para. 136, rejected in the case CAS 2007/A/1298-1299-1300, at para. 141 ff., and left open in the case CAS 2007/A/1358, at para. 97.

In the oft-quoted CAS 2008/A/1519-1520 case, the CAS panel found as generally recognised in Swiss employment law that the loss of earnings (*lucrum cessans*) is a possible part of the damages caused through the unjustified termination of an employment agreement. The award, therefore, recognised that the loss of a possible transfer fee can be considered as a compensable damage heading if the usual conditions are met, i.e. in particular if it is proven the necessary logical nexus between the breach or the unjustified termination of the agreement and the lost opportunity to realize a certain profit (CAS 2008/A/1519-1520, at paras. 116-117).

The Panel notes that in the present case, differently from other CAS cases, there is evidence of what the club itself where the Player wanted to transfer to, i.e. FC Sion/Olympique des Alpes SA, was willing to pay as transfer fee. In this case, therefore, Al-Ahly had an evident opportunity to obtain a certain fee by trading the services of the Player to the Swiss club but this opportunity was frustrated by no other cause than the unjustified departure of the Player.

In this regard, it is common ground among the parties that the aim of the tripartite meeting of 14 February 2008 in Cairo was to conduct negotiations in view of the transfer of the Player to FC Sion/Olympique des Alpes SA. Although Al-Ahly in its Answer Brief claimed that at that time no serious or binding financial offer was made by FC Sion/Olympique des Alpes SA, it nevertheless acknowledged in the course of the hearing of 9 December 2009 that the Swiss club had offered USD 400,000 during the Cairo meeting. This amount corresponds to the one reported by the witness Mr Zeaf during the hearing of 9 December 2009. In the Panel's view, this correspondence lends credibility also to the other amounts reported by Mr Zeaf.

Indeed, Mr Zeaf testified at the hearing of 9 December 2009 that Al-Ahly had asked for USD 800,000 during the negotiations with FC Sion/Olympique des Alpes SA. This amount was not contested by Al-Ahly's representatives during the hearing. Mr Zeaf also testified that Mr Constantin had confided him during the negotiations that he was ready and willing to raise the offer of FC Sion/Olympique des Alpes SA up to USD 600,000 but that, for tactical reasons, he was waiting to put forward this proposal. As none of the parties presented any other amount in their written submissions, the latter amount of USD 600,000 can therefore be taken as the amount that FC Sion/Olympique des Alpes SA was ready to pay as compensation for the transfer of the Player.

In short, 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.

In this respect, it is worth noting that, according to the evidence on file (some uncontested press releases), on 20 July 2009 – one and a half season after the facts giving rise to the dispute – the Player was transferred from FC Sion/Olympique des Alpes SA to the Egyptian club FC Ismaily for a transfer fee of USD 600,000. In the Panel's view, such amount confirms the reliability of the above figure of USD 600,000 as the transfer fee that FC Sion/Olympique des Alpes SA was ready to pay for the release of the Player.

In other terms, the Panel finds that the amount of USD 600,000 is the amount that Al-Ahly would have to spend on the transfer fees market in order to obtain a player of analogous value from another club.

As a result, with a view to basically putting the injured party Al-Ahly in the same position as it had before the Player's contractual breach, Al-Ahly would have to spend on the market, in order to acquire the services of a player of analogous value, the following figures: (i) the pecuniary amount needed to hire the services of such a player; (ii) the pecuniary amount needed to obtain the release of such a player from his current club.

Therefore, in order to obtain the market value of the services of an analogous player Al-Ahly would have to spend: (i) USD 488,500 (see *supra*) and (ii) USD 600,000, for a total cost of USD 1,088,500.

In this connection, the Panel notes that in the case CAS 2008/A/1519-1520, at paras. 123-124, the panel deducted the remuneration that the former club saved because of its premature departure. The same applies to this case, as Al-Ahly saved approximately USD 292,000 for the remaining Player's remuneration (see *supra*). Accordingly, the amount of USD 292,000 (see *supra*) must be deducted from USD 1,088,500, yielding a total amount of USD 796,500.

In the Panel's opinion, an amount of compensation of USD 796,500 would allow Al-Ahly to go on the market and replace the Player with a player of analogous value.

2.3.4 Time remaining on the existing contract

The *"time remaining on the existing contract up to a maximum of five years"* is a factor whose rationale is to be found in the circumstance that a club or a player should be able to rely on the stability of the employment relationship – the club in terms of technical continuity of the team's roster and the player in terms of steadiness and serenity of his football career and personal life –, all the more so if the contract still has a substantial duration before its natural termination.

In the present case, the Panel observes that the Player and the Second Respondent had signed an employment contract with a duration of three and half years (1 January 2007 until the end of the season 2009/2010). The Player terminated this contract on 15 February 2008 when signing the employment contract with FC Sion, *i.e.* with more than two thirds of the contract still pending. However, the Panel assumes that this factor was duly taken into account by Al-Ahly when it assessed the amount of USD 800,000 that it wished to obtain in order to release the Player. As a consequence, the Panel does not deem that this factor should have an impact in correcting such amount.

2.3.5 Occurrence of the contractual breach within the protected period

Another factor which could be taken into consideration is whether the breach or unjustified termination occurred during the so-called *"protected period"*. The FIFA Transfer Regulations define it 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"* (FIFA Transfer Regulations, Definitions, no. 7).

In the present case, the Player's unjustified unilateral termination occurred indisputably within the protected period. In principle, the Panel is of the view that the fact that a breach or unjustified termination of contract occurs during the protected period should be taken into consideration as an aggravating factor when assessing the compensation due. It would otherwise be difficult to understand why this element has expressly been listed as a criterion to take into consideration when assessing such compensation.

However, taking into account the specific circumstances of the case – in particular the Player's advanced sporting age (currently 37 years old) and inevitably declining career – the Panel is of the opinion, for proportionality considerations, that the sporting sanctions provided by Article 17.3 are sufficient to penalize the Player for his unjustified unilateral termination of the contract, and that an additional amount on this count would overcompensate his

former Egyptian club.

2.4 The specificity of sport

Article 17.1 of the FIFA Transfer Regulations also asks the judging body to take into due consideration the *"specificity of sport"*, that is the specific nature and needs of sport, so as to attain a solution which takes into account not only the interests of the player and the club, but also, more broadly, those of the whole football community (CAS 2008/A/1644, at para. 139; CAS 2008/A/1568, at paras. 6.46-6.47; CAS 2008/A/1519-1520, at paras. 153-154; CAS 2007/A/1358, at paras. 104-105). Based on this criterion, the judging body should therefore assess the amount of compensation payable by a party keeping duly in mind that the dispute is taking place in the somehow special world of sport. In other words, the judging body 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 (CAS 2008/A/1519-1520, at para. 155).

Taking into account the specific circumstances and the course of the events, a CAS panel might consider as guidance that, under certain national laws, a judging authority is allowed to grant a certain "special indemnity" in the event of an unjustified termination. The specific circumstances of a sports case might therefore lead a panel to either increase or decrease the amount of awarded compensation because of the specificity of sport (CAS 2008/A/1519-1520, at para. 156; CAS 2008/A/1644, at para.139)

However, in the Panel's view, the concept of specificity of sport only serves the purpose of verifying the solution reached otherwise prior to assessing the final amount of compensation. In other words, the specificity of sport is subordinated, as a possible correcting factor, to the other factors. In particular, according to CAS jurisprudence, this criterion *"is not meant to award additional amounts where the facts and circumstances of the case have been taken already sufficiently into account when calculating a specific damage head. Furthermore, the element of the specificity of sport may not be misused to undermine the purpose of art. 17 para. 1, i.e. to determine the amount necessary to put the injured party in the position that the same party would have had if the contract was performed properly"* (CAS 2008/A/1519-1520, at para. 156).

Having recalled these principles, on the basis of the evidence available in this case, the Panel does not find that the specific circumstances and the course of the events in the present case may lead to increase or reduce the amount of compensation due to the Second Respondent.

In particular, the Panel does not deem the fact that the Player was the first goalkeeper of Al-Ahly and has been one of the most successful goalkeepers ever in his continent as an element which should increase or decrease the amount of compensation assessed on the basis of the other factors. Indeed, the Panel does not consider the eminent status of the Player and the number of titles won with Al Ahly as a factor that is only to be counted against the Player, because Al Ahly has also very much benefitted from the services of such an outstanding player. In this respect, CAS jurisprudence has recognised that the important personal investment and contribution of a player in the performances of his club must be taken into account as an element that is favourable to him (TAS 2005/A/902-903, at para. 147). This is especially true in this particular case, as the Player has been rendering outstanding services to his club for twelve years (since 1996, see *supra*), playing more than five hundred matches for Al-Ahly and contributing substantially to many important victories.

In this regard, the Panel underlines that, according to the evidence given by Mr Zeaf, a representative of Al-Ahly had told the Player that, precisely because of the outstanding longevity and achievements with his club, Al-Ahly would not object to a transfer to FC Sion/Olympique des Alpes SA as long as the financial aspects of the transfer were settled (*"vu les douze années que vous avez passées au Club, vu les 29 titres que vous avez gagnés avec nous, c'est pas aujourd'hui qu'on va vous embêter pour partir [etc.]"*; see *supra*).

Therefore, the Panel is of the opinion that the Player's eminent status as a goalkeeper should not be used to increase or decrease the amount of compensation owed to Al-Ahly. The same goes, in the Panel's view, for the other elements that have been mentioned by the DRC or the parties in connection with the "specificity of sport" factor. There are some elements that seem to be detrimental to the Player and others that seem to play in favour of the Player or against the Second Respondent. In particular, the Panel does not share Al-Ahly's view that a goalkeeper is harder than the other players to replace as no evidence was provided to support this assertion (which, in the Panel's view, is even counter-intuitive and would thus need particularly persuasive evidence).

Above all, the Panel is of the view, in line with the *Matuzalem* jurisprudence (see *supra*), that the factor of the specificity of sport may not be misused to compensate the injured party with an amount which would put such party in a better position than the one

it would have if the termination had been mutually agreed. As a consequence, the Panel sees no reason to increase or decrease – because of the specificity of sport – the compensation that the injured party itself was ready to accept as suitable transfer fee at the moment of the Player's transfer to Switzerland.

2.5 The amount of compensation awarded to Al-Ahly

In conclusion, the Panel finds that the decisive element in this case is the fact that there is persuasive evidence that Al-Ahly might be able to go on the players' market and replace the Player with a player of equivalent value for the same period of contractual time by spending USD 796,500. Therefore, in line with the "positive interest" or "expectation interest" notions, this amount would basically put Al-Ahly in the same position that it would have had if the Swiss club had paid the transfer fee it was ready and willing to pay and the Player's contract had been terminated by mutual consent.

Therefore, the Panel holds that the amount of compensation owed by the Player to Al-Ahly must be of USD 796,500. In this respect, the Panel's decision supersedes the Appealed Decision's ruling, which had granted to Al-Ahly the amount of EUR 900,000 (see *supra*).

In addition, in order to put Al-Ahly even closer to the same position that it would have had if the Player had not breached his contract, the Panel is of the opinion that item 5 of the Appealed Decision's ruling – granting a 5% interest rate per annum as of the expiry of the time limit of 30 days after the notification of the Appealed Decision (see *supra*) – must be upheld *mutatis mutandis*, i.e. granting a new time limit of 30 days after the notification of the present award. The Panel notes that this is in line with recent CAS decisions (see e.g. TAS 2009/A/1895, at paras. 86-87).

The Panel is indeed of the view that it may grant such interest because Al-Ahly did ask in its motions *"to confirm the challenged decision"*; therefore, the Panel may partially uphold this motion and confirm, *mutatis mutandis*, the said item 5 of the Appealed Decision's ruling.

As a result, the Panel holds that the Player must pay to Al-Ahly USD 796,500 plus a 5% interest rate per annum as of 30 days after the notification of the present award until the date of effective payment.

3. The sporting sanction

In accordance with Article 17.3 of the FIFA Transfer Regulations, the DRC decided that the Player had to be sanctioned with a restriction of four months on his eligibility to participate in any official football match.

According to CAS jurisprudence, a literal interpretation of the said provision yields the duty of the competent body to impose sporting sanctions on a player who has breached his contract during the protected period: "shall" is obviously different from "may". Consequently, if the intention of the FIFA Transfer Regulations was to give the competent body the discretion to impose a sporting sanction, it would have employed the word "may" and not "shall". FIFA and CAS jurisprudence on this particular article 17.3 may be considered not fully consistent, mainly since the decisions are often rendered on a case by case basis. The consistent line however is that if the wording of a provision is clear, one needs clear and strong arguments to deviate from it. (CAS 2008/A/1568, at paras. 6.57-6.59; CAS 2007/A/1429 & 1442, at para. 6.23).

In the present case, the Panel cannot not find any strong arguments which would justify not imposing the sanctions as laid down in article 17.3 of the FIFA Transfer Regulations. As already said, E. is a player of great experience on the international scene. Although he may have believed in good faith that his former club would allow his transfer for free, the letter of 24 February 2008 from Al-Ahly to FC Sion/ Olympique des Alpes SA made clear that this would not be the case. The Player, therefore, should have been aware that, by staying with the Swiss club, he risked to be sanctioned under the FIFA rules that he was supposed to know (in fact, he declared to know them when he signed the Swiss employment contract on 15 February 2008, as already found by this Panel at para. 95 of the Partial Award dated 7 October 2009; see *supra*). Moreover, the Player himself sent a termination letter to Al-Ahly on 25 February 2008 (see *supra*).

In view of the above, the Panel must confirm the findings of the DRC in regard of the sporting sanctions imposed on the Player, as stated in item 6 of the Appealed decision's ruling (see *supra*). The Player shall therefore be imposed a restriction of four months on his eligibility to participate in any official football match.

The Panel notes that the Appealed Decision determined that this sporting sanction was to take effect as of the start of the following season of the Player's new club (see item 6 of the Appealed decision's ruling, *supra*). As on 7 July 2009 – before any official match of the new season – the Deputy President

of the CAS Appeals Arbitration Division issued an Order granting a stay of the implementation of the Appealed Decision, the Panel observes that the Player never started to serve his suspension. Therefore, the sanction of four months of ineligibility to play in official matches must be confirmed in its entirety, taking effect – *mutatis mutandis* – as of the start of the next season of the Player's current club following the notification of the present award.

Arbitration CAS 2009/A/1881
E. v. Fédération Internationale de Football Association (FIFA) & Al-Ahly Sporting Club
7 October 2009

Football; modification of the motions for relief in the Appeal Brief; cumulative conditions to trigger the lis pendens exception; difference between the concept of "pendency" and that of "jurisdiction"; serious reasons to require the stay of the arbitral proceedings; purpose of Art. 22 RSTP; submission to the jurisdiction of the FIFA; validity of clauses "by reference" to confer jurisdiction to the CAS.

Panel:
Prof. Massimo Coccia (Italy), President
Mr Olivier Carrard (Switzerland)
Prof. Ulrich Haas (Germany)

Relevant facts

E. (the "Appellant" or the "Player") is an Egyptian football player born in 1973. He is a goalkeeper who has played most of his professional career (1996-2008) for the Egyptian team Al-Ahly Sporting Club. He played for some time in 2008 and 2009 for the Swiss team FC Sion, after a disputed transfer which gave rise to the present case. In July 2009 he returned to Egypt joining the team Ismaily Sporting Club. He has successfully experienced on various occasions the international club competitions and has been international more than a hundred times with the Egyptian national team.

The Fédération Internationale de Football Association (FIFA; the "First Respondent") is the world governing body for the sport of football, having its headquarters in Zurich, Switzerland.

Al-Ahly Sporting Club ("Al-Ahly" or the "Second Respondent") is a professional football club in Egypt. It is affiliated to the Egyptian Football Association.

On 1 January 2007, the Player and Al-Ahly signed an employment contract effective until the end of the 2009-10 season.

On 14 February 2008, a meeting took place in Cairo between, amongst others, the Player, representatives of Al-Ahly and representatives of the Swiss professional club known as "FC Sion", with a view to negotiating the possible transfer of the Player from Al-Ahly to FC Sion. Apparently, no document of any kind was signed at the end of the meeting. FC Sion and the Player claim that a verbal arrangement on the transfer was reached whereas Al-Ahly denies such alleged circumstance.

On 15 February 2008, the Player and FC Sion signed an employment contract effective until the end of the 2010-11 football season.

On 27 February 2008, FC Sion sent by fax an urgent letter to FIFA requesting the issuance of an International Transfer Certificate (ITC) to allow the Player to be registered for FC Sion with the Swiss Football Association. The Player himself signed the letter at the bottom: *"Signé le 27 février 2008 pour accord, pour valoir exactitude des informations contenues et pour valoir confirmation qu'il est impossible pour le joueur d'envisager un retour au pays. E."*.

On 4 April 2008, the Player's counsel wrote to FIFA on behalf of his client insisting on the issuance of the ITC and threatening to resort to civil courts in the absence of such issuance. He also stated as follows in order to object to any possible arbitration proceedings: *"les divers* [sic] *clauses arbitrales ne sont pas opposables à mon client car elles ne remplissent pas les conditions juridiques nécessaires. Aussi sont-elles, formellement, par les présentes, récusées"*.

On 11 April 2008, the Single Judge of the FIFA Players' Status Committee (the "Single Judge") issued a provisional ITC, authorising the Swiss Football Association to provisionally register the Player and allowing him to play for FC Sion with immediate effect. The Single Judge emphasised that the decision was *"without prejudice and pending the outcome of a contractual labour dispute between the player and the Egyptian club as to the substance of the matter, which would have to be dealt with by the Dispute Resolution Chamber. (…)"*.

On 12 June 2008, Al-Ahly lodged a claim with FIFA against the Player and FC Sion for, respectively,

breach of contract and inducement to breach of contract.

On 16 April 2009, the FIFA Dispute Resolution Chamber (the "DRC") rendered a decision (the "Appealed Decision") which adjudged FC Sion and the Player to have been in breach of the FIFA Transfer Rules and imposed on the Player a sanction of four months ineligibility in official matches as well as an obligation to pay EUR 900,000 to Al-Ahly. Other sanctions were imposed to FC Sion, which was also held jointly and severally liable for the payment of the above mentioned compensation.

On 18 June 2009, the Player filed an appeal with the CAS against the Appealed Decision, requesting an interim stay of the effects of the Appealed Decision and contesting the jurisdiction of the CAS. The Player submitted that in his opinion no arbitration clause in favour of FIFA and/or CAS met the necessary legal requirements to be applied to him. The Player specified that, in this context, he was submitting an appeal to the CAS only *"pour la sauvegarde de ses droits, de manière, entre autres, à respecter le délai de 21 jours"*.

On 29 June 2009, the Player filed a civil law suit with the District Court of Zurich (*"Bezirksgericht Zürich"*; the "Zurich Court") against FIFA and Al-Ahly contesting the Appealed Decision and requesting its annulment (*"Anfechtung/Feststellung der Ungültigkeit"*) on the basis of Article 75 of the Swiss Civil Code ("CC").

On 6 July 2009, the Zurich Court dismissed the Player's application for *ex parte* interim measures (the so-called *"superprovisorische Massnahmen"* or super-provisional measures). The procedure is currently pending.

On 10 July 2009, the Player submitted his Appeal Brief, confirming his jurisdictional objection and requesting a preliminary award on jurisdiction in accordance with Article 186, third paragraph, of the Swiss Private International Law Act ("LDIP"). The Player requested also that, in any event, the CAS arbitration procedure be suspended on account of *lis pendens* until the Zurich Court determines whether it has jurisdiction to decide the dispute.

Extracts of the legal findings

A. Power of the Panel to decide on its own jurisdiction and lis pendens

First of all, the Panel observes that this case involves an Egyptian athlete as Appellant and an Egyptian club as Second Respondent, i.e. two parties that are neither domiciled nor habitually resident in Switzerland. This arbitration procedure is thus clearly governed by Chapter 12 of the LDIP, in accordance with Article 176 thereof.

Then, the Panel finds that from the outset the Player has contested the CAS's jurisdiction to adjudicate this case on the merits and has asked to stay the present arbitral proceedings until the Zurich Court decides on its jurisdiction.

It is true, as the Respondents point out, that the Players's motions for relief set forth in his Statement of Appeal did not make specific reference to those two preliminary issues, but it is also true that the Player made it immediately clear that he did not feel bound by any arbitration clause and that he was going to file a claim in a civil court.

In any event, in the Panel's view, Article R51 of the CAS Code does not preclude an appellant from modifying in the Appeal Brief the motions for relief put forward in the Statement of Appeal. The practice of the CAS has consistently repudiated any excessive formalism and has allowed parties to modify their motions for relief on condition that the principle of equal treatment of the parties and their right to be heard be preserved. The Panel observes that in the present case, in compliance with Article R55 of the CAS Code, the Respondents filed their Answers after the Appeal Brief and, therefore, could not be affected by the Appellant's variation of his motions for relief.

This said, the Panel observes that both the jurisdiction of an international arbitral tribunal sitting in Switzerland to decide on its own jurisdiction – the *"Kompetenz-Kompetenz"* or *"compétence-compétence"* – and the authority to do it vis-à-vis an exception of *lis pendens* are regulated by Article 186 LDIP. Unofficially translated in English, Article 186 LDIP would read as follows:

"1. The arbitral tribunal shall rule on its own jurisdiction.

1bis. It shall decide on its own jurisdiction without regard to proceedings having the same object already pending between the same parties before a State court or another arbitral tribunal, unless serious reasons require a stay of the proceedings.

2. The objection of lack of jurisdiction must be raised prior to any defence on the merits.

3. In general, the arbitral tribunal shall rule on its jurisdiction by means of an interlocutory decision".

The Panel remarks that the recently introduced paragraph 1bis of Article 186 LDIP – an amendment adopted on 6 October 2006 and entered into force on 1 March 2007 – makes clear that an international arbitral tribunal sitting in Switzerland is allowed to decide on its own jurisdiction even if a lawsuit between the same parties and involving the same matter is pending before a State court.

In the Panel's view, paragraph 1bis of Article 186 LDIP would require this Panel to uphold the Athlete's *lis pendens* exception and, thus, to stay these arbitral proceedings only if three conditions were cumulatively met:

a) the first is an objective test: the arbitration and the civil lawsuit must be between the same parties and must concern the same matter.

b) the second test is also objective: the action before the State court must have been brought prior to the action before the CAS or, in other terms, the lawsuit before the State court must be "already pending" (*"déjà pendante"*) when the arbitration claim is lodged with the CAS.

c) the third test allows consideration of subjective elements but it must rest on solid grounds: the party raising the exception of *lis pendens* must prove the existence of "serious reasons" (*"motifs sérieux"*) requiring the stay of the arbitral proceedings.

With regard to the first test, on the basis of the documents on file attesting that the Player has summoned before the Zurich Court both FIFA and Al-Ahly to obtain the annulment of the Appealed Decision, the Panel has no doubt that the present arbitration and the lawsuit before the Zurich Court involve the same parties and the same cause of action with regard to the same matter. The first condition is thus met.

With regard to the second test, the Panel notes that the Athlete lodged his Statement of Appeal with the CAS on 18 June 2009 appointing an arbitrator from the CAS list and setting this arbitration in motion under the terms of Article 181 LDIP, whereas the civil action before the Zurich Court was filed eleven days later, on 29 June 2009, as attested by the same civil Court at paragraph 2 of its resolution dated 6 July 2009:

"Mit Eingabe vom 29. Juni 2009 reichte der Kläger beim hiesigen Gericht Klage ein betreffend 'Anfechtung/Feststellung der Ungültigkeit des Beschlusses der FIFA Dispute Resolution Chamber vom 16. April 2009'" .

[Emphasis added]

The Player argues that the proceedings before CAS were not truly pending first, because the arbitral claim was only filed in order to safeguard his rights and under the condition that the Zurich Court would not accept jurisdiction. However, the Panel is of the opinion that the concept of "pendency" must be kept distinct from the concept of "jurisdiction". Accordingly, in the Panel's view, a party may well file a "conditional" claim to the CAS in order to safeguard its rights with regard to jurisdiction but this filing inevitably determines the procedural "pendency" (which is indeed unconditional) of the arbitration. In other terms, the Player had the right to lodge his appeal to the CAS with the sole purpose of asking the Panel to suspend the arbitration and decline its jurisdiction. However, even merely asking the Panel to adjudicate the preliminary issues in his favour (i.e. requesting that the CAS suspend the proceedings and, in any event, decline jurisdiction), the Player has nonetheless instituted the procedure for the appointment of the arbitrators and has asked the Panel to deal with those preliminary issues, thus determining inexorably the pendency of the arbitration from the date of the filing. This Panel's construction is in line with Article 181 LIDP, under which the arbitration is pending *"dès le moment […] que l'une des parties engage la procédure de constitution du tribunal arbitral"* (i.e. *"from the moment […] one of the parties institutes the procedure for the appointment of the arbitral tribunal"*).

Accordingly, the Panel finds that the second condition is not met because the CAS is the court first seized of the matter and, thus, the civil proceedings before the Zurich Court were not "already pending".

With regard to the third test, the Panel is of the view that, in order to demonstrate the existence of "serious reasons", the Appellant should prove that the stay is necessary to protect his rights and that the continuance of the arbitration would cause him some serious inconvenience. The Panel, having considered all aspects of the *lis pendens* objection, finds that it is not satisfied that the Player has discharged the burden on him of demonstrating that the stay of these arbitral proceedings is compelled by "serious reasons".

Indeed, the Appellant merely stated that the serious reasons would be related to the fact that he is challenging the jurisdiction of the CAS and to the possibility that the Zurich Court may come up with a different decision than that of the CAS. In the Panel's view, these are manifestly not serious reasons. Indeed, such situations would arise in every case of parallel proceedings involving an arbitration tribunal and a civil court, where necessarily there is at least one party

who objects to the arbitral jurisdiction and where the possibility of conflicting decisions is always present. If one were to accept this argument, the arbitral proceedings would end up being always suspended, which is manifestly not the legislative aim of the recent amendment to Article 186 LDIP (notoriously a pro-arbitration amendment prompted by the legal uncertainty created by the Swiss Federal Tribunal's *Fomento* decision of 14 May 2001, 4P.37/2001).

The Panel also finds no support for the Player's position in the ILA Recommendations, given that paragraph 3 states that, where the parallel proceedings are pending before a court of the jurisdiction of the place of the arbitration (as is the case here), in deciding whether to proceed with the arbitration the arbitral tribunal should merely *"be mindful of the law of that jurisdiction, particularly having regard to the possibility of setting aside of the award in the event of conflict between the award and the decision of the court"*.

It is obvious that this Panel is mindful of Swiss law and is aware that an erroneous decision on the issue of jurisdiction could eventually lead to the annulment of the award under para. 2 lit. b of Article 190 LDIP. However, specifically because this Panel is mindful of Swiss law, it is this Panel's duty to comply with the will of the Swiss legislator and proceed with this arbitration unless all three conditions of para. 1bis of Article 186 LDIP are met.

Accordingly, as the *lis pendens* objection fails to meet the second and third conditions under para. 1bis of Article 186 LDIP, the request submitted on behalf of the Athlete must be dismissed. The Panel thus determines to proceed with this arbitration notwithstanding the parallel procedure pending before the Zurich Court.

It follows that this Panel has the authority to decide the issue of its own jurisdiction and, in accordance with para. 3 of Article 186 LDIP, it may adjudicate this preliminary issue by means of a partial award.

B. The jurisdiction of the CAS

The Panel notes that the dispute brought to the attention of FIFA, and now of CAS, was triggered by the fact that on 15 February 2008 FC Sion and the Player signed an employment contract and on 27 February 2008 jointly asked FIFA to issue an ITC that would allow the international transfer of the Player from the Egyptian Football Association to the Swiss Football Association. Indeed, pending the outcome of the final decision of the DRC on the substance of the matter, the FIFA Single Judge issued on 11 April 2008 a provisional ITC, allowing the Player to be registered as a professional footballer with the Swiss Football Association and to perform his services for FC Sion.

The Panel notes also that the authority of FIFA to deal with the matter derived from the fact that the Player wished to transfer from an Egyptian club to a Swiss club, thus falling within the scope of application of the FIFA Regulations on the Status and Transfer of Players, in the version entered into force on 1 January 2008 ("FIFA Transfer Regulations"), whose Articles 1, para. 1, and 9, para. 1, so read in the relevant parts:

"These regulations lay down global and binding rules concerning the status of players, their eligibility to participate in organised football, and their transfer between clubs belonging to different associations" ;

[Emphasis added]

"Players registered at one association may only be registered at a new association once the latter has received an International Transfer Certificate (hereinafter: ITC)".

Had the Player wished to transfer from Al-Ahly to another Egyptian club, he would not have needed an ITC and the authority to deal with the matter would have rest solely with the Egyptian Football Association, as acknowledged by Article 1, para. 2, of the FIFA Transfer Regulations.

However, as international transfers may take place only through an ITC, and as the Egyptian Football Association was not willing to spontaneously release the ITC because it deemed the Player to be still contractually bound to Al-Ahly, FC Sion and the Player jointly brought the matter to attention of the relevant FIFA bodies, whose *potestas judicandi* on any such disputes is based on Article 22 of the FIFA Transfer Regulations:

"Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:

a) disputes between clubs and players in relation to the maintenance of contractual stability (articles 13-18) where there has been an ITC request and a claim from an interested party in relation to said ITC request, in particular regarding the issue of the ITC, sporting sanctions or compensation for breach of contract; […]".

In the Panel's view, such provision must be considered as an offer by FIFA to provide players and clubs a forum to hear and solve disputes concerning international transfers. By submitting on 27 February 2008 – without any reservation whatsoever – their

joint request for the release of the ITC to register the Player with the Swiss Football Association, the Player and FC Sion accepted the offer and agreed to refer their case to FIFA in accordance with FIFA rules. Indeed, they were even successful in the interim stage of the procedure, when they obtained the issuance of the provisional ITC.

The Panel remarks that the above quoted lit. a of Article 22 of the FIFA Transfer Regulations clearly links the request for and the issuance of an ITC to the possible imposition by FIFA of *"sporting sanctions or compensation for breach of contract"*. In this connection, the Panel finds that the Player himself was well aware of the FIFA rules and sanctions because the letter to FIFA of 27 February 2008, that he signed *"pour accord"* and *"pour valoir exactitude des informations contenues"*, cited various provisions of the FIFA Transfer Regulations – such as articles 5, 9, 11, 13, 14, 16, and annex 3 – and put forward the following statement:

"comment imaginer sinon qu'un jouer de l'expérience de E. signe un contrat au FC Sion valable dès le 15 février 2008, […] s'il n'y était pas expressément autorisé par son ancien club? Malgré ses dénégations, Al-Ahly ne pourra faire croire à personne qu'un jouer de 35 ans, international accompli, puisse prendre le risque de se voir suspendre par la FIFA (ce qui à son âge signifierait la fin de sa carrière) pour un contrat en Suisse".

[Emphasis added]

Accordingly, in the Panel's opinion, when the Player resorted to FIFA he knowledgeably accepted the FIFA rules and the competence of FIFA not only to issue an ITC (as FIFA did on 11 April 2008) but also to look into the substance of the matter and decide on sporting sanctions and on compensation for breach of contract (as FIFA subsequently did on 16 April 2009).

The Respondents are right in pointing out that it would be an extraordinary case of *venire contra factum proprium* if the Player were allowed to submit to the rules and authority of FIFA with respect to the ITC and to reject such rules and authority with respect to the other side of the same coin, i.e. the dispute concerning his status as a free agent or not at the moment of signing the contract with FC Sion and the disciplinary consequences thereof.

The Panel is of the view that the clear wording of Article 22 of the FIFA Transfer Regulations and the application of the general principle of law *"cuius commoda, eius et incommoda"* (meaning that the one who seeks and obtains a benefit must also take the possible burdens coming with that benefit) inexorably lead to the result that FIFA had the competence to deal with the matter and issue both the decision of 11 April 2008 and the Appealed Decision of 16 April 2009.

In the Panel's opinion, the fact that the Player on 4 April 2008 specifically indicated to FIFA that he contested the validity of any arbitration clause in favour of FIFA has no relevance whatsoever, because the Player did not withdraw his request to obtain an ITC and, when he obtained it on 11 April 2008, he started playing for FC Sion, thus accepting the benefit granted by FIFA (the *"commoda"*) and the related burdens deriving from possible disciplinary measures (the *"incommoda"*).

Nor is of any relevance the Player's argument that no reference to FIFA rules can be found in the employment contract with the Egyptian club Al-Ahly, because this is not an employment-related dispute concerning solely the two Egyptian counterparts but, rather, an international transfer-related dispute concerning also the Swiss club FC Sion and the two Football Associations involved in the registration of the Player. The Panel observes that the difference between the two types of dispute is clearly set forth in the first paragraph of Article 22 of the FIFA Transfer Regulations (see *supra*).

The Panel thus finds that FIFA had the *potestas iudicandi* to issue the Appealed Decision in accordance with FIFA rules.

In the Panel's view, it necessarily follows that the CAS has appellate jurisdiction to decide the present dispute, in accordance with Article R47 of the CAS Code, Articles 62 and 63 of the FIFA Statutes and Article 24 of the FIFA Transfer Regulations.

The statutes and regulations of FIFA indeed provide, in accordance with Article R47 of the CAS Code, that an appeal may be brought to CAS against the decision of its bodies.

Pursuant to the relevant part of Article 24 of the FIFA Transfer Regulations:

"Decisions reached by the Dispute Resolution Chamber or the DRC judge may be appealed before the Court of Arbitration for Sport (CAS)".

The Panel also notes that Article 64, paragraph 2, of the FIFA Statutes makes clear that the arbitral jurisdiction of the CAS for decisions taken by FIFA bodies is granted on an exclusive basis, ruling out the jurisdiction of State courts:

"2. Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations".

The Panel remarks that the Player, in addition to knowing and invoking the FIFA rules to his benefit and playing on several occasions in FIFA competitions, expressly acknowledged in the letter to FIFA of 27 February 2008 that he was at the time an experienced player with an extensive international career (*"un joueur de l'expérience de E."*, *"international accompli"*). It also goes without saying that he has been registered for many years with the Egyptian Football Association and then with the Swiss Football Association, which are both members of FIFA and bound by FIFA rules.

Accordingly, in the Panel's view, the Player's pretentions to being considered unaware of the FIFA rules and of the CAS's jurisdiction referred to therein are wholly implausible. By his recourse to FIFA under the FIFA Transfer Regulations, without entering any reservation regarding the CAS arbitration clause included in the FIFA rules which he was invoking, the Player signified his consent to that arbitration clause. The Panel takes comfort from the fact that its view on this issue is consistent with the opinion rendered by the Swiss Federal Tribunal on a similar issue in the *Stanley Roberts v. FIBA* case:

"The appellant therefore, by his recourse to the Appeals Commission under those Internal Regulations, without entering any reservation regarding the arbitration clause of which he was aware, signified his consent to that clause. This is confirmed by the fact that by lodging the appeal he was implicitly applying for a general permit to play and the respondent was therefore also entitled to assume from this that he would recognize its rules, with which he was familiar" (Judgment of 7 February 2001, 4P.230/2000, unofficial translation in Reeb M. (ed.), Digest of CAS Awards II, 808, at 812).

On the basis of the above, the Panel has no doubt in finding that the Player willingly submitted to FIFA rules and procedures, thus squarely accepting FIFA rules providing for the competence of the FIFA bodies and for the exclusive jurisdiction of the CAS on appeal from the decisions of those bodies.

In addition, the Panel notes as well that in the Player's contract with FC Sion dated 15 February 2008, which was a triggering element of the international transfer-related dispute, both parties clearly accepted:

"de se soumettre au pouvoir juridictionnel des organes compétents de la SFL, l'ASF, l'UEFA, et la FIFA, en cas de violation des dispositions statutaires et réglementaires" (article 39, para. 2, of the contract between the Player and FC Sion);

[Emphasis added]

and pledged:
"à respecter les statuts, règlements et directives de l'ASF, de la SFL, de l'UEFA et de la FIFA ainsi que ceux du club et à s'y soumettre. Les documents principaux sont indiqués dans l'annexe 1. 2. Le joueur confirme avoir eu l'occasion de prendre connaissance, avant la signature du présent contrat, des documents susmentionnés, qui sont à sa disposition au secrétariat/bureau du club" (article 41, paras. 1-2, of the contract between the Player and FC Sion).

[Emphasis added]

The Panel observes that Annex 1 to the Player's contract with FC Sion includes, among the documents that he has expressly declared to have knowledge of and to pledge to respect, the FIFA Statutes and the FIFA Transfer Regulations, i.e. the documents which contain the rules establishing the competence of the DRC and the arbitral jurisdiction of the CAS.

The Panel is of the view that, as the contract with FC Sion has been the basic factor of the Player's violation of FIFA Rules found by the DRC, the Player's acceptance of the FIFA rules and of the disciplinary authority of FIFA, contained in the contract with FC Sion, would also be sufficient in itself to justify the *potestas indicandi* of FIFA and, as a consequence, the appellate jurisdiction of the CAS.

The Panel thus dismisses the Player's objection as to the validity of the CAS arbitration clauses "by reference" included in the FIFA rules. Indeed, in signing his contract with FC Sion, the Player explicitly and unreservedly acknowledged that he had acquainted himself with the FIFA Statutes and Transfer Regulations, i.e. with the documents containing the arbitration clause in favour of the CAS. As the Swiss Federal Tribunal stated in the above quoted *Stanley Roberts v. FIBA* judgment of 7 February 2001, the *"reference need not explicitly cite the arbitration clause, but may include by way of general reference a document containing such a clause"* (4P.230/2000, unofficial translation in Reeb M. (ed.), Digest of CAS Awards II, 808, at 811).

The Panel thus concludes on the basis of all of the above that the CAS has exclusive jurisdiction to hear this dispute on appeal from the Appealed Decision. As a consequence, the jurisdictional objection submitted by the Player fails.

The Panel will thus continue on the merits the present arbitration proceedings jointly with the parallel procedure CAS 2009/A/1880 FC Sion c. FIFA & Al-Ahly Sporting Club.

Arbitration CAS 2009/A/1909
RCD Mallorca SAD & A. v. FIFA & UMM Salal SC
25 January 2010

Football; unilateral termination of an employment contract without just cause during the Protected Period; burden of proof; applicable national law; material error; signature of two contracts for the same period; liquidated damages; Protected Period; sporting sanctions

Panel:
Prof. Luigi Fumagalli (Italy), President
Mr José Juan Pintó Sala (Spain)
Mr Hendrik Willem Kesler (the Netherlands)

Relevant facts

RCD Mallorca SAD ("Mallorca" or the "First Appellant") is a Spanish football club affiliated to the Real Federación Española de Fútbol (RFEF), which is a member of the Fédération Internationale de Football Association (FIFA or the "First Respondent").

A. (the "Player" or the "Second Appellant"; Mallorca and the Player are hereinafter jointly referred to as the "Appellants") is a professional football player of Guinean nationality, born on 26 June 1983.

UMM Salal SC ("UMM Salal" or the "Second Respondent"; FIFA and UMM Salal are hereinafter jointly referred to as the "Respondents") is a football club with its registered office in Doha, Qatar. UMM Salal is a member of the Qatari Football Association (QFA), itself affiliated to FIFA.

At the beginning of 2008 the Player had a contract in force with Al Itthiad FC ("Al Itthiad"), a club affiliated to the Saudi Arabian Football Federation (SAFF), due to expire on 30 June 2008.

The Player signed an *"Employment contract of a professional footballer"* with Mallorca dated 1 February 2008 (the "First Contract"), valid from 1 July 2008 to 30 June 2013. Under such First Contract, the Player was to receive a monthly salary of EUR 11,000 *"net"* (to be paid in 14 instalments), a *"bonus"* of EUR 360,000 *"net"*, and a *"game bonus in accordance with the bonus structure as agreed for the rest of the squad"*.

The Player signed also a *"Football Player's Contract"* with UMM Salal dated 17 March 2008 (the "Second Contract"), valid from 1 July 2008 to 1 June 2010. Under the Second Contract, the Player was entitled to receive, over the contractual term, inter alia a total salary of USD 2,400,000. The Second Contract contained the following provisions, concerning *"Termination by the Club or the Player"* (Article X):

"1. The Club and the Player may terminate this Contract, before its expiring term, by mutual consent.

2. The Club and the Player shall be entitled to terminate this Contract, before its expiring term, by fifteen (15) days' notice in writing for just cause according with the FIFA Regulations governing this matter as well as the Law of the State of Qatar.

3. When the termination of the Contract is not due to just cause or a mutual agreement between the Parties concerned, the Club or the Player shall be entitled to receive from the other party in breach of the Contract a compensation for an amount of 160,000 $ (one hundred sixty thousand dollars)".

A document dated 20 March 2008, under letterhead of Fairplay Agency GmbH (the "FPA"), was signed by the Player (the "FPA Document"). The FPA Document describes the *"Conditions of Contract [A.]"* concerning his employment with Mallorca, providing, inter alia, salaries, for each year of contract, of EUR 600,000 *"net"* and a *"signing fee"* of EUR 2,000,000.

On 3 May 2008 the Player informed UMM Salal, by means of a handwritten letter (the "Termination Letter"), that he was not in a position to comply with the Second Contract, since he was obliged with another club. The Player therefore requested the cancellation of the Second Contract.

On 15 May 2008 the Player agreed with Al Itthiad to terminate by mutual consent the employment contract at the time in force between them.

On 3 June 2008 the QFA contacted the SAFF to request the issuance of the International Transfer

Certificate (ITC) for the transfer of the Player to UMM Salal. On 8 June 2008, the SAFF, after consulting Al Itthiad, sent the ITC to the QFA.

On 8 July 2008 the RFEF, acting upon Mallorca's request, asked the SAFF to issue the ITC for the transfer of the Player to Spain. In light of the prior issuance of the ITC in favour of the QFA, such request was however denied by the SAFF on 14 July 2008. The SAFF referred the RFEF to the QFA. Following the SAFF's indications, the RFEF requested the ITC from the QFA. On 20 July 2008, the QFA denied the ITC, indicating that the Player had a contract with UMM Salal.

In a letter dated 26 August 2008 to the SAFF and the QFA, FIFA, having been contacted by the RFEF, requested the issuance of the ITC.

After an exchange of correspondence with Mallorca, in letters dated 1 September 2009 and 9 September 2009 UMM Salal specified that, while reserving any right to seek a remedy for the damages sustained, it did not intend *"to be prejudicial* [to] *the sporting career of A. nor to prevent club Deportivo Mallorca from not being able to profit from the services of the aforesaid player and this, only because of a financial dispute of contractual nature with A."*.

On 14 September 2008 the ITC was finally issued by the QFA in favour of the RFEF.

On 15 October 2008 UMM Salal filed with FIFA a claim against the Player for breach of contract without just cause, and requested compensation from the Player in the amount of USD 2,000,000. At the same time, UMM Salal requested that Mallorca be held jointly and severally liable for the payment of such compensation.

On 15 May 2009 the Dispute Resolution Chamber of the FIFA Players' Status Committee (the "DRC") issued a decision (the "Decision") holding as follows:

"1. The claim of the Claimant, Umm Salal Sports Club, is partially accepted.

2. The Respondent 1, A., has to pay the amount of USD 160,000 to the Claimant, Umm Salal Sports Club, within 30 days of notification of the present decision.

3. The Claimant, Umm Salal Sports Club, is directed to inform the Respondent 1, A., directly and immediately of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received.

4. If this amount is not received within the aforementioned time limit, an interest rate of 5% per annum as of the expiry of the said time limit will apply and the matter will be submitted, upon request, to FIFA's Disciplinary Committee so that the necessary disciplinary sanctions may be imposed.

5. A restriction of four months on his eligibility to play in official matches is imposed on Respondent 1, A. This sanction shall take effect as of the start of the next season of the player's club following the notification of the present decision.

6. The Respondent 2 / Counter-Claimant, Real Club Deportivo Mallorca, is not jointly and severally liable for the payment of the aforementioned compensation.

7. Any further requests filed by the parties are rejected".

The Decision was notified to Mallorca, the Player and UMM Salal on 25 June 2009.

On 16 July 2009, Mallorca and the Player filed a joint statement of appeal, dated 14 July 2009, with the Court of Arbitration for Sport (CAS), pursuant to the Code of Sports-related Arbitration (the "Code"), against UMM Salal to challenge the Decision.

On 24 July 2009, the Appellants filed their appeal brief, dated 22 July 2009.

On 20 August 2009, UMM Salal filed its answer, dated 19 July 2009, to the appeal, seeking its dismissal, together with a counterclaim.

On 24 August 2009, FIFA filed its answer to the appeal, asking its rejection.

In a letter of 5 October 2009, the CAS Court Office informed the parties that the Panel had decided to allow the Appellants to file an answer to the counterclaim lodged by UMM Salal. As a result, the Appellants filed a brief in reply to the counterclaim, dated 19 October 2009, and a *"complementary statement"* intended to modify their presentation of the facts and to withdraw an allegation brought in support of their request for relief, dated 24 November 2009.

Extracts of the legal findings

A. Applicable law

The question of what law is applicable in the present arbitration is to be decided by the Panel in accordance with the provisions of Chapter 12 of the Swiss Private International Law Act (the "PIL"), the arbitration bodies appointed on the basis of the Code being international arbitral tribunals having their seat in

Switzerland within the meaning of Article 176 of the PIL.

Pursuant to Article 187.1 of the PIL,

"The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the law with which the case is most closely connected".

Article 187.1 of the PIL constitutes the entire conflict-of-law system applicable to arbitral tribunals, which have their seat in Switzerland: the other specific conflict-of-laws rules contained in Swiss private international law are not applicable to the determination of the applicable substantive law in Swiss international arbitration proceedings (Kaufmann-Kohler/Stucki, International Arbitration in Switzerland, Zurich 2004, p. 116; Rigozzi, L'arbitrage international en matière de sport, Basle 2005, § 1166 *et seq.*).

Two points should be underlined with respect to Article 187.1 of the PIL:

a) it recognizes the traditional principle of the freedom of the parties to choose the law that the arbitral tribunal has to apply to the merits of the dispute;

b) its wording, to the extent it states that the parties may choose the *"rules of law"* to be applied, does not limit the parties' choice to the designation of a particular national law. It is in fact generally agreed that the parties may choose to subject the dispute to a system of rules which is not the law of a State and that such a choice is consistent with Article 187 of the PIL (Dutoit, Droit international privé suisse, Basle 2005, p. 657; Lalive/Poudret/Reymond, Le droit de l'arbitrage interne et international en Suisse, Lausanne 1989, p. 392 *et seq.*; Karrer, in Honsell/Vogt/Schnyder, Kommentar zum schweizerischen Privatrecht, Internationales Privatrecht, Basel 1996, Art. 187, § 69 *et seq.*; see also CAS 2005/A/983 & 984, § 64 *et seq.*, award of 12 July 2006). It is in addition agreed that the parties may designate the relevant statutes, rules or regulations of a sporting governing body as the applicable "rules of law" for the purposes of Article 187.1 of the PIL (Rigozzi, *op. cit.*, § 1178 *et seq.*).

This far-reaching freedom of the choice of law in favour of the parties, based on Article 187.1 of the PIL, is confirmed by Article R58 of the Code. The application of this provision follows from the fact that the parties submitted the case to the CAS. Article R27 of the Code stipulates in fact that the Code applies whenever the parties have agreed to refer a sports-related dispute to the CAS.

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 solving this question the Panel has to consider the following:

a) the First Contract specifies that:

"5.- The Player warrants that he know … the Rules and Regulations that govern football … .

6.- All matters not covered by this contract shall be governed by Royal Decree 1006/85 dated 26th June relating to the special employment relationship of professional sportsmen, the collective agreement that is in force and any other applicable regulations".

b) the Second Contract provides that:

"Article I Employment Basis
[…]

2. The following elements form an integral part of this Contract:

a) Statutes and Regulations of the Club
b) Statutes and Regulations of the Qatar Football Association (QFA)
c) Statutes and Regulations of AFC and FIFA … .

3. The Player acknowledges the aforementioned statutes and regulations as strictly binding on him … .

[…]

Article XIII Law and Jurisdiction

1. *In case of any contractual dispute the applicable law shall be the Law of the State of Qatar as well as the FIFA, AFC and QFA Regulations governing this matter. …".*

c) 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".

In light of the foregoing, the Panel remarks that:

a) the parties referred to the FIFA regulations in the First Contract and in the Second Contract, even though together with some domestic laws;

b) the appeal is directed against a decision issued by the DRC, 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;

c) the parties discussed in this arbitration, without raising any objection, the application of some provisions of Swiss law, as contained in the CO: no petition was based on, and no reference was made to, Qatari and/or Spanish law.

The Panel therefore concludes that this dispute has to be determined on the basis of the FIFA regulations, with Swiss law applying subsidiarily. More exactly, the Panel agrees with the DRC (see above) that the dispute, submitted to FIFA by UMM Salal on 15 October 2008, is subject to the 2008 edition of the FIFA Regulations on the Status and Transfer of Players (the "Regulations"), according to their Article 26.

B. Burden of proof

The Panel underlines that it finds itself to be bound to apply the general rules on the burden of evidence to determine which party should bear the consequences of the failure to prove its allegations.

In fact, pursuant to Article 8 of the Swiss Civil Code

"Chaque partie doit, si la loi ne prescrit le contraire, prouver les faits qu'elle allègue pour en déduire son droit".

Translation: "Unless the law provides otherwise, each party shall prove the facts upon which it relies to claim its right".

Such principle applies also in CAS proceedings (see for instance CAS 96/159 & 96/166, published in *Digest of CAS Awards II 1998-2000*, pp. 434 ff.). As a result, in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its "burden of proof", i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue.

At the same time it must be stressed, as made clear in the CAS jurisprudence (CAS 96/159 & 96/166, at § 16, pp. 441-442), that *"selon la jurisprudence fédérale suisse, dans le cas où une preuve directe ne peut pas être rapportée, le juge ne viole pas l'art. 8 CC … en fondant sa conviction sur des indices ou sur un haut degré de vraisemblance (ATF 104 II 68 = JdT 1979 I 738, à la p. 545). En outre, des faits dont on doit présumer qu'ils se sont déroulés dans le cours naturel des choses peuvent être mis à la base d'un jugement, même s'ils ne sont pas établis par une preuve, à moins que la partie adverse n'allègue ou ne preuve des circonstances de nature à mettre leur exactitude en doute (ATF 100 II 352, à la p. 356)"* [Translation: "according to the Swiss federal case law, in the event direct evidence cannot be offered, a judge does not violate Article 8 of the Civil Code … if he bases his decision on clues or on a high degree of likelihood … . In addition, events whose existence must be presumed according to the normal course of things can be indicated as a basis of a judgment, even if these events are not confirmed by evidence, if the opposing party does not indicate or prove circumstances suitable to put their existence in doubt"].

In this framework, therefore, the Panel can, for instance, note that on one hand the Appellants brought evidence, by way of documents and witness depositions, to affirm their position, while, on the other hand, UMM Salal did not present any evidence to the contrary. Indeed, notwithstanding the Appellants' specific request, the UMM Salal's legal representative did not attend the hearing.

C. Has the Player breached the Second Contract?

The DRC held in this respect that, *"in lack of any relevant defence which could possibly justify the termination of the employment contract"* concluded between the Player and UMM Salal, and *"by entering into a labour contract with the Claimant* [UMM Salal] *valid as from the same date (i.e. 1 July 2008) as the contract concluded with the Respondent 2 / Counter-Claimant* [Mallorca]*"*, the Player *"breached his employment contract with the Claimant* [UMM Salal] *without just cause"*. The Appellants challenge such holding, and maintain that the Player is not responsible for any breach.

Under a first point of view, the Appellants submit that the Second Contract is not binding on the Player (and therefore could not be breached), since his

"consent" to be bound by it *"was vitiated by an essential error in his terms and effects"*. More specifically, the Appellants invoke Articles 23 and 24 of the CO and allege that the Player signed the Second Contract on the erroneous assumption that it could be terminated by simply paying the amount stipulated in its Article X, without any further disciplinary consequence. In the course of this arbitration, in fact, the Appellants withdrew the other allegation, that the Player's consent was vitiated because it had not been freely given.

Contrary to the Appellant's submission based on Swiss law, FIFA maintains that *"there is no room for the subsidiary application of art. 23 seq. of the Swiss Code of Obligations"*, because *"the Regulations conclusively determine the situations due to which a player shall no longer be considered bound by a labour agreement"*.

The Panel does not agree with FIFA's indication that a player cannot invoke his error, relevant under the applicable domestic rules, in order to have an employment contract terminated.

The Panel, in this respect, notes that the invocation of an error is indeed consistent with the Regulations (which therefore do not exclude it) as it could be treated as a just cause for termination, pursuant to their Article 14. In any case, the Panel confirms that a player can invoke domestic law in order to have an employment contract terminated, if his consent is vitiated by error. In the Panel's opinion, in fact, it cannot be held that the entire legal regime applicable to employment contracts of professional players has to be found exclusively in the Regulations. Indeed, as the CAS practice shows, several points, not covered by the Regulations, need to be filled by reference to a domestic law, and mainly to Swiss law (on the limits to freedom of contract: CAS 2008/A/1544, award of 13 February 2009; on interest payable: CAS 2008/A/1519 & CAS 2008/A/1520, award of 19 May 2009; on the concept of "decision": CAS 2008/A/1633, award of 16 December 2008, with further references; etc.). The Regulations themselves, being rules adopted by an association created under Swiss law, are subject to the mandatory provisions of Swiss law (see the advisory opinion rendered by a CAS panel on 21 April 2006, CAS 2005/C/976 & 986, para. 123). And the Panel doubts that the Regulations could be considered to be consistent with Swiss law, should they be interpreted to exclude any remedy in the event the consent given by a player to an employment contract is vitiated (by error, fraud or violence). In addition, the concurrent application of the Regulations and, subsidiarily, of Swiss law, is confirmed also by Article 62.2 of the FIFA Statutes.

The provisions of the Swiss Code of Obligations (CO) on error are the following (translation):

Article 23 CO
[*"Effects of error"*]

"The contract does not bind the party that, at the time of the conclusion, was in material error".

Article 24 CO
[*"Cases of error"*]

"[1] An error is in particular, deemed to be material:
1. if the party in error intended to enter into a contract other than the one he declared to consent to;

2. if the party in error had another thing in mind than the one which is the object expressed in contract, or another person, provided that the contract was concluded with a particular person in mind;

3. if the performance promised by the contracting party invoking his error is considerably greater in extent, or the performance promised by the other party is considerably smaller in extent, than the performance the party in error intended;

4. if the error related to certain facts that the party in error considered to be a necessary basis of the contract, in accordance with the rules of good faith in the course of business.

[2] The error concerning only the motives of the contract is not material.

[3] Mere errors in calculations do not invalidate the contract; they shall be corrected".

Article 25 CO
[*"Action contrary to good faith principles"*]

"[1] The party in error is not permitted to avail himself of such error if this is contrary to good faith principles.

[2] In particular, a party in error is bound by a contract as it was understood by him, as soon as the other party consents thereto".

Article 26 CO
[*"Error caused by negligence"*]

"[1] The party invoking his error in order to avoid the effects of the contract shall compensate for the damages caused by the invalidity of the agreement if the error derives for his own negligence, unless the other party knew or should have known the error.

[2] *The judge may, if equity so requires, award compensation for further damages to the damaged party".*

According to Swiss law (see Schwenzer, in: Basler Kommentar, OR I, 3. Aufl., Basel 2003, p. 230; Gauch/Aepli/Stoeckli, Praejudizienbuch zum Obligationenrecht, 5. Aufl., Zurich 2002, p. 147; Gauch/Schluep/Schmid/Rex, Obligationenrecht Allgemeiner Teil, 8. Aufl., Zurich 2003, p. 73), therefore, a contract is not binding because of an error only if the error is material (*"essentielle"*) and the invocation of the error is not contrary to the good faith of the other party. Swiss law, then, defines the cases in which an error is material (*"essentielle"*).

The foregoing provisions do not allow, in the Panel's opinion, the relief requested by the Appellants, i.e. the conclusion that the Second Contract was vitiated by an error, and therefore does not bind the Player.

In fact, the error invoked by the Appellants (the assumption that the Second Contract could be terminated by simply paying the amount stipulated in its Article X, without any further disciplinary consequence) does not appear to be considered material (*"essentielle"*) by Article 24 CO. Indeed, the Player does not claim by such submission that he *"intended to enter into a contract other than the one he declared to consent to"*, or that he *"had another thing in mind than the one which is the object expressed in contract, or another person"*, or that *"the performance* [he] *promised … is considerably greater in extent, or the performance promised by …* [UMM Salal] *… is considerably smaller in extent, than the performance …* [he] *… intended"*. Indeed, the error invoked does not relate *"to certain facts"* that the Player *"considered to be a necessary basis of the contract, in accordance with the rules of good faith in the course of business"*: it relates to the legal consequences of an action (i.e., of the termination of the Second Contract), and therefore to an element which is not deemed material (*"essentielle"*) by Article 24 CO. Indeed, the disciplinary consequences, if any, of an action of an athlete pertinent to his sporting activity are defined by the rules of the relevant sport system, since they are intended to protect the values on which such system is based: consequently, the parties to a contract are in principle not allowed to modify their regime. Therefore, since the disciplinary consequences do not form part of the contractual arrangements, an error regarding them is not an error pertinent to the contract. Such error seems more to relate to the motives and is thus irrelevant pursuant to Article 24.2 CO.

As a result, the Panel holds that the conclusion of the Second Contract was not vitiated by an error relevant pursuant to the CO. The Second Contract was therefore binding on the Player.

Under a second point of view, the Appellants deny that the Player breached the Second Contract. In their submission, the withdrawal of the Player from the Contract was allowed by its Article X. Therefore, the Player, by the Termination Letter, exercised a contractual right, whose only consequence was the payment of the amount indicated in Article X of the Second Contract.

Contrary to the Appellants' submissions, the Panel finds that Article X of the Second Contract, concerning *"Termination by the Club or the Player"* (see above), does not allow a unilateral withdrawal of the Player: it only provides for the termination of the Second Contract for *"mutual consent"* or *"just cause"*, and sets the amount of the compensation to be paid by the *"party in breach"* when *"the termination of the Contract is not due to just cause or a mutual agreement between the Parties concerned"*. In other words, termination other than for just cause or mutual consent is considered to be a breach of the contract; and the amount to be paid, when just cause or mutual consent are not given, is not the consideration for the withdrawal, but a quantification of the damages due in the event of breach.

In light of the foregoing, the Panel holds that the Player breached the Second Contract, as a result of his refusal to comply with it, expressed in the Termination Letter and his failure to join UMM Salal according to its terms, not being justified by mutual consent or by just cause.

In any case, the Panel wishes to underline that the signature by the Player of two contracts for the same period constitutes in itself a breach of the Regulations, which entails the application of the rules therein contained concerning the maintenance of contractual stability and the breach of contract (as indicated in Article 18.5 of the Regulations): the signature of two conflicting contracts constitutes in fact an action which cannot be allowed; a player is not entitled to sign a second contract in order to "insure" himself against the possible breach of the first contract by the club: if he does that, he is himself in any case in breach of one of the two contracts.

D. What are the consequences of the Player's breach of the Second Contract?

Article 17 of the Regulations provides for a number of consequences in the event an employment contract is breached by a player:

a) compensation shall be paid (Article 17.1),

b) the player's new club shall be jointly liable with

the player for the payment of such compensation (Article 17.2), and

c) sporting sanctions shall be imposed, if the breach occurs during the Protected Period (Article 17.3).

The Panel found that the Player breached the Second Contract. As a result, the Panel has to identify, in light of Article 17 of the Regulations, the consequences of the Player's breach.

1. Are damages to be awarded to UMM Salal? If so, in what measure?

The first consequence set by Article 17.1 is the payment of compensation. The obligation to pay compensation is indeed a corollary of the binding force of contracts: the party that does not comply with the obligations binding it has to bear the financial consequences of its action and compensate the other party of the adverse effects it caused.

As a result, the Player, having breached the Second Contract, is obliged to pay compensation for the damages caused to UMM Salal. The holding of the Decision in this respect is correct.

UMM Salal, however, in its counterclaim, disputes the amount of compensation the DRC awarded, and request the payment of larger damages.

The Panel notes that the Regulations set, in Article 17.1, some criteria intended to assist in the calculation of the compensation payable. Such criteria, however, can be applied only *"unless otherwise provided for in the contract"*. In fact, *"the amount"* of compensation *"may be stipulated in the contract or agreed between the parties"* (Article 17.2 of the Regulations). The Regulations, in other words, acknowledge the freedom of the parties, recognized in the domestic legal systems, to define in advance (in "penalty" or "liquidated damages" clauses) the amount of compensation to be paid in the event of breach. As a result, if a breach occurs, that amount has to be paid and not the amount determined under the other criteria set in the Regulations.

The Player and UMM Salal defined, at Article X.3 of the Second Contract, in USD 160,000 the measure of the compensation to be paid in the event of breach by the Player (or UMM Salal) of the Second Contract. As a result, the compensation to be awarded to UMM Salal is limited to such amount: the Decision that so held is correct; and UMM Salal's claim for larger damages cannot be sustained.

At the same time, the Panel notes that UMM Salal's indication that the damages it suffered exceed the contractual amount is not assisted by any evidence at all. As a result, UMM Salal's claim could not, in any case, be accepted.

In light of the foregoing, the Decision (point 2 of the holding of the Decision) is to be confirmed: the Player is bound to pay UMM Salal compensation in the amount of USD 160,000 for the breach of the Second Contract.

According to the Decision (point 4 of the holding of the Decision), interest accrues on such amount, at the rate of 5% per annum. Such interest started to accrue on 25 July 2009, i.e. as of the expiry of the thirty day period after the notification (on 25 June 2009) of the Decision.

2. Is Mallorca jointly and severally liable for the payment of the damages awarded?

Pursuant to Article 17.2 of the Regulations, *"if a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment"*. The DRC, in light of such provision, established (point 6 of the holding of the Decision) that Mallorca was not to be held jointly and severally liable for the payment by the Player of the damages awarded to UMM Salal, because the First Contract had been concluded before the Second Contract and therefore Mallorca was not the *"new club"* of the Player.

It is not clear to the Panel whether UMM Salal, in its counterclaim, challenges also such holding of the Decision. Indeed, the Second Respondent requested this Panel *"to reform partially the decision pronounced by the Dispute Resolution Chamber … in what A. … is condemned to the payment of an allowance to the amount of 2.000.000,00 $ (and this, if need be, in Co-solidarity with club REAL DEPORTIVO MALLORCA SAD)"* .

[Emphasis added]

In other words, UMM Salal's claim that Mallorca be held liable for the compensation due by the Player seems to be linked, and therefore limited, to the petition that compensation in a larger amount be granted, and not submitted also with respect to the amount actually granted by the DRC. As a result, the dismissal of the claim for larger damages would imply also the rejection of the claim for a joint liability.

In any case, the Panel holds that the Decision was correct in excluding the joint liability of Mallorca. Therefore, a challenge on this point, if submitted by

UMM Salal, is to be dismissed.

The Panel, in this respect, remarks that Mallorca had a contract with the Player before the Player signed the Second Contract, and therefore before the Player breached the contract with UMM Salal. As a result, Mallorca, being already the club of the Player at the time of the breach, cannot be considered as the *"new club"* of the Player for the purposes of Article 17.2 of the Regulations.

In light of the foregoing, the Panel concludes that Mallorca is not jointly and severally liable for the payment of the compensation due by the Player to UMM Salal. The Decision is on this point to be confirmed.

3. Is a restriction on the eligibility to play in official matches to be imposed on the Player?

Pursuant to Article 17.3 of the Regulations, *"in addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the protected period. This sanction shall be a four-month restriction on playing in official matches. In the case of aggravating circumstances, the restriction shall last six months. Unilateral breach without just cause or sporting just cause after the protected period shall not result in sporting sanctions …"*. In other words, the provision distinguishes between breaches committed within and breaches committed without the Protected Period: only in the first situation *"sporting sanctions shall … be imposed"* in addition to the obligation to pay compensation.

The application of such provision in the dispute before this Panel raises two questions: i.e. whether the breach of the Second Contract occurred in the Protected Period, and, if so, whether a sanction is to be imposed on the Player. The Decision in such respect held that the Player breached the Second Contract in the Protected Period and imposed on the Player the sporting sanction provided in Article 17.3 of the Regulations (point 5 of the holding of the Decision).

With respect to the first point, the Appellants submit that the Second Contract was not breached in the Protected Period: the Second Contract, in fact, at the time of the Termination Letter, *"had not yet come into force"*, since it had effects starting from 1 July 2008. As a result, no suspension can be imposed on the Player. According to the Appellants, in fact, the Protected Period starts only at the moment the relevant contract comes into force – to last then for the period indicated in the Regulations. Thus, a breach occurring before the entry into force of a contract does not occur within the Protected Period.

The Panel does not agree with such interpretation of the concept of Protected Period. The Panel notes that the wording of the definition of Protected Period contained in the Regulations could lend some support to the Appellants' interpretation to the extent is refers to *"a period … following the entry into force of a contract"*. The Panel, however, underlines that the definition can also be read as only setting the date the Protected Period expires (i.e., at the end of a period of two or three years or seasons following the entry into force of a contract) and not to imply that a breach committed after the signature of the contract and before its entry into force is not within the Protected Period.

More in general, the Panel understands the interpretation submitted by the Appellants as based on the confusion between the "binding force" of a contract and the "entry into force" of such contract. An employment contract is binding on the parties as of its signature even if an initial deadline is set for its applicability. A breach before that deadline (e.g., the day before), depriving the other party of the expected performance promised by the party in breach, is not less serious than a breach after (e.g., the day after) the deadline. The rationale underlying the concept of Protected Period, i.e. to reinforce the contractual stability in the first years of contract, applies to both breaches. As a result, the breach of the Second Contract by the Player, to the extent it was committed after the signature of the Second Contract but before its entry into force, occurred in the Protected Period.

In any case, the Panel notes, as FIFA did, that the breach of the Second Contract, as a result of the Player's refusal to comply with the Second Contract, expressed in the Termination Letter, was confirmed by his failure to join UMM Salal according to its terms at the moment the Second Contract had entered into force. Therefore a breach *"following the entry into force of a contract"*, i.e. certainly within the Protected Period, was committed by the Player.

Article 17.3 of the Regulations provides that if a breach is committed within the Protected Period *"sporting sanctions shall … be imposed"*. On the basis of such provision, the Decision imposed a restriction of four months on the Player's eligibility to play in official matches.

The sanction is challenged by the Appellants, who requested that the restriction be cancelled. The Appellants submit that the parties to the Second Contract stipulated therein that in the event of breach only the payment of USD 160,000 was due – and no sporting sanctions were contemplated: *"the autonomy of will of the parties"*, recognized by Article 19 of the

CO, could also be exercised in order to define all consequences of termination of a contract, excluding the application of the FIFA rules on the matter. In this respect, the Appellants invoke a CAS precedent (CAS 2008/A/1544, award of 13 February 2009).

The Panel does not agree with this Appellants' submission. As already noted, the disciplinary consequences of an action of an athlete pertinent to his sporting activity are defined by the rules of the relevant sport system, which intend to protect the values on which such system is based. Consequently, the parties to a contract are in principle not allowed to modify their regime: the freedom of the parties, in fact, can be exercised only when private interests of the individuals concerned are involved (as it happened in CAS 2008/A/1544, concerning the parties' stipulations on the payment of the solidarity contribution contemplated in Article 21 of the Regulations). As a result, the fact that the Second Contract did not mention the imposition of a disciplinary sanction in the event of breach without just cause in the Protected Period is not a reason to exclude the application of Article 17.3 of the Regulations.

The Panel has therefore to turn its attention to Article 17.3 of the Regulations. It follows from a literal interpretation of said provision that it is a duty of the competent body to impose sporting sanctions on a player who has breached his contract during the protected period: "shall" is obviously different from "may"; consequently, if the intention of the Regulations was to give the competent body the power to impose a sporting sanction, it would have employed the word "may" and not "shall". Accordingly, based on the wording of Article 17.3 of the Regulations, a sporting sanction had to be imposed on the Player, without any further evaluation: the mentioned provision appears to give the competent body the obligation, and not only the power, to impose a sporting sanction on a player found to be in breach of contract during the Protected Period.

However, this Panel underlines, as another CAS Panel did (CAS 2007/A/1358 and CAS 2007/A/1359, awards of 26 May 2008), that rules and regulations have to be interpreted in accordance with their real meaning. This is true also in relation with the statutes and the regulations of an association.

In the mentioned CAS precedents, FIFA observed that it is stable, consistent practice of FIFA and of the DRC in particular, to decide on a case by case basis whether to sanction a player or not. The CAS Panel was in those cases satisfied that there is a well accepted and consistent practice of the DRC not to apply automatically a sanction as per Article 17.3 of the Regulations. The Panel then followed such an interpretation of Article 17.3 of the Regulations which appears to be consolidated practice and represents the real meaning of the provision as it is interpreted, executed and followed within FIFA.

Such practice was discussed but not disputed by FIFA at the hearing before this Panel. As a result, this Panel finds itself in the same position as the other CAS Panel (in CAS 2007/A/1358 and CAS 2007/A/1359) and bound to give Article 17.3 of the Regulations its real meaning and to follow the stable, consistent practice of FIFA to decide on a case by case basis whether to sanction a player or not. Indeed, the Panel notes that the Regulations have not been amended following the mentioned CAS precedents to exclude such discretion.

With respect to the Player, the Panel notes that a number of exceptional circumstances are given to justify the imposition of no disciplinary sanction, additional to the payment of compensation. Such circumstances include:

a) the unique situation in which the Second Contract was signed by the Player, and more specifically the breach by Mr Abdulla and UMM Salal of the agreement then reached that all the copies of the Second Contract, signed by the Player and UMM Salal, had to be kept by Mr Abdulla, with the instruction to destroy them in the event the Player had decided to play for Mallorca: on the point, the Panel relies on the Player's declarations, that have not been contradicted by UMM Salal, whose legal representative did not attend the hearing;

b) the fact that the termination without just cause was declared by the Player in the Termination Letter, not long after the signature of the Second Contract;

c) the fact that the Player has *de facto* been prevented from playing in official matches for a certain period, at the time the issuance of the ITC was delayed.

In light of the foregoing, the Panel concludes that no restriction on playing in official matches is to be imposed on the Player. The Decision is on this point to be set aside.

Arbitration CAS 2009/A/1912 & 1913
Claudia Pechstein & Deutsche Eisschnelllauf Gemeinschaft e.V. (DESG) v. International Skating Union (ISU)

25 November 2009

Speed skating; doping (blood doping); longitudinal hematological profiling as a mere evidentiary method; anti-doping proceedings without adverse analytical finding and burden of proof; absence of adverse analytical finding and departures from the international standards for testing; comfortable satisfaction of the Panel as standard of proof for doping cases; chain of custody; reliability of the machine used to analyse the blood samples; abnormal hematological values and establishment of a doping offence; intra-individual abnormality of the Athlete's high reticulocytes percentage; simultaneous adverse analytical finding for rEPO and high %retics values.

Panel:
Prof. Massimo Coccia (Italy), President
Mr. Stephan Netzle (Switzerland)
Mr Michele Bernasconi (Switzerland)

Relevant facts

Ms Claudia Pechstein ("the Athlete" or "First Appellant" or "Ms Pechstein") is a 37-year old German speed skater whose main disciplines are 3,000m and 5,000m and is one of the most successful winter sports athletes of all times.

The Deutsche Eisschnelllauf Gemeinschaft e.V. (DESG or "Second Appellant") is the national federation governing the sport of speed skating in Germany, to which Ms Pechstein is affiliated. The DESG is a member of the International Skating Union.

The International Skating Union (ISU or "Respondent") is an association formed under the laws of Switzerland and having its seat in Lausanne. The ISU is recognized by the International Olympic Committee as the international federation governing the sports of figure skating and speed skating worldwide.

In the period between 4 February 2000 and 30 April 2009 the Athlete underwent numerous in-competition and out-of-competition anti-doping controls. None of these controls resulted in an adverse analytical finding.

During the same period the ISU collected more than ninety blood samples from the Athlete as part of the ISU blood profiling program. In particular, from 20 October 2007 until 30 April 2009 the ISU collected twenty-seven blood samples from the Athlete, the last twelve of which were collected between January and April 2009.

The blood parameters which are measured and recorded within the scope of the Respondent's blood profiling program include *inter alia* hemoglobin, hematocrit and percentage of reticulocytes ("%retics"). Reticulocytes are immature red blood cells that are released from the bone marrow. The %retics is a sensitive hematological parameter which provides a real-time assessment of the functional state of erythropoiesis in a person's organism.

While ISU considers that the "normal" %retics values fall within the 0.4–2.4 range, some of the Athlete's blood screening results showed %retics values well above the value of 2.4 followed by a sharp decrease.

On 7-8 February 2009 the Respondent organised the 2009 ISU World Allround Speed Skating Championships in Hamar, Norway. Blood samples for screening purposes were taken from all athletes one day before the beginning of said Championships, in the morning of 6 February 2009. The Athlete's %retics value was measured at 3.49.

Following this result, the ISU collected two more tubes of blood from the Athlete, in the morning and in the afternoon of 7 February 2009. The %retics count was found to be respectively 3.54 and 3.38. On the same day, the Athlete and the DESG were informed by the ISU medical advisor Prof. Dr. Harm Kuipers ("Dr. Kuipers") that the %retics values were "abnormal". Although the values of hemoglobin and hematocrit were not such to provide a situation of "no start", the DESG communicated that Ms Pechstein was not taking part in the following day's races.

A few days later, on 18 February 2009, another blood sample was collected from the Athlete out-of-competition, showing a %retics of 1.37.

After reviewing the Athlete's blood profile, on 5 March 2009 the ISU filed a Statement of Complaint with the ISU Disciplinary Commission (DC). The ISU accused the Athlete of having used a prohibited substance and/or a prohibited method, i.e. some form of blood doping, which would constitute an anti-doping rule violation under Article 2.2 of the ISU Anti-Doping Rules which entered into force on 1 January 2009 (ISU ADR) in conformity with the new version of the World Anti-Doping Code enacted by the World Anti-Doping Agency (WADA).

On 1 July 2009 the ISU Disciplinary Commission issued its decision (the "Appealed Decision") declaring, inter alia, the Athlete responsible for an Anti-Doping violation under Article 2.2 of the ISU ADR by using the prohibited method of blood doping and imposing on her a two years' ineligibility.

Both the Athlete and the DESG appealed against the Appealed Decision to the CAS.

Extracts of the legal findings

A. Burden and Standard of Proof

1. Burden of Proof

Pursuant to Article 3.1 of the ISU ADR the "*ISU and its Members shall have the burden of establishing that an Anti-Doping rule violation has occurred*".

There is no dispute that the onus of establishing the doping charge that has been levelled against Ms Pechstein is on the ISU. All parties accept that the ISU bears the burden of proof in respect of its claims. Hence, the ISU must prove that (i) the blood samples used to acquire the Athlete's hematological values and portray her profile were properly taken, (ii) there was a reliable chain of custody of the blood samples from the place of collection to the laboratory, (iii) the machine used to analyse the blood samples – the Bayer Advia 120 or, in its latest evolution, Advia 2120 (the "Advia Machine") – was a reliable equipment to record accurate hematological values, (iv) the transmission of those values to, and the storage in, the ISU data base was reliable, and (v) the hematological values of Ms Pechstein are reliable evidence of her use of a prohibited method in violation of Article 2.2 of the ISU ADR.

In this respect, the Panel does not agree with the Appealed Decision's statement, in reference to the Advia Machine, that there is "*a factual presumption that the blood screening tests of the Alleged Offender produced correct result*". Indeed, no presumption is provided in favour of the ISU when a charge is brought under Article 2.2 of the ISU ADR. As a CAS Panel stated: «*in anti-doping proceedings other than those deriving from positive testing, sports authorities do not have an easy task in discharging the burden of proving that an anti-doping rule violation has occurred, as no presumption applies*» (CAS 2005/C/841 CONI, para. 84).

[Emphasis added]

Accordingly, the Panel finds that the ISU bears the full burden to present reasonably reliable evidence to persuade the Panel, by the applicable standard of proof, that the Athlete committed a doping offence in violation of Article 2.2 of the ISU ADR.

In this connection, the Panel underscores that, as this is not a case of adverse analytical finding where a presumption is provided in favour of the anti-doping organization (see *supra* at para. 44), the ISU is not mandated to follow the WADA IST and WADA ISL in order to prove the Athlete's use of a prohibited method. Indeed, in the Panel's opinion, any reasonably reliable practice of sample collection, post-test administration, transport of samples, analytical process and documentation would suffice. This view is confirmed by the official comment to Article 2.2 of the ISU ADR:

«Unlike the proof required to establish an anti-doping rule violation under Article 2.1, Use or Attempted Use may also be established by other reliable means such as […] 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 Article 2.1. For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the ISU provides a satisfactory explanation for the lack of confirmation in the other Sample».

[Emphasis added]

The Panel remarks that this view is confirmed, *a fortiori*, by the fact that, even in cases of adverse analytical findings, departures from WADA International Standards do not invalidate *per se* the analytical results, as long as the anti-doping organization establishes that such departure did not cause the adverse analytical finding (see Article 3.2.2 of the ISU ASR, as well as the identical provision of the WADA Code). As a consequence, the Appellants' contention that the ISU's departure from the WADA

International Standards would impede the proof of the Athlete's violation fails.

The Panel also does not agree with the Appellants' contention that the WADA Draft Biological Passport Guidelines should be followed by the ISU as "minimum standards" because, as correctly pointed out by the ISU, that document is a draft which has not been finalized yet and which will not be mandatory even when it is eventually adopted.

The Panel is also of the opinion that the ISU does not have to prove the intent or the fault of the Athlete in using a prohibited method such as blood doping. Indeed, Articles 2.2.1 and 2.2.2 of the ISU ADR provide as follows: "*(2.2.1) It is each Skater's personal duty to ensure that no Prohibited Substance enters his or her body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Skater's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method. (2.2.2) The success or failure of the Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an ISU Anti-Doping Rule violation to be committed*".

The Panel notes that the ISU ADR, exactly like the WADA Code, adopt a strict liability principle in relation to the prohibition to "use" a prohibited method or substance, whereas intent must be proven in cases of "attempted use" (which is not relevant here), as confirmed by the relevant official comment to Article 2.2.2 of the ISU ADR: "*Demonstrating the "Attempted Use" of a Prohibited Substance requires proof of intent on the Skater's part. The fact that intent may be required to prove this particular anti-doping rule violation does not undermine the strict liability principle established for violations of Article 2.1 and violations of Article 2.2 in respect of Use of a Prohibited Substance or Prohibited Method*".

The Panel notes that an equal comment to Article 2.2.2 can be found in the version of the WADA Code in force until 31 December 2008, to which the previous ISU Anti-Doping Rules conformed.

Accordingly, the Panel rejects the Appellants' contention that the ISU bears the burden to also prove the Athlete's fault or intent to use blood doping.

2. Standard of Proof

So far as the standard of proof is concerned, the Panel will apply Article 3.1 of the ISU ADR, under which:

"The standard of proof shall be whether the ISU or its Member has established an Anti-Doping rule violation to the comfortable satisfaction of the hearing panel 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".

The "comfortable satisfaction" test is well-known in CAS practice, as it has been the normal CAS standard in many anti-doping cases even prior to the WADA Code (see e.g. TAS 2002/A/403-408, CAS 98/208, CAS OG/96/004). Several awards have withstood the scrutiny of the Swiss Federal Tribunal, which has stated that anti-doping proceedings are private law and not criminal law matters and that "*the duty of proof and assessment of evidence [are] problems which cannot be regulated, in private law cases, on the basis of concepts specific to criminal law*" (Swiss Federal Tribunal, 2nd Civil Division, Judgment of 31 March 1999, 5P.83/1999, Para. 3.d).

Therefore, the Panel does not agree with the Athlete's contention that the standard of proof must be very close to "proof beyond reasonable doubt" because of the particular seriousness of the allegation against Ms Pechstein. The standard of proof beyond reasonable doubt is typically a criminal law standard that finds no application in anti-doping cases. Obviously, the Panel is mindful of the seriousness of the allegations put forward by the ISU but, in the Panel's view, it is exactly the same seriousness as any other anti-doping case brought before the CAS and involving blood doping; nothing more, nothing less.

Accordingly, with regard to disputed facts the Panel will apply, without further qualifications, the normal "comfortable satisfaction" standard that is provided by the ISU ADR and that has been applied in many CAS cases concerned with allegations of blood manipulation or other serious forms of doping.

B. Blood Samples' Collection

The Panel has heard evidence from the Athlete and Dr. Kuipers regarding the collection of the Athlete's blood samples. Also, Dr. Jane Moran testified in detail about the ISU blood profiling procedures before the ISU Disciplinary Commission. It has remained undisputed that:

- blood samples were taken both out-of-competition and on the occasion of ISU events;

- *all* athletes who intended to participate in an ISU event would be tested one or two days before the event, usually during the morning. Depending on the number of participants, blood sample collection would take place before or after each athlete's training session. On 6 February 2009 the ISU collected a blood sample before the Athlete's

morning training session;

- some of the skaters would be requested to provide a blood sample also during the days of competition; for example, on 7 February 2009 the Athlete's blood was withdrawn shortly after she had completed her race.

The Panel initially notes that, although Communication 1520 came into effect on 30 July 2008, the previous Communication no. 1352 of 28 October 2005, equally entitled "ISU Procedures for Blood Testing", was substantially identical. In accordance with its rules, ISU's constant practice in the last years has been to collect blood samples from all athletes on the occasion of its events, since the hematological parameters could also be used for a "no-start" prohibition. It is thus through ISU's regulations and established practice that the Athlete knew that blood collection would take place at certain points in time during the sporting season. In addition, no issue has been raised with respect to the Athlete's notification for any of the blood samples' collection relevant in this case.

As regards the details of the blood sampling procedure, the ISU arranged to have blood drawing stations close to the place of residence of the athletes during an event, often at the same hotel. The Athlete would be notified either directly by the ISU or through the DESG about the exact time she had to appear at the station. After being identified through her passport or other identification document, the Athlete was asked to select one strip of three identical bar code labels. The ISU medical advisor would then scan the label and assign the number to the Athlete's name in the ISU data base with the help of a specially designed software program. The Athlete then proceeded for the blood sample collection either alone or with a DESG representative. The Athlete would choose a tube, the needle and the arm from which blood would be withdrawn. 3ml of blood were collected in the tube and one of the bar codes would be attached on the tube for sample identification purposes. Before exiting the station the Athlete was provided with a list of names and dates; she would have to attach the second bar code label next to her name and date and accordingly sign, confirming the date of the collection and that that the specific bar code belonged to her sample.

The Athlete argues that the phlebotomists used by the ISU at in-competition tests were not qualified for such process. The Panel does not agree with such contention. Firstly, the Panel notes that there is no record on file that the Athlete ever exercised her right under the ISU rules to have her own doctor or phlebotomist perform a blood collection (see Article 2.3), thus avoiding to have collection done by an allegedly non-qualified person. Then, the Panel finds that the evidence submitted by the ISU has established to the comfortable satisfaction of this Panel that the sample collection was performed by technicians qualified to take blood under the direct supervision of the ISU Medical Advisor who would be present on site and would often be the one to collect the sample, as for example Prof. Kuipers did on 7 February 2009 in Hamar.

Moreover, the ISU has submitted many lists with bar code labels attached and side-signed by the Athlete which refer in particular to numerous blood sample collections done at ISU competitions between 1 March 2007 and 7 February 2009.

The Panel notes that Communication 1520 does not require the use of sophisticated doping control forms. Despite the fact that the bar code lists are not doping control forms containing detailed information about the sample collection, in light of the evidence heard at the hearing the Panel is comfortably satisfied that, for purposes of Article 2.2 of the ISU ADR, the material aspects of the process such as the date and place of the blood collection, the identification of the Athlete through her signature and of her sample through an identical bar code have been properly recorded by the ISU.

Further, the Panel notes that the evidence before it indicates that the requirements for blood collection set out in Communication 1520 were met. The Panel emphasizes that Communication 1520 does not encompass the requirements set out by the ISU or WADA with respect to anti-doping testing. In fact, it is clear from the wording of Communication 1520 that blood testing for screening purposes is distinguished from post-race anti-doping testing:

"*1.3 Time of Testing*

Blood Testing may take place on the days prior to the first competition and/or on the competition days. Blood Testing may also be carried out post competition on any Skater, including those Skaters selected for post race Anti-Doping Testing".

[Emphasis added]

In particular, the Panel is persuaded that the WADA IST and WADA ISL, to which the ISU conforms in accordance with the ISU Anti-Doping Procedures set forth by Communication No. 1547, do not apply to blood testing done for profiling purposes, given that no complex laboratory operations are needed to analyse the blood samples and record the required

hematological values.

As a result, the Panel holds that the ISU Anti-Doping Procedures and the WADA IST and WADA ISL do not apply to blood sample collection for screening purposes and that the Athlete's respective arguments must fail.

Lastly, it is relevant to note that at the time of collection the Athlete has never protested against any of the blood sampling procedures performed by the ISU on her. Indeed, the bar code lists shown to the Panel had sufficient space for athletes to handwrite comments or record objections, if any, but the Athlete has always inserted her signature without further ado. Nor did the Athlete point out any material flaws in the process, aside from the fact that the tubes were allegedly not sealed when blood was withdrawn in-competition. The Panel will deal with this issue when addressing the samples' chain of custody.

Therefore, the Panel finds that the blood samples used to acquire the Athlete's hematological values and portray her blood profile were properly taken.

C. Chain of Custody

As a preliminary remark the Panel notes that Communication 1520 does not set out legal requirements for the samples' chain of custody; hence, it is the role of the Panel to decide on the basis of the evidence before it whether the chain of custody applied by the ISU and ISU-assigned persons with respect to Ms Pechstein's samples is reliable.

It has been established by the ISU to the Panel's comfortable satisfaction that, after completion of the blood sample collection, the ISU Medical Advisor placed all the tubes in a cooled transport container. The parties agreed that the tubes were closed – not sealed – with a rubber top but the container in which they were transported, either by the ISU Medical Advisor himself or by a courier company, was sealed. When the measurement did not take place on site and transportation of the samples was required, it took place immediately after all athletes were tested and the samples were directly delivered to the laboratory.

The ISU has produced letters from the laboratories in Hamar (Norway), Zuiderzee (the Netherlands), Okaya (Japan), Orbassano (Italy) and Calgary (Canada) describing the steps of the laboratory internal chain of custody in very similar terms:

- the laboratory technician received the container and the ISU Doping Control Chain of Custody Form (the "ISU Form"), verified that the seal was intact and compared the security seal number on the container with the seal number listed in the ISU Form;

- the technician opened the container and confirmed that a) the number of tubes matched the number of samples listed on the ISU Form, b) the tubes were closed, and c) each tube bore a unique bar code;

- the technician then proceeded with the analysis by placing each tube into the Advia Machine for automatic screening; the rubber top of the tube was not removed at any stage of the process because the Advia Machine uses a needle that pierces the rubber top and extracts from the tube the amount of blood necessary for analysis.

The above laboratories have analyzed the majority of the Athlete's samples in the last two years, including the Calgary (November 2007) and Hamar (February 2009) samples, where the Athlete's values were significantly high. The Panel finds that the above-mentioned procedure demonstrates a harmonized process of handling blood samples collected by the ISU which does not leave much space for manual operations. Further, the ISU has produced 15 ISU chain of custody forms regarding, amongst others, the Athlete's samples from Hereenven and Erfurt (January 2009) and Hamar (February 2009). The data recorded in these ISU forms identify *who* and *when* was in possession of the sample between the time of collection and the time of analysis. The Panel found the record to be continuous in that respect.

With reference to the samples for which no ISU form has been produced, the chain of custody is reliable if the ISU can prove that the sample arrived in good order at the laboratory, it belonged to the Athlete and had not been tampered with (see CAS 2007/A/1394, pp. 31-34, which dealt with comparable circumstances). Indeed, the evidence submitted by the ISU and heard at the hearing proves beyond any doubt that the samples belonged to Ms Pechstein, especially in view of the fact that the ISU bar codes are automatically recognised by the Advia Machine and associated with the results of the analysis.

The Panel has further heard and examined evidence that does not leave any reasonable doubts as to the transportation conditions. Indeed, the laboratories have confirmed that the sealed containers and the tubes were received in good condition and it has been shown that, when the measurement did not take place on site and a laboratory was used, the latter was situated close to the sample collection site and received the samples during the same day. In any

event, the Panel heard persuasive expert evidence at the hearing explaining that a degradation of the Athlete's samples can be safely excluded because all her mean cell volume (MCV) values were at the bottom of the normal range and that any delay in the process would be in favour of the Athlete because the reticulocytes would decrease.

The Athlete also contends that the samples were not individually sealed and thus the ISU had not taken all necessary measures to avoid manipulation of the samples. The Panel firstly notes that the ISU forms in the relevant part read: "*If the inner containers are opened this will invalidate the chain of custody*". No such incident has been recorded on the ISU forms or reported in whatsoever way or recalled by any witness.

Moreover, the analytical process followed by the laboratories does not require any person from the laboratory personnel to open the tube's top, since the sample is placed directly from the container into the analysing machine. As explained before, unlike in anti-doping testing where the laboratory (by means of a complex and costly investigation) looks for prohibited substances yielding an adverse analytical finding, in blood screening the laboratory simply measures (by means of an automated machine) certain hematological parameters. Dr. Moran pointed out, and the Panel accepts her testimony as compelling, the following: "*The tube cannot take more than 3 ml. If you wanted to add something to it, the top would have to come off. If you added a substance, that would not make the test positive. If you added a fluid that was not the specific pH of the [Athlete's] body, the cells would all be destroyed. The only thing that would not destroy the cell[s] would be saline. If you managed somehow to add saline, it would be to the advantage of the athlete, because it would cause hemodilution and lower the parameters*".

[Emphasis added]

It is relevant to note that neither Ms Pechstein nor any of the experts or witnesses who testified before the Panel gave any clue as to *how* and *why* one could have manipulated the Athlete's anonymous samples and alter the values of the hematological parameters found by the various laboratories' Advia Machines.

In view of the above, the Panel holds that it is comfortably satisfied that there was a reliable chain of custody of the blood samples from the place of collection to the various laboratories using the Advia Machine.

D. The Advia Machine

The Panel observes that the equipment used by the ISU for almost all the analyses of the blood samples of Ms Pechstein (and of all other elite skaters) is the Advia Machine, a piece of diagnostic equipment nowadays manufactured by Siemens after the acquisition, in 2006 of Bayer Healthcare's diagnostic division.

On very few occasions, the ISU has resorted to another well-known blood sample analyser, the Sysmex, produced by the Sysmex Corporation (the "Sysmex Machine").

The Advia Machine is a modern laser-based hematologic analyser and is undoubtedly a piece of equipment largely used by hospitals and laboratories in Europe. About four thousand of them are currently used worldwide. All experts agreed that, in general terms, it is a reliable machine, which obviously needs to be correctly calibrated. An expert called by the Athlete (Dr. Röcker, Head of the laboratory Labor 28 in Berlin) testified at the hearing that he liked the Advia Machine, actually used on a daily basis in his own laboratory. Another Appellants' expert, Prof. Jelkmann, declared before the ISU Disciplinary Commission that "*if they* [the Advia Machines] *are used correctly, they are reliable*".

The Panel understands from the evidence heard and examined that, in general, the Advia Machine tends to yield higher reticulocytes values than the Sysmex Machine. Given this difference between the two machines and the importance for blood profiling that the same technology is always used, the Panel will disregard any Athlete's hematological values deriving from a Sysmex Machine and will only take into account values deriving from analyses performed by the Advia Machine. In this way, the Panel is comfortably satisfied that the values are all comparable between themselves, particularly because the calibration of the Advia Machine has always been done in accordance with the same protocol developed by Bayer/Siemens.

Indeed, the manufacturer company of the Advia Machine has developed a 47-page protocol named "Using the Advia 120 for Sports Event" ("Advia Sports Protocol") with the purpose of providing directions for calibrating, running and managing the Advia Machine at sports events where athletes' blood samples are to be tested. The ISU requires the collaborating laboratories to comply with the Advia Sports Protocol when measuring hematological values of blood samples collected by the ISU.

At the hearing the Panel heard extensive evidence submitted by Mr. Tor Tverli, a Senior Field Service Engineer for Advia hematology systems who has specialised on the Advia Machine since the latter

was introduced in the late '90s. Mr. Tverli confirmed that he performed a periodic maintenance on the Advia Machine in Hamar on 20 January 2009 and that he calibrated the same machine according to the Advia Sports Protocol on 4 February 2009, two days before the Athlete was tested on the eve of the World Allround Speed Skating Championships. He had also calibrated the Advia Machine in 2008 before the ISU World Cup event in Hamar.

Mr Tverli explained in detail the four-hour process that he followed in order to fine-tune the parameters of the Advia Machine and ensure the accuracy of the results produced. The Advia Sports Protocol is a special procedure which entails three levels of control and numerous adjustments by using five normal blood samples. The Panel notes that it is a sophisticated process, more complex than the "standard" calibration performed for ordinary diagnostic use in laboratories or hospitals. The Panel is comfortably satisfied by the evidence given by Mr Tverli that the calibration process provided by the Advia Sports Protocol actually minimizes – if not nearly extinguishes – the risk of producing erroneous values to an adequate level.

Further, the Panel refers to the testimony of Ms Kjersti Skaug, a laboratory technician who operated the Advia Machine in the Hamar laboratory. Ms Skaug confirmed that a full check called "Daily Calibration Check", which includes cleaning of the device and running five normal blood samples, was made without any problems both on 6 and 7 February 2009 prior to analysing the skaters' samples in Hamar. Ms Skaug also testified that the routine procedure of running all samples twice was uneventfully followed. On this particular issue Prof. Kuipers explained that running the samples twice through the Advia Machine is the practice for all ISU samples regardless of the laboratory used. The Panel notes that this is in fact a requirement set out at page 15 of the Advia Sports Protocol.

With respect to the analyses of Ms Pechstein's other samples, the Panel underlines that the previously mentioned five laboratories who dealt with those samples confirmed in writing that they calibrated their own Advia Machines in accordance with the Advia Sports Protocol prior to performing any blood screening on behalf of the ISU on the same dates that Ms Pechstein's samples were analysed.

The above evidence allows the Panel to be comfortably satisfied that conclusions may be safely drawn from the blood values of Ms Pechstein. Although Dr. Kruse, an expert called by the Appellants, insisted that "you cannot absolutely exclude errors", the Panel remarks that it has not seen or heard any relevant evidence of a specific malfunctioning of the Advia Machines used by the ISU and that no criticism has been raised towards the correctness and suitability of the Advia Sports Protocol. The Athlete's remark that the different MCHC values – MCHC is the ratio of hemoglobin to hematocrit – obtained from the two different samples taken in Hamar on 7 February 2009 (at different times) would indicate a measuring error has been convincingly rebutted by Prof. Gassmann's explanation that a 0.1 g/dl variation in hemoglobin and a 0.02 variation in hematocrit may well occur between two samples taken in the same day. The Panel has also verified that the Athlete's assertion that calibration was different between laboratories because in certain laboratories the %retics values have been constantly high is not correct since, for instance, the average value measured in Hamar 2009 was of 1.54% and the second highest value of an athlete was approximately 2.30%, as testified by Prof. Kuipers during the hearing.

Moreover, according to evidence heard and examined by the Panel, the hematological values of all other skaters (either tested at the same event in Hamar or at previous occasions) have been consistent with a correct functioning of the Advia Machine. It would be utterly implausible and unreasonable, in the Panel's view, to assume the occurrence of analytical errors, more than once, solely in the case of Ms Pechstein. Therefore, on the face of the evidence before it, the Panel considers that the specifications of the Advia Sports Protocol ensure that the Advia Machine produces reliable results for anti-doping purposes.

In this connection the Panel observes that, after all, automated hematology analysers such as the Advia Machine are constantly used by hospitals and laboratories in everyday life, with both doctors and common people assessing medical situations and taking decisions in matters of – literally – life and death in full reliance on the values shown by such kind of equipment. In view of that, it would be unreasonable, in the absence of any evidence suggesting that the hematological data recorded by the Advia Machine are untrustworthy, to disregard those data in connection with a disciplinary matter.

In conclusion, the Panel is comfortably satisfied that the Advia Machine is a reliable equipment and that it has been properly used on behalf of the ISU to analyse the blood samples of Ms Pechstein and of the other elite skaters and to record reasonably accurate hematological values.

E. Transmission and Storage of Values in the ISU Data Base

One of the main features of the Advia Machine used in analysing the samples of Ms Pechstein's (and of all other world elite skaters) is its software, which allows the raw data produced after the analysis to be digitally exported to a data file. Then, it is rather simple for the operator of the Advia Machine to send the data file to the ISU Medical Advisor as email attachment. As explained by Dr. Alofs, who designed and developed the structure of the ISU data base after 2005, the software used by the ISU processes the raw data and assigns the results to the respective skater on the basis of the sample's bar code. This unique bar code has already been – from the time of blood collection – linked to a specific skater and thus the ISU data base can associate the results with the name of an individual. As soon as the ISU Medical Advisor receives the results from the laboratory, he runs the program and 421 columns with analytical data, including the date and the time of analysis are automatically imported into the ISU data base. The user of the program is not authorised to access any other function than the standard data base functions offered by the program. Manual insertion of values has occurred only in a few cases where there was no raw data available from the machine used for sample screening.

The Panel notes that the above procedure and the ISU data base as developed by Dr. Alofs has not been questioned or challenged by the Appellants. Rather, Ms Pechstein contends that a) results of fourteen blood samples collected from the Athlete do not appear on the ISU data base; b) there have been eleven samples where the bar code on the doping control was not the same as on the ISU data base; c) there are discrepancies or missing data in the Athlete's values that the ISU has failed to explain.

Firstly, the parties agree that the ISU data base displays only values of blood samples measured within the framework of the ISU blood profiling program. Blood samples collected and analysed with a purpose of directly detecting prohibited substances in accordance with the relevant rules are not recorded in the ISU data base. The Athlete bases her argument on the doping control forms currently in her possession. However, nine out of the fourteen allegedly "missing" tests were either WADA – or IOC – mandated and the blood samples were submitted only to analysis focusing on the detection of a prohibited substance. This is evidenced from the WADA's correspondence dated 4 August 2009 and from the dates of three samples taken in connection with the 2006 Winter Olympic Games in Turin. The sample taken on 20 September 2004 is reported in the ISU database. A sample taken on 20 June 2005 was not fully analysed by the Kreischa laboratory due to overcooling of the sample during transportation; the same laboratory confirms by letter dated 24 June 2006 that the red blood cells were destroyed and the bar code was almost illegible. The sample collected on 10 October 2008 was reported initially by fax and then by email in unknown format which the ISU was not able to open until after the Complaint had been filed; the ISU submitted however that the Athlete's values on that date were normal. Lastly, the samples collected on 4 June and 27 November 2008 were not taken into account since the analysis was either not done at all or did not include the %retics values, as the evidence submitted by the ISU proves.

Secondly, with respect to the alleged errors in the bar codes of eleven samples, the Panel accepts the ISU's submission that in the seven older samples, when the ISU data base was still in a development phase, the ISU would simply add one or more digits to the bar code appearing on the tube for reasons of better data management: e.g. instead of #139 the ISU data base shows #2139 because the ISU would insert the digit "2" in the code as an identification for male skaters. The other four samples were given a different bar code by the ISU than the one on the tube because the doping control officers for logistical reasons had not used the ISU bar codes at the moment of the control and the software could not read such bar codes. In view of the relevant reports prepared by the laboratory in Kreischa, which analysed all these samples, and the testimony at the hearing of Ms. Rebecca Cairns, the ISU Anti-Doping Administrator who compared and matched the sample numbers on the doping control forms and on the laboratory reports with the ISU-assigned bar codes, the Panel finds that the results of all eleven samples were properly stored in the ISU data base.

In any event, since all eleven samples were taken in the period between 2000-2005, the Panel notes that the ISU put forward its case before the CAS essentially relying only on tests performed from 15 November 2007 on: "*the 'series of tests' which the Medical Advisors and the ISU Medical Experts have deemed sufficient to 'draw conclusions' of artificial blood manipulation by the Appellant is limited to the tests taken on November 15, 2007 and later. Accordingly, the Respondent does not discuss again the alleged errors which relate to the period 2000-2006 […]*" .

Thirdly, with respect to the proper recording of values in the ISU data base, the Panel initially points out that there was a difference in the unit of measurement of absolute reticulocyte counts on one occasion, i.e. the sample collected on 18 November 2005. No party elaborated on this issue further and the evidence on file indicates that, apart from that single case, the same measurement unit was always used by the ISU

to count absolute reticulocytes. In addition, the Panel remarks that there is no issue in this case concerning the measurement unit of the %retics. Then, with respect to the fact that the MCV values are missing in the excel table for the tests occurred on 2 March 2005, 11 February 2006, 11 January 2007 and 1 March 2007, the Panel notes that those are tests on which the ISU is not relying anymore. With respect to the fact that the data concerning the absolute reticulocytes and the total cells values for 24 November 2007 (an out-of-competition test) are missing from the excel table provided by the ISU, the Panel finds this irrelevant as all other important values are present, such as hemoglobin, hematocrit and %retics.

Further, the Panel has been provided with detailed laboratory reports of several analyses, indicating that the %retics values reported in the ISU data base correspond most of the time to the mean value of the double (or multiple) run performed by the Advia Machine on each blood sample. It is to be noted that the double (or multiple) analytical run on the same sample is done for the sake of accuracy and reliability of the results, and thus to the benefit of the athletes. The Panel is comfortably satisfied that such mean value constitutes the suitable value to be used for an evaluation under Article 2.2 of the ISU ADR. This is particularly true for the important blood samples that were analysed and recorded on 7 February 2009 in Hamar; on that day two samples were collected and each one of them was measured four times; the mean values of each sample (3.535 and 3.3775) were inserted into the ISU data base rounded up to two decimals (3.54 and 3.38) in order to fit the software's requirements. The same level of precision is reflected – *ex multis* – in the values of the tests performed on 8, 10 and 11 January 2009 in Lelystad as well as on 15 and 17 November 2007 in Calgary. The few occasions on which the ISU recorded in its data base the value of the first or the second measurement instead of the mean value occurred in tests conducted in 2000 and 2002, and the Panel is not going to take them into consideration.

For the above reasons the Panel is comfortably satisfied that, with regard to Ms Pechstein's hematological values recorded as of 15 November 2007, the transmission of those values to the ISU data base and the storage therein was appropriately performed and yields reliable data.

F. Ms Pechstein's Hematological Values

A large part of this case has been devoted to the evaluation of the hematological values of Ms Pechstein. In particular, the debate has focused on the very high %retics shown on some occasions, in particular in Hamar 2009 and the related fluctuation (see *supra*). Indeed, all experts agreed that the %retics is a very robust parameter because it cannot be influenced by artificial hemodilution – i.e. an increase in the fluid content of blood and thus in the volume of plasma, resulting in a reduced concentration of red blood cells in blood – or by other unnatural ways of reducing the values of hemoglobin, hematocrit and absolute reticulocytes. In other terms, according to the current scientific research, a cheating athlete has no way of hiding the increase in %retics deriving from blood doping.

1. Inter-individual abnormality of the Athlete's high reticulocytes percentage

The Panel notes that there is substantial consensus among the experts that the values of %retics around 3.5 shown by Ms Pechstein are abnormal in terms of inter-individual variation (i.e. in comparison with the general population in Europe as well as with other athletes). With specific reference to speed skaters, Prof. Kuipers testified that such high values of %retics found in Hamar 2009 were much higher than the highest values shown by the other skaters taking part in the same competition.

Indeed, some of the experts who gave evidence in this case assured that in their entire professional career they have never seen values of that kind in a healthy person, even in athletes. Prof. Kuipers testified at the hearing that out of all the %retics values obtained by the ISU from all skaters in the last decade (approximately 970 men and 680 women), the average value of female athletes is within the range of 0.47–2.31%.

The Panel notes that even the German laboratory chosen by the Athlete to perform some tests on her (the Labor 28 in Berlin) indicates in its analytical forms a value of 0.5–2.5 %retics as reference range ("*Referenzbereich*").

The inter-individual abnormality of a reticulocytes percentage around 3.5 is confirmed by the recent scientific literature, based on the automatic counting methods (i.e. using modern equipment such as the Advia Machine, given that the old manual way of visually counting reticulocytes through microscopes used to be much less accurate). In an article recently published by Prof. Banfi, a recognized authority in this field, it is stated that "*reticulocyte concentrations <0.4% or >2.6% could be interpreted, in the general population and in athletes also, as abnormal values*" (Banfi G., *Reticulocytes in Sports Medicine*, in *Sports Med*, 2008, 38:3, 1-24).

The Appellants relied on the reference values found

by one of their experts (Prof. Jelkmann) in a German medical handbook, the "*Taschenbuch der medizinisch-klinischen Diagnostik*" (73rd ed., 2000) by SCRIBA P.C. and PFORTE A., to argue that an upper reference value of 4.1 %retics would be acceptable for the female population. The same book indicates an upper reference value of 2.5% for the male population. However, the Panel notes that the said publication is almost ten-years old, is a general medical handbook which dedicates only a few lines to this subject, and is derived from an ancient medical publication (the original authors were born in the XIX century). In fact, the Panel finds that this publication is unreliable for the purposes of this case because its %retics reference values are based on data gathered before the introduction of the equipments allowing the automated reticulocytes counts, as persuasively clarified by Prof. d'Onofrio, a renowned hematologist who published extensively on hematological issues:

"The occasional finding of a reference upper limit of 4.1% for reticulocyte count in females, reported in Dr Jelkmann Expert's Opinion, is in open contradiction with hundreds of reports in medical literature and with daily clinical practice. If a doctor would consider normal such value in a patient, he would miss the diagnosis of severe and even deadly blood diseases. A probable explanation for this "strange range" is the fact that it refers to the pre-automation era, when reticulocytes counts were performed with the microscope and the imprecision of the method was responsible for wider reference limits (although usually not so wide). This explanation is confirmed by the fact that the text of the paragraph "2.5.8 Reticulozyten", page 45, strangely reports only manual microscope methods, which are obsolete since the mid '90s. The lack of mention of the automated flow-cytometric methods available since that time (and the only ones used in laboratories today) suggests that this paragraph is a relic of ancient times. It is like if a text on ground transportation would mention horses and bicycles, but not cars: obviously the average speed would not reflect the contemporary reality. Moreover, the great majority of literature agrees on the fact that there are no differences in reticulocytes percentages between males and females" (Prof. d'Onofrio's report dated 22 August 2009).

The Panel remarks that no expert contradicted at the hearing this forceful explanation provided by Prof. d'Onofrio.

Therefore, the Panel is comfortably satisfied that the %retics values of 3.49, 3.54 and 3.38 shown by the Athlete in Hamar on 6 and 7 February 2009 constitute abnormal values in inter-individual terms, i.e. in comparison with both the general population in Europe and other elite speed skaters.

2. Intra-individual abnormality of the Athlete's high reticulocytes percentage

The Panel must also evaluate the high %retics values shown by the Athlete in Hamar on 6 and 7 February 2009 in terms of intra-individual variation. Indeed, one of the main arguments of the Appellants and their experts has been that Ms Pechstein has naturally high %retics values and that, therefore, they cannot be compared to those of the general population nor to those of the other skaters (a view that the Respondent's experts consistently refuted).

In this respect, in order to establish an acceptable longitudinal blood profile for the Athlete, the Panel takes into account the last seventeen %retics values recorded by the athlete prior to 6 February 2009, i.e. all the values recorded between the Calgary World Cup event of 17 November 2007 – when the Athlete also had an abnormal value of 3.75, which is the only other time that the ISU data base recorded an Athlete's %retics above 3.0 – and the said Hamar World Allround Speed Skating Championships of February 2009.

On the basis of the scientific evidence heard and examined in this case, the Panel is of the opinion that seventeen tests taken in a period of fifteen months is a more than acceptable basis to establish an individual longitudinal profiling of %retics for Ms Pechstein. In this respect the Panel takes comfort from the fact that Section 4.2 of the WADA Draft Biological Passport Guidelines, even though certainly not applicable as such to the present case, provides that three tests would be an acceptable starting point to establish an individual biological passport:

"The sensitivity of the passport increases with the number of tests. In particular, the intra-individual variations can be reduced to an acceptable level after the collection of three initial values. Thus, the sensitivity of the passport is vastly improved when the number of tests per Athlete is higher than three and constant testing is encouraged".

[Emphasis added]

The Panel notes that the mean value of %retics recorded by the Athlete through those seventeen tests is 2.10, that is quite high (and, according to the Respondent's experts, very suspicious in itself, considering that there are laboratories where the upper reference value is 2,0) but still within a relatively normal range. The maximum value shown in those seventeen tests is 2.84 (on 24 January 2008, on the occasion of the Hamar World Cup event of that season) and the minimum value is 1.27 (on 6 December 2007, on the occasion of the Heerenveen World Cup event of that season).

Interestingly, the Panel notes that very similar values

appear by checking the values shown by the analyses performed (upon request by the Athlete herself and without the ISU's involvement) on the Athlete's blood samples by the laboratory of the Athlete's choice (Labor 28 of Berlin) in various tests between 21 July 2009 and 29 September 2009, (twelve with an Advia Machine and eight with a Sysmex Machine). Indeed, taking into account for obvious reasons of comparability only the test performed by means of the Advia Machine, the Athlete's mean value of %retics through those twelve tests is 2.1, with a maximum value of 2.9 and a minimum value of 1.2. Accordingly, even though there is no guarantee that the Athlete's blood was not affected by any artificial stimulation of the red blood cell production when both above sets of values were gathered, the Panel is of the opinion that, to the benefit of the Athlete, the mean value of 2.1 might be safely taken into consideration as a basis for comparison of the Athlete's %retics values recorded in Hamar on 6 and 7 February 2009.

Taking into account the scientific evidence heard and examined, the Panel is persuaded that even in comparison with her own individual %retics values, the values recorded by the Athlete in February 2009 in Hamar (3.49, 3.54 and 3.38) are abnormal. Indeed, considering, on the basis of Prof. Banfi's research on this subject, that "*the critical difference (a difference, calculated from analytical and biological intraindividual variability, which is higher than the one physiologically expected and is related to external factors) for reticulocyte data can be calculated from 24.1% to 36.1%*" (Prof. d'Onofrio's expert report of 25 May 2009, quoting Prof. Banfi's 2008 publication cited *supra*), %retics values of 3.49, 3.54 and 3.38%, starting from the Athlete's said mean value of 2.10, are certainly above a maximal critical difference of 36.1% (which would bring about a maximum acceptable value of 2.85).

Even in terms of intra-individual fluctuation, the Panel notes that the Athletes variations in %retics from 1.74 on 8 January 2009 to 3.49 on 6 February 2009 (that is +100.6% in less than a month) and then down again to 1.37 on 18 February 2009 (that is -60.7% in less than two weeks) are also striking. Indeed, on the basis of the scientific evidence heard and examined, the Panel takes the view that such variations are also abnormal. The Panel observes that even the Appellants acknowledge that when there is EPO abuse the %retics value sharply decreases; yet, the Appellants argue that it should decrease below 0.50 to prove blood manipulation and that a decrease to 1.37 is insufficient evidence. In this respect, the Panel is of the opinion that the Appellants cannot have it both ways: if they argue that the Athlete's %retics values are naturally very high, then also the low level post-EPO %retics values must be expected to be higher than normal (and thus a decrease from around 3.50 to 1.37 is clearly abnormal). This was confirmed by Prof. Gassmann in his expert report of 28 August 2009:

«the Appellant's % reticulocytes values are often expressed around 2%, which represents the upper physiological range. Accordingly, a possible drop of this value following any potential use of an ESA [Erythropoietic Stimulating Agent] might be not as prominent as expected. Moreover, as mentioned [...], it is theoretically possible to prevent a prominent drop of reticulocytes via treatment with low doses of an ESA».

In addition, the Panel notes that an article published in 1999, and quoted by some of the experts who gave evidence before this Panel (Audran M. et al., "*Effects of erythropoietin administration in training athletes and possible indirect detection in doping control*", in *Med Sci Sports Exerc*, 1999, 31, 639-645), shows that in the authors' experiment the lowest reticulocytes count occurred twenty-five days after discontinuation of erythropoietin injections, while the Athlete's 1.37 value was recorded only eleven days after the collection of the Hamar samples and, thus, a couple of weeks after the suspected blood manipulation.

The Athlete also submits that if the high %retics counts were the result of blood manipulation, e.g. the exogenous application of rEPO, this should have been followed by the positive finding of rEPO in her urine samples or in elevated hemoglobin or hematocrit values in her blood samples, and only an elevated hemoglobin value rather than a high %retics count would bring the intended (but prohibited) effect of increased oxygen transportation. As explained by various experts during the proceedings, EPO stands for erythropoietin, which is a glycoprotein hormone that controls erythropoiesis, or red blood cell production. The Panel remarks that it is uncontested that none of the tests which were performed on Ms Pechstein ever revealed the presence of a prohibited substance. However, on the basis of the evidence examined, the Panel notes that the presence of exogenous rEPO can normally be detected by an anti-doping test only for a couple of days after the treatment, and in no case after four days. When an increased red blood cell production is identified by a high %retics count, the rEPO which may have triggered the increased production of red blood cells is likely to already have disappeared. Therefore, not only a simultaneous adverse analytical finding for rEPO is not a necessary consequence of finding high %retics values but, in fact, it would be a rather extraordinary occurrence. The Panel is also aware of sophisticated dosage plans which provide for the frequent administration of very small dosages of rEPO, which makes it increasingly difficult to detect

it in urine samples at all. Hence, the Panel does not consider the absence of a positive finding of rEPO to be evidence which could exclude blood manipulation.

As to hemoglobin values, the persuasive expert evidence provided by Prof. d'Onofrio shows that hemoglobin values can be rather stable if an individual is treated with moderately high doses of rEPO. In particular, Prof. d'Onofrio makes reference to the research carried out by Audran et al. on voluntary subjects treated with rEPO – later confirmed by the research of Robinson et al. (2006) – where the %retics values increased significantly while changes in hemoglobin were quite small (no more than 10%), with a variation pattern very similar to or inferior than that observed in the Athlete's blood. For instance, the Athlete's hemoglobin went from 13.9 on 13 November 2008 to 15.3 on 18 December 2008 (+10%), from 14.3 on 4 February 2007 to 16.1 on 1 March 2007 (+12,5%), from 13.9 on 14 December 2006 to 15.1 on 11 January 2007 (+8.6%). Prof. d'Onofrio also makes reference to an experiment of autologous transfusion published by Prof. Damsgaard, where after blood reinfusion the hemoglobin increased only by 8%. As a result, the Panel finds that the absence of elevated hemoglobin values does not impair the finding of the abnormal %retics counts.

The Panel also notes that all experts acknowledged that, as confirmed by several laboratory tests, the hemoglobin and hematocrit levels may be manipulated quickly and effectively by quite simple methods of hemodilution, whereas the %retics count is very robust and remains unaffected by such methods. As testified by Prof. Kuipers and Dr. Stray-Gundersen, there are easily-operated machines that athletes may use to constantly check and keep under control the levels of hemoglobin and hematocrit, thus avoiding the no-start sanctions connected with high values of those blood parameters.

Therefore, after having heard the expert testimonies, the Panel does not consider the absence of elevated hemoglobin or hematocrit values to be conclusive evidence which would exclude blood manipulation.

As a result, the Panel holds that the ISU satisfied the burden on it to establish to the comfortable satisfaction of the Panel that the Athlete's %retics peaks of February 2009 were abnormal.

3. Explanations for the Athlete's abnormally high reticulocytes percentage

The ISU's case is straightforward. The Athlete's abnormally high %retics values in Hamar are due to the exogenous stimulation of her erythropoiesis or, in other words, the artificial stimulation of her body's capacity to produce red blood cells that carry oxygen to muscles and organs, with the evident purpose of reducing fatigue and attaining an unfair advantage over her competitors. In short, blood doping. According to the ISU, any other explanation is unreasonable.

On the other hand, the Appellants put forward multifarious explanations, such as physical stress due to cold temperature, altitude, physical stress due to intense exercise, foot pressure due to ice skates and blades, unequal distribution of the tests throughout the year, bleeding, and an infection incurred in January 2009, before the Hamar event.

With regard to cold temperature, the Panel notes that the publication quoted by Prof. Jelkmann makes reference to "*arctic winter field operation studies on healthy members of Navy forces [engaged in] outdoor activities*" [Emphasis added] at a temperature of -17°, and even in such extreme conditions the maximum recorded value of %retics was 2.6. As a matter of course, the Athlete has never been exposed to arctic outdoor conditions given that top speed skating rinks (including the one in Hamar) are conveniently indoor. As to altitude, suffices to say that Hamar's altitude is utterly inconspicuous (125m) and that none of the samples taken from the Athlete during 2008 and 2009 was collected at an higher altitude than 325m, which no scientific study deems to be significant in connection with the hematological values considered here.

The Panel remarks that the other skaters' %retics values would have been equally affected by such alleged conditions, but it did not occur; the same goes for the foot pressure justification and for the unequal distribution of the tests throughout the year. Obviously all skaters use tight ice skates and blades and all of them are mostly tested during the competitions season, but these situations did not cause any remarkable blood values.

With regard to physical stress due to intense exercise, the most recent studies seem to contradict this justification, because they only show minimal increases of the %retics after very acute exercise – e.g. from 0.8 to 1.3 after a cycling ultra-marathon of 1600km (sic) – and even cases in which the %retics decreased or remained unchanged (see Banfi 2008, already quoted *supra*). In any event, the Panel notes that even the tests performed by Dr. Röcker on Ms Pechstein during and after some training sessions – upon the Athlete's request, and without the ISU's involvement or any other external control – fall short

of supporting the Appellants' argument. In fact, such tests do not show %retics values as elevated as those recorded in Hamar, given that the Athlete's maximum post-exercise value was 2.8 (measured with an Advia Machine). In the light of these findings, even the Appellants' argument that one of the tests in Hamar was done less than two hours after skating – in contrast to the collection timing suggested by the rules of other international federations and by the WADA Draft Biological Passport Guidelines – becomes irrelevant (also because the very high %retics value of 6 February 2009 derived from a sample collected prior to skating; see *supra*).

As to the infection that the Athlete allegedly suffered in January 2009, the Panel notes that recent scientific studies contradict such explanation. Prof. D'Onofrio has credibly pointed out and quoted recent scientific articles showing that infections suppress reticulocytes count. With regard to bleeding, scientific studies indicate "massive bleeding" as a possible cause of a %retics increase, whereas the Panel has not seen or heard any factual evidence proving that the Athlete ever suffered any massive bleeding in the days before the Hamar races of February 2009 (and such an incident would have anyway hindered her successful participation in those races). As to the possibility of excessive menstrual bleeding, the medical examination performed by Prof. Schrezenmeier (see *infra* indicated that the Athlete's menstrual bleeding was regular and that there was no evidence of "hypermenorrhea".

In short, the Panel has not found the above mentioned justifications, nor the few others that the Appellants have thrown in during the proceedings, to be convincing. The Panel finds them to be unsubstantiated or scientifically unsound or insufficient to explain the magnitude of the Athlete's abnormal %retics values of 6 and 7 February 2009. In addition, the Appellants' multifarious explanations imply that all of a sudden a perfectly fit athlete incurred all sorts of unlikely situations and misfortunes that in some way affected her blood values; it appears to the Panel too an astonishing coincidence to be reasonably credible.

However, a plausible explanation of the Athlete's high %retics values has been put forward. Indeed, there has been consensus among the experts that the Athlete's abnormal %retics values might be due not only to illicit blood manipulation but also to a congenital blood disease. The high MCHC values sometimes recorded by the Athlete have been mentioned by Professors Jelkmann, Gassmann and Heimpel as an indication of a potential hematological abnormality. In particular, both the Appellants' and the Respondent's experts have mentioned the possibility of a blood anomaly known as "hereditary spherocytosis". This is a congenital hemolytic anemia with an estimated prevalence of 1:2000 in Europe and North America, according to what was explained in particularly persuasive terms by Prof. d'Onofrio, whose hematological expertise appears to the Panel to be very reliable in light of his impressive curriculum, of his many publications specifically devoted to this subject and of his oral evidence at the hearing. The fact itself that Prof. d'Onofrio put forward such an explanation in his written reports appears to be, in the Panel's eyes, as a sign of his bona fide attitude in these proceedings and thus of his particular credibility as an expert witness.

Indeed, in his written reports submitted prior to the hearing Prof d'Onofrio stated that some tests should have been performed on the Athlete in order to verify whether a hereditary spherocytosis could be found, "*such as serum EPO, birilubin, Coombs test, serum transferring receptor, red cell enzymes and SDS-PAGE electrophoresis*" (Prof. d'Onofrio's report of 22 August 2009). The same was advocated by Prof. Gassmann, who wrote prior to the hearing that "*a medical examination of the Appellant including intense blood analysis is necessary. Tests should incorporate several serum parameters that allow monitoring for hemolysis. An additional non-invasive analysis of organs can also be used. For example, chronic hemolysis leads to enlargement of the spleen (splenomegaly). Such an intense medical examination is a standard procedure for a hematologist and should not take longer than a month*" (Prof. Gassmann's report of 28 August 2009).

The Panel observes that the suggested medical examination and tests (which had not been performed at the time of the hearing before the ISU Disciplinary Commission), and some more, were eventually performed in Ulm (Germany) by Prof. Dr. Hubert Schrezenmeier, an expert hematologist chosen by the Athlete, with a view to finding out whether genetic or acquired disorders of the red blood cell formation were detectable. According to the testimony of Dr Lutz (DESG's medical doctor) before the ISU Disciplinary Commission, Prof. Schrezenmeier is considered to be "one of the leading hematologists in Germany". Interestingly, Prof. Schrezenmeier is the only expert, of all those who gave written or oral evidence in these proceedings, who actually examined the Athlete in depth from a medical point of view. On the basis of the evidence on file, the medical examination and the tests were particularly accurate, to the point that some of the tests were performed by a specialized institute of the University of Bristol (United Kingdom). Prof. Schrezenmeier's final report, dated 30 July 2009, was submitted to the

Panel and to the other parties only a few days before the hearing.

Prof. Schrezenmeier – who was not called by the Appellants to be examined at the hearing – reported that the physical conditions of the Athlete were excellent, that all organs and values were normal, and that no hemolysis or blood-related pathology could be detected. Prof. Schrezenmeier also carried out a family anamnesis and reported that within the Athlete's family "*there are no known problems of hematopoiesis*" and "*no accumulation of specific diseases*". Prof. Schrezenmeier put forward *inter alia* the following conclusions:

"Abdomen: soft cover of abdominal momentum, no pain when palpitated, no "Defense tension", no applicable resistance. Liver: 12 cm in the "MCL". Spleen: also no palpitation when "inspiration". Kidney: "deposit" free.

Ultrasound of the Abdomen [...] non-existance of an enlarged liver. Spleen appears in its size and shape inconspicuous.

In the overall hemoglobin analysis normal diagnosis, no hemoglobinopathy, specifically no indication of an unstable hemoglobin in line with a Hemolysis. […]

Overall the diagnosis gives no indication of a hereditary spherocytosis.

[...] Overall it resulted in a normal activity of erythrocyte enzymez.

[…] the further examinations as stated above give no indication of a illness change in the frame of a membrane pathology, hemoglobinopathy or enzyme defect of the erythrocytes. An acquired disorder of the erythrocytes […] could not be detected […].

Also there was no indication of antibodies against erythrocyte antigens in the sense of an immune hemolysis» (Prof. Schrezenmeier's report of 30 July 2009, translated from German).

[Emphasis added]

The report sent by the University of Bristol's International Blood Group Reference Laboratory to Prof. Schrezenmeier on 9 September 2009 – and attached to the latter's report – presents a summary of the "*results from erythrocyte membrane protein analysis*" performed on the Athlete's blood sample and state that there "*is no evidence to suggest that Claudia has abnormal red cell cytoskeleton*".

Prof. d'Onofrio could for the first time take a look at Prof. Schrezenmeier's documentation on the day of the hearing and declared to the Panel that he was pleased to see that all the tests that he had advised the Athlete to undertake had been performed. Prof. D'Onofrio remarked that, as is evident even to a layman reading the above quoted Prof. Schrezenmeier's clear-cut language, the examinations and tests performed by Prof. Schrezenmeier gave no indication whatsoever of the existence of a hereditary spherocytosis or of a membrane pathology or of any other genetic or acquired blood disorder. Even the manual and ultrasound examinations of the kidneys, of the liver and, particularly, of the spleen – an organ which according to Prof. Gassmann would have been affected by a chronic hemolysis – gave no signs of anomalies.

Answering a question posed by the Panel, Prof. d'Onofrio stated that at this point there are no other tests or examinations to be performed on the Athlete and that the hypothetical hereditary spherocytosis might be looked for only by examining the Athlete's relatives. However, he also added that even if such examination of the Athlete's relatives yielded no positive results, in theory there could still be a minuscule possibility that a totally asymptomatic, inconsequential and undetectable mild hereditary spherocytosis existed. In short, Prof. d'Onofrio conveyed to the Panel his strong conviction that Prof. Schrezenmeier's report confirmed to the upmost degree his opinion that the Athlete's values derived from blood doping.

Prof. Heimpel, one of the experts appointed by the Athlete, after reviewing Prof. Schrezenmeier's report acknowledged that, even if the MCHC values pointed in the direction of hereditary spherocytosis, no genetic or acquired blood anomalies had been found:

"Results of physical examination including abdominal ultrasound and routine clinical chemistry were normal. There were no abnormal findings for osmotic resistance, EMA-test, red cell enzymes, anti red cell autoantibodies, SDS-Page of erythrocyte membranes, GPI deficiency (PNH). [...] Up to now, no definite diagnosis of the type of the red cell or red cell membrane abnormality could be made" (Prof. Heimpel's report of 7 October 2009).

[Emphasis added]

The Panel also notes that Prof. Gassmann, who during and after the ISU Disciplinary Commission's proceedings had maintained that there was a fair possibility of a blood disorder in the sense of a mild and compensated spherocytosis – in fact, he was quoted and called to be heard as an expert witness also by the Appellants –, modified his position after seeing Prof. Schrezenmeier's report. Prof. Gassmann declared at the hearing that on the basis of the new

evidence deriving from Prof. Schrezenmeier's medical examination and tests, he was now persuaded that the only reasonable explanation of the Athlete's high %retics was blood manipulation.

In the Panel's opinion, the evidence provided by Prof. Schrezenmeier is the decisive element of this case, because his expert report essentially excludes that the Athlete has been suffering from any detectable blood disease. In particular, the Panel notes that Prof. Schrezenmeier states with the utmost clarity : "*Overall the diagnosis gives no indication of a hereditary spherocytosis*" (see *supra*). Not even the family anamnesis has given any sign of a hereditary blood anomaly (see *supra*). In addition, even the remote possibility mentioned by Prof. d'Onofrio would be inconsistent with the anomalous fluctuations of the Athlete's %retics values.

The Panel finds that, once the possibility of a blood disease has been safely excluded, the various explanations put forward by the Athlete for those high values of %retics do not withstand scientific scrutiny.

In particular, the Panel is of the view that the written and oral expert evidence provided by Prof. Dame about the use of algorithms to detect a possible genetic mutation is not conclusive, both because such genetic mutation affects a large part (between 34% and 50%, depending on the experts) of the female population and because his studies are related to analyses done in human embryonic kidney cells and to EPO concentrations in the eye's vitreous body, which are far too remote, in terms of causal link, from the abnormal %retics values shown by Ms Pechstein. Indeed, Prof. Dame himself concludes his report stating that "*the open questions, which may have been raised by my investigations, will require to my opinion appropriate model systems, including transgenic mouse lines. Their development will require a tremendous work and a time interval of about two years or even longer*". In other terms, Prof. Dame himself says that his scientific research yields questions rather than answers; accordingly, the Panel finds such research fascinating but cannot find any concrete indication that could specifically help the Athlete's case.

As a result, in exercising its discretion to consider the evidence submitted by the parties, the Panel, bearing in mind the seriousness of the allegation, and based on all the considerations made above, finds that the ISU has discharged its burden of proving to the comfortable satisfaction of the Panel that the abnormal values of %retics recorded by Ms Pechstein in Hamar on 6 and 7 February 2009, and the subsequent sharp drop recorded on 18 February 2009, cannot be reasonably explained by any congenital or subsequently developed abnormality. The Panel finds that they must, therefore, derive from the Athlete's illicit manipulation of her own blood, which remains the only reasonable alternative source of such abnormal values.

Considering that, under Item M1 ("*Enhancement of Oxygen Transfer*") of the applicable Prohibited List, "*Blood doping, including the use of autologous, homologous or heterologous blood or red blood cell products of any origin*" is a prohibited method, the Panel holds that Ms Pechstein committed a doping offence in violation of Article 2.2 of the ISU ADR.

G. Sanctions

Under Article 10.2 of the ISU ADR, the sanction for a first offence consisting of the use of a prohibited method in violation of Article 2.2 of the ISU ADR is the Athlete's ineligibility for two years.

Under Article 10.1 of the ISU ADR "*An Anti-Doping rule violation occurring during or in connection with an Event may upon the decision of the ISU Disciplinary Commission, lead to Disqualification of all of the Skater's results obtained in that Event […]with all Consequences, including forfeiture of all medals, points and prizes*".

As a consequence, the Panel upholds the sanctions already imposed by the Appealed Decision and holds that the Athlete is liable for the full two-year period of ineligibility, starting as of 8 February 2009, and for the disqualification of her results at the Hamar World Allround Speed Skating Championships of February 2009, with consequent forfeiture of all medals, points and prizes obtained by her on that occasion. In relation with the starting date of the suspension, the Panel notes that there is a minor inconsistency between the main part of the Appealed Decision (see para. 40) and its ruling, as different starting dates of the period of ineligibility are referred to. Based on Article 10.9.4 of the ISU ADR, and considering that the Athlete agreed not to compete on 8 February 2009, the starting date of the period of ineligibility shall be that day, i.e. 8 February 2009, and not the following day as mistakenly ruled by the Appealed Decision, which must thus be modified accordingly.

For all the above reasons, the Panel holds that Ms Pechstein's and the DESG's appeals must be dismissed.

The above conclusion, finally, makes it unnecessary for the Panel to consider the other requests or motions submitted by the parties to the Panel. Accordingly, all other motions or prayers for relief are rejected.

Arbitration TAS 2009/A/1960
Trabzonspor c. LOSC Lille Métropole
&
Arbitration TAS 2009/A/1961
LOSC Lille Métropole c. Trabzonspor & S.

5 mai 2010

Football; résiliation unilatérale du contrat de travail sans juste motif; droit applicable: élection de droit indirecte, exclusion de la règle de conflit; autorité de chose jugée; forme du contrat; réserve de forme; rémunération du joueur; valeur des services d'un joueur; période protégée: point de départ de la nouvelle période; période protégée: facteur aggravant pour la fixation de l'indemnité; intérêts

Formation:
Me Martin Schimke (Allemagne), Président
Me Jean-Jacques Bertrand (France)
Me François Klein (France)

Faits pertinents

LOSC Lille Métropole (le "LOSC") est un club de football membre de la Fédération Française de Football (FFF), laquelle est affiliée à la Fédération internationale de Football Association (FIFA).

Trabzonspor Futbol İşletmeciliği Ticaret AŞ ("Trabzonspor") est un club de football membre de la Fédération Turque de Football (Türkiye Futbol Federasyonu – TFF), laquelle est affiliée à la FIFA.

S. est un joueur de football professionnel né en mai 1975. Il occupe la position de gardien.

Le 12 juillet 2004, le LOSC a signé avec S. un *"contrat de joueur professionnel – Contrat N° 100075-100107-V2"*, valable du 1er juillet 2004 au 30 juin 2007. Selon ce document, il apparaît que S. avait le statut de joueur professionnel depuis plusieurs années, qu'il était *"en fin de contrat avec son club"* précédent et qu'il n'avait pas eu recours aux services d'agents sportifs. Le salaire mensuel brut convenu était de EUR 30,000.-, augmenté de diverses primes, lesquelles faisaient l'objet d'un *"avenant au contrat professionnel – Contrat N° 100075-100107-V2 – Avenant N°1-V2"*, signé le même jour.

Le 7 juillet 2005 et au moyen d'un nouvel *"avenant au contrat professionnel – contrat N° 100075-100107-V2"*, le LOSC et S. se sont engagés à prolonger leurs relations professionnelles pour *"une durée maximum de 2 saisons, à dater du 01/07/2007 pour se terminer le 30/06/2009"*. Les signataires de ce document ont notamment arrêté ce qui suit:

"Toutes les clauses financières figurant sur l'avenant n°1-V2 du contrat n° 100075-100107-V2 signé entre les parties le 12/07/2004 sont annulées et remplacées par les conditions financières et dispositions suivantes:

Pour les saisons 2005/2006, 2006/2007, 2007/2008 et 2008/2009, le joueur percevra une rémunération mensuelle brute équivalent en nombre de points à 50,000 € (…)".

Dans cet avenant du 7 juillet 2005, le LOSC s'est encore engagé à verser à S. non seulement des bonus liés aux résultats ainsi que des primes collectives mais encore une gratification exceptionnelle d'un montant brut de EUR 100,000.- au mois de septembre de chaque saison, à condition que le joueur soit présent au sein du club du LOSC.

Le 17 mai 2008, le LOSC a disputé le dernier match de la saison 2007/2008.

Le 31 mai 2008, S. a notifié par écrit au LOSC le fait qu'il mettait un terme avec effet immédiat aux rapports contractuels les liant. A l'appui de sa démarche, le joueur s'est expressément prévalu de l'article 17 du Règlement du Statut et du Transfert des Joueurs de la FIFA. Il a également fait allusion au principe de la libre circulation des travailleurs au sein de l'UE/EEE ainsi qu'à l'accord intervenu en mars 2001 entre l'Union Européenne et la FIFA. Par ailleurs, S. a informé le LOSC qu'il allait désormais se mettre à la recherche d'un nouvel employeur.

Le 30 juin 2008, S. a signé avec Trabzonspor un contrat de durée limitée, valable pour les saisons 2008/2009 et 2009/2010, soit jusqu'au 31 mai 2010. Le club turc s'est engagé à verser au joueur une rémunération nette d'impôt totalisant EUR 1,200,000.- pour la saison 2008/2009 et EUR 800,000.- pour la saison 2009/2010, augmentée de diverses primes. En outre,

Trabzonspor prenait à sa charge des prestations en nature.

Le même jour, le LOSC a informé Trabzonspor qu'il considérait le joueur comme étant encore son employé et qu'il se réservait le droit de saisir la FIFA pour préserver ses intérêts.

Le 29 juillet 2008, la TFF a demandé à la FFF de lui délivrer le certificat international de transfert de S. Le 31 juillet 2008, la FFF a écarté cette requête au motif que le contrat entre le joueur et le LOSC était encore valable jusqu'au 30 juin 2009.

En date du 25 août 2008, la TFF a prié la FIFA de l'autoriser à enregistrer provisoirement S. Le juge unique de la Chambre de Résolution des Litiges de la FIFA a fait droit à cette requête par décision du 19 septembre 2008, notifiée le 26 du même mois.

Le 16 Juillet 2008 et par l'intermédiaire de Me Christof Wieschemann, Trabzonspor a proposé au LOSC de trouver une solution amiable.

Il s'en est suivi des échanges de courriers électroniques au dernier duquel était annexée une convention intitulée *"Transfer agreement of [S.]"* (ci-après: le *"Transfer Agreement"*), datée du 30 août 2008 et qui prévoit notamment ce qui suit (traduction libre):

"Cet accord est passé le 30 août 2008 entre:

(1) [Trabzonspor]
(2) [LOSC]
(3) [S.]

(…) Par la présente, le LOSC accepte de transférer le Joueur à Trabzonspor avec effet au 30 août 2008 (le "Transfert").

En compensation du dommage causé au LOSC par l'annulation du contrat liant le LOSC au Joueur et de la perte commerciale importante ainsi que du dommage sportif liés à l'absence du joueur, Trabzonspor paiera au LOSC une indemnité fixée à € 1,200,000.- (…).

Cette prime de transfert de € 1,2 million est nette de toute charge. En d'autres termes, le LOSC recevra par virement bancaire le 100% de la prime de transfert (€ 1,2 million).

Cette prime de transfert sera payée par Trabzonspor en 5 tranches:

- *Euro 500,000,00 (…) le 10 septembre 2008;*
- *Euro 200,000,00 (…) le 20 septembre 2008;*
- *Euro 150,000,00 (…) le 30 novembre 2008;*
- *Euro 150,000,00 (…) le 31 décembre 2008;*
- *Euro 200,000,00 (…) le 31 mars 2009.*

Si, pour chacune de ces tranches, Trabzonspor paie le LOSC avec un retard supérieur à 10 jours à compter de l'échéance fixée (10 septembre; 20 septembre; 30 novembre; 31 décembre 2008 et 31 mars 2009), Trabzonspor devra verser une pénalité de EUR 400,000,00 (…), laquelle ne peut pas venir en déduction de la prime de transfert. Cette pénalité sera due avec le paiement de la tranche concernée. (…)

En signant la présente convention, le Joueur confirme expressément qu'il accepte toute obligation pouvant découler de ce document et s'engage à prendre toutes les dispositions pouvant relever de son fait pour la bonne exécution du présent contrat. (…). Il reconnaît qu'aucun salaire, prime, stimulant de performance ou tout autre paiement n'est dû au joueur par le LOSC, le LOSC n'a rien à payer à S.

2. Ce contrat est soumis aux normes nationales et internationales relevant des autorités ainsi qu'au droit national français. (…).

Signé en deux exemplaires par les représentants autorisés des parties, lesquelles expriment ainsi leur consentement.

Signé par (…) au nom et pour le compte de Trabzonspor

Signé par (…) au nom et pour le compte de LOSC

Signé par S., le Joueur".

Le 31 août 2008, Me Wieschemann a adressé au LOSC le courrier électronique suivant (traduction libre):

"Nous sommes vraiment désolés qu'aucune amélioration ne se dessine à l'horizon.

Nous avons tenté de persuader S. hier soir et ce matin à nouveau de signer le contrat mais il a refusé. J'ai été en contact avec Trabzonspor, qui était en contact avec S., son interprète ainsi que T. jusqu'à 11 heures hier soir et depuis 9 heures ce matin mais il n'en démord pas. Nous ne pouvons pas le faire changer d'avis. J'ignore sous l'influence de qui il se trouve mais il est arrêté dans sa position".

Le 16 octobre 2008, le LOSC a formellement saisi la Chambre de Résolution des Litiges de la FIFA (la "CRL") et a demandé à cette autorité de reconnaître la rupture unilatérale du contrat de travail par S. Il a également conclu au paiement d'une indemnité, laquelle devait être calculée selon les termes du *"Transfer Agreement"* du 30 août 2008, valablement entré en force.

Le 15 mai 2009, la CRL a partiellement accepté les prétentions formulées par le LOSC et condamné S. à payer à son ancien employeur la somme de EUR 1,130,000.-. La CRL a en outre reconnu Trabzonspor comme étant solidairement débiteur du

paiement de la somme en question. La décision a été notifiée aux parties en date du 4 septembre 2009.

Par déclaration d'appel du 16 septembre 2009, Trabzonspor a saisi le TAS.

Par déclaration d'appel du 22 septembre 2009, le LOSC a aussi saisi le TAS.

Le 3 et le 21 décembre 2009, le LOSC et Trabzonspor ont adressé au TAS leur réponse respective, confirmant les positions ainsi que les demandes exposées dans leur mémoire d'appel.

En date du 28 janvier 2010, une audience a été tenue à Lausanne, au siège du TAS.

Extraits des considérants

A. Droit applicable

Le siège du TAS se trouvant en Suisse et aucune des parties n'ayant, au moment de la conclusion de la convention d'arbitrage, ni son domicile ni sa résidence habituelle en Suisse, les dispositions du chapitre 12 relatif à l'arbitrage international de la Loi fédérale sur le droit international privé (LDIP) sont ainsi applicables en vertu de son article 176 al. 1 (Arrêt du Tribunal fédéral du 31 octobre 2003, 4P.149/2003). Pour que le chapitre 12 de la LDIP s'applique, il suffit que le *"siège du tribunal arbitral se trouve en Suisse",* d'une part et que *"au moins l'une des parties n'avait, au moment de la conclusion de la convention d'arbitrage, ni son domicile, ni sa résidence habituelle en Suisse".* (ATF 129 III 727; Dutoit B., Droit international privé suisse, Commentaire de la loi fédérale du 18 décembre 1987, Bâle 2005, N. 2 *ad* art. 176 LDIP, p. 615).

Au chapitre 12 de la LDIP, le droit applicable au fond est régi par l'article 187 al. 1 LDIP qui prévoit que le *"tribunal arbitral statue selon les règles de droit choisies par les parties ou, à défaut de choix, selon les règles de droit avec lesquelles la cause présente les liens les plus étroits".*

Peut être choisie par les parties (au sens de l'article 187 al. 1 LDIP) non seulement une loi nationale, mais encore une loi non nationale, comme les règles et règlements d'associations internationales sportives (Haas U., Football Disputes between Players and Clubs before the CAS, in Bernasconi/Rigozzi (éd.), Sport Governance, Football Disputes, Doping and CAS Arbitration, 2nd CAS & SAV/FSA Conference Lausanne 2008, Berne 2009, p. 218).

En l'espèce, l'article 2 du *"Transfer Agreement"* prévoit que ce dernier est *"soumis aux normes nationales et internationales relevant des autorités ainsi qu'au droit national français"* (v. clause no. 2). Or, comme il sera examiné ci-après, S. n'a jamais donné son accord à ce contrat, de sorte que, ni en droit suisse, ni en droit français, ce dernier n'est venu a chef en tant que contrat tripartite et que l'élection de droit contenue à son art. 2 ne constitue pas un accord des parties sur le droit applicable. Quant à la référence à certaines dispositions du Code du travail français figurant dans le contrat de travail et dans l'avenant au contrat de travail conclus entre le LOSC et S. le 12 juillet 2004 et le 7 juillet 2005, la question de savoir si elle aurait pu avoir une incidence sur le droit applicable au présent litige ne se pose pas ici. D'une part, indépendamment des différentes théories développées à cet égard (Haas, *op. cit.*, p. 221-223), il est évident que ces dispositions de droit français n'auraient été choisies que par les parties au contrat, à l'exclusion de Trabzonspor; d'autre part, ni le LOSC, ni S. ne se sont jamais prévalus des dispositions de droit français auxquelles leur contrat de travail fait référence, en tant qu'argument pour l'application du droit français au présent litige. Bien au contraire, ils semblent être d'accord sur le fait que ces règles n'ont pas d'incidence sur la compensation du dommage subi par le LOSC en raison de la rupture du contrat.

[Mise en relief ajoutée]

Enfin, une élection de droit peut aussi être indirecte. Selon la doctrine suisse dominante, le choix des parties peut être indirect lorsqu'elles se soumettent à un règlement d'arbitrage qui contient lui-même des dispositions au sujet de la désignation du droit applicable. Une élection de droit tacite et indirecte par renvoi au règlement d'une institution d'arbitrage est admise (Karrer P., Basler Kommentar zum Internationalen Privatrecht, 1996, N. 92 et 96, *ad* art. 187 LDIP; Poudret/Besson, Droit comparé de l'arbitrage international, Zurich et al. 2002, N. 683, p. 613 et références citées; Dutoit, *op. cit.*, N. 4 *ad* art. 187 LDIP, p. 657; CAS 2004/A/574).

S'agissant de la procédure applicable aux arbitrages devant le TAS, l'article R58 du Code prévoit ce qui suit:

"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".

En l'espèce, les règlements applicables sont indiscutablement les règles de la FIFA, puisque l'appel est dirigé contre une décision rendue par cette

fédération internationale. En vertu de l'article 62 al. 2 des Statuts de la FIFA, *"[l]a procédure arbitrale est régie par les dispositions du Code de l'arbitrage en matière de sport du TAS. Le TAS applique en premier lieu les divers règlements de la FIFA ainsi que le droit suisse à titre supplétif "*. La première phrase citée se réfère au droit procédural, la deuxième au droit matériel.

S. est un joueur professionnel. En cette qualité, il est notamment tenu de respecter les Statuts et les règlements de la FIFA.

Trabzonspor et le LOSC sont tous deux des clubs de football, membres de leur fédération nationale respective, elles-mêmes affiliées à la FIFA. En tant que tels, ils ont pris l'engagement de respecter la réglementation établie par leur fédération nationale et ce faisant, ils se sont soumis indirectement aux directives de la FIFA (ATF 119 II 271; Riemer H. P., Berner Kommentar *ad* art. 60- 79 du Code Civil suisse, N. 511 et 515; CAS 2004/A/574).

En tout état de cause, toutes les parties ont expressément accepté de procéder devant la FIFA, puis devant le TAS. En procédant de la sorte, elles ont consenti à se soumettre à la réglementation de la FIFA et à celle du TAS.

Il résulte de ce qui précède, que les parties ont, à tout le moins tacitement, indirectement et, pour le LOSC et S., de façon subséquente à la conclusion du contrat de travail et de l'avenant professionnel à ce contrat (voir, par ex., CAS 2006/A/1180), choisi de se soumettre aux divers règlements de la FIFA, lesquels doivent être appliqués en premier lieu, le droit suisse étant applicable à titre supplétif.

Il convient de préciser que, lorsque les parties élisent un droit national, il faut entendre par-là, sauf indication contraire, que c'est à ses dispositions matérielles et non pas à ses règles de conflit qu'elles entendent se soumettre (Poudret/Besson, *op. cit.*, N. 684, p. 614; CAS 2003/O/486, décision préliminaire du 15 septembre 2003). En rendant le droit suisse applicable, à titre supplétif du moins, l'article 62 al. 2 des Statuts de la FIFA exclut donc l'application de toute règle de conflit, telle que celle de l'article 187 al. 1, 2ème phrase LDIP, relative à la question de savoir quelles sont *"les règles de droit avec lesquelles la cause présente les liens les plus étroits"* ou celle prévue par l'article 121 al. 1 LDIP, selon laquelle le *"contrat de travail est régi par le droit de l'Etat dans lequel le travailleur accomplit habituellement son travail"*.

S'agissant de la version du Règlement FIFA applicable, il convient de souligner que l'affaire opposant les parties a été soumise à la FIFA le 16 octobre 2008 et que le litige concerne une indemnité liée à une rupture de contrat intervenue le 31 mai 2008. Ces événements sont donc intervenus après le 1er juillet 2005, qui est la date à laquelle est entré en vigueur le Règlement du Statut et du Transfert des Joueurs (édition 2005).

Par surabondance, il y a lieu de noter que, en vertu de l'article 29 al. 2 dudit règlement, *"[l]'article 1, al. 3a, l'article 5, al. 3 et 4, l'article 17, al. 3, l'article 18bis, l'article 22e et 22f, l'annexe 1, art. 1, al. 4d et 4e, l'annexe 1, art. 3, al. 2, l'annexe 3, art. 1, al. 2, 3 et 4 et l'annexe 3, art. 2, al. 2, ont été complétés, voire amendés à l'occasion du la séance du Comité Exécutif de la FIFA le 29 octobre 2007. Ces adaptions entrent en vigueur au 1er janvier 2008"*. Dans la mesure où elle a été portée devant la FIFA après le 1er janvier 2008, la présente affaire doit, cas échéant, être instruite conformément aux amendements précités (le "Règlement FIFA 2008").

B. L'autorité de chose jugée

Avant d'aborder le fond de la présente affaire, la Formation doit encore se déterminer sur l'affirmation du LOSC selon laquelle la décision de la CRL est entrée en force de chose jugée s'agissant de S., ce dernier n'ayant pas valablement recouru devant le TAS.

A titre préliminaire, la Formation rappelle qu'en vertu de l'article R57 du Code, *"[l]a Formation revoit les faits et le droit avec plein pouvoir d'examen. Elle peut soit rendre une nouvelle décision se substituant à la décision attaquée, soit annuler cette dernière et renvoyer la cause à l'autorité qui a statué en dernier"*. Le TAS jouit donc d'un plein pouvoir d'examen en fait et en droit, ce qui lui permet d'entendre à nouveau les parties sur l'ensemble des circonstances de faits ainsi que sur les arguments juridiques que celles-ci souhaitent soulever et de statuer définitivement sur l'affaire en cause (TAS 99/A/252; TAS 98/211; TAS 2004/A/549; TAS 2004/A/674; TAS 2005/A/983 & 984).

L'effet dévolutif du recours devant le TAS est établi tant par les textes régissant cette autorité (article R57 du Code) que par la jurisprudence constante du TAS, en vertu de laquelle *"[l]'essence même de l'appel consiste précisément dans la faculté de conduire à nouveau un procès du début à la fin et de permettre à l'instance de rendre une nouvelle décision, fondée sur un état de fait qu'elle aura elle-même établi"* (TAS 2001/A/340, para. 19).

Dans leurs écritures respectives, le LOSC et Trabzonspor contestent le dispositif de la décision de la CRL dans son intégralité et ne limitent pas leurs conclusions d'appel à l'encontre de l'autre club exclusivement. C'est ainsi que Trabzonpor demande

au TAS d'annuler la décision de la CRL (*"To set aside the decision of the Dispute Resolution Chamber of the FIFA from the 15 May 2009"*). Quant au LOSC, il demande principalement au TAS de reconnaître que sa créance est fondée sur le *"Transfer Agreement"* et non sur la base de l'article 17 (contrairement à ce qu'a décidé la CRL) et subsidiairement *"que TRABZONSPOR et le joueur S. sont condamnés, sur base des articles 17 et suivants du règlement FIFA sur le Statut et le Transfert des joueurs"*.

A partir du moment où le LOSC et/ou Trabzonspor ont exercé valablement leur droit d'appel, la cause reste "pendante" devant le TAS et, dès lors, n'a pas acquis autorité de chose jugée pour aucune des parties, même celles qui n'ont pas fait appel. Cela est d'ailleurs en cohérence avec l'article R55 al. 2 du Code qui autorise la Formation à poursuivre la procédure d'arbitrage et rendre une sentence même en l'absence de réponse de l'intimé.

C. Le "Transfer Agreement" daté du 30 août 2008 a-t-il été valablement conclu?

1. De manière générale

La Formation est appelée à se pencher sur la question de savoir si le *"Transfer Agreement"* du 30 août 2008 a été valablement conclu, puisque si tel devait être le cas, le litige opposant les parties devrait être tranché exclusivement à la lumière des termes de cette convention et n'aurait plus à être examiné à la lumière de l'article 17 du Règlement FIFA 2008.

Selon le Code suisse des Obligations (CO), le contrat est parfait lorsque les parties ont, réciproquement et d'une manière concordante, manifesté leur volonté (article 1 al. 1 CO). Si elles ne se mettent pas d'accord sur tous les éléments essentiels du contrat, celui-ci ne vient pas à chef (ATF 127 III 248 consid. 3c, 3d et 3e). La conclusion du contrat n'est subordonnée à l'observation d'une forme particulière que si une disposition spéciale de la loi le prévoit (article 11 al. 1 CO) ou si les parties en sont convenues (article 16 al. 1 CO). Lorsqu'aucune forme particulière n'est prescrite, la manifestation de volonté peut être expresse ou tacite (article 1 al. 2 CO). Le contrat pour lequel la forme écrite est exigée, doit être signé par toutes les personnes auxquelles il impose des obligations (article 13 CO et 16 al. 2 CO).

En l'absence d'une disposition spéciale tant dans la réglementation applicable de la FIFA qu'en droit suisse, le contrat lié au transfert d'un joueur entre clubs ou au paiement d'une indemnité par un club à un autre (en relation avec la rupture unilatérale du contrat de travail par un joueur) n'est soumis à aucune exigence de forme.

Se pose donc la question de savoir si les parties ont convenu d'une réserve de forme au sens de l'article 16 CO, lequel dispose ce qui suit:

"Les parties qui ont convenu de donner une forme spéciale à un contrat pour lequel la loi n'en exige point, sont réputées n'avoir entendu se lier que dès l'accomplissement de cette forme.

S'il s'agit de la forme écrite, sans indication plus précise, il y a lieu d'observer les dispositions relatives à cette forme lorsqu'elle est exigée par la loi".

Les parties peuvent convenir de réserver la forme écrite, expressément ou par actes concluants (cf. arrêt du Tribunal fédéral 4C.1/2000 du 27 mars 2000, consid. 3a; ATF 105 II 75 consid. 1, p. 79; arrêt du Tribunal fédéral 4C.290/2003 du 29 juin 2004, consid. 3.4). L'existence et la portée d'une forme conventionnelle réservée se déterminent en principe selon les règles usuelles en matière d'interprétation des contrats, soit tout d'abord par interprétation subjective, soit en recherchant la réelle et commune intention des parties (article 18 al. 1 CO). Lorsqu'il n'est pas possible d'établir en fait une volonté concordante des parties, leurs déclarations s'interprètent selon le principe de la confiance, dans le sens qu'un destinataire de bonne foi pouvait et devait leur donner en fonction des termes utilisés et d'après toutes les circonstances les précédant et les accompagnant; on parle alors d'interprétation objective (ATF 126 III 119 consid. 2a et les arrêts cités).

Lorsque les parties n'ont pas réglé complètement la portée ou les modalités de la forme réservée, ou si des problèmes d'interprétation se posent, l'article 16 al. 1 CO énonce la présomption qu'elles n'ont entendu se lier que dès l'accomplissement de cette forme. Cette présomption peut être renversée par la preuve que les parties n'ont voulu donner à la forme écrite qu'un but probatoire ou qu'elles ont renoncé après coup à la réserve de la forme, expressément ou par actes concluants. De manière générale, il n'y a lieu de considérer que la forme écrite a été convenue dans un but probatoire que si elle n'a été réservée qu'après la conclusion d'un accord sur l'objet du contrat (arrêt du Tribunal fédéral 4C.85/2000 du 23 octobre 2000, consid. 3b bb).

Quant à la validité d'une convention en droit français, elle est régie par l'art. 1108 du Code civil français qui dispose:

"Quatre conditions sont essentielles pour la validité d'une convention:

Le consentement de la partie qui s'oblige;

Sa capacité de contracter;

Un objet certain qui forme la matière de l'engagement;

Une cause licite dans l'obligation".

Le droit civil français ne soumet par ailleurs les contrats à aucune forme particulière, sauf exception prévue par la loi.

2. En l'espèce

Le LOSC et S. sont d'avis que les discussions intervenues entre le club français et Trabzonspor au cours du mois d'août 2008 ont lié les deux clubs, le *"Transfer Agreement"* n'étant que de nature déclaratoire et probatoire. En revanche, Trabzonspor a plaidé, d'une part, que les parties n'ont entendu s'engager que dès l'accomplissement de la forme écrite, laquelle fait en l'espèce défaut et, d'autre part, que le consentement du joueur aurait été nécessaire.

A titre liminaire, il convient de rappeler qu'en date du 31 mai 2008, S. a dénoncé avec effet immédiat son contrat avec le LOSC. Une telle résiliation est irrévocable, à moins d'un accord entre l'employeur et l'employé d'en annuler les effets (WYLER R., Droit du travail, 2ème éd., Berne 2008, p. 440). En l'espèce, le joueur n'a jamais remis en question le congé qu'il a donné et il n'y pas eu d'accord entre lui et le LOSC pour en effacer les conséquences. Bien au contraire, le joueur a entrepris des démarches pour trouver un nouvel employeur et, en date du 30 juin 2008, a signé un contrat de travail avec Trabzonspor.

Il résulte de cette rupture unilatérale de contrat que le LOSC est en droit de demander le paiement d'une indemnité, ce qui n'est d'ailleurs pas contesté.

Dans un tel contexte, une convention entre S., le LOSC et Trabzonspor paraît nécessaire. En effet, si un accord devait intervenir exclusivement entre les deux clubs, le joueur ne pourrait pas s'en prévaloir et serait – du moins en théorie – toujours redevable de la compensation prévue en raison de la rupture unilatérale du contrat. Il convient ainsi d'écarter l'argumentation présentée par le LOSC selon laquelle le joueur n'aurait pas à être partie au contrat déterminant le principe et le montant de l'indemnité financière versée par le club "acquéreur" en contrepartie de l'accord de libération du joueur par le club "vendeur".

La thèse selon laquelle une convention tripartite ait été voulue par les parties est appuyée par les éléments suivants:

- Lors des discussions entre les deux clubs, l'intervention du joueur semble indissociable à la conclusion du contrat (Courrier de Me Wieschemann du 29 août 2008: *"Trabzonspor has authorised my request for 1.2 MIO, although I am in doubt because of the participation of the player"*).

- A cet égard et au cours de l'audience du 28 janvier 2010, il a été admis par les personnes concernées que Trabzonspor n'avait pas entièrement versé le salaire de S., le solde devant servir à couvrir une partie de l'indemnité qui serait finalement allouée au LOSC. Cela peut expliquer la nécessité pour le joueur à être partie prenante à la convention qui fixerait l'indemnité à verser au LOSC et, par voie de conséquence, l'importance de sa contribution.

- Le *"Transfer Agreement"* commence par les termes suivants:

"THIS AGREEMENT is made on 30th August 2008

BETWEEN:

(1) TRABZONSPOR FUTBOL ISLETMECILIGI TICARET A.S [...]

(2) SASP LILLE METROPOLE SASP [...]

(3) S. [...]"

- Le *"Transfer Agreement"* impose un certain nombre d'obligations et de charges à S., car selon les termes du contrat ce dernier non seulement *"accepte toute obligation pouvant découler de ce document et s'engage à prendre toutes les dispositions pouvant relever de son fait pour la bonne exécution du présent contrat"*, mais encore il *"reconnaît qu'aucun salaire, prime, stimulant de performance ou tout autre paiement ne sont dus au joueur par le LOSC, le LOSC n'a rien à payer à S."* et renonce donc à d'éventuels droits à l'égard du LOSC; S. fait d'ailleurs partie des signataires indiqués à la dernière page de la convention.

- Le fait que le document litigieux soit intitulé "*Transfer Agreement*" est sans incidence, puisque les termes que les parties peuvent utiliser à tort ou même dans le but de dissimuler leur véritable intention ne sont pas déterminants (article 18 al. 1 CO). Pour les raisons évoquées plus haut, S. a résilié le contrat avec le LOSC de manière définitive. Son transfert auprès de Trabzonspor n'était juridiquement plus réalisable en tant que tel, sauf accord du joueur et du LOSC d'annuler les effets de la résiliation. Un tel accord n'est jamais intervenu. C'est donc bel et bien une convention liée à l'indemnisation du LOSC qui

était prévue. Cela résulte d'ailleurs du texte du *"Transfer Agreement"* (*"In consideration of the injury caused to LOSC by the cancellation of its contract with S. and of the significant commercial and sport injury entailed by the PLAYER's absence, TRABZONSPOR will pay to LOSC an agreed indemnity net of € 1.200.000,00"*). Pour qu'une telle convention soit opposable à toutes les parties concernées, leur intervention à celle-ci était indispensable.

Au cours de l'audience du 28 janvier 2010, S. a affirmé ne jamais avoir participé aux négociations entre les deux clubs ni en avoir soupçonné l'existence. Il résulte de ce qui précède que toutes les parties au contrat (le LOSC, Trabzonspor et le joueur) n'ont donc pas manifesté leur volonté réciproquement ou d'une manière concordante (article 1 CO, art. 1108 du Code civil français). Le contrat et la clause d'élection de droit qu'il contient ne sont donc jamais venus à chef.

De surcroît et en tant que le droit suisse serait applicable à la question de la validité du contrat de transfert, il résulte de l'ensemble des circonstances que Trabzonspor n'entendait être lié qu'à la signature du *"Transfer Agreement"*. Cela découle notamment du texte de ce document (*"LOSC hereby agrees to transfer the Player to TRABZONSPOR"*; *"By signing this Agreement as indicated below, the Player expresses his agreement to any obligations under pertinent portions of this Agreement"*; *"SIGNED in two by the authorized representatives of the parties to indicate their agreement"*).

En outre, le 29 août 2008, soit avant l'élaboration du projet du *"Transfer Agreement"*, Me Wieschemann a mis en place les modalités liées à la signature de la convention. A cette occasion, il a déclaré notamment *"I would sign an executed copy by fax concerning my power of attorney (so the agreement is in force)"*. Par courrier du 30 août 2008, Me Wieschemann a encore affiné lesdites modalités indiquant par-là même la volonté de Trabzonspor de ne se lier que par acte écrit. D'ailleurs, lorsque l'une des parties envoie à l'autre des exemplaires du contrat pour qu'elle les signe, on présume en général qu'elle n'entend s'engager que dans la forme écrite (arrêt du Tribunal fédéral du 2 juillet 1980, reproduit in SJ 1981 p. 177 consid. 2a; ATF 105 II 75 consid. 1a; arrêt du Tribunal fédéral 4C.85/2000 du 23 octobre 2000, consid. 3b bb). En l'espèce, cette présomption n'a pas été renversée.

En conclusion, le *"Transfer Agreement"* et l'élection de droit qu'il contient n'ont, ni en droit français, ni en droit suisse, été valablement conclu entre Trabzonspor, le LOSC et S.

D. Si le "Transfer Agreement" n'a pas été conclu, est-ce que le LOSC est en droit de réclamer une compensation et, cas échéant, sur quelle base?

Faute de contrat conclu valablement entre les parties, le droit du LOSC à une indemnité doit se déterminer sur la base de l'article 17 du Règlement FIFA 2008. D'ailleurs, lorsqu'en date du 31 mai 2008, S. a donné son congé avec effet immédiat au LOSC, il s'est expressément référé à cette disposition.

Toutes les parties à la présente procédure ont admis que S. avait résilié le contrat de manière unilatérale, prématurée et sans juste cause et chacune d'entre elles – soit à titre principal, soit à titre subsidiaire – a reconnu que les critères d'application de l'article 17 du Règlement FIFA étaient remplis, dans l'hypothèse où la Formation arrivait à la conclusion que le *"Transfer Agreement"* n'était pas venu à chef.

E. Comment doit être calculée la compensation à laquelle a droit le LOSC?

En substance, S. comme Trabzonspor estiment que l'indemnité ne peut que correspondre à la somme des salaires encore dus jusqu'au terme conventionnel du contrat passé avec le LOSC et ne doit dès lors pas dépasser les EUR 700,000.-. Tous deux sont d'avis que le *"Transfer Agreement"* ne peut pas servir de base de calcul. Quant au LOSC, il soutient que l'indemnité s'élève à EUR 3,200,000.-, qui est le montant arrêté entre les clubs au cours des négociations intervenues en août 2008.

L'autorité appelée à déterminer le montant de l'indemnité doit tenir compte des circonstances du cas d'espèce, des arguments présentés par les parties et des éléments documentés produits. A cet égard, le fardeau de la preuve repose sur celui qui réclame le versement d'une indemnité (CAS 2008/A/1519-1520, para. 85 et références cités) et qui doit dès lors prouver les faits pour en déduire son droit (article 8 du Code Civil suisse).

La Formation est frappée par le peu d'éléments factuels apporté par les parties à l'appui de leur position respective. Trabzonspor et S. se basent surtout sur les salaires versés avant et/ou après la rupture unilatérale du contrat par le joueur alors que le LOSC se fonde exclusivement sur les négociations entourant l'établissement du *"Transfer Agreement"*. Au cours de l'audience du 28 janvier 2010, le LOSC a bien soutenu que la valeur à attribuer aux services de S. se situe entre EUR 3,200,000.- et EUR 4,000,000.- au vu de sa position particulière de gardien et de sa très grande expérience, puisqu'il aurait été

sélectionné dans l'équipe nationale du Sénégal, aurait participé à beaucoup de matches en Ligue 1 et en Champions League. Aucune de ces affirmations n'a été documentée.

De même et dans leurs écritures, les parties n'ont fait aucune allusion ni n'établissent d'autres éléments qui sont généralement pris en compte pour le calcul de l'indemnité, tels que le montant de tous les frais et dépenses occasionnés ou payés par l'ancien club et qui n'ont pas été amortis (voir article 17 al. 1 du Règlement FIFA 2008), les éventuels coûts de remplacement (CAS 2008/A/1519-1520, para. 133 ss) ainsi que les autres dépenses (CAS 2008/A/1519-1520, para. 140 ss). Il ne sera donc pas tenu compte de ces critères.

Enfin et parmi les critères expressément prévus par l'article 17 al. 1 du Règlement FIFA 2008, figure celui du droit en vigueur dans le pays concerné. Ce paramètre a pour objectif de garantir la compatibilité de la décision qui sera prise avec le droit étatique intéressé. En principe, ce dernier est celui qui régit les relations de travail entre le joueur et son ancien employeur, c'est-à-dire le droit de l'Etat avec lequel le contrat présente les liens les plus étroits (CAS 2008/A/1519-1520, para. 144 ss et réf.), soit en l'occurrence le droit français. Ici également, aucune des parties n'a évoqué ou ne s'est prévalu d'une base légale française devant être prise en compte dans le calcul de l'indemnité. Ce critère peut dès lors également être écarté par la Formation sans autre considération.

Les éléments dont dispose donc la Formation pour calculer l'indemnité sont ceux liés a) à la rémunération du joueur avant et après la rupture du contrat, b) ceux découlant des discussions intervenues en août 2008, c) ceux relatifs à la durée restante du contrat au moment de sa résiliation et à la question de savoir si la rupture intervient pendant les périodes protégées ainsi que ceux concernant la spécificité du sport.

1. La rémunération

En ce qui concerne la rémunération versée avant/après la rupture contractuelle, il y a lieu de tenir compte du fait que cet élément ne constitue que l'un des paramètres (non exhaustifs) permettant de déterminer la quotité de l'indemnité censée couvrir le dommage causé à l'employeur ensuite de la perte des services du joueur. Alors que la rémunération sous l'ancien contrat pourra donner des indications utiles sur la valeur attribuée par l'ex-employeur aux services du joueur, les salaires convenus avec le nouvel employeur peuvent donner des éléments de réponses quant à la valeur du marché des services du joueur et quant à savoir ce qui a motivé l'employé à rompre son contrat de manière unilatérale et prématurée.

En l'occurrence, il apparaît que dès la saison 2005/2006, le salaire annuel fixe versé par le LOSC était de l'ordre de EUR 700,000.- brut alors que celui versé par Trabzonspor était de EUR 1,200,000.- net la première saison et EUR 800,000.- net la seconde. Pour la saison litigieuse (2008/2009), S. aurait perçu un salaire de EUR 700,000.- brut auprès du LOSC contre EUR 1,200,000.- net auprès de Trabzonspor. Alors que les deux clubs s'étaient également engagés à verser à S. des primes, seul Trabzonspor fournit des prestations en nature au joueur (une maison complètement meublée, la mise à disposition d'un véhicule ainsi que de deux billets d'avion aller-retour (Trabzonspor – Sénégal) en classe affaires pour le joueur et cinq membres de sa famille).

Il apparaît que S. a quitté le LOSC car il estimait valoir plus que ce que le club français voulait bien lui verser. Au cours de l'audience du 28 janvier 2010, le joueur ne s'en est d'ailleurs pas caché, puisqu'il a affirmé à la Formation avoir approché le LOSC pour rediscuter ses prétentions salariales. Devant la non entrée en matière de son employeur, il a décidé de quitter ce dernier prématurément.

En conclusion, l'analyse du paramètre lié à la rémunération permet de constater, d'une part, que S. estimait valoir plus que ce qu'il percevait auprès du LOSC et que, d'autre part, Trabzonspor était disposé à lui verser plus de EUR 2,000,000.- pour deux saisons, tout en s'exposant à des revendications de l'ancien employeur du fait de la rupture unilatérale du joueur. Il est effectivement peu crédible que Trabzonspor ait ignoré que S. était encore lié à son ancien employeur et qu'il se soit fié aux seules déclarations du joueur, selon lesquelles il était libre de toute obligation contractuelle envers son ancien employeur. Il apparaît d'ailleurs que Trabzonspor n'a fait aucune difficulté pour entrer en négociations avec le LOSC immédiatement après le 30 juin 2007 en prenant d'ailleurs l'initiative (voir *infra*).

Toutefois, le critère de la rémunération ne donne qu'un indice quant à la valeur des services du joueur (CAS 2008/A/1519-1520, para. 102). Cela ressort d'ailleurs du texte même de l'article 17 du Règlement FIFA 2008, qui dresse une liste non-exhaustive des critères devant être pris en compte. Dans ce contexte, c'est à tort que Trabzonspor et S. tentent de soutenir que seuls les salaires encore dus par le LOSC peuvent être pris en compte. A cet égard, en se référant à l'article 337 c CO, ils oublient que la réglementation de la FIFA doit être observée prioritairement, le droit suisse ne s'appliquant qu'à titre supplétif. Ce dernier ne peut donc pas l'emporter sur l'article 17 du

Règlement FIFA 2008. Tout au plus peut-il servir à offrir des pistes (CAS 2008/A/1519-1520, para. 156).

2. Les négociations intervenues en août 2008 – le *"Transfer Agreement"*

La valeur des services d'un joueur peut varier au fil du temps. Le rôle de la Formation est de déterminer cette valeur au moment de la rupture unilatérale des rapports professionnels par le joueur. Dès lors que, en cours de contrat de travail, le transfert d'un joueur fait l'objet d'un accord entre les deux clubs concernés, le montant de l'indemnité de transfert représente de manière fiable la valeur que l'ex-employeur attribue aux services de son employé et le prix auquel il est disposé à y renoncer (CAS 2008/A/1519-1520, para. 104 et réf. cit.). La situation est comparable lorsqu'il n'y a pas de contrat de transfert en raison de la rupture unilatérale du joueur, mais que les négociations en vue d'un accord à l'amiable entre les clubs concernés sont très avancées. En effet, le montant auquel s'entendent les deux clubs pour régler le conflit, fournit une indication très importante sur la valeur qu'ils donnent aux services du joueur.

En l'espèce, Trabzonspor a approché le LOSC dès le 16 juillet 2008 pour trouver une solution transactionnelle à leur différend. Le 29 août 2008, Trabzonspor a informé le club français que le prix de EUR 1,200,000.- était admissible à ses yeux. Le 30 août 2008, le club turc a accepté les termes stipulés dans le projet de contrat, dont un *"transfer fee"* de EUR 1,200,000.- net de toute charge, à verser au LOSC sans déduction aucune. Le 31 août 2008, Trabzonspor a porté à la connaissance du LOSC le refus du joueur de signer le *"Transfer Agreement"* mais a insisté sur le fait qu'il a très longuement essayé de persuader ce dernier d'accepter l'accord.

Entre le début et la fin des négociations, plus d'un mois et demi s'est écoulé. Durant ce laps de temps, les parties aux négociations ont pu prendre en compte tous les paramètres qu'elles jugeaient opportuns pour arrêter la valeur des services de S. Malgré le fait que le *"Transfer Agreement"* n'a pas été valablement conclu, il apparaît que les deux clubs se sont entendus sur un montant. Le fait que le joueur n'ait pas ratifié la convention négociée entre les deux clubs ne change rien au fait que ces derniers ont trouvé un consensus quant à la valeur à attribuer à ses services. Cette valeur paraît d'autant plus objective qu'elle a été fixée par des parties dont les intérêts étaient manifestement antagonistes, Trabzonspor recherchant l'indemnité la plus basse et le LOSC l'indemnité la plus haute.

Le montant de EUR 1,200,000.- issu des négociations intervenues en août 2008 constitue indubitablement un point de rattachement prépondérant auquel la Formation doit donner toute sa considération. Cette somme a été arrêtée par les parties directement concernées, ensuite de négociations longues de plusieurs semaines. Trabzonspor était manifestement convaincue du bien-fondé de cette indemnité puisqu'il a tenté – en vain – pendant plusieurs heures de convaincre S. d'accepter le *"Transfer Agreement"* (*"We tried to persuade Tony yesterday in the night and this morning again to sign the agreement, but he refused. I have been in contact with Trabzonspor and them with Tony, his interpreter and Tchunda until 11.00 yesterday in the night and since 9.00 a.m. today, but he is still bullheaded. We can't change his decision"*).

Au cours des discussions liées au *"Transfer Agreement"*, les deux clubs ont négocié un système de peines conventionnelles, applicable en cas de retard dans le paiement par Trabzonspor de l'une des cinq échéances constituant l'indemnité. La Formation est d'avis qu'une telle peine conventionnelle ne peut pas être prise en compte pour au moins deux raisons. D'une part, ladite peine conventionnelle n'a pas pour objectif de compenser le dommage causé par la rupture unilatérale du contrat de travail par S. Or, seul ce dommage est visé par l'article 17 du Règlement FIFA 2008. La peine conventionnelle est plutôt destinée à inciter Trabzonspor à exécuter son obligation contractuelle dans les délais convenus et, cas échéant, à sanctionner le débiteur en demeure. D'autre part, la peine conventionnelle, en tant que contrat accessoire, dépend de l'existence du contrat principal, c'est-à-dire du *"Transfer Agreement"*. Or, pour les motifs déjà évoqués, celle-ci fait défaut, le *"Transfer Agreement"* n'étant jamais venu à chef.

Au vu de ce qui précède, la Formation est d'avis qu'elle n'a pas à s'écarter du montant de l'indemnité négocié entre les deux clubs, lesquels ont nécessairement tenu compte des critères fixés par l'article 17 du Règlement FIFA ainsi que des avantages et des inconvénients que la somme de EUR 1,200,000.- pouvait représenter. Ce montant n'est assurément pas incompatible avec la valeur que S. se donnait, ce dernier ayant précisément quitté le LOSC au motif qu'il estimait valoir plus que ce que son ancien employeur était disposé à lui verser.

Il résulte de ce qui précède que l'indemnité de EUR 1,200,000.- correspond à la valeur que les clubs concernés donnaient aux services de S. au moment de la rupture unilatérale du contrat par ce dernier. Il n'y a dès lors pas lieu de tenir compte d'autres critères, tels que la durée restante du contrat ou la spécificité du sport.

F. Y a-t-il un motif permettant de diminuer l'indemnité?

1. Liberté de circulation des travailleurs

Selon Trabzonspor, la FIFA n'a pas de raison légale à vouloir garantir la stabilité des contrats au-delà des trois premières années. Dès lors, si la rupture du lien contractuel devait intervenir après la troisième année, le principe de la libre circulation des travailleurs doit l'emporter sur l'intérêt du club au maintien du contrat de travail.

La thèse avancée par Trabzonspor ne trouve aucun fondement dans la réglementation de la FIFA et contrevient assurément à cette dernière qui vise précisément à garantir la liberté ainsi que la stabilité contractuelle. Si les parties à un contrat de travail ont convenu de se lier pour une durée limitée de cinq ans, rien ne justifie que les intérêts de l'une (le club) soient favorisés les trois premières années et ceux de l'autre (le joueur) les deux dernières années. S'il fallait donner raison à Trabzonspor, quelle serait alors la situation de l'employé qui serait prématurément congédié par son employeur après la période de trois ans, soit au moment où le principe de la libre circulation devrait (aux dires de Trabzonspor) l'emporter sur l'intérêt au maintien du contrat? L'employé ayant recouvré son entière liberté de circulation verrait-il son droit à une indemnité diminuer? Enfin, Trabzonspor n'explique pas en quoi un employé limite excessivement sa liberté de circuler lorsqu'il s'engage auprès du même employeur pour une durée limitée de cinq ans. Bien plus, il ne démontre pas où se trouve l'atteinte excessive et contraire aux mœurs ou au droit européen qui résulterait d'un tel contrat et qui justifierait une protection particulière de l'employé. Devant cette inconsistance, la Formation décide de rejeter cet argument sans autre considération.

2. Congé donné en dehors de la période protégée

Trabzonspor considère comme une circonstance atténuante le fait que S. ait rompu unilatéralement et sans juste cause le contrat en dehors de la période protégée. Dans le lexique du règlement FIFA 2008, no. 7, la période protégée est définie comme la *"période de trois saisons entières ou de trois ans – seule la période la plus courte étant retenue – suivant l'entrée en vigueur d'un contrat si le contrat en question a été conclu avant le 28e anniversaire du professionnel, ou une période de deux saisons entières ou de deux ans – seule la période la plus courte étant retenue – suivant l'entrée en vigueur d'un contrat si le contrat en question a été conclu après le 28e anniversaire du professionnel"*. En vertu de l'article 17 al. 3, dernière phrase du Règlement FIFA 2008, *"La période protégée recommence lorsque lors du renouvellement du contrat, la durée du contrat précédent est prolongée"*.

Cette disposition doit être interprétée dans le sens que si le contrat en question est prolongé avant l'expiration de la période protégée, l'ancienne période protégée se termine et la nouvelle période protégée commence à courir. Cela résulte des termes même de la loi, selon lesquels *"La période protégée recommence lorsque (...) la durée du contrat précédent est prolongée"* .[Mise en relief ajoutée] Or, la prolongation de la durée du contrat a lieu lors de l'accord des parties, indifféremment du fait que cet accord ait pour objet la simple prorogation de la durée du contrat originel ou son remplacement par un nouveau contrat. Ainsi, l'interprétation selon laquelle la nouvelle période de protection ne commence à courir qu'après l'expiration de l'ancien contrat ne trouve pas de fondement dans les termes de la loi. Une telle interprétation serait justifiée si l'article 17 al. 3, dernière phrase du Règlement FIFA 2008 se terminait par les mots *"..., le contrat précédent arrive à terme"*. Ladite interprétation provoquerait d'ailleurs des périodes protégées de longueur excessive. Au surplus, dans le cas où un contrat serait conclu pour une durée plus longue que la période protégée et que la durée de ce contrat serait ensuite prolongée avant l'expiration du contrat, cette solution entraînerait la conséquence peu souhaitable qu'il y aurait une "lacune de période protégée" parce que cette dernière se terminerait au bout de deux ou trois ans (en fonction de l'âge du professionnel au moment de la conclusion du contrat) et recommencerait à courir après le terme du contrat originel.

Attendu que S. est né le 17 mai 1975, que le contrat avec le LOSC a été signé le 12 juillet 2004, c'est-à-dire après le 28e anniversaire du professionnel, qu'il a été reconduit le 7 juillet 2005, la résiliation avec effet immédiat du 31 mai 2008 est intervenue en dehors de la période protégée d'une durée de deux ans. Cela n'est d'ailleurs pas contesté par aucune des parties à la présente procédure.

Les ruptures de contrat ou les licenciements qui interviennent pendant la période protégée sont considérés comme étant particulièrement répréhensibles et sont d'ailleurs frappés de sanctions sportives. C'est pourquoi il y a lieu d'en tenir compte non seulement pour fixer la sanction mais également pour déterminer la quotité de l'indemnité. Il s'agit-là d'un facteur aggravant (CAS 2008/A/1519-1520, para. 165). Il ressort d'ailleurs du texte même de l'article 17 du Règlement FIFA 2008 que ne constitue pas une circonstance atténuante le fait de résilier le contrat de manière injustifiée en dehors de la période protégée. Ainsi, l'art. 17 al. 1er, 3ème phrase du Règlement FIFA contient une énumération non exhaustive des critères du calcul de l'indemnité pour rupture de contrat, à

savoir *"la rémunération et autres avantages dus au joueur en vertu du contrat en cours et/ou du nouveau contrat, la durée restante du contrat en cours jusqu'à cinq ans au plus, le montant de tous les frais et dépenses occasionnés ou payés par l'ancien club (amortis sur la période contractuelle) de même que la question de savoir si la rupture intervient pendant les périodes protégées"*. [Mise en relief ajoutée] Le fait que la rupture soit intervenue *pendant* les périodes protégées est donc considéré comme facteur aggravant, tandis que le fait que la rupture soit intervenue *en dehors* des périodes protégées n'est pas mentionné en tant que facteur atténuant. Il en découle clairement que la rupture de contrat est toujours considérée comme un comportement illicite et condamnable, et d'autant plus si elle intervient pendant les périodes protégées.

En outre, le fait que le congé ait été donné pendant ou après la période protégée ne saurait changer le fait que le LOSC et Trabzonspor ont estimé la valeur des services du joueur à EUR 1,200,000.-.

3. Demande reconventionnelle

Trabzonspor demande que le LOSC soit condamné à lui verser EUR 100,000.- à titre de dommages et intérêts en raison du temps perdu engendré par le refus du club français à ce que S. soit enregistré auprès du club turc.

L'article 41 CO prévoit ce qui suit:

"Celui qui cause, d'une manière illicite, un dommage à autrui, soit intentionnellement, soit par négligence ou imprudence, est tenu de le réparer.

Celui qui cause intentionnellement un dommage à autrui par des faits contraires aux moeurs est également tenu de le réparer".

En ce qui concerne la fixation du dommage, l'article 42 CO énonce le principe selon lequel il revient au demandeur de prouver le dommage. Cette disposition prévoit ce qui suit:

"La preuve du dommage incombe au demandeur.

Lorsque le montant exact du dommage ne peut être établi, le juge le détermine équitablement en considération du cours ordinaire des choses et des mesures prises par la partie lésée".

Le lésé doit donc prouver non seulement l'existence mais aussi le montant du dommage (ATF 122 III 219). L'article 42 alinéa 2 CO qui déroge à l'alinéa 1 s'applique si le préjudice est d'une nature telle qu'il est impossible de l'établir ou si les preuves nécessaires font défaut ou encore si leur administration ne peut être exigée du demandeur. Cette disposition ne libère pas le lésé de l'obligation d'alléguer et de prouver tous les faits permettant de conclure à l'existence d'un dommage et qui rendent possible ou facilitent son estimation (ATF 131 III 360, 365 consid. 5.2).

En l'espèce, les prétentions de Trabzonspor sont exclusivement fondées sur des affirmations. Il n'a fourni aucun élément probant permettant d'établir l'existence d'un éventuel gain manqué lié aux difficultés qu'il a rencontrées lors de l'enregistrement de S. Dans de telles circonstances, la Formation ne dispose d'aucun élément lui permettant de faire application de l'article 42 alinéa 2 CO et, par conséquent, ne peut pas entrer en matière sur la demande en dommages-intérêts formée par Trabzonspor, laquelle doit donc être écartée.

4. Conclusion

Se basant sur ce qui précède, la Formation arrive à la conclusion qu'il n'y a pas de motif à diminuer le montant de l'indemnité fixée à EUR 1,200,000.-.

Arbitration CAS 2009/A/1974
Nicolo Napoli v. S.C.F.C. Universitatea Craiova & Romanian Football Federation (RFF)

16 July 2010

Football; disciplinary sanction of the club on its former coach; legal relationship between the RFF and the RPFL and standing to be sued; duty of the first adjudicating body to inform the parties of their rights to request reasons and file an appeal; right of the CAS Panel to issue a new decision in replacement of the decision appealed against; power of the employer to exercise disciplinary control after the end of the contractual relationship

Panel:
Mr. Lars Hilliger (Denmark), President
Mr. Jean-Philippe Rochat (Switzerland)
Mr. Clifford Hendel (United States, France)

Relevant facts

Nicolo Napoli ("the Appellant") is an Italian professional football coach born on 7 February 1962. He currently trains the team of FC Astra Ploiesti.

S.C. Football Club Universitatea Craiova ("the Club" or "the First Respondent") is a Romanian first division football club with its registered office in Craiova, Romania. It is a member of the Romanian Football Federation.

The Romanian Football Federation (RFF or "the Second Respondent") is the national football association of Romania and has its registered office in Bucharest, Romania. It is affiliated to the Union des Associations Européennes de Football (UEFA) and to the Fédération Internationale de Football Association (FIFA).

On 10 May 2008 the Appellant and the Club entered into an employment contract whereby the latter engaged the Appellant as coach for its first team for the season 2008-2009 ("the Contract").

The Contract was executed in the Romanian language; the English translation was provided by the Appellant and has been considered accurate by the Parties and the Panel. Certain other correspondence and documentation referred to in this Award has similarly been submitted without objection with English translation on which the Panel has relied.

The relevant parts of the Contract read as follows:

"1. Object of Agreement

The object of the agreement is constituted by the training and coaching by the provider of the first team of the U Craiova club, upon the terms and conditions set forth by the latter.

2. Duration of agreement

The duration of the agreement shall be terminated, one (1) year, the agreement being further executed as from the date of 01.07.2008 until the date of 30.06.2009.

3. The fee

Art. 1 For the performance of the activities provided in point 1, the provider benefits from a fee payable in RON, at the inter-banking average exchange rate set forth by NBR for the payment date, divided as follows:

Season 2008-2009: EUR 180,000 net, out of which EUR 40,000 net payable until the date of 30.06.2008, and the rest of EUR 140,000 net payable in equal monthly instalments. […]

4. Bonuses […]

In case, at the end of the competition season, the team is placed on a position allowing it to qualify in the UEFA CUP, the coach shall benefit from a bonus in amount of EUR 150,000; […]

5. Parties' rights and obligations […]

2. The provider bonds to: […]

not to make statements or give interviews to the press without the written approval of the club for the entire duration of the agreement, under the sanction of decreasing the fee, according to the FRF Regulation. […]

6. Civil agreement changing

The change of any clause of the civil agreement may only be made by parties' consent, agreed upon in writing, by additional document.

7. Termination of the civil agreement

The present civil agreement shall be terminated in the following situations:

upon expiry of the term it was concluded for;

by parties' agreement.

8. Final provisions

Litigations arising from the execution of the provisions of the present civil agreement shall be ami[c]ably settled, otherwise by the competent instances of FRF."

Apparently, the trainer performed his obligations from July 2008 to May 2009 without any problems and without receiving any warning from the Club.

On 15 May 2009, with the Club's team being at the 6th place of the Romanian first division's standings, the Club served on the Appellant a document entitled "Notification" ("the Termination Letter"):

"The underwritten, S.C. FOTBAL CLUB CRAIOVA S.A., registered office in Craiova, […] duly represented by Mr Mititelu Adrian, as General Director,

We hereby inform you upon the following:

Due to the pour [sic] results in the team training and evolution of FC Universitatea Craiova football team, as well as to the lack of professionalism of which you are showing, we are informing you that, as from the date of 15.05.2009, you will no longer coordinate the trainings of FC Universitatea Craiova team, being dismissed from the position of main coach of this team".

Following receipt of the letter the Appellant remained for a few days in Craiova without any professional activity and then returned to Italy.

The Club did not propose the coach any other activity within the Club. The coach did not receive his salary for May and June 2009.

On 17 June 2009 the Romanian newspaper "Gazeta de Sud" published an article with an interview of the Appellant where several comments about the Club and its management were made. The Club maintained that it had not authorised such an interview. The coach, for his part, denied to have given such an interview.

Following a meeting on 3 July 2009, the Club's board of directors issued its decision Nr 46/08.07.2009 ("the Club's Decision") by which it decided to impose on the Appellant

"[…] a financial penalty in quantum of EUR 18,000 representing 10% of the value of the contractual rights entitled to for the season 2008-2009, as he did not comply with the contractual provisions stipulated in art. 5 point 2 letter c) from the Civil Agreement no 1207 from 10.05.2008, respectively he granted interviews to the press and more exact to "Gazeta de Sud" newspaper on the date of 17.06.2009, without having the approval of ou[r] club, although according to art. 5 point 2 letter c) in the agreement concluded with our club under no 1207/10.05.2008 and registered with FRF under no 1725/27.06.2009, there is provided that he is expressly forbidden to grant interviews to the press without written approval from our club, under the sanction of decreasing his agreement".

The parties are in dispute on whether the Club's Decision was indeed delivered to the Appellant's Italian address mentioned in the Contract, i.e. to Quarta S. Elena, Cagliari, Italy or to the Appellant's Romanian address as mentioned in the registration certificate issued by the Foreigners Office. In addition, the Club's Decision was submitted to the Romanian Professional Football League's (RPFL) Disciplinary Committee ("the RPFL Committee") for ratification, in accordance with the applicable RFF and RPFL regulations.

On 5 August 2009 and following a hearing where only the Club's representative participated and the Appellant defaulted, the RPFL Committee issued a decision without reasons ("the RPFL Decision"), which reads as follows:

"Summon procedure duly fulfilled. […]
[B]ased on the evidence produced in the case, with unanimity of votes:

DECIDES

Based on art. 42 point 6.2 letter e) from the Disciplinary Regulation it is hereby ratified the sanction applied by [the Club] by Decision no 46/08.07.2009 to coach Nicolo Napoli. Permanent [sic].
With appeal within 2 days since communication".

On 20 August 2009 the Appellant filed an appeal against the RPFL Decision before the RPFL Appeal Commission.

After hearing the arguments of both parties, on 3 September 2009 the RPFL Appeal Commission dismissed the Appellant's appeal ("the Appealed

Decision") as inadmissible because it was directed against a decision without reasons. In summary, the RPFL Appeal Commission initially accepted that the Appellant was properly summoned for the hearing before the RPFL Committee. Further, it considered that the Appellant had a procedural duty to first request the reasons for the RPFL Decision and then file an appeal before the RPFL Appeal Commission. Finally, it considered that the fact that the RPFL Decision did not mention the 3-day deadline to apply for a motivated decision did not exempt the Appellant of his duty, since he should have been aware of the applicable RFF and RPFL regulations. Therefore, the RPFL Appeal Commission considering itself unable to review a decision without reasons and to examine how the RPFL Committee applied the relevant rules, it accepted the Club's arguments and declared the appeal inadmissible.

The Appealed Decision was notified to the Appellant on 17 September 2009.

On 5 October 2009 the Appellant filed his Statement of Appeal with the Court of Arbitration for Sport (CAS).

Extracts from the legal findings

A. The Appellant's request for payment of salaries, bonuses and compensation

The Club argues that the Appellant is not entitled to request the CAS to order the payment of salaries, bonuses or compensation because said requests were not the subject of the proceedings at the previous instances.

Article R57 of the CAS Code states: "*The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.[…]*"

In this respect, the Panel takes note of the CAS Panel's considerations in case CAS 2007/A/1426: "*It is true that pursuant to art. 57 of the CAS Code the Panel has the full power to review the facts and the law and to issue a decision de novo. However, when a CAS Panel is acting following an appeal against a decision of a federation, association or sports-related body, the power of such a Panel to rule is also determined by the relevant statutory legal basis and, therefore, is limited with regard to the appeal against and the review of the appealed decisions, both from an objective and a subjective point of view. […] [A]s the subsidiary motion of the Appellant was neither object of the proceedings before the Italian sport authorities, not in any way dealt with in the Appealed Decision, the Panel does not consider itself to have the power to decide on it*".

The Panel finds the above analysis applicable to the present case, in which the issue of whether the Club owes to the Appellant salaries/bonus payments under the Contract or compensation for unjust dismissal has not been raised before the RPFL Committee or the RPFL Appeal Commission. The subject of the proceedings at the previous instances was merely disciplinary, i.e. whether the Club's Decision to impose a fine on the Appellant for his alleged misbehaviour was legitimate or not.

In addition, the Panel notes that in his appeal before the RPFL Appeal Commission the Appellant did not file any request concerning outstanding amounts arising from his contractual relationship with the Club. The Panel finds that said requests are not directly related to the matter at hand and, despite the fact that they are also based on the Contract, cannot be raised for the first time in these proceedings.

Therefore, the Panel holds that it does not – at least at this point – have jurisdiction to decide on the requests under points 5 and 6 of the Appellant's prayers for relief. The Panel reaches this conclusion without prejudice to the Appellant's right to exercise any claims arising from the Contract before the competent first-instance body.

B. Does the RFF have standing to be sued?

In its Answer, the RFF drew the Panel's attention to the following provisions of its own Statutes:

Article 56 entitled "Jurisdictional bodies" at paragraph 5 provides: "*As an exception to the above, based on the annual agreement entered between the RFF and the professional leagues, and approved by the RFF Executive Committee, the professional leagues may have, according [to] the competition level at which they activate [sic], their own jurisdictional bodies, i.e. a) Disciplinary Commission; b) National Dispute Resolution Chamber, c) [Appeal] commission*".

Article 62 entitled "*Effective date*" provides: "*1. The Statutes were adopted by the RFF General Assembly on 11th May 2009 in Bucharest. 2. These Statutes shall enter into full force and effect as of 1st July 2009*".

Further, the RFF produced a copy of the RFF-RPFL Agreement, the relevant parts of which read as follows:

"*[…]*

Article 2

(1) This Agreement governs the organization of professional

football activity for the period 10th June 2009 – 30th June 2010. [paragraph amended by the so called "Rider No.1" signed by RFF and RPFL] […]

3. *[R]PFL – an entity set up as a result of the association of the clubs which participate in the "1st League National Championship" competition – is a private law, autonomous, non-governmental, non-political and non-profit entity, which is subordinated to the RFF and recognized as such by the RFF.*

Article 8

(1) [R]PFL has its own jurisdictional bodies, as follows: a) Disciplinary Commission, b) National Dispute Resolution Chamber, c) [Appeal] Commission.

(2) Any disciplinary cases and disputes involving exclusively the clubs that take part in the "1st League National Championship" competition, their officials, senior players and coaches shall be solved solely by the [R] PFL jurisdictional bodies provided for under the previous paragraph. Any disputes arising between the clubs which take part in the competitions organized by RFF shall be solved solely by the RFF jurisdictional bodies. Any disputes arising between the clubs that take part in the "1st League National Championship" which have also 2nd and 3rd League teams and the senior players shall be solved by the RFF or [R]PFL jurisdictional bodies, as the case may be, according to the registering body for each individual contract. [paragraph amended by the so called "Rider No.2" signed by RFF and RPFL]

(3) The decisions passed by the [R]PFL [Appeal] Commission may be appealed with the Court of Arbitration for Sport in Lausanne, in accordance with the RFF Statutes and Regulations".

It is evident from the above provisions that, prior to the Club's Decision of 8 July 2009 and its application to the RPFL Committee, the RPFL had already made use of its right under the RFF Statutes to constitute its own adjudicating bodies. Such initiative was approved by the RFF upon signing the RFF-RPFL Agreement, which clearly provided that "*the clubs that take part in the 1st League … and [their] coaches … shall be solved solely by the [R]PFL jurisdictional bodies*". [Emphasis added] This is exactly the type of dispute brought before this Panel.

With respect to the legal relationship between the RFF and the RPFL, Article 2 para. 3 of the RFF-RPFL Agreement leaves no doubt about the legal status of RPFL: similar to the organization of football leagues in other countries (see CAS 2008/A/1525 pp.13-14) the RPFL is neither a body nor an organ of the RFF, but rather a separate legal entity with powers and authority to organize the Romanian professional football championship.

Based on the applicable provisions, the disciplinary dispute between the Appellant and the Club should be – and indeed was – submitted by the Club to the RPFL Committee. Subsequently, the Appellant also submitted himself to the jurisdiction of the RPFL bodies by filing an appeal before the RPFL Appeal Committee.

In view of the foregoing, the Panel finds that the Appealed Decision has been issued by a body established and operated by the RPFL, which is a legal entity separate from the RFF. Therefore, the RFF is neither the body that issued the Appealed Decision nor has any authority to interfere with the decisions of the RPFL Committee and the RPFL Appeal Commission.

As a result, the Panel holds that the RFF has no standing to be sued in this case.

C. Was the appeal before the RPFL Appeal Commission inadmissible?

The RPFL Appeal Commission dismissed the Appellant's appeal considering that he had failed to comply with his procedural duty to first request the reasons for the RPFL Decision and then file an appeal.

The Panel notes that, generally, in case a decision does not contain any reasons supporting its ruling, the reviewing role of an appeals body is almost an impossible task. It is thus logical and legally sound that a person affected by a decision without reasons shall, as a first step, request that the reasons of the decision are delivered and then file an appeal before the second instance body. On the other hand, given that a possible failure to ask for the reasons is connected to serious legal consequences such as the inadmissibility of an eventual appeal, the body issuing the unreasoned decision must inform the parties of their respective rights to (a) request reasons and (b) file an appeal.

In this respect, Articles 115 and 116 of the RFF Disciplinary Regulations provide the following:

"*Article 115 – Judgments without stated reasons*

(1) The [RPFL Committee] can decide to communicate the party/parties only the operative part of the award. At the same time, the party/parties shall be informed in writing that he/they/ has/have the right to request in writing the communication of the reasons for the judgment within three

days from communication of such reasons. In case this right is not availed of, the judgment becomes irrevocable.

(2) If the party/one of the parties requests communication of the reasons for the judgment, the reasons shall be communicated to the party/parties within three days from receipt of such request. The deadline to file an appeal shall run from the date of communication of the reasoned judgment.

Article 116 – Appealable judgments

[…]

3. The time limit to file an appeal is two days from communication of the judgment. Reasons for the judgment shall be stated in writing within three days from the expiry of the above-mentioned deadline."

In the present case, the RPFL Committee's decision reads *in fine*: "*With appeal within 2 days since communication".*

The Panel notes that, contrary to Article 115 para. 1 cited above, the RPFL Decision does not contain any mention about the parties' right to ask for the reasons thereof. In the view of the RPFL Appeal Commission said omission was not substantial.

The Panel disagrees. Even if one were to accept that a party has a duty to be aware of and comply with the applicable procedural rules, the adjudicating bodies too have duties in this regard. Firstly, the Appellant did not participate in the proceedings before the RPFL Committee and received no other information about the case other than the RPFL Decision. Further, it is undisputed that the RPFL Committee violated the rules by not informing the Appellant – even with a footnote at the body of the RPFL Decisions – that he had three days to request the reasons, otherwise the RPFL Decision would become non-appealable.

Secondly, given that the time limits set out in the RFF Disciplinary Regulations are extremely stringent (two days for reasons, three days for appeal), the proper communication of the parties' rights is a *condition sine qua non* for a due process. The Panel finds that the information contained in the RPFL Decision was not only incomplete but actually misleading. The Appellant, a foreign coach, followed the instructions of the notice of appeals communicated to him and challenged the RPFL Decision within the time limit of two days, only to find out later that this was not enough for a substantive review of his case. The Panel finds that the Appellant acted *bona fide* and cannot be held liable for a procedural mistake which can be largely attributed to the information provided to him by the RPFL Committee. Thus, by erroneously holding that the appeal was inadmissible, the RPFL Appeal Commission violated the Appellant's right to be heard and to have the appeal tried before the RPFL Appeal Commission.

Therefore, the Appealed Decision must be set aside.

At this point, the Panel takes note of the Club's contention that the role of the CAS in this case is restricted to examining whether the appeal before the RPFL Appeal Commission was admissible or not. If so, the CAS should simply set aside the Appealed Decision and refer the matter back for a new hearing.However, the power of a CAS Panel in arbitration appeals proceedings to issue a new decision in replacement of the decision appealed from is expressly defined in Article R57 of the CAS Code: "*It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance*".

In compliance with consistent CAS jurisprudence both in pecuniary (CAS 2008/A/1741, CAS 2009/A/1793, etc.) and in disciplinary (Oschuetz F., *Sportschiedsgerichtsbarkeit*, Berlin 2005, p 348, with reference to CAS jurisprudence) disputes heard upon appeal and having regard to the circumstances of this case, the Panel opts to review the merits of this case and issue a new decision in the dispute at hand. Indeed, the value and complexity of the dispute would not justify a referral of the case back to the RPFL Appeal Commission. Although the Panel did not have the benefit of examining detailed documentation related to the Appellant's alleged disciplinary infraction and thus the RPFL Appeal Commission would probably be closer to the facts of the case, reasons of procedural economy and legal arguments explained below speak in favour of CAS resolving finally the disciplinary aspect of the dispute between the Appellant and the Club. Thereafter, however, the parties may resolve any financial dispute(s) before the appropriate forum.

D. Was the Club entitled to impose the fine on the Appellant?

The Club's Decision to impose a fine of EUR 18,000, representing 10% of the Appellant's annual income under the Contract, was based on article 5 of the Contract, which the Appellant allegedly breached by giving an interview without the prior written approval of the Club. Given that the contents of the interview were neither mentioned in the Club's Decision nor documented in the present proceedings, the Panel will focus on whether the Appellant (a) was still bound by the terms of the Contract at the relevant point in time and, (b) if so, whether he indeed violated its terms and received an appropriate sanction by the Club.

The parties are in dispute as to when the Contract was terminated. On the one hand the Appellant contends that he was dismissed by virtue of the Termination Letter and thus released from any obligations under the Contract on 15 May 2009. On the other hand, the Club argues that the Contract does not provide for a right of unilateral termination and it expired at the end of its term, i.e. on 30 June 2009. In addition, the Club considers that the Termination Letter did not produce any legal consequences because it was not ratified by the competent RFF Commission, as provided in the applicable rules.

At the outset, the Panel notes that in their pleadings the parties consider as common ground that the validity of the Club's Decision to impose a fine is contingent upon the validity of the Contract itself. Indeed, it is a general principle of labour law –and there is no evidence that Romanian law provides otherwise– that an employer is not empowered to exercise any disciplinary control, let alone impose monetary sanctions, on a person that is no longer employed by it. The situation would be different if the parties had expressly agreed that certain terms of the contract would still be binding on them for a specified period of time after the end of their contractual relationship, which is usually the case for "non-disclosure" or "non-competition" clauses. Again, under such a clause the employer suffering from the breach would have a claim against its former employee but not any longer disciplinary authority on him.

In the present case, no such clause is contained in the Contract which simply lists in article 5 the Appellant's obligations as follows: "*The [Appellant] bonds to: a) strictly comply with the training and competition schedule, to participate in advertising activities organised by the club, to strictly comply with the By-laws and [RFF] and [RPFL] Regulations; (b) to make efforts specific to a professional coach's occupation, on levels of the existing standards; (c) not to make statements or give interviews to the press without the written approval of the club for the entire duration of the agreement, under the sanction of decreasing the fee, according to the FRF Regulation. […]".*

The Panel is unable to find any wording in the Contract suggesting – especially in the context of Article 5 which clearly refers to the duties of the Appellant during his employment by the Club – that the Appellant must obtain permission for an interview after the end of their collaboration. Therefore, the Panel finds at the time of the alleged breach that the validity of the Club's Decision is contingent upon the validity of the Contract.

In this respect, the Panel will examine whether the alleged breach took place on a date (17 June 2009) when the Contract was still binding on the parties.

In its submissions the Club makes reference to Article 18.6 of the RFF's "Regulations for the Transfer and Status of Football Players, 2009", which the parties agree that applies also to coaches and reads as follows:

"*Article 18 – Termination of contractual relationships[…] 18.6 – Termination of the contractual relationships by mutual agreement/agreement of the parties, arising during the performance of the contract, can be made in writing, explicitly and unequivocally, such termination being established by the qualified commission which shall render a judgment. In the agreement they conclude, the parties shall mention the mode of extinguishing their mutual obligations.*"

The Club argues that article 18.6 is applicable to the present dispute and that the Termination Letter did not satisfy its terms and accordingly produced no legal consequences. The Panel cannot accept the Club's argument. The provision mentioned above is not relevant to the contents of the Termination Letter which was a unilateral declaration and not a mutual agreement for the termination of the Contract. Hence, article 18.6 does not apply and there is no approval or ratification by a RFF/RPFL body required in order for the Termination Letter to have legal effect.

The next question is what exactly the legal consequences of the Termination Letter are. The Panel notes that Article 7 of the Contract entitled "Termination of the civil agreement" provides no express right of unilateral termination by either Party: the Contract would end either upon expiry of its term or by agreement of the parties. However, the parties' rights are not only described in the Contract but also in the respective RFF Regulations which are mentioned more than once in the Contract. Indeed, aside from the well established general principle in CAS jurisprudence that each party to an employment agreement has the right to terminate it for just cause, the RFF Regulations also provide that a player's (or coach's) contract can be terminated upon initiative of the club (Article 18.1.c) or of the player/coach (Article 18.1.d). Regarding the latter provisions the Panel notes that, since it had received only a selective translation of Article 18 by the Club, during the hearing the interpreter assisting the Appellant translated the relevant parts upon the Panel's request.

The Panel further considers that, on the basis of the applicable regulations and the evidence before it, indeed the Termination Letter produced legal consequences and put an end to the Contract. The Panel has carefully examined the language of the

Termination Letter which is unambiguous and leaves no room for interpretation:

"… we are informing you that, as from the date of 15.05.2009, you will no longer coordinate the trainings of EC Universitatea Craiova team, being dismissed from the position of main coach of this team".

[Emphasis added]

In addition, the Appellant immediately after being served with the Termination Letter a) did not train the team again and generally stopped offering his services without any complaint or other reaction from the Club, b) did not receive any further payment from the Club, and c) shortly thereafter decided to return to his home town in Italy. Thus, the Panel finds that as of 15 May 2010 the Appellant was released from his contractual duties and the Contract was no longer in effect. The Panel reached this conclusion without entering into the question whether the Appellant's dismissal was justified and lawful or not, which is not the subject of the present proceedings.

Therefore, even if it had been proven – *quod non* – that the Appellant actually gave the interview to Gazeta de Sud on 17 June 2009 without the Club's prior approval, on the basis of the above analysis the Panel finds that the Appellant did not breach the Contract which had already ended since 15 May 2009.

Consequently, the Panel holds that the Club's Decision to impose a fine of EUR 18,000 on the Appellant must be annulled.

Arbitration CAS 2010/A/2071
Irish Football Association (IFA) v. Football Association of Ireland (FAI), Daniel Kearns & Fédération Internationale de Football Association (FIFA)
27 September 2010

Football; admissibility of new documents submitted after the filing of the Appeal/Answer; principles governing the interpretation of rules; rules governing the eligibility of players to play for the representative teams of national associations; distinction between a "shared" and a "dual" nationality; hierarchy of norms

Panel:
Prof. Luigi Fumagalli (Italy), President
Mr. Michael Beloff QC (United Kingdom)
Mr. Michele Bernasconi (Switzerland)

Relevant facts

The Irish Football Association (IFA or the "Appellant") is the governing body of football in Northern Ireland. It has its registered office in Belfast, Northern Ireland. It was founded in 1880 and is affiliated to the Fédération Internationale de Football Association since 1911.

The Football Association of Ireland (FAI or the "First Respondent") is the governing body of football in the Republic of Ireland. It has its registered office in Dublin, Republic of Ireland. It was founded in 1921 and is affiliated to the Fédération Internationale de Football Association since 1923.

Mr Daniel Kearns ("Mr Kearns" or the "Second Respondent") is a professional football player. He has both Irish and British nationality.

The Fédération Internationale de Football Association (FIFA or the "Third Respondent") is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the governing body of international football at worldwide level.

It is undisputed that Mr Kearns has had dual British and Irish citizenship from birth.

Mr Kearns was selected in several international matches for the U-15 and U-16 schoolboy teams of Northern Ireland as well as for the Northern Ireland U-17 and U-19 teams. However, he has never played a match in an official competition at "A" international level for the IFA.

On 11 August 2009, Mr Kearns filed an application before FIFA for a change of association team, from the IFA to the FAI. On 2 November 2009, he confirmed to FIFA his request, acknowledging the fact that such a change would be irreversible.

On 3 November 2009 and in compliance with the applicable FIFA regulations, the FAI submitted a formal request to FIFA for Mr Kearns' change of association team.

On 4 February 2010, the Single Judge of the FIFA Players' Status Committee (the "Single Judge") accepted the request made by the FAI and by Mr Kearns for the change of association team.

In particular, the Single Judge dismissed the submission of the IFA that Mr Kearns was not eligible to play for the FAI because he did not fulfil any of the criteria contained in Article 16 of the Regulations governing the application of the 2009 FIFA Statutes (the "2009 Application Regulations"). The Single Judge found that said provision applied exclusively to players eligible to represent several associations on the basis of one single nationality. As Mr Kearns has both the British and Irish nationality, the Single Judge concluded that he did not need to comply with the requirements of Article 16 of the 2009 Application Regulations. Hence, in light of the fact that Mr Kearns a) has more than one nationality, b) had not played for the IFA in an official competition at "A" international level, c) had the Irish nationality at the time of his appearance in international matches in official competitions with the team of the IFA, the Single Judge concluded that only Article 18 of the 2009 Application Regulations had to be considered. In this regard, he reached the conclusion that Mr Kearns fulfilled the objective prerequisites of this provision.

On 2 March 2010, the IFA filed a statement of appeal with the Court of Arbitration for Sport (CAS) to

challenge the above mentioned Appealed Decision. The Appellant named as respondents to the appeal FAI, Mr Kearns and FIFA (collectively referred to as the "Respondents").

Extracts of the legal findings

A. New Documents

On 1 and 16 July 2010, the IFA filed respectively a written statement of Mr Patrick Nelson, dated 1 July 2010, backed up by supporting documents, and a 30 pages long paper entitled "*Skeleton argument for the Appellant*" accompanied by three "*hearing bundles*" of various papers.

Pursuant to Article R44.1 par. 2, second sentence of the Code, "*after the exchange of the written submissions, the parties shall not be authorized to produce further written evidence, except by mutual agreement or if the Panel so permits on the basis of exceptional circumstances*".

In its appeal brief, the IFA described the content of the "*1950 FIFA Ruling*", but explained that it was not uncertain of the form it took, so was in the process of seeking a copy of the original ruling.

The Panel decided to admit into the file some documents, originally submitted as attachments to a written statement of Mr Patrick Nelson dated 1 July 2010. Such documents consisted of excerpts of the FAI's webpage, exchange of letters between the IFA, the FAI and/or FIFA, and minutes of meetings relating to the football situation in Ireland during the early and middle of the last century, because their production had been foreshadowed in the appeal brief, they constituted best evidence, their authenticity could not be doubted, and no unfairness would be caused to the respondents by their admission. The request to file all the other submissions and documents (Mr Patrick Nelson's statement itself, the "*Skeleton argument for the Appellant*" and the three bundles) was denied. While agreed bundles of documents (already annexed to pleadings or witness statements) in chronological (or other rational) sequence and skeleton arguments can be of considerable assistance to Courts or Tribunals if produced in advance of a hearing, their admission can only be entertained before a CAS Panel on the basis of the agreement of both parties and with the prior consent of the Panel itself.

B. Merits

The modern history of Ireland and its division into North and South has engendered, as is well known, acute political controversy, and aroused strong emotions on each side of the border and indeed elsewhere. The Panel, in its arbitral capacity, while aware of this, wishes to emphasise that it is seized only of the interpretation of the relevant legal instruments (which are universal in their ambit in the football world) and in its application of those instruments, so interpreted, to the facts of the instant case. It is concerned with the position of Mr Kearns and not with any wider implications which others may perceive to flow from its ruling in the context of football or otherwise.

FIFA as the records shows, has from time to time commendably sought to reconcile the competing ambitions of the IFA and FAI with the rules, but it is undisputed that the eligibility of players to play in association teams is currently governed by Articles 15 to 18 of the 2009 Application Regulations. In such respect, the IFA contends that Article 16 of the 2009 Application Regulations applies to Mr Kearns' specific situation, whereas the FAI and FIFA contend that only Articles 15 and 18 fall to be considered. More specifically, on the one hand, the IFA submits that Article 16 applies to cases of dual nationality cases; on the other hand, the FAI submits that Article 16 is only applicable to players with a "*shared nationality*", i.e. to those who are eligible to represent more than one association on account of a single nationality.

As an alternative ground of appeal, the IFA submits that based on the "1950 FIFA Ruling" and the subsequent accord which arose between the two associations, the IFA and the FAI accepted to confine themselves to selecting players with a territorial connection to their respective areas of jurisdiction.

In light of the above, the main issues to be resolved by the Panel, in order to verify whether Mr Kearns was entitled to a change of association under the 2009 Application Regulations, are the following:

- What is the proper construction of the FIFA regulations regarding the eligibility of players to play in association teams?

- Are the IFA and the FAI bound by a contract, the terms of which supersede any applicable provision of the 2009 Application Regulations?

1. What is the proper construction of the FIFA regulations regarding the eligibility of players to play in association teams?

Chapter VII of the 2009 Application Regulations ["*Eligibility To Play For Representative Teams*"] contains the following four provisions:

15. Principle

1. Any person holding a permanent nationality that is not dependent on residence in a certain country is eligible to play for the representative teams of the Association of that country.

2. With the exception of the conditions specified in Article 18 below, any Player who has already participated in a match (either in full or in part) in an official competition of any category or any type of football for one Association may not play an international match for a representative team of another Association.

16. Nationality entitling players to represent more than one Association

1. A Player who, under the terms of art. 15, is eligible to represent more than one Association on account of his nationality, may play in an international match for one of these Associations only if, in addition to having the relevant nationality, he fulfils at least one of the following conditions:

(a) He was born on the territory of the relevant Association;
(b) His biological mother or biological father was born on the territory of the relevant Association;
(c) His grandmother or grandfather was born on the territory of the relevant Association;
(d) He has lived continuously on the territory of the relevant Association for at least two years.

2. Regardless of par. 1 above, Associations sharing a common nationality may make an agreement under which item (d) of par. 1 of this Article is deleted completely or amended to specify a longer time limit. Such agreements shall be lodged with and approved by the Executive Committee.

17. Acquisition of a new nationality

Any Player who refers to art. 15 par. 1 to assume a new nationality and who has not played international football in accordance with art. 15 par. 2 shall be eligible to play for the new representative team only if he fulfils one of the following conditions:

(a) He was born on the territory of the relevant Association;
(b) His biological mother or biological father was born on the territory of the relevant Association;
(c) His grandmother or grandfather was born on the territory of the relevant Association;
(d) He has lived continuously for at least five years after reaching the age of 18 on the territory of the relevant Association.

18. Change of Association

1. If a Player has more than one nationality, or if a Player acquires a new nationality, or if a Player is eligible to play for several representative teams due to nationality, he may, only once, request to change the Association for which he is eligible to play international matches to the Association of another country of which he holds nationality, subject to the following conditions:

(a) He has not played a match (either in full or in part) in an official competition at "A" international level for his current Association, and at the time of his first full or partial appearance in an international match in an official competition for his current Association, he already had the nationality of the representative team for which he wishes to play.
(b) He is not permitted to play for his new Association in any competition in which he has already played for his previous Association.

2. If a Player who has been fielded by his Association in an international match in accordance with art. 15 par. 2 permanently loses the nationality of that country without his consent or against his will due to a decision by a government authority, he may request permission to play for another Association whose nationality he already has or has acquired.

3. Any Player who has the right to change Associations in accordance with par. 1 and 2 above shall submit a written, substantiated request to the FIFA general secretariat. The Players' Status Committee shall decide on the request. The procedure will be in accordance with the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber. Once the Player has filed his request, he is not eligible to play for any representative team until his request has been processed.

The interpretation of the statutes and rules of a sport association has to be rather objective and always to start with the wording of the rule, which falls to be interpreted. The adjudicating body −in this instance the Panel− will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. In its search, the adjudicating body will have further to identify the intentions (objectively construed) of the association which drafted the rule, and such body may also take account of any relevant historical background which illuminates its derivation, as well as the entirely regulatory context in which the particular rule is located (CAS 2008/A/1673, para. 33, p. 7; CAS 2009/A/1810; CAS 2009/A/1811, para. 73, p. 15; see also ATF 87 II 95 consid. 3; ATF 114 II 193, p. 197, consid. 5.a; decision of the Swiss Federal Court of 3

May 2005, 7B.10/2005, consid. 2.3; decision of the Swiss Federal Court of 25 February 2003, consid. 3.2; and Piermarco Zen-Ruffinen, Droit du Sport, 2002, par. 168, p. 63).

As its first ground of appeal, the IFA contends that the historical element is decisive in the construction of the modern FIFA regulations applicable to the present case. It contends in particular that the Articles 15 to 18 of the 2009 Application Regulations were developed in response to the particular situation of IFA-FAI. According to the IFA, an interpretation taking due account of the regulatory prehistory will inevitably lead to the conclusion that, under the applicable regulations in their contemporary form, the FAI is not authorized to select for its representative teams players born in Northern Ireland and with no connection to the territory of the Republic of Ireland by residence, by birth, by parental or grandparental birth.

The Panel notes that the IFA bears the burden of demonstrating the accuracy of its analysis (Article 8 of the Swiss Civil Code, ATF 123 III 60 consid. 3a, ATF 130 III 417 consid. 3.1). It is not sufficient for it simply to make an assertion as to the relevant rules' derivation. Hence the Panel has had to consider with care the historical record to which it now turns.

1.1 The historical interpretation

1.1.1 The 1940s and 1950s

The dispute between the IFA (founded in 1880) and the FAI (founded in 1921) as to which players could be selected for which international teams has a considerable ancestry; and complaints of poaching have been made at different times by each association. It is, in the Panels view, not necessary for the purpose of the appeal, to consider in detail any period before the end of the Second World War.

On 7 October 1946, because at that time the IFA were selecting players born anywhere in Ireland for its international teams, the FAI requested FIFA to confirm that "*players born within the area of [FAI's] jurisdiction [were] not eligible for selection for International purposes by any Association other than the Football Association of Ireland*".

On 18 October 1946, the General Secretary of the FIFA, Mr Shricker, answered as follows:

"Art. 21 al. 2 of the Regulations of the F.I.F.A. (…) reads as follows: "The players (NB. of International Matches) must be selected by the National Associations concerned and be subjects of the country they represent". This rule is binding on the British Associations since they have rejoined the F.I.F.A, and, in the future players born in the area of your jurisdiction will not be authorised to play in International match for the Irish F.A.".

The IFA did not accept that Mr Shricker's approach applied to matches against the other British associations, which, at the time, were not governed by the FIFA regulations. The issue was raised on several occasions before FIFA, which initially deemed that it was not in a position to interfere in the matter, but later accepted to intercede when the IFA brought to its attention the fact that the FAI was putting pressure on players from within its jurisdiction to sign an undertaking not to play for the IFA.

On 17 April 1951, the General Secretary of the FIFA wrote the following letter to the IFA:

"The Executive Committee of the F.I.F.A. considered the complaint made by your Association against the F.A. of Ireland at its meeting in Madrid, and have directed us to confirm that the Football Association of Ireland would act contrary to the F.I.F.A. regulations if they imposed conditions or restrictions before a player was transferred to another association in membership with the F.I.F.A., if his transfer documents were otherwise completely in order.

On the other hand, the Executive Committee consider it inadmissible to select players, being citizens of Eire, for the representative teams of a country other than Eire. An exception from this rule is only allowable in respect of the international matches between the four British Associations if those countries agree and the F.A. of Ireland do not object, but not for matches played in Jules Rimet Cup".

The IFA submits that the effect of this letter was to extend the "ruling" of 18 October 1946 to matches between the British associations.

The Panel reminds itself that the purpose of historical interpretation is to consider the historical conditions in, from and because of which the current legal text originated. It requires ascertainment of not only the genesis of but also the entire development underlying the text so as to ascertain how it obtained its final linguistic expression and to enable useful comparison to be made of the present with any previous rules regulating the same legal matter. It is as a result of such a comprehensive exercise that the historical interpretation can assist in establishing the meaning of a legal text (ATF 133 III 257, consid. 2.4 and 2.5.2). In the present appeal, however, the IFA limited its presentation of the historical facts to the events surrounding the FIFA letter dated 17 April 1951. It gave no consideration, and provided no exposition to the Panel, of how the situation has evolved since the

1950's and, in particular, how the FIFA regulations have developed between the 1950 and the 2010. This is particularly important as this period of time was marked by significant political changes in Ireland and elsewhere.

What the IFA calls the "*1950 FIFA ruling*" is no more than an exchange of letters between the FAI, the IFA and/or then the General Secretary of the FIFA. The FAI has not been able to demonstrate that (or how) such letters have the force of law or that (or how) they have a binding effect on the rights and duties of the member associations of the FIFA. Furthermore, the General Secretary of the FIFA took his position on particular issues that were brought to its attention; but the exact nature of those issues is unclear, notably whether they were linked to matters of citizenship or nationality. The FAI for its part contends that the status of Irish citizens living in Northern Ireland has never been discussed and that the FAI has never accepted that Irish citizens could not be selected for its team, whether they were living in Northern Ireland or elsewhere. Moreover, as appears from his letter, the FIFA General Secretary based his position on "*Art. 21 al. 2 of the Regulations of the F.I.F.A.*" which stated that the players must be "*subjects of the country they represent*". Such a wording does not on its face exclude the possibility that a player may be selected on the basis of his citizenship alone and without any other connection to the country he represents.

In light of all the above considerations, the Panel is of the opinion that the "*1950 FIFA Ruling*" does not provide any helpful guideline as regards to the interpretation of the Articles 15 to 18 of the 2009 Application Regulations. The most recent developments, discussed below, are inconsistent with the "*1950 FIFA Ruling*" having any residual influence on the shape of the modern regulations and give the lie to the contention of the IFA that players' eligibility to play for IFA or FAI has always been determined by the sole application of the territorial connection test, regardless of the citizenship.

For instance, the minutes of the meeting of the FIFA Players' Status Committee, held in Zurich on 17 May 1994, read as follows:

"3. REGULATIONS GOVERNING THE STATUS AND TRANSFER OF PLAYERS

In this connection, two points were raised from the national associations of Belgium and Northern Ireland: (…)

b) Irish Football Association (Northern Ireland)

The Committee considered this association's statement that almost any player can obtain a Republic of Ireland passport in order to secure eligibility to play for this country.

The Committee discussed this very serious matter at length and had to come to the unfortunate conclusion that FIFA cannot interfere with the decisions taken by any country in the question of granting passports.

The only way that the national associations could prevent their nationals from being systematically granted passports by another country to enable them to play for its national teams would be to field them in an official match for one of their national representative teams, which would bind them to this particular association".

1.1.2 Since 2004

Between 2004 and 2009, the eligibility to play for association teams was governed by one Article (Article 15 of the Regulations Governing the Application of the 2004 Statutes) (the "2004 Application Regulations"), which contains the following provisions:

Para. 1: *"Any person holding the nationality of a country is eligible to play for the representative teams of the Association of that country. The Executive Committee shall decide on the conditions of eligibility for any Player who has not played international football in accordance with par. 2 below, and either acquires a new nationality or is eligible to play for the teams of more than one Association due to his nationality".*

Para. 2: sets the principle that a player who has been fielded by an association in an international match is barred from playing for another association.

Para. 3: defines the conditions under which a player who has more than one nationality, or who acquires a new nationality or who "*is eligible to play for several Associations' teams due to nationality*" can request to change the association for which he "*is eligible to play international matches to the Association of another country of which he holds nationality*". Those conditions were the following ones:

"(a) He has not played a match (either in full or in part) at "A" international level for his current Association, and if at the time of his first full or partial appearance in an international match in an official competition for his current Association, he already had the nationality of the Association's team for which he wishes to play.

(b) He is not permitted to play for his new Association in any competition in which he has already played for his previous Association. A player may exercise this right only once".

Para. 4: deals with the situation where the player loses his nationality without his consent or against his will.

Para. 5: describes the procedure to be complied with by the player in order to file his request for a change of association.

In its Circular Letter No. 901, dated 19 March 2004, the FIFA explained to its member associations that the above provision appeared not to be operating satisfactorily as some players and associations tried to exploit to their advantage the apparent latitude of its first paragraph. In particular it was reported that a number of Brazilian players intended to assume the Qatari nationality in order to be eligible to play for the Qatari association. In this context, the FIFA informed its member associations of the following:

"The first sentence of Article 15 par. 1 (…) means that if a player has never played for a national team, he may assume another nationality and play for the national team of the new country, irrespective of his age. However, this basic provision does not expressly provide for players being able to play without any impediment, for another national team for no obvious reason. If a player changes his nationality or if he accepts another nationality simply in order to be able to play for new national team, he is clearly breaching Article 2(e) of the FIFA statutes (…)

(…) on 16 March 2004, the FIFA Emergency Committee ruled as follows:

1. *Any player who refers to the first sentence of Article 15, paragraph 1 (…) to assume a new nationality shall only be eligible to play for the new national team if he fulfils one of the following conditions:*

   a) the player was born on the territory of the relevant Association;
   b) his biological mother or biological father was born on the territory of the relevant Association;
   c) his grandmother or grandfather was born on the territory of the relevant Association;
   d) he has lived continuously for at least two years on the territory of the relevant Association.

2. *The decision outlined in point 1 above enters into force immediately (…)".*

On 1 July 2005, the Regulations for the Status and Transfer of Players (edition 2005) came into force. Annexe 2 ["*Eligibility To Play For Association Teams For Players Whose Nationality Entitles Them To Represent More Than One Association*"] provides as follows:

Article 1 Conditions

1. *A player who, under the terms of Art. 15 of the Regulations Governing the Application of the FIFA Statutes, is eligible to represent more than one Association on account of his nationality, may play in an international match for one of these Associations only if, in addition to having the relevant nationality, he fulfils at least one of the following conditions:*

   [same conditions as those mentioned in the FIFA Circular Letter No. 901, dated 19 March 2004]

2. *Notwithstanding par. 1 of this Article, Associations sharing a common nationality may make an agreement under which item d) of par. 1 of this Article is deleted completely or amended to specify a longer time limit. Such agreements must be lodged with and approved by FIFA.*

The FIFA Commentary on the Regulations of the Status and Transfer of Players confirms that the said Annexe 2 applies to players with "*shared nationality*", i.e. to players "*who [have] a nationality that entitles [them] to represent more than one association*" (see FIFA Commentary, ad. Annexe 2, page 98).

As to the particular position of the British associations, the FIFA Commentary provides as follows (*ibidem*):

1. *There is a specific agreement, stipulating the conditions to play for a national team, for the four British associations. Besides having British nationality, the player needs to fulfil at least one of the following conditions*

   a) he was born on the territory of the relevant association;
   b) his biological mother or father was born on the territory of the relevant association;
   c) his grandmother or grandfather was born on the territory of the relevant association.

2. *If a player has a British passport, but no territorial relationship as provided for in conditions a-c above, he can choose for which of the British associations he wants to play.*

   [Footnote] e.g. a player who was born on the Cayman Islands and holds British nationality can choose to play for any of the four British associations if called up by a British association.

In this context, the following exchange of correspondence took place between FIFA, the IFA

and the FAI:

- On 19 January 2007, the IFA formally complained before FIFA of the alleged poaching by the FAI of Northern Irish players.

- On 7 March 2007, FIFA informed the FAI of the complaint made by the IFA and stated as follows: "*As the FIFA Legal Committee understands it, the situation in Northern Ireland is such that all Northern Irish footballers could opt to play for your association teams, given that they have a birthright to an Irish passport. Evidently, the same is not applicable to the footballers of the Republic of Ireland, who do not have such a claim to a UK passport. This means that the [IFA] is exposed to a one-way situation, where players can choose to play for your association teams but the vice-versa is not possible. This circumstance is rather unique and the FIFA Statutes and regulations do not provide for a solution*".

  In view of this finding, the FIFA Legal Committee invited the FAI voluntarily to confine itself to selecting for its association teams Northern Irish players who meet one of the following requirements: a) the player was born in the Republic of Ireland, b) his biological mother or father was born in the Republic of Ireland, c) his grandmother or grandfather was born in the Republic of Ireland, or d) he has lived continuously, for at least two years, in the Republic of Ireland.

  In this context and in order to underline its point, FIFA drew attention to Annexe 2 of the Regulations of the Status and Transfer of Players (applicable to players who hold a nationality that enables them to represent more than one association) and its Circular Letter No. 901, dated 19 March 2004 (applicable to players who obtain a new nationality). FIFA noted that in both cases additional conditions were imposed on the players to demonstrate a connection between them and the country or association for which they are playing.

  However, in its letter, FIFA emphasised the fact that the above proposal was only a recommendation, not based on regulatory considerations but on self-imposed restrictions, which "*would not only be appropriate to ensure that the players joining [FAI's] association teams are actually linked, in a closer manner with the Republic of Ireland, but that this would put an end to all accusations of 'poaching' of players raised by the [IFA]*".

- On 5 November 2007, FIFA informed the IFA that the FAI did not accept its proposal of 7 March 2007. FIFA also came to the conclusion that the applicable regulations did not provide for avoidance of the "*one-way situation*" described in its letter dated 7 March 2007. Hence and in order to find an amicable solution to the Irish eligibility issue, the FIFA Legal Committee made a "*new proposal*" and invited the IFA as well as the FAI to express its position on the following "*suggested approach*": "*(…) every player born on the territory of Northern Ireland, holding the UK nationality and being entitled to a passport of the Republic of Ireland or born on the territory of the Republic of Ireland and holding the Irish nationality could either play for the [FAI] or the [IFA], under the condition that all other relevant prerequisites pertaining to player's eligibility for a specific Association team are fulfilled*".

- On 8 November 2007, the IFA expressed its disagreement with the proposal of the FIFA Legal Committee, which was however accepted by the FAI on 20 November 2007.

. On 28 December 2007, the FIFA wrote to the IFA and the FAI the following:

  "(…) on the occasion of its recent meeting held on 15 December 2007 in Tokyo, Japan, the FIFA Executive Committee deliberated on the abovementioned issue in order to pass a decision with respect to the eligibility of players to play for the respective Association teams of the two Irish Associations.

  In this respect, the FIFA Executive Committee first and foremost acknowledged that both proposals for an amicable settlement of the issue at stake submitted to the two Associations concerned by FIFA on behalf of its Legal Committee were not accepted either by one or the other of your Associations.

  On account of the above, as well as having thoroughly considered the existing applicable provisions of the regulations of FIFA, the FIFA Executive Committee was of the opinion that the current regulatory framework is sufficient to properly cover also the situation at hand. As a consequence, it does not appear to be appropriate to make any changes to the existing regulations, in particular not to art. 15 of the Regulations Governing the Application of the FIFA Statutes. The Executive Committee therefore concluded to adhere to the status quo".

1.1.3 The Panel's Position

It appears that, in the years 2004-2009, the eligibility to play for association teams was conclusively governed by the then-applicable Article 15 of the 2004 Application Regulations. According to this provision, the right to represent a country was exclusively determined by the nationality of the

player. The cases of players with more than one nationality, or who acquired a new nationality, or who were eligible to play for several associations' teams due to nationality, were to be decided by the FIFA Executive Committee. At that time, the applicable regulations did not require any territorial connection for eligibility for international representation.

This regime proved to be inadequate as associations could easily circumvent it by naturalising talented foreigner players in order to allow them to be selected for their national teams, resulting in unfair competition between associations in respect of international matches. The attempt of Qatar to naturalise Brazilian players in 2004 prompted a reaction from the FIFA Emergency Committee, which decided that a player, who acquires a new nationality without having a clear connection to the country involved, is not entitled to play for the national team of this country. The FIFA member associations were notified of this decision by means of the FIFA Circular Letter No. 901, dated 19 March 2004.

In 2005, the situation of players "*whose nationality entitles them to represent more than one association*" was expressly dealt with by annexe 2 of the Regulations for the Status and Transfer of Players (edition 2005). According to this document, players with multi-eligibility due to one single nationality were required to have a territorial connection in order to establish a genuine link between them and the country concerned.

To sum up, the following is the chronological order of the amendments to the regulations covering the eligibility of the players for international matches, to be deployed in aid of the historical interpretation of the current rules:

- In the beginning of 2004, Article 15 of the then-applicable 2004 Application Regulations was the only provision dealing with the matter of eligibility of players to be selected for representative teams of member associations. According to this provision, eligibility was dependent on the legal nationality of the player.

- On 19 March 2004, the above Article 15 was amended by the FIFA Circular Letter No. 901, which governed the situation of players acquiring a new nationality.

- On 1 July 2005, the Regulations for the Status and Transfer of Players (edition 2005) came into force and their Annexe 2 completed the then-applicable Article 15 with regard to players with multiple eligibilities because of their "*shared nationality*".

It appears that all the above amendments were incorporated in Articles 15 to 18 of the 2009 Application Regulations.

The exchange of letters between FIFA, the IFA and/or the FAI happened in 2007, i.e. long after the last amendment to the original Article 15. In other words, there is no basis for a claim that the particular IFA/FAI situation inspired the form of the modern rules. On the contrary, the examination of the correspondence quite clearly reveals that: FIFA applied to the IFA/FAI conflict its then-applicable regulations, which resulted however in an unfair "*one-way situation*" Players born in Northern Ireland have a right by birth to an Irish and British passport which entitles them to be selected for the representative teams of the IFA as well as of the FAI, whereas, in contrast, players born in the Republic of Ireland do not have such dual-nationality from birth and, as a consequence, are confined to playing for the association teams of the FAI. Under such circumstances, the FIFA Legal Committee made two proposals, respectively on 7 March and 5 November 2007, which were both rejected. Those proposals were not binding upon any party and FIFA did not commit itself to adapt its regulations to the specific IFA/FAI situation. Once it was clear that the two associations declined FIFA's offer to resolve the situation through a specific and unique agreement, FIFA came to the conclusion that "*the current regulatory framework is sufficient to properly cover also the situation at hand. As a consequence, it does not appear to be appropriate to make any changes to the existing regulations, in particular not to art. 15 of the Regulations Governing the Application of the FIFA Statutes*".

It results from the foregoing that there is no basis for concluding that FIFA has drafted its current regulations, in particular Article 16, as a way of responding to the Irish issues of players' eligibility. Contrary to the IFA's allegation, nothing suggests that the struggle for players between the IFA and the FAI influenced the FIFA Congress when it voted the amendments to the FIFA's statutes and regulations.

1.2 The proper construction of the FIFA Regulations regarding the eligibility of players to play in association teams

Two general principles emerge from Article 15 of the 2009 Application Regulations:

- The first one is that a player can be selected for the representative teams of the association of the country of which he holds the nationality. The nationality must be permanent and not dependent upon residence in the country concerned (Article

15 par. 1). Exceptions to this principle are found in Articles 16 and 17.

- The second principle is that a player who has already been selected for the team of an association and participated in any match (either in full or in part) in an officia1 competition may not thereafter switch to another association for which he would also be eligible (Article 15 par. 2). However, if the player satisfies the conditions specified in Article 18, he can make on a single occasion only a request for change of association.

1.2.1 Article 16

This provision governs the situation where a player, under the terms of Article 15 par. 1, is entitled to represent more than one association "*on account of his nationality*". Under such circumstances, the player must meet one of the four territorial connections set out in the said provision.

Whether the player's multiple eligibilities are based on one single nationality and/or on two or more nationalities is disputed. The IFA submits that Article 16 is applicable to any player who is entitled to play for several associations on the basis of multiple nationalities whereas the FAI submits that it is only applicable to a player who is entitled to play for several associations on the basis of a "*shared nationality*", i.e. a single e nationality that entitles him to represent two or more associations.

Based on the historical interpretation, it appears that the current Article 16 implements Annexe 2 of the Regulations for the Status and Transfer of Players (edition 2005). Both provisions have a quasi-identical wording. The title of Annexe 2 ("*Eligibility to play for association teams for players whose nationality entitles them to represent more than one association*") as well as the FIFA Commentary compel the conclusion that Article 16 covers exclusively the situations of players with "*shared nationality*".

The fact that Article 16 applies only to players with "*shared nationality*" is also confirmed by its wording as well as by the systematic interpretation:

- The term of nationality is used in the singular form in the title as well as in the par. 1 of the provision, according to which "*A Player who (…) is eligible to represent more than one Association on account of his nationality*". The IFA contends that the use of the singular form is acceptable English and does include individuals with more than one nationality. The Panel observes that such would not be the case in French or German. In this regard, the French version ("*sa nationalité autorise à représenter plus d'une association*") and the German version of the 2009 Regulations ("*Ein Spieler, der gemäss Art. 15 aufgrund seiner Staatsbürgerschaft für mehr als einen Verband spielberechtigt ist*") also use the term "nationality" in the singular form.

- Par. 2 of Article 16 expressly states that associations "*sharing a common nationality*" may make an agreement "*to vary item (d)of para 1 of the Article*".

- As already noted, Article 18 provides exceptions to the second principle set out in Article 15. Its first paragraph begins with the following three sentences: "*If a Player has more than one nationality, or if a Player acquires a new nationality, or if a Player is eligible to play for several representative teams due to nationality*". In other words, Article 18 identifies the various categories of individuals who are allowed to change associations notwithstanding the Article 15 par. 2. In such a context, it is obvious that the first sentence deals with players who have dual (or more) nationality, i.e. are in a situation falling within Article 15, the third sentence with players who fall under Article 16 and the second sentence with players who fall under Article 17. If the IFA analysis were correct, it would follow that the first and third sentences would deal with the exactly same situation, which would inconsistent with any intelligible intention to be attributed to the rule-maker. The FAI analysis by contrast endows the Articles with a certain symmetry.

For all the above reasons, the Panel concludes that Article 16 of the 2009 Application Regulations is only applicable to players with a "*shared nationality*". Whatever force the IFA's submissions might have, if based exclusively on the complex language of the relevant provisions and an assumption that they were designed with the Irish situation specifically in mind, they must yield to an interpretation which recognizes both their historic origins and the wider issues they were designed to address.

In the case at hand, Mr Kearns has a dual nationality. He can choose to play for the IFA given his British passport and for the FAI given his Irish passport, without any added territorial connection. He would not have such an option if he held either British or the Irish nationality but not both. Under such circumstances, the Appellant cannot reasonably claim that Mr Kearns' situation is to be equated with shared nationality as provided under Article 16 or that he requests a changed of association from a starting point of a shared nationality. His situation, with respect to his Irish nationality, is not governed

by Article 16, but by the general principle set forth by Article 15 para. 1 of the said Regulations. No further connection (as described by Article 16) has to exist between Mr Kearns and the Republic of Ireland to make him eligible to play for the FAI's representative team.

The Panel noted that IFA also advanced an alternative argument that Mr Kearns had shared nationality because, as an Irish national (irrespective of his British nationality), he could play for either IFA or FAI and Mr Hunter asserted that it had always been the case that the IFA could select Irish nationals with a territorial connection to Northern Ireland. The absence of Irish nationality from the commentary on Annexe 2 is, he submitted, inconclusive. It was apparent to the Panel that the factual basis for the assertion was controversial and disputed by the FAI's counsel. Since neither the factual nor legal basis for this argument was sufficiently established, the Panel is in no position to find in its favour.

1.2.2 Article 17

According to this provision and as an exception to Article 15 para. 1, a player must also meet one of the four territorial connections set out in Article 17 if he acquires a new nationality.

As accepted at the hearing by the IFA, the exception to the general principle provided under Article 17 is not engaged in the present matter: Mr Kearns was born an Irish citizen. His claimed eligibility to play for the representative team of the FAI is therefore not the result of the acquisition of a new nationality. There is thus no reason to give any further consideration to this provision. Save to observe that its origins lie in the FIFA Circular Letter No. 901, dated 19 March 2004 which is exclusively related to the change of nationality. Therefore, contrary to its submissions, IFA cannot find any assistance in this circular to support its argument that players with dual citizenship fall under Article 16 and must have a territorial connection with the association of the concerned representative team.

1.2.3 Article 18

By way of exception to the general principle set out in Article 15 para. 2, Article 18 authorizes players to operate a switch from one association for which they are eligible under Articles 15 to 17 to another association. It provides that a player with dual (or more) nationality ("*If a Player has more than one nationality*" – Article 15 para. 1) or with "*shared nationality*" ("*or if a Player is eligible to play for several representative teams due to nationality*" – Article 16), or players who "*acquires a new nationality*" (Article 17), may change association on only one occasion subject to the three following requirements:

- *"He has not played a match (either in full or in part) in an official competition at "A" international level for his current Association".*

- *"… at the time of his first full or partial appearance in an international match in an official competition for his current Association, he already had the nationality of the representative team for which he wishes to play".*

- *"He is not permitted to play for his new Association in any competition in which he has already played for his previous Association".*

It is undisputed that Mr Kearns fulfils the above prerequisites and must therefore be recognized to enjoy the right to a change of association, from the IFA to the FAI.

2. Are the IFA and the FAI bound by a contract, the terms of which supersede any applicable provision of the 2009 Application Regulations?

The 2009 Statutes and the 2009 Application Regulations were adopted at the Congress in Nassau on 3 June 2009 and came into force on 2 August 2009. The Congress is the supreme and legislative body (Article 21 of the 2009 Statutes) responsible for amending the Statutes and the regulations governing their application (Article 26 para. 1 of the 2009 statutes). FIFA member associations have to comply fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time as well as with the decisions of the Court of Arbitration for Sport (CAS) passed on appeal on the basis of Article 62 para. 1 of the FIFA Statutes (Article 13 para. 1 lit. a of the 2009 FIFA Statutes).

In other words, FIFA provides global rules which must be universally applied and which were not designed for the purpose of a single situation. The regulations put in place by FIFA are binding and must be observed at all times by every member association. The compulsory nature of the FIFA regulations flows from the need for FIFA to be able to achieve its objectives as set out in Article 2 lit. e of the FIFA Statutes. As regards the issue of eligibility to play for representative teams, only Article 16 par. 2 of the 2009 Application Regulations authorises associations to come to an agreement in very limited circumstances. In any event, such an agreement must "*be lodged with and approved by the Executive Committee*".

In the case at hand, the Panel observes at the outset primarily that the IFA has not claimed to have contested the decision of the Congress regarding the adoption of the current FIFA Statutes and of Articles 15 to 18 of the 2009 Application Regulations.

The IFA claims that based on the "*1950 FIFA Ruling*", the IFA and the FAI accepted to confine themselves to selecting players with a territorial connection to their respective area of jurisdiction. According to the IFA by "poaching" Mr Kearns, the FAI breached a contract implied by conduct. IFA contends that as a matter of fact during the last 60 years there was a harmonious relationship between the two associations, each of which accepted that it should select players exclusively on the basis of a territorial connection and applied this approach without any variation to hundreds, if not thousands, of players.

In contrast to non-binding rules of conduct such as gentlemen's agreements, contracts forming a binding agreement require the mutual agreement of the parties. Such agreement may be either express or implied (Article 1 of the Swiss Code of Obligations). There is an implied agreement only when the behaviour of the party alleged to have agreed is consistent only with its having done so. In general, a passive behaviour cannot be held to amount to an agreement to be bound by a contract (ATF 123 III 53, 59). In other words, silence does *not* imply consent (François Dessemontet, in Commentaire Romand, Code des Obligations I, Bâle 2003, p. 14, ad. Art. 1, N. 32).

For all the reasons already noted, the IFA cannot plausibly argue that Article 16 was drafted in response to the IFA/FAI situation or that this provision should be construed to give effect to the convention between the IFA and the FAI. Moreover, the alleged contract has never been submitted to the FIFA Executive Committee for approval. Finally, the existence of a "*contract implied by conduct*" is denied by the FAI, which disputes that it has ever discussed the status of Irish citizens living in Northern Ireland or accepted that Irish citizens could not be selected for its teams, whether living in Northern Ireland or elsewhere. The contrary has not, in the Panel's view, been established by the IFA. In any event the IFA's evidence fell short of establishing the binding nature of the alleged agreement or the legal/regulatory basis which would allow it to supersede Articles 15 to 18 of the 2009 Application Regulations.

In any event, the alleged tacit agreement may not be used to defeat the claim of Mr Kearns, who was of course not a party to any such agreement and who, in any event, is entitled to exercise his rights as provided under Article 15 and 18 of the 2009 Application Regulations.

C. Conclusion

Based on the above, the Panel finds that the Appealed Decision must be upheld in its entirety, without any modification. This conclusion makes it unnecessary for the Panel to consider the other requests submitted by the parties. Accordingly, all other prayers for relief are rejected.

Arbitration CAS 2010/A/2119
International Federation of Body Building and Fitness (IFBB) v. International World Games Association (IWGA)
19 November 2010

Body Building; suspension of an IF from its participation to the World Games due to a "bad doping record"; power of the IWGA to suspend an IF if the IF causes adverse effects to the event; "Bad doping record" of the IF as a basis for the suspension of an IF from the World Games; failure of an IF to implement proper anti-doping policies and damage on the image of the IWGA; presumption of consequences and evidence according to Swiss law; limits of financial means as justification for inadequate number of out-of-competition controls by the IF; proper announcement of the vote on suspension of an IF and violation of its right to be heard; proportionality of the sanction of suspension of an IF from the World Games

Panel:
Prof. Luigi Fumagalli (Italy), President
Mr. Michael Beloff, QC (United Kingdom)
Mr. Olivier Carrard, (Switzerland)

Relevant facts

The International Federation of Body Building and Fitness (IFBB or the "Appellant") is an international amateur governing body for the sport of body building and fitness, established in 1946.

The IFBB has its offices in Madrid, Spain, and is a non-governmental, non-profit legal entity registered under Spanish law and is a member of the International World Games Association (IWGA or the "Respondent"). IWGA is an association, created in 1980, of independent international sports federations which administer sports or disciplines of sports which are not on the program of the Olympic Games. The IWGA has its offices in Luzern, Switzerland, and is a legal entity with limited liability established under Swiss law.

The IWGA organizes, every 4 years, since 1981, an international multi-sport event for sports and disciplines of sports administered by its member federations, known as the World Games ("World Games").

Following the Kaohsiung edition of World Games from 16 to 26 July 2009, in a letter dated 14 September 2009, the IWGA informed the IFBB that the Executive Committee of the IWGA ("Executive Committee") had "*unanimously endorse[d] a provisional suspension of the International Body Building Federation and its athletes from the World Games*" ("Decision of 14 September 2009") on the basis of "*Article 7.2.6e and 10.2.1-2 of the International World Games Association's Constitution*" for the following reason: "*We regretfully had four of your athletes test positively for banned substances under the IWGA Anti-Doping Rules in the World Games Kaohsiung 2009. One of the athletes was tested twice, once in training and then as a gold medallist. In the second test, he had three additional substances. There were a total of five positive tests for four athletes. The IWGA advised you by email on April 27th where we issued a warning about the adverse publicity we receive from federations who continually have doping issues at the World Games' events*".

In the same letter the IFBB was informed that: "*It is the IWGA's intention to have this item on the agenda in the upcoming AGM in Dubai for a final decision about the IBBF membership*".

On 26 March 2009, the IWGA transmitted to all its members the invitation to attend the 2010 IWGA Annual General Meeting, to be held in Dubai (UAE) on 26 April 2010 ("2010 AGM"). Point 6 of the agenda of the 2010 AGM (the "Agenda") related to the "*Termination of membership of International Federation of Body Building and Fitness (IFBB) in the International World Games Association*"; the motions proposed to the 2010 AGM with respect to the various items to be discussed in accordance with the Agenda were detailed in a booklet annexed to the Agenda ("2010 AGM Booklet").

With respect to point 6 of the Agenda, the 2010 AGM Booklet specified the following motion, as submitted for approval by the Executive Committee to the 2010 AGM: "*That the membership in IWGA of the International Federation of Body Building and Fitness (IFBB) be terminated with immediate effect in accordance with Art. 4.4 of the IWGA Constitution*".

The 2010 AGM Booklet, however, contained the indication that, depending on the results of the vote on the primary proposal of the Executive Committee (i.e., the termination of the IFBB's membership in the IWGA), the 2010 AGM could be invited to confirm the Decision of 14 September 2009. Finally, the 2010 AGM Booklet specified the procedure to be adopted in relation to the motion proposed under point 6 of the Agenda and had attached the text of some provisions deemed to be relevant in that respect:

a) Articles 4.4, 5.2, 10.2.1 and 10.2.2 of the IWGA Constitution and Regulations ("IWGA Constitution"); and

b) Articles 2.2, 2.2.1, 2.2.2, 2.2.3, 2.2.4 and 16.3.2 of the Rules of the World Games ("WG Rules").

Some days before the 2010 AGM another document was distributed by IWGA to its members, containing "*Additional Information on & Confirmation of Item #6 of the Agenda*".

At the 2010 AGM, as the required majority for the approval of the motion to terminate the IFBB's membership in the IWGA had not been reached, a resolution ("AGM Resolution") was adopted confirming the Decision of 14 September 2009 to suspend the IFBB from the World Games.

On 17 May 2010, the IFBB 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 AGM Resolution.

In summary, the IWGA asked the Panel to dismiss the appeal brought by the IFBB and to confirm the AGM Resolution. In the Respondent's submission, in fact, "*the decision to suspend the Appellant from the participation for the next edition of the World Games is properly supported by the regulations and represents an adequate measure to protect the integrity of the World Games*".

Extracts from the legal findings

The focus of this appeal is limited to the AGM Resolution, which made final the provisional suspension of the IFBB imposed by the Executive Committee. In this context, there are three main questions that the Panel has to examine:

A. Can a proper legal basis for the AGM Resolution be found in the IWGA rules and regulations?

The regulatory framework concerning the participation in the World Games of a federation member of the IWGA is defined by the IWGA Constitution and by the WG Rules, which set terms and conditions for the admission to, and the exclusion from, the World Games by reference to the following principles:

a) membership of the IWGA does not automatically imply participation in World Games events. The member federations of the IWGA, in order to be eligible for inclusion of their sport in the programme of the World Games, must meet specific conditions, defined in the WG Rules (Article 5.1 of the IWGA Constitution);

b) the decision on the admission of sports events to the sports programme of a specific edition of the World Games is made by the Executive Committee, which takes into consideration such aspects as finance, available sports facilities, and any other aspects deemed relevant (Article 5.2 of the IWGA Constitution);

c) in order to be eligible for inclusion in the World Games programme, a federation member of the IWGA must guarantee, also on the basis of documented evidence, its ability to organise an elite competition which is reserved for invited competitors of the highest standard only, and its sport must satisfy specific eligibility criteria (Article 2.1 of the WG Rules);

d) the final decision on the composition of the official sports programme of the World Games is taken by the Executive Committee (Article 2.3 of the WG Rules);

e) the Executive Committee has the power to investigate and deal with breaches of the IWGA Constitution or WG Rules or with any act, which in the opinion of the Executive Committee, is against the interests of the IWGA (Article 10.2.1 of the IWGA Constitution);

f) as a result, the Executive Committee has the power to suspend, with immediate effect, any member federation from entry in the next edition of the World Games, if this member federation is not adequately representing its sport or discipline of sport in the World Games or is not acting in accordance with the WG Rules (Article 10.2.2 of the IWGA Constitution);

g) more specifically, under the WG Rules, the Executive Committee has the power to deny otherwise eligible sports participation in a World Games event if, *inter alia*, the member federation concerned at or in the period leading up to a

previous World Games event has caused, by its organisation and performance, adverse effects to the event (Article 2.2.4 of the WG Rules);

h) any suspension imposed by the Executive Committee has to be discussed at the next General Meeting of the IWGA for confirmation, revision or removal (Article 10.2.1 of the IWGA Constitution) and remains in effect until cancelled by the Executive Committee or by a resolution of the General Meeting, supported by the majority of the votes (Article 10.2.2 of the IWGA Constitution).

In light of the foregoing, the decision to suspend the IFBB from entry in the next edition of the World Games was properly taken by the Executive Committee (which is competent for such decision pursuant to Article 10.2.2 of the IWGA Constitution and Article 2.2.4 of the WG Rules), and the Decision of 14 September 2009 was correctly submitted to the 2010 AGM for confirmation, as required by Article 10.2.2 of the IWGA Constitution.

The real dispute in this arbitration with respect to the legal basis of the AGM Resolution concerns the conditions under which a federation member of the IWGA can be suspended from entry into the World Games, rather than the competence of the bodies which took the decision to suspend.

On the basis of the relevant rules, a federation can be suspended from entry into the World Games if any of the following conditions is met:

a) breach of the IWGA Constitution or of the WG Rules or of commission of any act which is against the interests of the IWGA; or

b) inadequate representation of its sport or discipline in the World Games, or acts not in accordance with the WG Rules; or

c) at or in the period leading up to a previous World Games event, causing adverse effects to the event by its organisation and performance.

The basis for the AGM Resolution was the "*bad doping record*" of the IFBB. Reference was made in the discussions at the 2010 AGM and in this arbitration to (i) the numbers of the anti-doping tests showing positive results during the past editions of the World Games, as well as to (ii) the overall figures of the anti-doping tests performed by the IFBB in 2009:

a) with respect to the first point, the figures show that in the 6 editions of the World Games (from Karlsruhe 1989 to Kaohsiung 2009), at which doping controls were conducted, out of the total 25 positive results, 17 were attributed to 16 body building athletes (one athlete having tested positive twice). At the Kaohsiung edition of 2009, 19 tests were effected on the 46 body building athletes that took part in the competitions, and showed 5 positive results (by 4 athletes) of the total 6 positives recorded at such edition;

b) in 2009, the IFBB performed 48 urine tests on a registered testing pool of 70 athletes, of which 45 tests were performed in-competition and 3 out-of-competition; of these 48 tests, 16 showed a positive result.

The above figures confirm the "*bad doping record*" of the IFBB: at the World Games, two thirds, and at Kaohsiung 2009 more than 80%, of the overall positive results came from body building. At Kaohsiung 2009, nearly one quarter of the body building athletes who were tested reported a positive result. In 2009, one third of the tests performed by IFBB showed a positive result.

Such doping record is certainly highly relevant in the context of the decision, taken with the AGM Resolution, concerning the participation of the sports of the IFBB in the World Games. Furthermore, the inability of IFBB, for whatever reasons, to take serious measures to address doping can properly be considered as contrary to the interests of the IWGA, is contrary to the WG Rules, and one which causes adverse effects to the World Games. The Panel emphasises that every one of these factors supplies a sufficient basis for the decision to suspend the IFBB from participation in the World Games.

Rejection of the practice of doping is a constitutional principle of the IWGA. Doping contradicts the objectives of the IWGA, as defined by Article 3 of the IWGA Constitution; runs counter to the promotion of the traditional values of sport; contradicts the development of the popularity of the sports governed by the member federations; is inconsistent with the promotion of the status and image of IWGA and its member federations, and with the search of excellence in sport through its practice. Rejection of doping, in addition, is a *sine qua non* of the cooperation between the IWGA and the Olympic Movement.

It is not possible sensibly to submit as IFFB seeks to do (i) that the IWGA has not proved that the actions for which the IFBB was suspended adversely affected the image of IWGA; or (ii) that the "*bad doping record*" can be attributed only to the athletes, responsible for the anti-doping rule violations, and not to the IFBB;

or (iii) that since the IFBB's anti-doping rules comply with all requirements defined by WADA the record can be ignored; or (iv) that in any case the IWGA had agreed not to reject the IFBB's participation in the World Games provided it became compliant with the WADA anti-doping requirements before the end of 2011.

As to the first point, the Panel underlines that the failure of the IFBB to implement proper anti-doping policies, as indicated by the anti-doping tests showing positive results during the past editions of the World Games, as well as by the anti-doping tests performed by IFBB in 2009, affects in itself the image of the World Games, as it establishes that the member federation is not in a position to ensure compliance of its athletes with the relevant anti-doping regulations.

Proof of damage to the IWGA image, arising out of such circumstances, in fact, does not need, in the Panel's view, confirmation by specific evidence, as it is inherent in the exposure to the public of the "*bad doping record*" of one of its member federations at the World Games – organized by the IWGA.

In any case, the existence of such damage can be inferred, on the basis of a general presumption that the conduct of illicit practices (such as doping) adversely affects the image of those appearing to be involved. And the Panel notes that Article 8 of the Swiss Civil Code (establishing the rule on the burden of proof: "*Chaque partie doit, si la loi ne prescrit le contraire, prouver les faits qu'elle allègue pour en déduire son droit*") allows the adjudicating body to base its decision on such natural inferences. Therefore, consequences, whose existence must be presumed to occur in the normal course of events, can supply the basis of a judgment, even if not established by particular evidence, where the party who puts them in issue does not itself provide material which puts their existence in doubt (see award of 27 March 1998, CAS 96/159 & 96/166, *A., C. F. & K. v/ FEI*, at § 16, in Reeb (ed.), *Digest of CAS Awards, II, 1998-2000*, The Hague, 2002, pp. 441-442). Therefore, the failure of the IFBB to implement proper anti-doping policies adversely affects the image of the World Games.

As to the second point, the Panel observes that the decision to suspend the IFBB from participation in the World Games was based on the IFBB's failure to take serious measures to address doping within its system and not on vicarious imputation to the IFBB of the actions of its athletes. In other words, the IFBB was held responsible for its own omissions, and not for the acts of third parties.

More specifically, the Panel draws attention to the obvious limitations of the IFBB's anti-doping efforts, in terms of results achieved which provides a robust basis for the decision of the 2010 AGM to confirm its exclusion from the World Games: education and promotion of ethical values was lacking; the use of available procedures and tools (such as the Anti-Doping Administration & Management System – "ADAMS") was insufficient; the implementation of the rules was poor.

In this respect, the Panel relies in particular, but not exclusively, on the fact that in 2009 the IFBB conducted only 3 out-of-competition tests, in a sport, such as body building, where only such tests appear to have any effect. Competitive body building involves body modifications and intensive muscle hypertrophy, itself obtained through preparation and muscle gains for most of the year, while at the competition bodybuilders merely display their physiques to a panel of judges, who assign points based on their appearance. In other words, the physical effort, which can be assisted by doping will inevitably take place for the most part off-season and off stage. Therefore, doping controls, in order to be effective, need to be concentrated in the preparation phase: i.e., out-of-, not in-, competition.

In the Panel's view, no justification, to excuse the inadequate number of out-of-competition controls in 2009, can be given by the limits of financial means available to the IFBB to conduct them. An international federation wishing to take part in the World Games must respect the rules of the IWGA and apply proper anti-doping policies. If it is not in a position to ensure the fair conduct of its sport – for whatever reason – such federation cannot claim to have its sport, tainted by doping, included in the World Games programme – so involving indirectly the IWGA in its failures.

In this context, in-competition controls have therefore limited resonance. Nonetheless, the number of positive results appears extraordinary, confirming the inadequacy of the anti-doping culture in the body building world during the period under review.

The Panel has indeed noted the commendable efforts undertaken by the IFBB in 2010 and in particular the increase in the number of the athletes to be tested and of the out-of-competition controls to be performed. Such evolution, however, subsequent to the 2010 AGM, does not undermine the basis of the AGM Resolution, which was bound to take account only of the situation at the time of its adoption. Any such improvements can however be considered by the competent bodies of the IWGA,

which have the power (under Article 10.2.2 of the IWGA Constitution) to lift any suspension from participation in the World Games.

As to the third point, the Panel agrees with the Respondent and underlines that it is not rules, but their implementation through an effective anti-doping program, including a sufficient number of anti-doping tests, especially out-of-competition, which is relevant. And, as explained by WADA in a message to the IWGA dated 6 April 2010, the then current in- and out-of-competition testing program of the IFBB "*cannot be seen as effective*".

As to the fourth point, it is not possible for IFFB to rely on the statements made by the President of the IWGA at the 2009 IWGA General Meeting (Denver, 24 March 2009) in order to maintain that, even if the IFBB had to be considered as a WADA non-compliant international federation, it should have been given additional time, until 2011 at least, to become compliant, and that it could not legitimately be excluded from the participation in the World Games, provided it became compliant within that time frame before the end of 2011.

The relevant minutes of the 2009 IWGA General Meeting read as follows: "*In President Froehlich's conversation with Mr. Fairweather there is a list of member federations of the IWGA that are not currently in compliance. President Froehlich did come to an agreement with WADA that as long as those IFs are currently in the process of becoming in compliance they are able to participate in Kaohsiung. Should they not be in compliance within the next two years then they will not be able to participate in the next edition of The World Games".*

The Panel cannot construe such declaration, made before the 2009 edition of the World Games, as a waiver of the obligation of, *inter alios*, the IFFB obligation to have proper anti-doping policies applied before the end of 2011, and therefore as preventing any decision by the IWGA in 2009 or 2010, after Kaohsiung 2009, to suspend a non compliant member federation from participation in the subsequent editions of the World Games. In any case the Panel, should the IFBB become compliant before the end of 2011, it could invoke the mentioned declaration to seek the lifting of its suspension.

In light of the above, the Panel concludes that the AGM Resolution finds a proper legal basis in the IWGA rules and regulations.

B. Has the IFBB's right to be heard been violated with respect to the adoption of the AGM Resolution?

The AGM Resolution is criticized by the Appellant because the confirmation of the provisional suspension from the World Games was voted without a prior discussion.

The Panel notes, however, that the proposals submitted by the Executive Committee to the 2010 AGM to terminate the IFBB's membership in the IWGA or, alternatively, to confirm the Decision of 14 September 2009 to suspend it from the participation in the World Games, had been announced well in advance of the 2010 AGM, and were based on the same factual and legal elements, i.e. the failure of the IFBB to take serious measures to address the doping issues affecting body building. The Panel notes too that the President of the IFBB had ample possibility to state at the 2010 AGM the position of IFBB in respect of the elements supporting the proposals of the Executive Committee and that discussions took place at the 2010 AGM also with respect to the meaning and purpose of the Executive Committee's proposal to have the Decision of 14 September 2010 confirmed by the 2010 AGM.

It is not possible, in the Panel's view, to maintain that the validity of the AGM Resolution is affected by the fact that the Agenda did not explicitly mention, in the list of issues to be discussed at the 2010 AGM, the suspension of the IFBB from the World Games, but only the termination of its membership in the IWGA. The vote on the IFBB's suspension was in fact properly announced in the 2010 Booklet: as a result, the IWGA members could not have been taken by surprise by the discussion on the point at the 2010 AGM and had the opportunity to get prepared to the debate (ATF 114 II 193, consid. C.5.d).

The Panel therefore finds that the IFBB's right to be heard has not been violated with respect to the adoption of the AGM Resolution.

C. Is the measure adopted by IWGA with respect to the IFBB pursuant to the AGM Resolution proportionate?

The AGM Resolution is criticized by Appellant under the point of view of proportionality, which requires, under Swiss law and CAS jurisprudence, that in disciplinary matters a reasonable balance must be struck between the violation and the sanction.

Contrary to the Appellant's submission, the Panel finds that the sanction of the suspension from the

participation in the next edition of the World Games is effective to achieve the purpose sought and does not exceed what is necessary for that purpose.

The failures of the IFBB with respect to the anti-doping system, and the IFBB's doping record at the World Games, in fact, affect the image of the World Games and of the IWGA. The suspension from participation in the World Games, therefore, constitutes a proper measure to avoid such effect.

The measure adopted, in addition, is not excessive. The suspension of the IFBB in fact refers only to the "*next edition*" of the World Games, as made clear by Article 10.2.2 of the IWGA Constitution, mentioned also in the Decision of 14 September 2009 confirmed by the AGM Resolution, and can be in any moment reviewed, also before such "*next edition*", by the Executive Committee or the General Meeting.

The Panel therefore finds the measure adopted by IWGA with respect to the IFBB pursuant to the AGM Resolution to be proportionate.

In light of the foregoing, the Panel finds that the appeal brought by the Appellant against the Respondent with respect to the AGM Resolution is to be dismissed.

Arbitration CAS 2010/A/2172
O. v. Union des Associations Européennes de Football (UEFA)
18 January 2011

Football; match fixing; production of new evidence; standard of proof requested in the context of match fixing; violation of the principles of conducts by a referee; disciplinary sanction

Panel:
Mr Michael Beloff, QC (United Kingdom), President
Mr Denis Oswald (Switzerland)
Mr José Juan Pintó (Spain)

Relevant facts

This appeal is brought by a referee against a finding of involvement in mach fixing and the sanction imposed upon him. It is the first case of its kind in European football involving a match official as distinct from a player or coach. It therefore has an importance beyond that to the disputant parties.

O. (the "Appellant"), born on 20 August 1967, is of Ukrainian nationality. Until the beginning of 2010, he was regularly appointed to officiate matches as a UEFA Category 2 Referee and was the head of the Youth Committee of the Football Federation of Ukraine (FFU), where he had worked for the past 16 years until the events hereinafter described..

The Union des Associations Européennes de Football (UEFA or the "Respondent"), is an association incorporated under Swiss laws with its headquarters in Nyon, Switzerland. UEFA is the governing body of European football..

On Thursday 5 November 2009, in Basel, Switzerland, the Appellant officiated a match between FC Basel 1893 and PFC CSKA Sofia in the Group Stage E of the 2009/2010 UEFA Europa League.

FC Basel 1893 won by the score of 3 to 1.

The Public Prosecutor of Bochum, Germany, conducted widespread criminal investigations into possible fraud related to match fixing and illegal gambling. It brought to light the existence of regular meetings between gambling syndicates connected to organized crime groups. In that context, several suspects were put under surveillance and their telephone conversations were intercepted.

Among the persons whose telephone was tapped, were Mr Ante Sapina, his brother Filip, Mr Marijo Cvrtak, his brother Josip, Mr Alex Kranz (alias Alik), Mr Roman Jatsinischyn and Mr Tuna Akbulut.

The transcripts of the telephone recordings as well as their translation into English were filed in the present proceedings and were equally available to the Appellant, the UEFA and the members of the Panel. Their content and the accuracy of their translation were not disputed.

On 26 November 2009, Mr Peter Limacher, UEFA's Head of disciplinary services, notified in writing the Appellant to appear at the UEFA headquarters on 30 November 2009. The Appellant was informed that he was to be heard on *"highly urgent matters"* and was required to keep the communication confidential.

In emails dated 27 October 2009, the Appellant asked Mr Peter Limacher what the meeting was about and whether there was a connection between the said meeting and the cancellation of his assignment to officiate a match in Austria on 16 December 2009.

The same day, Mr Peter Limacher answered the Appellant as follows:

"We want to discuss with you about some matches you refereed for UEFA with the objective to understand the dynamics involved prior and after the match, in particular with regard to certain individuals who might have contacted you. The communication from the referee's unit is the usual procedure in cases where we contact a referee in matters of integrity. Needless to say that we expect your full cooperation in this issue. It is most essential that we can clarify certain things by the beginning of next week. It will also help appointing you in the near future".

On 30 November 2009, the Appellant was questioned by Mr Peter Limacher and Mr Rudolf Stinner at the

UEFA premises in Nyon, Switzerland.

The minutes of the meeting indicate the following:

The Appellant was informed of his rights prior to the questioning. He claimed that he had no contact with the German criminal organisation involved in the illegal betting and match-fixing scandal in Europe. However, he admitted the he "*had been contacted approximately prior to the UEL match FC Basel - CSKA Sofia by a person called ROMAN, (R) who he had known for 10 years. (…) R asked him whether he was interested in meeting some people. R wanted [him] to meet them. Even afterwards R contacted [the Appellant] to know more about his UEFA appointments, and [the Appellant] informed him that he was appointed for the UEL match in Basel.*

Approximately one month ago, but after his match in Basel, Roman introduced two gentlemen to [the Appellant]. Both gentlemen appeared to be involved in sports betting. (…) [The Appellant] was asked to manipulate certain matches, which he refused, stating that his career was too important to him. The two gentlemen told him that he would be a millionaire in 2-3 years from now by manipulating certain games.

"[The Appellant] stated that [Roman] contacted him several times to persuade him to manipulate certain matches (after reading the draft of the minutes, [the Appellant] indicated here that [Roman] asked him several times whether he was not ready to manipulate a game)".

"Asked why he had not reported these contacts to UEFA, [the Appellant] declared that he did not consider this to be important, as the approach was not specific enough. Moreover, his command of English would not be sufficient to inform UEFA. [He] also stated that he did not know whom to inform at UEFA. (…) [The Appellant] also indicated that he was reluctant in releasing information of the conversations, because he was afraid for his family".

The Appellant admitted that he should have reported to the UEFA the contacts he had regarding match manipulation but disputed that he had either been offered or received money for the match played in Basel on 5 November 2009.

At the hearing before the Court of Arbitration for Sport, the Appellant claimed that the meeting of 30 November 2009 actually lasted the whole day, until 18h30. He claimed further that he signed the original minutes at 16:30 assuming that his remarks and disagreements with the draft would be recorded subsequently. This version of the facts is not corroborated by the evidence given by Ms Döhler and Mr Boulakovsky, who recalled that the meeting lasted about an hour and went smoothly.

On 23 August 2010, Mr Ante Sapina was held in Germany awaiting trial and was interrogated by the police of Bochum, Germany. According to the transcript of his interrogation, Mr Sapina was told that Oriekhoy had accepted the offer and he organized with others the bribe money from Ukraine.

On 10 December 2010, a public hearing was held before the Criminal Court in Bochum, Germany, regarding betting fraud in international football. According to various press clippings filed before the Court of Arbitration for Sports, one of the defendants accused of involvement in the match fixing scandal, Mr Tuna Akbulut, confirmed that the Appellant had accepted to manipulate a match for a sum amounting EUR 50,000 to EUR 60,000.

On 18 February 2010 and in accordance with article 32bis of the UEFA Disciplinary Regulations, the Chairman of the UEFA Control and Disciplinary Body provisionally suspended the Appellant from all refereeing activities until a decision was taken on the merits.

On 18 March 2010 and after having heard the Appellant and carefully evaluated the available evidence, the UEFA Control and Disciplinary Body decided the following:

"1. O. , international referee, is banned for life from exercising any football related activities.

2. FIFA will be requested to extend the present decision so as to give it worldwide effect".

On 30 March 2010, the Chairman of the FIFA Disciplinary Committee decided to extend the ban on the Appellant to have a worldwide effect. He specified that his decision was contingent on the outcome of any possible appeal.

The Appellant lodged a timely appeal against the decision of the UEFA Control and Disciplinary Body with the UEFA Appeals Body.

On 18 May 2010, the UEFA Appeals Body held that there was sufficient evidence of repeated contacts between the Appellant and members of a criminal group involved in betting fraud. It concluded accordingly that the Appellant violated the principles of conduct and the duty of disclosure of illicit approaches prescribed by the applicable regulations in failing immediately to report to UEFA that he had been in receipt of offers by certain individuals to take an active part in their match-fixing scheme. It considered the offence committed by the Appellant to be extremely serious as he "*did not hesitate to endanger*

the very essence of football, which relies on matches taking place in a spirit of loyalty, integrity and sportsmanship, free of all constraints except the Laws of the Game". As a consequence, the UEFA Appeals Body concluded that a life ban on exercising any football-related activity was the appropriate sanction to be imposed upon the Appellant and, hence, upheld the decision of the Control and Disciplinary Body.

On 17 July 2010, the Appellant filed a statement of appeal with the Court Of Arbitration for Sport (CAS). He challenged the Appealed Decision.

Extracts of the legal findings

A. Procedural issue - new evidence

The UEFA produced the following new evidence after the exchange of its original written submissions:

- The minutes of the interrogation of Mr Ante Sapina by the Bochum police dated 23 August 2010. This document was filed on 9 December 2010 by the UEFA, which alleged that it has been "*made available from the Bochum police (in German) for disclosure only a few days ago. UEFA was, therefore, not in position to produce these minutes when it filed its answer brief on 30 August 2010".*

- Press clippings in relation with a public hearing held on Friday 10 December 2010 before the Criminal Court in Bochum. Those documents and their translation into English were filed on Monday 13 December 2010.

  Article R56 of the CAS Code provides the following:

  "Unless 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".

The new evidence in question could not have been made available any earlier and UEFA disclosed it together with its English translation expeditiously. The circumstances are exceptional in that the new evidence consists of testimony given very recently by the exactly the same persons whose telephone conversations were intercepted and the transcripts of which were adduced by UEFA against the Appellant. The situation is even more special as those testimonies were obtained either during the evidentiary proceedings ordered by the Public Prosecutor of Bochum or during a public hearing before the Criminal Court in Bochum, i.e. in a context external to the proceedings before the CAS. In other words, this documentary evidence was not prepared with the present dispute in mind.

Moreover, the Appellant neither opposed the new evidence produced by the UEFA nor asked for a time extension to review it or comment on it.

Under those particular conditions, the production of the submitted evidence was deemed admissible by the President of the Panel.

B. Merits: Has the Appellant committed a disciplinary rule violation?

1. In general

Article 5 of the UEFA Disciplinary Regulations provides in so far as relevant as follows:

"Article 5 Principles of conduct

1. *Member associations, clubs, as well as their players, officials and members, shall conduct themselves according to the principles of loyalty, integrity and sportsmanship.*

2. *For example, a breach of these principles is committed by anyone:*

   a) *who engages in or attempts to engage in active or passive bribery and/or corruption; (…)*

   d) *whose conduct brings the sport of football, and UEFA in particular, into disrepute; (…)*

   j) *who acts in a way that is likely to exert an influence on the progress and/or the result of a match by means of behaviour in breach of the statutory objectives of UEFA with a view to gaining an undue advantage for himself or a third party. (…)*

   l) *who participates directly or indirectly in betting or similar activities relating to UEFA competition matches, or who has a direct or indirect financial interest in such activities.*

Article 6 of the General Terms and Conditions for Referees states the following:

"Referees undertake to behave in a professional and appropriate manner before, during and after their appointment.

Referees also undertake not to accept any gifts worth more than CHF 200 (or of an equivalent value) from bodies and/or persons directly and/or indirectly connected with the UEFA

matches for which they have been appointed. Match souvenirs such as pennants and replica team shirts are acceptable. Under no circumstances are Referees allowed to keep the match ball(s).

Any Referee who is the target or considered to be the target of attempted bribery shall notify UEFA immediately.

(…)

Referees shall not take part in any betting activities concerning UEFA matches".

2. The assessment of the evidence available

As far as the assessment of the available evidence is concerned, the Panel endorses the position articulated in CAS 2009/A/1920:

"Taking into account the nature of the conduct in question and the paramount importance of fighting corruption of any kind in sport and also considering the nature and restricted powers of the investigation authorities of the governing bodies of sport as compared to national formal interrogation authorities, the Panel is of the opinion that cases of match fixing should be dealt in line with the CAS constant jurisprudence on disciplinary doping cases. Therefore, the UEFA must establish the relevant facts "to the comfortable satisfaction of the Court having in mind the seriousness of allegation which is made" (CAS 2005/A/908 nr 6.2)".

In the particular case, when assessing the evidence, the Panel has well in mind that corruption is, by nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing.

The Panel observes that – as far as is relevant - the gap between the Appellant's version of the facts and UEFA's is of limited importance in terms of the outcome of the appeal.

The Appellant admits that he was approached by two gentlemen apparently complicit in sports betting and who assured him that he could be a rich man within a very short time. Furthermore, the Appellant does not dispute the fact that the contact was improper and that he did not disclose it to UEFA. Therefore, on his own evidence, he was in breach of his duties under the regulation.

In addition, it is common ground that the Appellant was appointed to officiate the match, which took place in Basel on 5 November 2009.The main issue is whether the Appellant's version of the facts is incomplete and that he was in fact approached *before* the match which took place in Basel on 5 November 2009. This is UEFA's position, supported by transcripts of intercepted telephone conversations, by the minutes of the meeting at UEFA headquarters on 30 November 2009 and by Mr Ante Sapina's statements made during his interrogation on 23 August 2010 and by recent press accounts which, in particular taken together, the Panel found to be convincing evidence.

2.1 The transcripts of the intercepted telephone conversations

The intercepted telephone conversations were about the match played in Basel on 5 November 2009. The protagonists talked about the game before it took place, commented it while it was under progress, and both reviewed the final result and evaluated the Appellant's officiating after it. It is apparent from the said transcripts that Mr Ante Sapina and his accomplices placed bets on the number of goals scored during the match in Basel, because their profit was guaranteed by the fact that they knew in advance the outcome of the game. They declared on several occasions that they had direct and indirect contacts with the Appellant before the match and gathered money to pay for his services, all with a view to ensuring manipulation of the results. The Panel notes, as UEFA submitted, that they had no reason to inculpate the Appellant (who did not ultimately dispute that it was his name that was mentioned) or to speak other than the truth when unconscious of the telephone taps and that what they said was consistent with the statements made by Mr Ante Sapina to the Bochum police.

To counter this evidence, the Appellant relied on three alibi witnesses and former colleagues who, on 14 May 2010, testified that the Appellant spent the whole day of 29 October 2009 "*at his working place in the building of FFU*". One former colleague however confirmed to the Panel that he actually did not spend the whole day with the Appellant, notably not during the lunch hour and another one expressly stated that he only met the Appellant in the late afternoon. The Panel observes in any event that although those three witnesses purported to remember an unremarkable day at work several months later, it would have found it hard to credit the accuracy of their recollection had it in fact purported to exclude the possibility of any contact between the Appellant and Mr Ante Sapina and/or his accomplices during the 29 October 2009. The Panel does not find that the alibi evidence excludes such possibility.

The Appellant laid emphasis on the fact (which is not in issue) that he had never taken part in the intercepted telephone conversations and submits that Roman Jatsinischyn had taken his name in vain

and without his knowledge. In his appeal brief, the Appellant suggested that "*It's more likely, that Roman, one of the participants of the telephone conversations, used the name and personal relation with the Appellant, without his awareness and behind his back made a fraud trying to receive a profit*". The Panel observes, however, that this does not explain why, respectively on 4 and 5 November 2009, Mr Ante Sapina and Mr Marijo Cvrtak confirmed that they had met the Appellant.

The Appellant has to suggest that Mr Ante Sapina was lying every time he claimed to having met him and negotiated the terms and conditions of the manipulation of the match in Basel. However, the Appellant does not supply any possible motive for such a lie - why Mr Ante Sapina (and the other perpetrators) should wish falsely to implicate the Appellant in the crime or what benefit would accrue to them for so doing. The Appellant did not establish as plausible the existence of a plot hatched against him by persons, whom he claims to have met for the first time only (approximately) a month after the match in Basel.

It must be noted that such an alleged conspiracy to defame the Appellant in this way would not only require the participation of most - if not all - the persons whose telephone was tapped, but would also be vain unless all those persons knew in advance that telephones would be tapped, indeed that their match fixing scheme would be discovered, by the police. Such a hypothetical scenario has only to be stated to be stigmatized as absurd.

2.2 The minutes of the meeting at UEFA headquarters on 30 November 2009

According to the minutes of the meeting at UEFA headquarters on 30 November 2009, the Appellant had been contacted before and after the match in Basel by persons who asked him to consider the possibility of manipulating matches. Regarding the content of the minutes, the Appellant signed the following declaration: "*The present record was read to me aloud in Russian language. I have understood it and deemed it accurate, to which I hereby attest with my signature*".

At the hearing before the CAS, as noted above, the Appellant asserted that he was convinced that the object of the meeting at the UEFA headquarters was related to his possible promotion to a higher referee category. He was therefore taken by surprise when the discussion turned to the subject of match fixing.

This explanation is wholly inconsistent with the e-mail exchange which took place between the Appellant and Mr Peter Limacher before the meeting, itself significantly identified in the initial summons as "urgent". Upon reception of his notification to appear at the UEFA headquarters, the Appellant immediately wondered if it was related to the cancellation of his appointment to officiate a match in Austria in December 2010. Furthermore, Mr Limacher confirmed unambiguously to the Appellant that he was contacted in relation with "*matters of integrity*" and specified that he wanted to hear him about "*some matches [he] refereed for UEFA*", "*the dynamics involved prior and after the match, in particular with regard to certain individuals who might have contacted you*". Finally, the disciplinary nature of the meeting should have been obvious to the Appellant as he was contacted by UEFA's Head of disciplinary services, i.e. Mr Peter Limacher.

In such a context, the Panel finds the Appellant's assertion that he came to the UEFA headquarters without knowing what would be discussed as utterly lacking in credibility.

The Appellant also told the Panel that the said meeting was divided in two sessions, one in the morning and another one in the afternoon. He claimed that he disagreed with the content of the minutes but accepted to sign them on the assumption that his remarks would be recorded. To his dismay, the content of the minutes remained unchanged and is therefore not reliable. The signature of the document allegedly happened at 16:30 despite the fact that he was still heard until 18:00.

The Appellant's version of the facts in terms of the timing is at odds with the minutes, according to which the meeting started at 9:30 and ended at 11:00. Moreover, it is not corroborated by the evidence given by the interpreters. As a matter of fact, the Panel found the testimonies of Ms Valeria Döhler and Mr Dimitri Boulakovski both credible and compelling as they were careful, clear and consistent. They did not say more than they could claim to remember and both affirmed that the Appellant's hearing went smoothly, lasted about an hour and there was no indication that he misunderstood what he was being asked.

The Panel finds the version of the facts presented by the Appellant unacceptable. Firstly, the Panel does not understand how the Appellant could sensibly have agreed to sign a document, the content of which he contested. Secondly, the Appellant has to suggest that he was deceived by two highly ranked delegates of the UEFA who either tricked or/coerced him into signing the minutes despite his dissent. Such a grave allegation would require cogent evidence (which is lacking) to be accepted, and is wholly at odds with the evidence of the interpreters. Thirdly, the minutes

on their face refer to clarification by the Appellant (e.g. when the name of one of the accomplices was clarified) which implies that his corrections were indeed noted. Fourthly, and critically the facts recorded in the minutes and admissions made by the Appellant are consistent with all the other evidence submitted before the CAS, notably the telephone transcripts and Mr Ante Sapina's declarations before the Bochum Police.

2.3 Conclusion

After careful analysis of the facts and based on the convergence of the various strands of evidence available, the Panel concludes that it has been proven not only to its comfortable satisfaction but indeed beyond reasonable doubt that there were repeated contacts between the Appellant and members of a criminal group involved in match fixing and betting fraud. The Panel finds that the transcripts of the telephone recordings made available by the criminal police of Bochum, Germany in conjunction with all the other evidence and testimonies are particularly incriminating as they establish a convincing connection between what was said during the intercepted calls, the events which took place around the match in Basel, the proven primary facts and the inferences properly to be drawn therefrom. It has been convincingly established that the Appellant was contacted before and after the match in Basel by persons who offered him monies to manipulate the result of the game. Hence, as a target of attempted bribery, the Appellant should have notified UEFA immediately.

The explanations of the Appellant for this admitted lack of contact, which were set out above, are not, in the Panel's view, at all impressive. Firstly, the assertion that the contact was too trivial to be reported is inconsistent not only with the objective evidence available but also with the fact that it is said at the same time to have caused him to fear for his family or for his career. Secondly, some kind of serious offer to manipulate matches must have been made to him as he declined it, "*stating that his career was too important to him*" . The same kind of statement was repeatedly made by the Appellant in his various briefs before the UEFA disciplinary bodies.

The contention that he did not report the said contact because of his inadequate command of English and ignorance of to whom to make such a report must be rejected. A referee of the Appellant's experience and standing could not plausibly advance such excuses given the seriousness of the illicit act and of its consequences. The Panel finds that the Appellant was obliged to report the said contacts to UEFA and had the capacity (including linguistic skills) to do so; its own observations led it to conclude that he chose to underplay his command of English. By failing to make such a report, the Appellant deliberately violated the principles of conduct as set forth under Article 5 of the UEFA Disciplinary Regulations and the duties imposed upon him by article 6 of the UEFA General Terms Conditions for Referees.

It is accordingly not necessary for the Panel to make a final finding on whether or not the Appellant actually manipulated the match played in Basel on 5 November 2009 (whose result was in fact consonant with the expectations of the gamblers) or actually received any moneys for agreeing to manipulate it or for its manipulation (if any). The offences are made out in any event.

C. What is the correct sanction?

1. In general

Article 5 of the UEFA Disciplinary Regulations reads as follows where relevant:

"Article 8 Principles

1. Unsportsmanlike conduct, breaches of the Laws of the Game, as well as infringements of the statutes, regulations, decisions and directives of UEFA, are punished by means of disciplinary measures.(…)

Article 11 Other offences

1. Disciplinary measures provided for in Articles 14 and 15 of the present regulations may be taken against member associations or clubs if:

a) a team, player, official or member is in breach of Article 5 of the present regulations;(…)

Article 15 Disciplinary measures against individuals

1. The following disciplinary measures may be imposed against individuals in accordance with Article 54 of the UEFA Statutes:
   a) warning,
   b) reprimand,
   c) fine,
   d) suspension for a specified number of matches or for a specified or unspecified period,
   e) suspension from carrying out a function for a specified numberof matches or for a specified or unspecified period,
   f) ban on exercising any football-related activity,
   g) withdrawal of a title or award.

Article 17 General principles

1. *The disciplinary body shall determine the type and extent of the disciplinary measures to be imposed, according to the objective and subjective elements, taking account of both aggravating and mitigating circumstances. Subject to Article 6 (1) of the present regulations, no disciplinary measures may be imposed in cases where the party charged bears no fault or negligence. "*

2. In Casu

The UEFA Appeals Body confirmed the life ban from any football related activities imposed upon the Appellant by the UEFA Control and Disciplinary Body.

The Appellant submits that in all the circumstances, his clean record, the fact that he was not the instigator of any plan to fix the match, the sanction imposed is by far too severe.

The Panel accepts that, until the recent events under scrutiny in this appeal, the Appellant's reputation was untarnished, his refereeing skills were well recognized and that he did not instigate the match manipulation. It also accepts that it should proceed on the basis that he did not actually manipulate the match or receive moneys to affect its outcome.

However, the Panel has to remind itself that match-fixing, money-laundering, kickbacks, extortion, bribery and the like are a growing concern, indeed a cancer, in many major sports, football included, and must be eradicated. The very essence of sport is that competition is fair; its attraction to spectators is the unpredictability of its outcome.

There are several pronouncements of CAS panels to that effect.

It is therefore essential in the Panel's view for sporting regulators to demonstrate zero-tolerance against all kinds of corruption and to impose sanctions sufficient to serve as an effective deterrent to people who might otherwise be tempted through greed or fear to consider involvement in such criminal activities. Match officials are an obvious target for those who wish to make illicit profit through gambling on match results (or indeed on the occurrence of incidents within matches). They must be reinforced in their resistance to such criminal approaches. CAS must, applying naturally to considerations of legality and of proportionality, respect in its awards the approaches of such regulators devoted to such virtuous ends.

To summarise, the Appellant was found involved in a match fixing scandal which occurred in a major European championship and which received an important media coverage. More than a year later, at the public hearing of Mr Tuna Akbulut on 10 December 2010, the media coverage was still intense as can be judged by the press abstracts presented on this subject. The Appellant's name was notably mentioned by the press in connection with alleged attempted manipulation of the match played in Basel on 5 November 2009 in the Group Stage E of the 2009/2010 UEFA Europa League.

In view of the importance of the UEFA Europa League, 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. Given his experience as a senior referee, the Appellant should have been particularly sensitive of his obligations and role in preserving and promoting such integrity. By not disclosing these improper approaches, he lamentably failed not only to obey the relevant regulations in their letter and spirit, but indeed to display any common sense.

The whole match fixing scandal and in particular the allegation related to the manipulation of the match in Basel caused a great and widely publicized damage to the image of UEFA and of football in general, inevitably raising doubts about whether match results are properly the product of footballers' skills, or improperly the product other illegal activities. In that context, the Appellant's mitigation is inadequate to displace the conclusions of three footballing bodies as to the appropriate penalty for his misconduct.

Based on all the above, the Panel finds that a life ban from any football related activities against the Appellant is a proportionate sanction and that the Appealed Decision must be upheld in its entirety, without any modification. This conclusion makes it unnecessary for the Panel to consider the other requests submitted by the parties. Accordingly, all other prayers for relief are rejected.

4A_284/2009**
Judgement of November 24, 2009
First Civil Law Court

Composition	Federal Tribunal Judge Klett, President Federal Tribunal Judge Kolly Federal Tribunal Judge Kiss Clerk of the Court: Mr Leemann
Parties	X._____, Appellant, represented by Dr. Monika Gattiker, **versus** Deutsche Reiterliche Vereinigung e.V. Respondent, represented by Dr. Stephan Netzle.

*** From Charles Poncet's translation, courtesy of the law firm ZPG/Geneva (www.praetor.ch).**
*** Translator's note: Quote as X.____v. Deutsche Reiterliche Vereinigung.____, 4A_284/2009. 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 The German Equestrian Federation based in Warendorf/DE (Respondent) is the national equestrianism organization of Germany. X._____, a German citizen, the Appellant, is an experienced jump rider. He is a member of the Respondent and represented the German national team in the 2008 Summer Olympics in China. The Fédération Equestre Internationale (FEI) is the world organization for equestrianism based in Lausanne.

A.b The Appellant was already a member of the German jumping team which won the gold medal at the 2004 Summer Olympics in Greece. The medal was denied after A._____'s horse tested positive to a prohibited substance.

A.c The riding competitions of the 2008 Summer Olympics took place in Hong-Kong between August 8 and August 21, 2008. The Appellant participated in the Olympic jumping competition with horse AX._____. On August 9 and 17, 2008 the competent veterinary committee filled out Medication Form 3 (Authorization for the Use of Medication not Listed as Prohibited under FEI Regulations) as well as Medication Form 1 (Authorization for Emergency Treatment, *i.e.* Medication with Prohibited Substances). The horse AX._____ was declared fit for competition on both documents. A request to the competent authority for the use of Capsaicin was not made and no medication form was filled out for that substance. On August 17, 2008 the horse AX._____ was tested. It was not mentioned in the FEI Medication Control Form that a substance based on Capsaicin could have been used on the animal. The analysis of the A-samples of August 18,

2008 showed that the prohibited substance Capsaicin was proved in the blood and the urine of the horse. X._____ was informed of the foregoing by a fax of August 22, 2008 and was immediately suspended provisionally. On August 22, 2008 a new analysis was made on the basis of the B-samples, which confirmed the presence of Capsaicin. In a press release of August 24, 2008 the Appellant stated that the horse AX._____ had been suffering from chronical back pains since participating in an equestrian event in Cannes in June, 2008. Therefore, ever since he had used the ointment "Equi-block" for treatment. It is not disputed that the product contains Capsaicin.

B.

B.a In a decision of October 22, 2008, the FEI-Tribunal found a violation of the FEI Equine Anti-Doping and Medication Control Rules, EADMC Rules[1] and imposed a 120 days ban of the Appellant as of August 21, 2008, as well as a fine of CHF 2000.-. It considered that Capsaicin was to qualify either as a doping agent, to the extent that it was used to increase sensitivity (so called hyper-sensitivity), as the forelegs of the horse were rubbed with it (which leads to an excessive sensitivity to pain upon touching the poles and thus to a higher effort during jumping), or as a prohibited substance of the "Medication Class A"[2]. It decided that there was no proof of a higher sensitivity of the legs of the animal and that accordingly, a mere violation through the use of a "Medication Class A" was proved: the Appellant resumed competitions when the ban expired on December 19, 2008.

B.b On November 13, 2008 the Respondent appealed the October 22, 2008 decision of the FEI-Tribunal to the Court of Arbitration for Sport (CAS) and asked for a ban of at least eight months since August 21, 2008. The Appellant also appealed and submitted essentially that the duration of the ban should be reduced to three months. In an award of April 30, 2009 the CAS upheld the Respondent's appeal and pronounced a ban of eight months against the Appellant, *i.e.* from August 21, 2008 until April 20, 2009. Simultaneously, all results achieved by the Appellant during that period were denied (with a loss of medals, points and prizes). The CAS rejected the Appellant's appeal.

C.

C.a In a Civil law appeal and a request for revision, the Appellant submits that the Federal Tribunal should annul the award of the CAS of April 30, 2009 and send the matter back to the CAS for a new decision. The Respondent submits that the appeal should be rejected as well as the request for revision, to the extent that the matter is at all capable of appeal. The CAS submits that the appeal should be rejected. The Appellant filed a reply with the Federal Tribunal.

1. Translator's note: in English in the original German text.

2. Translator's note: in English in the original German text.

Reasons

1.

The decision under appeal was issued in English. In the proceedings in front of the Federal Tribunal, the parties used German. According to art. 54 BGG[3], the decision is to be issued in the German official language.

2.

In the field of international arbitration, a Civil law appeal is possible under the requirements of art. 190-192 PILA[4] (art. 77 (1) BGG).

2.1 The seat of the Arbitral Tribunal is in Lausanne in this case. At the relevant time, the parties had neither their seat, nor their domicile, nor their usual residence in Switzerland. As the parties did not exclude in writing the provisions of chapter 12 PILA, they are applicable (art. 176 (1) and (2) PILA).

2.2 Only the grievances limitatively listed in art. 190 (2) PILA are admissible. (BGE 134 III 186 at 5 p. 187; 128 III at 1a p. 53; 127 III 279 at 1a p. 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 requirement for reasons in art. 106 (2) BGG with regard to violations of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186 at 5 p. 187 with references). As to the grievances based on art. 190 (2) (e) PILA the incompatibility of the arbitral award under review with public policy must be shown specifically (BGE 117 II 604 at 3 p. 606). Criticism of an appellate nature is not allowed (BGE 119 II 380 at 3b p. 382).

2.3 The Federal Tribunal bases its decision 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

3. Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

4. Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute of December 18, 1987, on Private International Law, RS 291.

when they are blatantly inaccurate or based on a violation of the law within the meaning of art. 95 BGG (see art. 77 (2) BGG which rules out the application of art. 105 (2) and art. 97 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). Furthermore, new facts and evidence may be introduced only to the extent that the decision of the lower court justifies doing so (art. 99 (1) BGG).

2.4 The Appellant precedes his legal developments with a thorough presentation of the facts, in which he describes the course of events and the proceedings from his point of view. As to various points he deviates from the factual findings of the CAS or widens them without alleging any substantiated exceptions to the binding character of the factual findings. He submits among other things that during the equestrian competitions of the 2008 Olympics some systematic controls of the legs of the horses were carried out as opposed to other tournaments, yet without even the smallest clue to a higher sensitivity being recognized and that as a consequence of a thermography of the legs of the horse AX._____ as well as the results of the test by the Recklinghausen Institute for veterinary matters and food stuffs controls, it could be ruled out that any hyper-sensitivity would have taken place. To that extent, his submissions must remain unheeded. The various means of proof introduced by the Appellant must also remain unheeded. In the rest of his arguments also, the Appellant goes beyond the factual findings of the award under appeal in an impermissible way. Thus he alleges that the FEI would have renounced a prosecution for doping in two other cases (concerning riders B._____ as well as C._____) in which the same substance would have occurred in the 2008 Olympics, from which he wants to deduct a contradictory attitude of the FEI and a violation of the prohibition of the abuse of rights. These submissions are not to be considered in the appeal, so that the grievances based on them come to nothing. The grievance as to a violation of the right to be heard, raised merely sweepingly, does not change the position as the requirements for a sufficient grievance fail in this respect (see art 77 (3) BGG).

3.
The Appellant further claims a violation of public policy according to art. 190 (2) (e) PILA.

3.1 The material 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 (BGE 121 III 331 at 3a p. 333). The judgement of a claim in dispute violates public policy only when it ignores some fundamental legal principles and is therefore plainly inconsistent with the widely recognized system of values, which according to the prevailing opinions in Switzerland, should be the basis of any legal order. Among such principles are: the fidelity to contracts *(pacta sunt servanda)*, the prohibition of abuse of rights, the principle of good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of incapables. The award under appeal may be annulled only if it contradicts public policy in its result and not merely in its reasons (BGE 132 III 389 at 2.2 p. 392 *ff.*; 128 III 191 at 6b p. 198; 120 II 155 at 6a p.166 f.).

3.2 The Appellant sees a violation of the prohibition of abuse of rights in the fact that the CAS did not recognize that the Respondent had no legal interest in the appeal to the CAS. The Respondent would have wanted to make an example of him and would have explicitly confirmed its intent to harm at the hearing in front of the CAS. It should not be a matter for the National Federation to concern itself with violations against international rules in lieu of the International Federation and the Respondent's punitive action proves by itself to be an abuse of rights according to art. 2 ZGB[5]. The right of a national federation to appeal to the CAS would find its limits in the prohibition of abuse of rights, respectively in material public policy. The lack of any legal interest would result from the fact that the Respondent still sanctions riders according to their own national rules; moreover it would have already excluded the Appellant from the national squad for two years before the initiation of the arbitral proceedings. Finally, the right to request sanctions in international competitions would be with the FEI on the basis of its Statutes. The judgement of the FEI Tribunal would have recognized the existence of a need for sanctions in the public interest in the fight against doping and so would have the FEI through its renunciation to its own

5. Translator's note: ZBG is the German abbreviation for the Swiss Civil Code.

appeal. It would not be a matter for the National Federation to ensure the right application of the provisions for sanctions of the International Federation from its point of view. As the award of the CAS came about only due to the abusive appeal of the Respondent, it would violate public policy and should be annulled.

3.3. The grievance is unfounded. The CAS dealt with the issue of the right to appeal thoroughly, which is why the grievance of a violation of the right to be heard (art. 190 (2) (2) PILA), raised simultaneously, proves itself in advance to be blatantly unfounded. Rightly, the Appellant does not deny that article 12.2.2 of the EADMC rules provides for a right of appeal of the National Federation. The CAS held that as the National German Federation and as a member of the FEI, the Respondent could have a legitimate interest to give particular attention to the prevention and the punishment of doping violations in view of the revocation of gold medals in two consecutives Olympics, with a correspondingly negative image in public opinion. Contrary to the Appellant's view, there is no violation of the prohibition of abuse of rights (Art.2 (2) ZGB) there. Contrary to the Appellant's submission, the factual findings of the award under review, which bind the Federal Tribunal (art. 105 (1) BGG), do not lead to the conclusion that the Respondent would have used its right to appeal only with a view to hurting the Appellant. The grievance of an abuse of right is untenable. The CAS is not to be accused of violating public policy.

3.4 The argument submitted by the Appellant in its request for revision, namely that some new facts would have become known in the meantime, which would most probably have led to an other judgement as to standing to appeal and as to the legality of the appeal, do not alter the aforesaid conclusion. Federal law admittedly gives to the parties to international arbitral proceedings the extraordinary legal recourse of revision for which the Federal Tribunal has jurisdiction according to case law (BGE 134 III 286 at 2 p. 286 f. with references). According to that, revision may be requested according to art. 123 (2) (a) BGG when the petitioner subsequently learns of some relevant facts or conclusive evidence, which he could not bring into the previous proceedings, excluding facts and evidence which originated after the decision (BGE 134 III 286 at 2.1 p. 287). Contrary to the Appellant's view it may not be assumed that the circumstances brought forward with reference to a report in the NZZ[6] of May 6, 2009 and to a press release of the FEI of May 28, 2009 would have led to a different assessment by the CAS of the Respondent's standing to appeal. To begin with, the Appellant does not describe the article accurately when he claims that the treatment of rider D._____'s horse described there, on the occasion of the 2008 Olympics would have been carried out with the awareness of the veterinary of the German team E._____, especially as, according to the press report, the keeper would have undertaken the treatment without consultation even before the required approval of the injection. The Appellant does not explain to what extent E._____'s statement in front of the CAS was relevant to the decision and why the award under review would have been different in light of the new facts argued. Be this as it may, even with a violation of the team veterinary's obligation to report or the alleged awareness of an official of the German Federation, it would not make the Respondent's appeal appear abusive. Contrary to the Appellant's view, the reasoning of the CAS according to which the Respondent could indeed have a legitimate interest to act consistently against doping violations in view of the negative image in public opinion, is rather reinforced by the circumstances described in the framework of the revision. The request for revision must therefore be rejected to the extent that the matter is capable of revision.

4.

Furthermore, the Appellant wrongly claims that the CAS would have disregarded the requirement to interpret in the Appellant's favour (*Unklarheitenregel*)[7] and thus violated public policy, because faced with two equivalent interpretations (*i.e.* a doping offence and an offence against "Medication Class A") it would have chosen the most unfavourable to the Appellant, namely doping. Contrary to the view expressed in the appeal, the CAS did not disregard the principle of good faith when it did not simply switch to the mildest sanction when faced with a substance which falls both under "Medication Class A" and also doping. Such an automatism in favour of the factual finding most favourable to the sportsman and for the mildest sanction cannot be deducted from the aforesaid principle. Irrespective of the issue as to whether or not disregarding the aforesaid principle could at all be the object of a grievance based on art. 190 (2) (e) PILA, it does not appear from the Appellant's explanations which provision applied by the CAS would have been

6. Translator's note: a Swiss newspaper.

7. Translator's note: *Unklarheitenregel* is a concept which leads to the interpretation most favourable to the other party when there is a doubt.

unclear and interpreted to the Appellant's detriment. The CAS rather imposed on him the burden to prove that the agent Capsaicin had not been applied to the limbs of horse AX._____ in this case, but used in an authorized way. When the Appellant disputes that allocation of the burden of proof and the consequences of the absence of evidence of the more inoffensive application of the agent, he does not claim a violation of the principle of good faith, but raises criticism of an appellate nature against the award under review. A violation of material public policy is not demonstrated.

5.
The Appellant further claims that the CAS would have disregarded the evidence altogether (including the statements of the FEI experts) as well as its evidence in rebuttal (see art. 190 (2) (d) PILA) although these would have been appropriate to establish that the legs of the horse had not been rendered hyper-sensitive. The Appellant's arguments show no violation of the right to be heard, but rather criticize the evidence accepted by the CAS on the basis of some particular statements by two experts and that is not allowed. The CAS relied on the statements of the various experts and held that Capsaicin is difficult to establish, as it hardly leaves any trace on the skin of the horse and after a few hours becomes completely untraceable in its blood. The CAS assessed very well the statements of the experts quoted by the Appellant as well as others, yet it found as to Capsaicin that there are differing views. No violation of the right to be heard is demonstrated in connection with the aforesaid finding in the award under appeal. As to the grievance that the CAS would have thus committed an obvious oversight, it is not a grievance admissible according to art. 190 (2) PILA (also see art. 77 (2) BGG, which rules out the application of art. 105 (2) and art. 97 BGG). It is not demonstrated that the Arbitral Tribunal would not have taken into account an important allegation by the Appellant due to oversight (see BGE 127 III 576 at 2e-f p. 579 f.). The same applies for the finding in the award under review, presented as contrary to the evidence, that the problematic substance would leave hardly any trace on the skin, particularly with dark horses. Be this as it may, it is not apparent, neither is it shown by the Appellant, to what extent the colour of the horse was relevant to the award under appeal. The grievance of a violation of the right to be heard comes to nothing here as well.

6.
The Appellant then claims a severe violation of privacy due to the suspension which took place. The rules applied by the CAS (EADMC rules FEI Equine Prohibited List) would result in an excessive commitment according to art. 27 (2) ZGB, which would cause the CAS arbitral award to violate public policy (art. 190 (2) (e) PILA). The Appellant's arguments are general and in large parts do not relate to the specific considerations of the award under review. He misjudges the scope of review of the Federal Tribunal when criticizing the anti-doping and medication control systems of the FEI, irrespective of the eight months suspension specifically issued and argues that the possible suspension of up to four years contained there, leads to a *de facto* occupational ban. Irrespective of the fact that it is not apparent that the Appellant would have made any corresponding arguments in conformity with the rules of procedure in front of the CAS (see art. 99 (1) BGG) and that his arguments are largely limited to criticism of an appellate nature of the award under review, an illicit intrusion in the personality rights as a consequence of the ban is not discernable. In the April 30, 2009 arbitral award, the Appellant was retroactively suspended for eight months, yet he resumed his tournament activities on December 19, 2008 already and the retroactive ban ordered by the CAS expired as of April 20, 2009. The limitation of his sport activities as a consequence of the award under review was thus rather limited, contrary to what he claims, as compared to other suspensions for doping ordered in the field of sports and the sanction which relates to a violation of the proper doping provisions of the FEI is in no way inconsistent with public policy (art. 190 (2) (e) PILA) (see the judgements 4P.64/2001 of June 11, 2001 at 2d/bb, not published in BGE 127 III 429; 5P.83/1999 of March 31, 199 at 3c).

7.
The appeal and the petition for revision must be rejected to the extent that the matter is capable of appeal or revision. In such an outcome of the proceedings, the Appellant 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 petition for revision is rejected to the extent that the matter is capable of revision.

3.
The judicial costs set at CHF 4000.-- shall be borne by the Appellant.

4.
The Appellant shall pay to the Respondent CHF 5000.-- for the federal judicial proceedings.

5.
This judgment shall be notified in writing to the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, November 24, 2009

In the name of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:	The Clerk:
Klett	LEEMANN

4A_624/2009
Arrêt du 12 avril 2010
Ire Cour de droit civil

Composition	Mmes et M. les Juges Klett, Présidente, Kolly et Kiss Greffier: M. Carruzzo
Parties	X._____, recourante, représentée par Me Philippe Kitsos, **contre** Association Y._____ intimée, & Fédération Z._____, intimée.
Objet	arbitrage international, recours en matière civile contre la sentence rendue le 10 novembre 2009 par le Tribunal Arbitral du Sport (TAS).

Faits

A.

A.a En 2004, X._____, née en 1978, athlète de niveau international, spécialiste des courses de demi-fond, a fait l'objet d'une procédure disciplinaire pour diverses infractions aux règles antidopage constatées lors de contrôles hors compétition.

Par décision du 15 juin 2005, la Commission centrale de discipline de la Direction générale de la jeunesse et du sport de Z._____ (CDC) a suspendu X._____ pour une durée de deux ans après avoir reconsidéré une première décision, contestée par l'Association Y._____ (ci-après: Y._____), qui fixait à un an la durée de la suspension de l'athlète.

X._____ n'a pas appelé de la décision du 15 juin 2005. Contestant la date du début de sa suspension, elle est cependant intervenue auprès de Y._____, par le truchement de son conseil, en menaçant de saisir le Tribunal Arbitral du Sport (TAS), afin que cette date fût avancée. Dans une lettre adressée le 16 août 2005 par son avocat au représentant de Y._____, l'athlète a confirmé qu'elle acceptait que le point de départ de la suspension fût fixé au 8 août 2004. Sur quoi, Y._____, par lettre du 19 septembre 2005, a informé la Fédération Z._____ de l'accord intervenu entre l'athlète et elle à ce sujet.

Ce nonobstant, par requête du 12 septembre 2005, X._____ a saisi la Cour administrative de Z._____ d'un recours dirigé contre la décision précitée du 15 juin 2005 au motif, notamment, que la CDC aurait violé la loi en revenant sur sa première décision. Par jugement du 4 avril 2007, l'autorité saisie, estimant que le cas ne relevait pas de la compétence de la juridiction administrative, a rejeté le recours. Le 24 juillet 2007, X._____ a contesté ce jugement devant le Conseil d'État, lequel n'a pas encore statué à ce jour.

La période de suspension de l'athlète a pris fin au début août 2006.

A.b Le 8 septembre 2007, un contrôle hors compétition effectué sur la personne de X._____, qui séjournait alors aux Etats-Unis d'Amérique pour y soigner une blessure, a révélé la présence de substances interdites dans le corps de l'athlète.

La procédure disciplinaire ouverte de ce chef le 18 octobre 2007 contre l'athlète a donné lieu à une série de décisions. La dernière en date a été rendue le 30 mai 2008 par le Tribunal arbitral de la jeunesse et du sport, juridiction nationale de Z._____ spécialisée dans le traitement des litiges en matière de sport, qui a prononcé une suspension pour une durée de quatre ans.

B.
Le 20 juin 2008, X._____ a adressé au TAS une déclaration d'appel visant à obtenir l'annulation de la décision du 30 mai 2008.

Dans sa réponse du 28 août 2008, Y._____ a contesté la compétence du TAS pour connaître de l'appel. Dans l'éventualité où le TAS entrerait néanmoins en matière, elle a conclu à ce que l'athlète fût suspendue à vie pour seconde infraction grave aux règles antidopage.

Une audience a été tenue le 2 avril 2009 à Lausanne. A la suite de celle-ci, le TAS a invité les parties à lui transmettre des pièces supplémentaires concernant tant la procédure disciplinaire relative à la première infraction commise par l'athlète que la procédure administrative pendante devant le Conseil d'État. Une fois en possession des pièces requises, il a donné aux parties la possibilité de se déterminer à leur sujet.

Par sentence du 10 novembre 2009, le TAS, après avoir annulé la décision prise le 30 mai 2008 par le Tribunal arbitral de la jeunesse et du sport, a prononcé la suspension à vie de l'athlète.

C.
Le 10 décembre 2009, X._____ a interjeté un recours en matière civile au Tribunal fédéral en vue d'obtenir l'annulation de la sentence du TAS.

Les deux intimées et le TAS, qui a produit le dossier de la cause, proposent le rejet du recours.

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 opté pour l'anglais. Le recours en matière civile interjeté par X._____ est rédigé en français. Conformément à sa pratique, le Tribunal fédéral adoptera la langue du recours et rendra 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 prévues 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 la recourante ou encore des motifs invoqués 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.
Dans un premier moyen, fondé sur l'art. 190 al. 2 let. e LDIP, la recourante reproche au TAS d'avoir rendu une sentence incompatible avec l'ordre public.

3.1 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).

3.2

3.2.1 La recourante fait grief au TAS d'avoir méconnu l'interdiction de la reformatio in peius qui constitue, à ses yeux, un principe juridique général et universel relevant de l'ordre public. A l'appui de ce grief, elle soutient que le TAS ne pouvait pas aggraver la sanction disciplinaire qui lui a été infligée dès lors que Y._____ n'avait pas recouru contre la décision du 30 mai 2008 et que les règles régissant la procédure d'appel devant le TAS ne prévoient pas la possibilité pour la partie intimée d'introduire une demande reconventionnelle après le dépôt d'un appel.

Il n'est pas nécessaire de trancher ici la question, laissée précédemment ouverte (arrêt 4A_17/2007 du 8 juin 2007 consid. 4.2), de savoir si l'interdiction de la reformatio in peius constitue ou non un principe fondamental

entrant dans la définition de l'ordre public au sens de l'art. 190 al. 2 let. e LDIP. En effet, quoi qu'en dise la recourante, le TAS n'a nullement méconnu ce principe en l'espèce. Contrairement à ce que soutient l'intéressée, le Code de l'arbitrage en matière de sport prévoit expressément, à son art. R55, la possibilité pour l'intimé de soumettre au TAS, dans les vingt jours suivant la réception de la motivation de l'appel, une réponse comprenant notamment «toute demande reconventionnelle». Y._____, intimée à la procédure d'appel, a fait usage de cette possibilité en déposant, le 28 août 2009, sa réponse contenant une demande reconventionnelle formée à titre subsidiaire, pour le cas - réalisé - où le TAS admettrait sa compétence, et tendant à ce que la suspension prononcée à l'encontre de la recourante le fût, non pas pour quatre ans, mais à vie. Du reste, le TAS constate expressément, au § 103 i.f. de sa sentence, que la réponse incluant la demande reconventionnelle a été déposée en temps utile et qu'elle est donc recevable.

Il suit de là qu'aucune violation de l'interdiction de la reformatio in peius n'a été commise au détriment de la recourante.

3.2.2 Sous le titre «violation du principe de la lex mitior et de la non-rétroactivité», la recourante reproche ensuite au TAS d'avoir appliqué les règles antidopage en vigueur en 2009, pour fixer la sanction disciplinaire qu'il lui a infligée, au lieu de faire fond sur celles en vigueur en 2007, applicables aux deux infractions commises par elle en 2004 et 2007. Or, celles-ci, contrairement à celles-là, subordonnaient l'existence d'une récidive, susceptible de justifier une suspension à vie, à la commission d'une nouvelle infraction de même nature que la précédente, condition non réalisée en l'espèce. Dès lors, en prononçant une suspension à vie en vertu des règles antidopage en vigueur en 2009, motif pris de la récidive, le TAS aurait clairement violé le principe de la non-rétroactivité de la «loi pénale», selon la recourante.

Le moyen tombe à faux. La manière dont il est formulé donne d'ailleurs à penser que la recourante n'a pas saisi la véritable portée de l'argumentation, pourtant claire, du TAS sur ce point. Il appert, en effet, de la sentence que les arbitres ont commencé par examiner la situation juridique au regard des règles antidopage en vigueur en 2007. Interprétant ces règles en ce sens qu'elles permettaient d'admettre l'existence d'une récidive nonobstant la nature différente des deux infractions entrant en ligne de compte (§ 114), ils les ont appliquées aux circonstances de la cause en litige pour en déduire qu'elles justifiaient de prononcer une suspension à vie à l'encontre de la recourante (§§ 115 à 121). Cela fait, les arbitres ont examiné si, en vertu du principe de la lex mitior, l'athlète pouvait bénéficier d'une sanction plus légère. Ils ont alors interprété les dispositions pertinentes des règles antidopage en vigueur en 2009 et sont arrivés à la conclusion que tel n'était pas le cas (§§ 122 à 128). Il ressort ainsi nettement du résumé de son argumentation que le TAS a infligé à la recourante la sanction disciplinaire prévue par les règles antidopage en vigueur en 2007, i.e. au moment où la seconde infraction avait été commise.

Pour le surplus, il n'appartient pas au Tribunal fédéral de revoir la manière dont le TAS a interprété la notion de récidive telle qu'elle découle des règles antidopage en vigueur en 2007. C'est d'ailleurs le lieu de rappeler qu'en matière d'arbitrage international, il examine uniquement les griefs qui lui ont été soumis et en fonction de la manière dont ils ont été motivés (art. 77 al. 3 LTF).

4.

Dans un second moyen, la recourante se plaint de la violation de son droit d'être entendue.

4.1 Le droit d'être entendu, tel qu'il est garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, n'a en principe pas un contenu différent de celui consacré en droit constitutionnel (**ATF 127 III 576** consid. 2c; **119 II 386** consid. 1b; **117 II 346** consid. 1a p. 347). Ainsi, il a été admis, dans le domaine de l'arbitrage, que chaque partie avait le droit de s'exprimer sur les faits essentiels pour le jugement, de présenter son argumentation juridique, de proposer ses moyens de preuve sur des faits pertinents et de prendre part aux séances du tribunal arbitral (**ATF 127 III 576** consid. 2c; **116 II 639** consid. 4c p. 643).

La jurisprudence a également déduit du droit d'être entendu un devoir minimum pour l'autorité d'examiner et de traiter les problèmes pertinents. Ce devoir, qui a été étendu à l'arbitrage international, est violé lorsque, par inadvertance ou malentendu, le tribunal arbitral ne prend pas en considération des allégués, arguments, preuves et offres de preuve présentés par l'une des parties et importants pour la décision à rendre. Il incombe à la partie soi-disant lésée

d'établir, d'une part, que le tribunal arbitral n'a pas examiné certains éléments de fait, de preuve ou de droit qu'elle avait régulièrement avancés à l'appui de ses conclusions et, d'autre part, que ces éléments étaient de nature à influer sur le sort du litige. Si la sentence passe totalement sous silence des éléments apparemment importants pour la solution du litige, c'est aux arbitres ou à la partie intimée qu'il appartiendra de justifier cette omission dans leurs observations sur le recours. Ils pourront le faire en démontrant que, contrairement aux affirmations du recourant, les éléments omis n'étaient pas pertinents pour résoudre le cas concret ou, s'ils l'étaient, qu'ils ont été réfutés implicitement par le tribunal arbitral. Il sied de rappeler, dans ce contexte, qu'il n'y a violation du droit d'être entendu, même au sens - plus extensif - donné par le droit constitutionnel suisse à cette garantie, que si l'autorité ne satisfait pas à son devoir minimum d'examiner les problèmes pertinents. Aussi les arbitres n'ont-ils pas l'obligation de discuter tous les arguments invoqués par les parties, de sorte qu'ils ne sauraient se voir reprocher, au titre de la violation du droit d'être entendu en procédure contradictoire, de n'avoir pas réfuté, même implicitement, un moyen objectivement dénué de toute pertinence. (**ATF 133 III 235** consid. 5.2 et les arrêts cités).

4.2 Dans une argumentation concise et présentée en des termes assez vagues, la recourante reproche, en substance, au TAS de n'avoir pas tenu compte de la procédure en cours devant le Conseil d'Etat de Z._____. A son avis, eu égard à cette procédure, il ne serait pas possible d'interpréter l'infraction commise par elle en 2007 comme une seconde infraction justifiant sa suspension à vie.

Force est de constater que la sentence attaquée fait allusion, à plusieurs endroits, à la procédure administrative que la recourante a conduite parallèlement en Z._____ et qui n'est, apparemment, pas encore close (cf. §§ 13, 50, 52, 54 et 60). Il est donc faux de soutenir que cette circonstance aurait échappé au TAS. Sans doute celui-ci n'indique-t-il pas expressis verbis pour quelle raison il considère que cette circonstance ne doit pas influer sur la décision qu'il est amené à prendre. Il ressort toutefois clairement du § 116 de la sentence attaquée que les arbitres ont implicitement dénié toute espèce d'importance à ladite circonstance, motif pris de ce que l'athlète incriminée avait accepté la suspension de deux ans prononcée à son encontre par la CDC et renoncé à appeler de la décision y relative auprès du TAS en échange de l'acceptation par Y._____ de sa demande visant à modifier le point de départ de cette mesure disciplinaire. En d'autres termes, les arbitres ont considéré de manière implicite que la démarche de la recourante consistant à initier une procédure administrative après que l'athlète se fut pliée à la décision rendue par la juridiction sportive nationale compétente constituait un venire contra factum proprium qui ne méritait pas d'être protégé, de sorte qu'il était inutile d'attendre de connaître l'issue de la procédure pendante devant le Conseil d'Etat pour fixer la mesure de la peine disciplinaire à infliger à la recourante. Telle est du moins la manière dont cette dernière pouvait interpréter, sans grand effort d'imagination, le passage topique de la sentence contestée.

Dès lors, le moyen pris de la violation du droit d'être entendu sera, lui aussi, rejeté.

5.
La recourante, qui succombe, devra payer les frais de la procédure fédérale (art. 66 al. 1 LTF). Quant aux deux intimées, comme elles agissent sans le concours d'un avocat, elles n'ont pas droit à des dépens.

Par ces motifs, le Tribunal fédéral prononce:

1.
Le recours est rejeté.

2.
Les frais judiciaires, arrêtés à 3'975 fr., sont mis à la charge de la recourante.

3.
Le présent arrêt est communiqué aux parties et au Tribunal Arbitral du Sport (TAS).

Lausanne, le 12 avril 2010

Au nom de la Ire Cour de droit civil
du Tribunal fédéral suisse

La Présidente:	Le Greffier:
Klett	Carruzzo

4A_456/2009**
Judgment of May 3, 2010
First Civil Law Court

Composition	Federal Tribunal Judge Klett, President Federal Tribunal Judge Corboz Federal Tribunal Judge Rottenberg Liatowitsch Federal Tribunal Judge Kolly Federal Tribunal Judge Kiss Clerk of the Court: Mr Leemann
Parties	X._____, Appellant, represented by Dr. Martin Bernet and Mrs Sonja Stark-traber, **versus** Y._____, Respondent, represented by Mr Antonio Rigozzi.

*** From Charles Poncet's translation, courtesy of the law firm ZPG/Geneva (www.praetor.ch).**
*** Translator's note: Quote as X._____ v. Y._____ , 4A_456/2009. 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 Y._____ (the Respondent) is a successful long-distance runner. X._____ (the Appellant) is the National Athletic Federation of Z._____ and as such a member of the International Association of Athletics Federations (IAAF).

A.b On March 12, 2006 the Respondent was subjected to a doping test during the Marathon in Seoul South Korea. The Respondent's sample was divided into an A and a B-sample and sent to the doping center of the Korea Institute of Science and Technology, the laboratory of which is recognized by the World Anti-Doping Agency (WADA). On March 16, 2006, the A-sample was examined by A._____ and the forbidden substance 19-Norandrosterone was found.

On April 13, 2006 the IAAF informed the Appellant of the result of the test and asked it to proceed according to Rule 37 of the IAAF Competition Rules.

On April 17, 2006 the Appellant advised the Respondent of the positive test result and informed him of his right to examine the B-sample.

The Respondent offered no explanation for the detection of 19-Norandrosterone in his A-sample. On April 25, 2006 he was temporarily banned from all competition by the Appellant.

On May 16, 2006, the B-sample was analyzed by A._____ under supervision by Dr. B._____. The substance 19-Norandrosterone was detected again.

B.

B.a On September 10, 2006 the Appellant held the first hearing in the framework of the disciplinary proceedings. After several postponements a new hearing took place in front of a newly constituted Disciplinary Committee on December 11, 2008.

In a letter of December 11, 2008 the Appellant advised the Respondent that the Disciplinary Committee had unanimously determined a doping violation and issued a ban between April 25, 2006 and December 11, 2008. The Respondent was also deprived of all medals and prizes in connection with the participation to the 2006 Seoul Marathon.

B.b The Respondent appealed the decision of the Disciplinary Committee of the Respondent of December 11, 2008 to the Court of Arbitration for Sport (CAS) in a brief of January 7, 2008. He argued essentially that Art. 5.2.4.3.2.2 of the WADA Code International Standard for Laboratories[1] had been violated because both the A and B-sample had been examined by the same person (A._____). The Appellant expressly challenged the jurisdiction of the CAS as neither the Statutes nor any of the other applicable Federation Regulations provided for an appeal to the CAS.

The CAS considered that its jurisdiction could not be based on the Appellant's Federation Regulations. Yet it found that it had jurisdiction on the basis of a letter sent by Dr. C._____, the IAAF Anti-Doping Administrator, to the Respondent's representative on April 10, 2008. In a July 24, 2009 arbitral award the CAS upheld the Respondent's appeal, annulled the Appellant's decision of December 11, 2008 and authorized the Respondent to participate in competitions again without any further investigation.

C.

In a Civil law appeal the Appellant submits that the Federal Tribunal should annul the CAS award of July 24, 2009 and find that the CAS has no jurisdiction to decide the Respondent's appeal. Alternatively, the issue should be sent back to the CAS.

The Respondent submits that the matter is not capable of appeal, alternatively that the appeal should be rejected. The CAS submits that the appeal should be rejected.

1. Translator's note : In English in the original text.

The Appellant submitted a reply to the Federal Tribunal and the Respondent a rejoinder.

D.

In a decision of the presiding Judge of November 16, 2009 the Respondent's motion for security for costs was upheld. The Appellant consequently deposited CHF 6'000.- with the Registrar of the Federal Tribunal.

Reasons

1.

According to Art. 54 (1) BGG[2] the Federal Tribunal issues its decision in an official language[3], as a rule in the language of the decision under appeal. When the decision is in another language, the Federal Tribunal resorts to the official language used by the parties. The award under appeal is in English. As that is not an official language and the parties used different languages in front of the Federal Tribunal, the decision will be in the language of the appeal in conformity with practice.

2.

In the field of international arbitration, a Civil law appeal is possible under the requirements of Art. 190 to 192 PILA[4] (Art. 77 (1) BGG).

2.1 The seat of the arbitral tribunal is in Lausanne in this case. None of the parties had a seat or a domicile in Switzerland at the relevant time. As the parties did not exclude the provisions of chapter 12 PILA in writing they are accordingly applicable (Art. 176 (1) and (2) PILA).

2.2 A matter is only capable of appeal when the Appellant has a legally protected interest to the annulment or to the modification of the decision under appeal (Art. 76 (1) (b) BGG; in this respect see BGE[5] 133 III 421 at 1.1 p. 425 ff). The Federal Tribunal basically reviews *ex officio* whether a matter is capable of appeal or not (Art. 29 (1) BGG). Even so, the appeal must be sufficiently reasoned (Art. 42 (1) and (2) BGG), and the Appellant must also explain that the legal requirements of an appeal according to Art. 76 (1) BGG are given. The Respondent wrongly disputes the Appellant's present

2. Translator's note : BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

3. Translator's note: The official languages of Switzerland are German, French and Italian.

4. 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.

5. Translator's note: BGE is the German abbreviation for the decisions of the Swiss Federal Tribunal.

practical interest to legal protection. Whilst the Respondent's ban already ended as of December 11, 2008, the Respondent was deprived of all prizes obtained at the 2006 Marathon and denied further advantages. Contrary to the opinion expressed in the answer to the appeal the Appellant's interest to the enforcement of the sanctions it pronounced cannot be denied because the prize money of USD 80'000.- was not due by the Appellant but by the organizer of the Marathon. The Appellant, which is in charge of disciplinary actions with regard to doping tests as a National Federation, retains an interest in the annulment of the award under review with regard to the prizes the Respondent obtained at the 2006 Seoul Marathon.

The Respondent's argument that the Appellant would lack personal interest to the appeal because it was not acting for itself but pursuant to instructions by the IAAF, whilst relying in part on speculative claims, proves untenable. The fact that the Appellant as a member of the IAAF has certain duties in connection with disciplinary proceedings, the violation of which may bring about sanctions of the International Federation, does not lead to the conclusion that the Appellant would lack personal interest, contrary to the Respondent's view. The Appellant is entitled to appeal pursuant to Art. 76 (1) BGG.

2.3 The Respondent may not be followed when he claims that the matter would not be capable of appeal for failure to challenge all alternative reasons of the award under review, particularly the main reasons, according to which the Appellant would have accepted the appeal proceedings to the CAS as proposed in the IAAF letter of April 10, 2008.

Contrary to the view expressed in the answer to the appeal this was not an independent reasoning in connection with other reasons, namely that the Respondent could have understood the April 10, 2008 letter as an offer to enter into an arbitration agreement or that under the circumstances the Appellant would be bound by the IAAF offer. Instead, the coming into being of an arbitration agreement requires first an offer to conclude a contract, which the Arbitral Tribunal saw in the IAAF letter. Thereupon the offer required an acceptance by the contractual counterpart. As the April 10, 2008 letter was a statement of intent from the IAAF according to the CAS, the Arbitral Tribunal ultimately had to explain why the Appellant would have to be bound by the agreement which came into being between the IAAF and the Respondent. An independent alternative reasoning to the ratification of a representation by the IAAF could at most be seen in the reasons of the award under review according to which the Appellant's attitude could also be understood as an offer to conclude an arbitration agreement in favour of the CAS. The award under appeal is not at all unequivocal in this respect and that argument contradicts peculiarly the repeated reasoning of the CAS, according to which the offer was issued by the IAAF, as well as the extensive developments as to the issue of the approval of the acts of the IAAF or their binding character for the Appellant, which could not be understood as alternative reasons. In any event the appeal aims at both reasons and therefore there can be no claim that the matter is not capable of appeal because of a failure to appeal the alternate reasons.

2.4 A Civil law appeal within the meaning of Art. 77 (1) BGG may fundamentally seek only the annulment of the decision under appeal (see Art. 77 (2) BGG ruling out the applicability of Art. 107 (2) BGG to the extent that the latter allows the Federal Tribunal to decide the case itself). However to the extent that the dispute involves the jurisdiction of the arbitral tribunal there is an exception in this respect, as was the case in the framework of the old public law appeal and the Federal Tribunal may itself determine the jurisdiction or the lack of jurisdiction of the arbitral tribunal (BGE 127 III 279 at 1b p. 282; 117 II 94 at 4 p. 95 ff; Judgment 4A_240/2009 of December 16, 2009 at 1.2). The Appellant's main submission is therefore admissible.

2.5

2.5.1 The grievances limitatively set forth in Art. 190 (2) PILA are the only admissible ones (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 which are brought forward in the appeal and reasoned; this corresponds to the duty to reason contained in Art. 106 (2) BGG as to the violation of fundamental rights and of cantonal and inter-cantonal law (BGE 134 III 186 at 5 p. 187 with references).

2.5.2 The Federal Tribunal bases its judgment on the factual findings of the arbitral tribunal (Art. 105 (1) BGG). It may neither correct 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. 105 (2) and Art. 97 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 such factual findings or when new evidence is exceptionally taken into account (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733; with references). Whoever argues an exception to the rule that the Federal Tribunal is bound to the factual findings of the lower court and wishes to rectify or supplement the factual findings on that basis must show with reference to the record that corresponding factual allegations were already made in the proceedings in conformity with procedural rules (see BGE 115 II 484 at 2a; 111 II 471 at 1c p. 473; both with references). The Respondent wrongly argues that when the CAS considered that the Appellant accepted the legal recourse proposed by the IAAF this would be a factual finding which binds the Federal Tribunal. Throughout the award the CAS rather relied on the principle of trust to assume the Appellant's acceptance.

3.
Based on Art. 190 (2) (b) PILA, the Appellant argues that the CAS wrongly assumed jurisdiction.

3.1 The CAS reviewed jurisdiction on the basis of Art. R47 of the CAS-Code according to which a decision by a sport federation may be appealed to the CAS to the extent that the statutes or the regulations of the federation provide for that or if the parties entered into a "specific arbitration agreement[6]".

The CAS decided first that its jurisdiction could not be based on the statutes or on the applicable federation regulations. Whilst the Respondent was subject to the Appellant's rules and by reference to the Anti-Doping Rules and to the procedural rules of the IAAF, these drew however an important difference between National-Level[7] and International-Level[8] athletes as to doping tests and the possibility to appeal to the CAS. The Respondent was a National-Level Athlete[9] within the meaning of the applicable IAAF Anti-Doping Rules. As such, according to Art. 60.12 of the IAAF Competition Rules he was not entitled to appeal to the CAS as this was only open to international athletes according to Art. 60.11. The CAS also rejected the Respondent's argument that the possibility given to appeal to the South African Institute for Drug Free Sport would not satisfy the requirements of the rule of law due to existing conflicts of interest, especially since the South African courts had to decide in this respect according to the TAS and the submissions made in this respect were not such as to justify jurisdiction of the CAS.

The CAS then reviewed whether or not a specific arbitration agreement[10] could be found in the fax letter from Dr. C._____, the IAAF Anti-Doping Administrator of April 10, 2008, within the meaning of Art. R47 of the CAS Code. In this respect the CAS found that arbitration clauses had to meet the requirements of Art. 178 PILA and moreover stated that Swiss law applies to the issue of the occurrence of such a clause, something which is not put in question by any party (see Art. 178 (2) PILA).

The aforesaid letter was sent to the then legal representative of the Respondent and purported to persuade him to settle the matter by conceding a doping violation and acknowledging a two years ban. It contained particularly the following wording:

"I would remind you that the decision that will ultimately be taken by the relevant disciplinary commission of [the national athletics federation] after 16th May will still be subject to an appeal to the Court of Arbitration for Sport in Lausanne, on your initiative if you disagree with it or on the initiative of IAAF, if the decision is not in accordance with the IAAF Rules. This will inevitably lead to a costly and lengthy arbitration procedure until the final award is rendered by CAS."[11]

The Respondent rejected Dr. C._____'s offer, yet he relied on the excerpt quoted later as to the jurisdiction of the CAS. The CAS found with regard to the letter of April 10, 2008 that the Respondent, on the basis of the principle of trust, could have relied on an offer to enter into an arbitration agreement by the IAAF and that by appealing to the CAS he had acted accordingly. The Appellant would have been aware of the aforesaid letter and agreed to the appeal possibility offered by Dr. C._____ in the name of the IAAF. Moreover the Respondent

6. Translator's note : In English in the original text.
7. Translator's note : In English in the original text.
8. Translator's note : In English in the original text.
9. Translator's note : In English in the original text.
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11. Translator's note : In English in the original text.

could have understood the letter of April 10, 2008 as a reference to the procedure according to Art. 60.12 of the IAAF Competition Rules, which rules out an appeal to the CAS for national athletes and he could have assumed that the IAAF was making an exception to that provision for him, to the extent that it would authorize an appeal to the CAS based on Art. 60.11. In view of the long duration of the proceedings, more than two years in front of the Disciplinary Committee of the Appellant and based on the ongoing communication[12] between the Appellant and the IAAF, the Respondent could legitimately understand the behavior of both federations as meaning that they did not wish an appeal at the national level but a direct appeal to the CAS.

Moreover the decision of the Appellant's Disciplinary Committee of December 11, 2008 contained no indication as to an appeal and it did not dispute the contents of the IAAF letter. The existence of Dr. C._____'s letter of April 10, 2008 was known to the Appellant and to its Disciplinary Committee and the Disciplinary Committee should have advised the Respondent that a national appeal was the only one available, should it have thought that no direct appeal to the CAS was available. The Respondent could legitimately understand this silence as an approval by the Appellant of Dr. C._____'s letter.

The CAS considered the IAAF letter of April 10, 2008 to the then legal representative of the Respondent as a specific arbitration agreement[13] on that basis and found that it had jurisdiction on the Respondent's appeal.

3.2 The Federal Tribunal exercises free judicial review on the legal issue of jurisdiction according to Art. 190 (2) (b) PILA, including such material preliminary questions from which the determination of jurisdiction depends. Yet, even as to jurisdiction, this Court reviews the factual findings of the award under appeal only to the extent that some admissible grievances within the meaning of Art. 190 (2) PILA are brought against such factual findings or exceptionally when new evidence is taken into account (BGE 134 III 565 at 3.1 p. 567; 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733).

3.3 The first disputed issue in this case is whether or not the Respondent could legitimately (Art. 2 (1) ZGB[14]) understand the April 10, 2008 IAAF letter as an offer to enter into an arbitration agreement.

As the CAS correctly points out, an arbitration agreement must meet the requirements of Art. 178 PILA. Whilst the formal requirements of § (1) must be met on the one hand, the substantive requirements are determined in § (2) of that provision. The arbitral Tribunal examined the occurrence of an arbitration agreement on the basis of Swiss law pursuant to Art. 178 (2) PILA, which is not challenged by the parties.

The necessary contents of an arbitration clause are not defined by PILA. It is clear from the purpose of an arbitration clause that the intent of the parties must be expressed to submit existing or future disputes to an arbitral tribunal, *i.e.* not to a state court (BGE 130 III 66 at 3.1 p. 70; 129 III 675 at 2.3 p. 679 with references).

Akin to other legal transactions requiring compliance with some formal requirements, an arbitration clause (Art. 178 PILA) must be interpreted at first according to the general rules of interpretation (BGE 130 III 66 at 3.2 p. 71 ff with references). Furthermore it must be determined whether or not the contents of the contract as determined by the general methods of interpretation was expressed in the legally required format (BGE 122 III 361 at 4 p. 366). The thorough explanations of the CAS as to the issue of the form required and its reference to the generous case law of the Federal Tribunal as to the formal validity of arbitration clauses in the field of international arbitration (BGE 133 III 235 at 4.3.2.3 p. 244 ff) are accordingly relevant only to the extent that the interpretation of the statements at hand leads at all to the conclusion that a contract was concluded. By contrast, the developments in the award under review as to case law regarding the validity of global references to arbitration clauses contained in the statutes of a federation are not relevant (BGE 133 III 235 at 4.3.2.3 p. 244 ff; Judgment 4A_358/2009 of November 6, 2009 at 3.2.4; with references). On the one hand the applicability of the Federation Rules to the appeal (Art. 60.9 ff of the IAAF Competition Rules) is not at all in dispute (as according to the decision under appeal they do not provide for CAS jurisdiction in this case) and no reference can be deducted from the aforesaid letter of April 10, 2008 on the other hand.

12. Translator's note : In English in the original text.

13. Translator's note : In English in the original text.

14. Translator's note : ZGB is the German abbreviation for the Swiss Civil Code.

3.3.1 As indicated above (at 2.5.2) the CAS could not determine a factual consensus of the parties as to the arbitration clause in dispute. Accordingly it rightly interpreted it on the basis of the principle of trust the April 10, 2008 IAAF letter to the then representative of the Respondent and the Appellant's attitude (see BGE 132 III 268 at 2.3.2 p. 274 ff; 130 III 66 at 3.2 p. 71 ff; with references). The statements of the parties are accordingly to be interpreted as they could and should be understood on the basis of their wording and the context as well as under the overall circumstances (BGE 133 III 61 at 2.2.1 p. 67; 132 III 268 at 2.3.2 p 275; 130 III 417 at 3.2 p. 424 ff, 686 at 4.3.1 p. 689; with references).

The objective interpretation according to the principle of trust also determines whether or not a statement of intent exists at all (Gauch/Schluep/Schmid, Schweizerisches Obligationenrecht, Allgemeiner Teil, Bd. I, 9. Ed. 2008, Rz. 208; Alfred Koller, Schweizerisches Obligationenrecht, Allgemeiner Teil, 3. Ed. 2009, § 3 Rz. 184; Ingeborg Schwenzer, Schweizerisches Obligationenrecht, Allgemeiner Teil, 5. Ed. 2009, Rz. 27.43; Judgment 4A_437/2007 of February 5, 2008 at 2.4; see BGE 120 II 197 at 2b/bb p. 200; 116 II 695 at 2b p. 696).

Accordingly it must be determined whether or not a specific statement could be understood in good faith by the recipient as the expression of an intent to activate a legal transaction and to enter into a legally binding commitment towards him. An offer (Art. 39 ff OR[15]) is to be recognized only when the statement evidences a sufficient intent to be bound by the party making it, including the intent to be bound should the offer be accepted (Schwenzer, a.a.O, Rz. 28.09).

3.3.1.1 Dr. C._____ of the IAAF reminded the legal representative of the Respondent in the April 10, 2008 letter that the decision of the Disciplinary Committee, which would normally be taken after May 16, 2008 could still be appealed to the CAS and that such an appeal would inevitably lead to a costly and time consuming arbitration procedure before a final award could be reached. The introduction to the excerpt of the letter quoted by the CAS ("I would remind you that"[16]) cannot on the basis of its wording be understood as a statement of readiness to enter into a commitment towards the recipient but merely as a reference to the legal means available according to the writer. The choice of words ("will be subject to an appeal" "[t]his will lead to a costly and lengthy arbitration procedure", "final award is rendered by CAS")[17] suggests that the writer proceeded on the basis of a specific representation of the legal means available and wanted to draw the recipient's attention to their adverse consequences with regard to costs and duration of the proceedings. The wording chosen assumes that the legal recourse described indeed results from the procedural rules applicable and that they are known to the recipient of the letter.

Thus according to its wording the excerpt in dispute was to be understood as a reference to the procedural situation in the case at hand which had to be considered by the parties. One cannot deduct from that an offer to commit to appealing the decision of the Disciplinary Committee to an arbitral tribunal in deviation from the available legal recourse. The aforesaid excerpt contains no clue at all which could legitimate the recipient to assume that the writer wanted to commit himself procedurally in any way.

3.3.1.2 Nor do the circumstances justify to conclude in good faith that in the April 10, 2008 letter Dr. C._____ would have wanted to commit the IAAF and ultimately also the Appellant, to submit the existing dispute to an international arbitral tribunal as opposed to the legal recourses according to the Regulations.

Based on the factual findings of the CAS, which bind this Court (see Art. 105 (1) BGG) the letter from Dr. C. _____, the Anti-Doping Administrator of the IAAF was addressed to the then legal representative of the Respondent and purported to bring the proceedings to an end by settling them. In this respect Dr. C. _____ proposed in writing to dispose of the matter with a two years ban as long as the Respondent would admit to a doping violation. According to the award under review the Respondent rejected that offer. There is no basis in the factual findings of the CAS to hold that

15. Translator's note : OR is the German abbreviation for the Swiss Code of Obligations.

16. Translator's note : In English in the original text.

17. Translator's note : In English in the original text.

the parties discussed any additional items beyond the proposed settlement. The April 10, 2008 letter was rather limited to an offer to conclude the proceedings speedily against the acknowledgment of a doping offense. It is not perceptible that a dual offer would have been made to terminate the proceedings on the one hand and, in case a settlement could not be reached, to submit the dispute to the CAS on the other hand.

Under the circumstances of the written settlement offer of April 10, 2008 the reference to the jurisdiction of the CAS must be understood as a warning of the time consuming proceedings and the costs related thereto. It served as an argument to move the Respondent towards an acknowledgment of the violation of the rules against the assurance of a minimal sanction. A contingent offer to change the legal recourses available under the Regulations should the offer of a settlement be rejected cannot be seen there. The conclusion of the letter also supports this understanding when stating that it was not the intent of the IAAF to step into the disciplinary proceedings but to find a fair and timely settlement.

The letter took place during the disciplinary proceedings, roughly eight months before a decision in the case. The fact that the December 11, 2008 decision contained no indications as to an appeal was therefore not to be understood at the time by the recipient of the April 10, 2008 letter in good faith as an expectation worthy of protection of the legal recourse mentioned there. Besides it is not apparent to what extent the lack of a reference to the appeal procedure could justify jurisdiction of the CAS.

The Respondent and counsel had accordingly to understand the April 10, 2008 letter in good faith as follows: either he accepted the settlement proposal of the IAAF, whereby the ban retroactively ordered would run out as of April 24, 2008 already and the proceedings would come to an end, or he refused it and the disciplinary proceedings would run their course. There was no discussion of a change in the proper procedure in case the offer was rejected. From the reference quoted to an appeal to the CAS it is not possible to deduct an offer by the IAAF to open a legal recourse for the Respondent in case the settlement proposal was rejected, which would not have been otherwise available.

The award under review irrelevantly considered that the letter contained an implicit reference to Art. 60.11 or 60.12 of the IAAF Competition Rules, which provide for an appeal to the CAS only for international athletes, which could have been understood by the Respondent as meaning that for him – although a national athlete within the meaning of these provisions - there would be an exception to the applicable rules. It is inexplicable to what extent such a reference to the aforesaid provisions (the applicability of which is undisputed) could result from the letter. Even less recognizable is a specific exception from such provisions, and neither from the reference to unusually lengthy proceedings or the ongoing exchange of information between the Appellant and the IAAF.

3.3.1.3 Neither from the wording of Dr. C._____'s letter of April 10, 2008 nor from the overall context of the expressions contained there could an offer to conclude an arbitration agreement in favor of the CAS be deducted. The interpretation of the letter according to the principle of trust rather leads to the conclusion that the IAAF meant to bind itself legally only as to the offer of a settlement; from an objective point of view there is no recognizable intent there to be bound any further in case of rejection of the settlement proposal.

3.3.2 If the Respondent could not understand the letter of April 10, 2008 in good faith as an offer by the IAAF to submit the legal dispute to the CAS, neither could it accept any proposal and effectively enter into an arbitration agreement by filing an appeal to the CAS. Thus the conclusion of an arbitration agreement with the Appellant based on the aforesaid letter falls out of consideration as well. The issue as to the formal validity is therefore not to be addressed.

Neither is it necessary to deal with the issue that the CAS examined as to whether the IAAF could validly bind the Appellant by its actions. The explanations of the CAS are anyway contradictory when on the one hand the CAS assumes practically throughout the award that Dr. C._____ acted in the name of the IAAF whilst on the other hand reviewing the ratification of a representative's acts based on Art. 38 (1) OR.

Contrary to the award under review no valid arbitration agreement according to Art. 178 (2) PILA came into being between the parties. The CAS wrongly found that it had jurisdiction to decide the dispute at hand on the basis of the April 10, 2008 letter.

3.4 The Respondent argues that the CAS should have found that it had jurisdiction on a different basis.

He takes the view that contrary to the award under review he would have to be qualified as an "International-Level Athlete"[18] within the meaning of the IAAF Anti-Doping Rules, which is why he could appeal to the CAS.

3.4.1 It is undisputed between the Parties that the Respondent would have been entitled to appeal to the CAS according to Art. 60.11 of the IAAF Competition Rules should he be deemed an International-Level Athlete[19] according to that provision. The IAAF hand-book contains the following definition in this respect:

"International-Level Athlete

For the purposes of the Anti-Doping Rules (chapter 3) and Disputes (Chapter 4) an athlete, who is in the Registered Testing Pool for out-of-competition testing or who is competing in an International Competition under Rule 35.7"[20]

According to the factual findings of the award under review, which are disputed by neither party, the Respondent was not listed in the Registered Testing Pool[21]. The only disputed issue in this appeal is whether or not the status which the Respondent claims as an International-Level Athlete[22] could be based on his participating in an International Competition[23].

3.4.2 The arbitral award under review found that the Seoul Marathon was not listed on the IAAF list of the international events of the year 2006 but that in the following years it was upgraded and appears as of now on the International Competition[24] list. The CAS accurately stated that the qualification of an event as International Competition[25] and the status of a sportsman as International-Level Athlete[26] in connection with that could not have mere procedural meaning. The difference between national and international athletes is better relevant for their respective rights and obligations in the framework of the Anti-Doping Rules of the IAAF. Contrary to the Respondent's view the corresponding classification is not tantamount to a procedural rule which would be applicable to facts that took place before it came into force.

The Respondent's argument that at the time the arbitral proceedings were initiated at the beginning of 2009 the Seoul Marathon had been classified as an international competition by the IAAF, thus opening the way to an appeal to the CAS, is not convincing. The sample assessed by the CAS was taken during the 2006 Seoul Marathon which was not recognized as an international competition by the IAAF. The legal recourse available, relying on the qualification as an international competition according to Art. 60.11 of the IAAF Competition Rules, does not lead to the CAS simply because another competition conducted later in the same place is classified differently. The fact that the 2008 Seoul Marathon (and according to the award under review perhaps even the 2007 one) was recognized as an international competition by the IAAF does not change the fact that the 2006 event did not have that status. Moreover the procedural rule according to which only an international athlete was entitled to appeal to the CAS remained unchanged. Contrary to the Respondent's view, it is not because the legal recourse changed since the doping test under review that it should be applied retroactively.

It cannot be claimed that in this case there would be some complex jurisdictional issue due to the applicability of various national and federation rules as in the case mentioned in the answer to the appeal (4P.149/2003 of October 31st, 2003 at 2.2.2). Moreover the issue in the aforesaid case was the exhaustion of legal remedies before an appeal to the CAS and not its jurisdiction. Contrary to the Respondent's view nothing can be derived to his benefit from that case.

18. Translator's note : In English in the original text.
19. Translator's note : In English in the original text.
20. Translator's note : In English in the original text.
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25. Translator's note : In English in the original text.
26. Translator's note : In English in the original text.

Neither is the jurisdiction of the CAS justified by the argument that the IAAF itself informed the Appellant of the positive result of the doping test, thus making it an "IAAF test" within the meaning of Art. 36.5 of the IAAF Competition Rules, which could only be carried out in international competitions according to Art. 35.7. In the corresponding letter to the Appellant of April 13, 2006, the IAAF instead clearly stated according to the award under review that it behooved the Appellant to assess the test results, as prescribed for national competitions. The Respondent does not challenge that the provisional ban was issued by the Appellant as a national federation as prescribed in Art. 38.2 for national athletes. Also irrelevant is the reference to the fact that in the year 2006, marathon events were generally not conducted as international competitions by the IAAF due to an oversight and that his was corrected later. For what reasons the 2006 Seoul Marathon was not recognized as an international competition by the IAAF is not decisive. In any event it does not appear from the factual findings of the award under review that the 2006 Seoul Marathon would in fact have been treated by the IAAF as an international competition according to Art. 35.7 as to the doping tests conducted, even though it was not listed as such.

3.4.3 With regard to the jurisdiction of the CAS, the Respondent vainly relies on the principle of *lex mitior* according to Art. 25.2 of the WADA Anti-Doping Code. The principle means that as an exception to the principle of non-retroactivity, the new law is to be applied to a doping offence committed before its entry into force when it provides for a milder sanction than the previous rules. The Respondent makes no convincing demonstration with his reference to the fact that arbitral proceedings in front of the CAS, as opposed to national proceedings, would provide an independent, quick and inexpensive arbitral proceeding. As the Appellant rightly points out, the principle of *lex mitior* applies to sanctions in doping cases but not to changes in material regulations impacting the applicable appeal procedures indirectly.

It is not apparent to what extent on the basis of the aforesaid principle there would be a right to appeal to the CAS instead of to a national body.

3.4.4 When the CAS found that the Respondent was to be denied the status of an International-Level Athlete[27] and therefore it had no jurisdiction according to Art. 60.11 of the IAAF Competition Rules, it did not violate the law.

4.
The CAS wrongly found that it had jurisdiction on the basis of the April 10, 2008 letter. Its jurisdiction cannot rely on the applicable Federation Regulations either. The award of the CAS of July 24, 2009 is accordingly to be annulled as a consequence of the appeal being allowed and the CAS must be found to lack jurisdiction.

In view of the outcome of the proceedings, the Respondent must compensate the Appellant and pay for the costs of the proceedings (Art. 66 (1) and Art. 68 (2) BGG).

Therefore, the Federal Tribunal pronounces:

1.
The Appeal is admitted and the CAS award of July 24, 2009 is annulled.

2.
The CAS shall have no jurisdiction to decide the Respondent's appeal.

3.
The court costs set at CHF 5'000.- shall be paid by the Respondent.

4.
The Respondent shall pay to the Appellant an amount of CHF 6'000.- for the federal judicial proceedings.

5.
This judgment shall be notified in writing to the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, May 31, 2010

In the name of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:	The Clerk:
Klett	Leemann

27. Translator's note : In English in the original text.

4A_386/2010
Arrêt du 3 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	Alejandro Valverde Belmonte, recourant, représenté par Me Sébastien Besson, **contre** Agence Mondiale Antidopage (AMA), intimée, représentée par Mes François Kaiser et Yvan Henzer, & Union Cycliste Internationale (UCI), intimée, représentée par Me Philippe Verbiest, & Real Federación Española de Ciclismo (RFEC), intimée, représentée par Me Jorge Ibarrola.
Objet	arbitrage international; recours en matière civile contre la sentence rendue le 31 mai 2010 par le Tribunal Arbitral du Sport (TAS).

Faits

A.

A.a En mai 2004, une enquête pénale a été ouverte en Espagne pour faits de dopage («Opération Puerto»). Elle a abouti, deux ans plus tard, à l'arrestation du Dr Fuentes et d'autres personnes. Il leur était reproché d'avoir violé la législation espagnole sur la santé publique.

Le 29 août 2007, l'Union Cycliste Internationale (UCI), qui s'était portée partie civile dans la procédure pénale aux côtés de l'Agence Mondiale Antidopage (AMA), a demandé à la Fédération espagnole de cyclisme, la Real Federación Española de Ciclismo (RFEC), de mettre en oeuvre une procédure disciplinaire contre Alejandro Valverde Belmonte, coureur cycliste professionnel de nationalité espagnole. Elle se fondait, pour justifier sa requête, sur le fait que, dans le cadre de l'Opération Puerto, les enquêteurs avaient saisi, le 6 mai 2006, dans le laboratoire du Dr Fuentes, une poche contenant du sang supposé appartenir à ce coureur cycliste (ci-après: la poche n° 18).

Le 7 septembre 2007, le Comité Nacional de Competición y Disciplina Deportiva (CNCDD), autorité compétente pour les affaires de dopage au sein de la RFEC, a décidé de ne pas ouvrir de procédure disciplinaire à l'encontre d'Alejandro Valverde Belmonte. Le même jour, le président de la RFEC a pris une décision identique à celle du CNCDD.

A.b A la même époque, les autorités italiennes menaient, elles aussi, des opérations antidopage. Le 21 juillet 2008, lors du passage du Tour de France en Italie, Alejandro Valverde Belmonte a fourni un échantillon sanguin à l'occasion d'un contrôle effectué sur plusieurs coureurs cyclistes par le Comitato Olimpico Nazionale Italiano (CONI).

Le 30 janvier 2009, des membres de la police judiciaire italienne, dûment autorisés par le juge d'instruction espagnol, ont prélevé des échantillons de la poche n° 18 dans un laboratoire

de Barcelone. L'analyse a permis d'établir une correspondance entre ces échantillons et celui qui avait été prélevé le 21 juillet 2008 sur le coureur cycliste espagnol.

Par décision du 11 mai 2009, le Tribunale Nazionale Antidoping du CONI a interdit à Alejandro Valverde Belmonte, reconnu coupable de violation des normes antidopage italiennes (NSA), de participer, pour une durée de deux ans, à des compétitions organisées par le CONI ou d'autres fédérations sportives nationales sur le territoire italien.

Statuant par sentence du 16 mars 2010, sur appel du coureur cycliste, le Tribunal Arbitral du Sport (TAS) a confirmé la décision de suspension.

Par arrêt du 29 octobre 2010, le Tribunal fédéral a rejeté, dans la mesure où il était recevable, le recours en matière civile formé par Alejandro Valverde Belmonte contre cette sentence arbitrale (cause 4A_234/2010).

B.
En octobre 2007, l'AMA et l'UCI ont chacune déposé un appel auprès du TAS contre les décisions prises le 7 septembre 2007 par le CNCDD et le président de la RFEC. Sur le fond, elles ont toutes deux conclu, en dernier lieu, à ce qu'Alejandro Valverde Belmonte soit suspendu pour une durée de deux ans et à ce que tous les résultats obtenus par lui depuis le 4 mai 2004 soient annulés.

Le coureur cycliste a conclu à l'irrecevabilité des appels et la RFEC à leur rejet.

Une Formation arbitrale, composée de Me Otto L.O. de Witt Wijnen (président), avocat à Bergambacht (Pay-Bas), du Prof. Richard H. McLaren (arbitre désigné par les appelants), avocat à London (Canada), et du Dr Miguel Angel Fernández Ballesteros (arbitre désigné par les intimés), Professeur à Madrid (Espagne), a été constituée le 28 janvier 2008 (ci-après: la Formation).

Le 10 juillet 2008, la Formation a rendu une sentence préliminaire (preliminary award) dans laquelle elle a notamment admis la compétence du TAS et la recevabilité des deux appels.

Après avoir instruit la cause au fond, la Formation a rendu, le 31 mai 2010, à la majorité de ses membres, une sentence arbitrale par laquelle, admettant partiellement les appels, elle a reconnu Alejandro Valverde Belmonte coupable de violation de l'art. 15.2 du règlement antidopage de l'UCI (version 2004) et l'a suspendu pour une période de deux ans à compter du 1er janvier 2010. Elle a, en outre, rejeté les requêtes de l'UCI et de l'AMA tendant à l'annulation des résultats obtenus en compétition par le coureur cycliste espagnol avant le 1er janvier 2010.

Les motifs énoncés au soutien de cette sentence arbitrale seront indiqués plus loin dans la mesure utile à l'examen des griefs formulés à l'encontre de celle-ci.

C.
Le 29 juin 2010, Alejandro Valverde Belmonte a interjeté un recours en matière civile au Tribunal fédéral en vue d'obtenir l'annulation de la sentence du 31 mai 2010 et de faire constater que le TAS n'était pas compétent pour statuer sur le fond.

Dans leurs réponses respectives des 18 et 21 octobre 2010, l'AMA, l'UCI et le TAS ont tous conclu au rejet du recours. La RFEC n'a pas déposé de réponse dans le délai qui lui avait été imparti à cette fin.

Par lettre du 22 novembre 2010, le recourant a renouvelé la requête procédurale, formulée dans son mémoire de recours, tendant à ce que le Tribunal fédéral ordonne au TAS de produire toute la correspondance écrite ou électronique échangée avec l'arbitre Fernández Ballesteros.

D.
Le 29 juin 2010, le recourant a déposé auprès du TAS une requête d'interprétation ou de correction de la sentence du 31 mai 2010. Par décision du 9 juillet 2010, le Président suppléant de la Chambre d'appel du TAS a refusé d'entrer en matière sur cette demande.

Le recourant a également interjeté un recours en matière civile au Tribunal fédéral contre ladite décision en date du 28 juillet 2010 (cause 4A_420/2010). Il a requis la jonction de cette cause avec la cause 4A_386/2010. Cette requête a été rejetée par ordonnance présidentielle du 4 octobre 2010, à l'instar de la requête du TAS des 17 et 20 septembre 2010 tendant à ce que la cause 4A_420/2010 soit suspendue jusqu'à droit connu dans la procédure 4A_386/2010.

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. Dans le mémoire qu'il

a adressé au Tribunal fédéral, le recourant a employé le français. 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 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 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).

La sentence attaquée revêt un caractère final et peut donc être attaquée pour l'ensemble des motifs prévus à l'art. 190 al. 2 LDIP. Les griefs soulevés par le recourant figurent dans la liste exhaustive de ces motifs-là.

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, en effet, remplie dès lors que le recourant allègue, sans être contredit par les intimés, que la suspension prononcée à son encontre lui cause un préjudice de 30'000 fr. au minimum.

Le recourant est directement touché par la sentence attaquée, car celle-ci lui interdit de participer à quelque compétition sportive que ce soit pour une durée de deux ans et annule les résultats qu'il a obtenus depuis le 1er janvier 2010. Il a ainsi un intérêt personnel, actuel et juridiquement protégé à ce que cette sentence n'ait pas été rendue en violation des garanties découlant de l'art. 190 al. 2 LDIP, ce qui lui confère la qualité pour recourir (art. 76 al. 1 LTF).

Déposé en temps utile (art. 100 al. 1 LTF) et dans la forme prévue par la loi (art. 42 al. 1 LTF), le recours est recevable.

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 A titre liminaire, le recourant indique qu'il complétera l'état de fait, dans la mesure utile, au moyen des preuves présentées durant l'arbitrage, celles-ci faisant partie du dossier de la cause. Il ajoute que ce procédé a été avalisé par le Tribunal fédéral dans une jurisprudence récente (arrêt 4A_600/2008 du 20 février 2009 consid. 3).

Cet avis ne saurait être partagé. Le recourant le fonde sur une unique opinion doctrinale qui n'est autre que celle de son propre conseil (SÉBASTIEN BESSON, Le recours contre la sentence arbitrale internationale selon la nouvelle LTF [aspects procéduraux], in Bulletin de l'Association Suisse de l'Arbitrage [ASA] 2007 p. 2 ss, 27 n° 59) et sur un précédent dont il donne une interprétation par trop extensive. L'arrêt qu'il cite avait, en effet, ceci de particulier que le prononcé attaqué se bornait à constater le retrait irrévocable d'une déclaration d'appel en raison du défaut de paiement de la provision requise par le TAS. Il était donc nécessaire, dans ce cas d'espèce, que le Tribunal fédéral examinât la manière dont s'était déroulée la procédure conduite par le TAS, telle qu'elle ressortait du dossier de l'arbitrage, pour statuer sur les griefs dirigés contre ce prononcé-là.

Il convient de s'en tenir aux principes susmentionnés. La mission du Tribunal fédéral, lorsqu'il est saisi d'un recours en matière civile visant une sentence arbitrale internationale, ne consiste pas à refaire le procès, à l'instar d'une juridiction d'appel, mais uniquement à examiner si les griefs recevables formulés à l'encontre de ladite sentence sont fondés ou non. Permettre aux parties d'alléguer d'autres faits que ceux qui ont été constatés par le tribunal arbitral, en dehors des cas exceptionnels réservés par la jurisprudence, ne serait plus compatible avec une telle mission, ces faits fussent-ils établis par les éléments de preuve figurant dans le dossier de l'arbitrage (arrêt 4A_234/2010 du 29 octobre 2010 consid. 2.2).

4.

4.1 Dans un premier moyen, qui a trait à la composition de la Formation, le recourant expose que, à un certain stade de la procédure et avant le prononcé de la sentence attaquée, l'arbitre Fernández Ballesteros a démissionné et n'a plus été en mesure de participer aux délibérations relatives à ladite sentence. Selon lui, l'absence de signature des coarbitres, les informations parues dans la presse espagnole et les réponses ambiguës du TAS démontreraient l'existence d'un dysfonctionnement important dans le processus de délibération.

A l'appui de ses dires, le recourant a produit un article publié le 2 juin 2010 dans l'édition électronique du journal espagnol El País, où il est fait état de la démission de l'arbitre précité (pce n° 25), ainsi que la correspondance échangée à ce sujet par le mandataire espagnol du recourant et le TAS (pces nos 27 à 30). Invoquant son droit d'être entendu, il requiert que le Tribunal fédéral ordonne au greffe du TAS et à la Formation de produire tout document «relatif à la démission de l'arbitre Ballesteros et/ou à la délibération de la sentence attaquée», en particulier les courriers écrits ou électroniques auxquels il est fait référence dans la réponse du TAS et dans le «Statement» dudit arbitre du 15 octobre 2010 annexé à celle-ci, puis qu'il lui accorde un délai approprié pour compléter sa motivation après réception de ces pièces (recours, n. 81, 83 à 86, 101 et 152; lettre du 22 novembre 2010).

Sous l'angle juridique, le recourant expose que, selon la jurisprudence fédérale, le droit à la composition correcte du tribunal est violé si, malgré la démission, même injustifiée, d'un arbitre, les autres membres du tribunal poursuivent la procédure sans qu'une convention les y autorise (**ATF 117 Ia 166**). Tel serait le cas en l'espèce, puisque le Code de l'arbitrage en matière de sport (ci-après: le Code) ne prévoit pas la possibilité pour deux arbitres de continuer la procédure en cas de démission du troisième arbitre. Cette situation se distinguerait, au demeurant, de celle, non visée par l'art. 190 al. 2 let. a LDIP, dans laquelle l'arbitre refuse de collaborer ou fait de l'obstruction, notamment en s'abstenant sans raison valable de participer aux délibérations du tribunal arbitral (**ATF 128 III 234** consid. 3b/aa). Dès lors, à suivre le recourant, il y aurait matière à annulation de la sentence litigieuse sur la base de l'art. 190 al. 2 let. a LDIP ou, alternativement, en application de l'art. 190 al. 2 let. d ou e LDIP.

4.2

4.2.1 Dans sa réponse, l'AMA expose que la démission d'un arbitre en cours de procédure est un problème connu auquel la doctrine la plus autorisée et plusieurs règlements en matière d'arbitrage international préconisent de remédier en admettant que les arbitres restants statuent seuls, à tout le moins lorsque la démission intervient au stade des délibérations. Selon elle, l'art. R59 du Code ne fait pas obstacle à l'adoption d'une telle solution par le TAS.

L'AMA souligne, par ailleurs, que la démission de l'arbitre Fernández Ballesteros n'est pas établie. Elle ajoute que, même dans l'hypothèse inverse, la démission de cet arbitre n'aurait de toute façon pas été donnée conformément aux règles du droit suisse, car le juge ordinaire n'a pas été requis de la ratifier.

Pour le surplus, rien n'indiquerait, selon cette intimée, que l'arbitre en question n'aurait pas participé aux délibérations de la Formation ou qu'il n'aurait pas été invité à le faire. Il s'ensuit que la sentence attaquée a été rendue par un tribunal arbitral régulièrement composé, de l'avis de cette partie.

4.2.2 L'UCI allègue, de son côté, qu'elle n'a pas été informée d'une éventuelle démission de l'arbitre Fernández Ballesteros. Elle conteste, en outre, qu'un article de presse puisse avoir une quelconque force probante à cet égard, tout en se réservant la possibilité de compléter son argumentation si d'autres éléments devenaient disponibles.

4.2.3 Pour sa part, le TAS résume, dans sa réponse (n. 8 à 11), les circonstances relatives à la prétendue démission de l'arbitre espagnol. Il expose, à ce propos, que les délibérations de la Formation se sont terminées le 25 mai 2010 avec la circulation du projet final de la sentence en vue d'une dernière relecture; que, le 28 mai 2010, l'arbitre Fernández Ballesteros a offert au Secrétaire général du TAS de démissionner de la Formation; que cette proposition a été refusée; que son auteur n'a pas cherché ensuite à envoyer une lettre de démission formelle à qui de droit (Président de la Chambre d'appel du TAS, suppléant du Président, Secrétaire général du TAS); que la sentence finale, rendue à la majorité, a été notifiée aux parties le 31 mai 2010; qu'en date du 2 juin 2010, un article publié par le journal espagnol El País a révélé, sans autres précisions, que l'arbitre Fernández

Ballesteros aurait informé son entourage de sa démission de la Formation; que cet article est resté sans suite et qu'aucun autre média n'a évoqué la question de l'éventuelle démission de cet arbitre; enfin, que, dans un échange de courriers ayant eu lieu au mois de juin 2010, le TAS a confirmé au conseil espagnol du recourant qu'il n'y avait pas eu de lettre formelle de démission de cet arbitre.

A la réponse du TAS était annexé un document intitulé «STATEMENT», rédigé en anglais et signé par le Professeur Fernández Ballesteros, le 15 octobre 2010, dans lequel ce dernier confirme qu'il a offert sans succès sa démission de la Formation au Secrétaire général du TAS, qu'il n'a pas contesté la décision de celui-ci et qu'il considère que la sentence attaquée ne devrait pas être annulée du chef d'une prétendue composition irrégulière de la Formation (annexe n° 4).

En droit, le TAS conteste que la sentence du 31 mai 2010 ait été rendue par une Formation irrégulièrement composée, étant donné qu'il n'y a pas eu de démission formelle de l'arbitre Fernández Ballesteros, les allégations du recourant ne se fondant que sur des rumeurs colportées par un seul journal espagnol. Il ajoute que le fait que ladite sentence n'a été signée que par le Président de la Formation est sans pertinence, car cette possibilité, prévue expressément par l'art. R59 al. 1 du Code, est assez souvent utilisée, en particulier lorsque la décision est rendue à la majorité.

Quant à la requête procédurale du recourant, le TAS, tout en admettant qu'il n'aurait a priori pas de raison particulière de s'y opposer, estime néanmoins qu'elle se fonde sur des indices qui ne sont pas suffisamment solides. De plus, comme l'arbitre Fernández Ballesteros a déjà lui-même donné sa version des faits, il lui paraît disproportionné d'ordonner une enquête approfondie, laquelle reviendrait de surcroît à percer le secret des délibérations de la Formation, qui doit normalement être garanti dans une procédure d'arbitrage conduite par le TAS.

4.3

4.3.1 Dans l'arrêt publié aux **ATF 117 Ia 166**, le Tribunal fédéral a examiné le problème de la démission d'un arbitre sans justes motifs. Il a jugé que, en pareille hypothèse, la procédure ne saurait se poursuivre, sans l'accord des parties, en l'absence du démissionnaire et avant qu'un nouvel arbitre ait été désigné. Par conséquent, si les autres membres du tribunal arbitral décident, en dépit de la démission de leur collègue, de poursuivre la procédure sans y avoir été préalablement autorisés par les parties, le tribunal arbitral n'est plus régulièrement constitué (consid. 6c).

Ultérieurement, le Tribunal fédéral a toutefois précisé qu'il convenait de bien distinguer de cette situation celle où l'arbitre désigné par une partie ne renonce pas formellement à assumer ses fonctions mais refuse de collaborer ou fait de l'obstruction, notamment en s'abstenant de participer sans raison valable aux délibérations du tribunal arbitral. Dans cette seconde hypothèse, il est communément admis que le tribunal arbitral continue d'être constitué régulièrement et que l'arbitre récalcitrant ne peut pas bloquer le collège d'arbitres lorsque celui-ci décide, à la majorité de ses membres, de poursuivre la procédure et de rendre une sentence, le cas échéant par voie de circulation (**ATF 128 III 234** consid. 3b/aa p. 238).

La problématique dite du «tribunal arbitral tronqué» a fait couler beaucoup d'encre (Antonio Rigozzi, L'arbitrage international en matière de sport, 2005, n° 1001). Une partie de la doctrine, très critique à l'égard du premier des deux arrêts susmentionnés, considère que le tribunal arbitral peut valablement délibérer sans la participation de l'arbitre qui, ayant démissionné sans justes motifs, a été sommé de reprendre sa mission par l'autorité compétente (cf., parmi d'autres, Berger/Kellerhals, International and Domestic Arbitration in Switzerland, 2e éd. 2010, nos 869 et 870). D'autres auteurs - l'opinion dominante, selon Poudret/Besson (Comparative law of international arbitration, 2e éd. 2007, n° 738 p. 657) - tiennent, en revanche, pour inéluctable le remplacement de l'arbitre démissionnaire, à moins que les parties ne soient convenues du contraire ou ne soient soumises à un règlement permettant de s'en passer (cf., notamment, Kaufmann-Kohler/Rigozzi, Arbitrage international, 2e éd. 2010, n° 413c).

4.3.2 En l'espèce, il n'est pas nécessaire d'examiner plus avant cette question délicate. Force est, en effet, de constater que la prétendue démission de l'arbitre Fernández Ballesteros n'est pas établie. Aussi bien, il ressort du «STATEMENT» précité que l'intéressé a certes offert sa démission, mais que celle-ci lui a été refusée et qu'il ne s'est pas opposé à ce refus.

Il faut en déduire que l'arbitre en question faisait toujours partie de la Formation lorsque la sentence attaquée a été rendue, de sorte qu'il n'y a pas matière à appliquer la jurisprudence controversée de l'**ATF 117 Ia 166** in casu, ladite sentence n'émanant pas d'un tribunal arbitral «tronqué». Pour le surplus, rien ne permet d'affirmer que l'arbitre en question n'ait pas été mis en mesure de participer régulièrement aux délibérations de la Formation. La simple affirmation contraire du recourant, fondée sur une coupure de presse isolée, n'y change rien. Il en va de même de sa remarque selon laquelle l'absence de signature des coarbitres au pied de la sentence serait très inhabituelle dans la pratique du TAS: d'une part, l'art. R59 al. 1 du Code dispose que la signature du Président de la Formation suffit; d'autre part, le Secrétaire général du TAS, qui est le mieux placé pour constater la chose, indique qu'il s'agit là d'une «possibilité qui, dans la pratique, se produit relativement souvent...» (réponse, n. 15).

Il n'y a pas lieu d'ordonner les mesures d'instruction requises par le recourant. La Cour de céans considère comme suffisantes les explications fournies sur le point litigieux par l'arbitre lui-même dans son «STATEMENT» du 15 octobre 2010. Dans sa lettre du 22 novembre 2010, le conseil du recourant ne fournit d'ailleurs pas de justification particulière à sa requête de production de pièces et il n'argue pas de fausses les affirmations de l'arbitre espagnol.

Cela étant, le moyen fondé sur l'art. 190 al. 2 let. a LDIP sera rejeté, tout comme les moyens alternatifs, d'ailleurs non motivés, tirés de l'art. 190 al. 2 let. d ou e LDIP.

5.

5.1

5.1.1 Invoquant l'art. 190 al. 2 let. b LDIP, le recourant reproche ensuite au TAS d'avoir outrepassé ses pouvoirs en statuant «au-delà de l'objet de la première décision portée en appel devant lui». La motivation de son grief peut être résumée comme il suit.

La procédure d'appel, couverte par la convention d'arbitrage, est limitée, ratione materiae, par l'objet de la décision dont est appel. Elle est, en effet, une voie de recours et la mission du TAS, dans ce cadre-là, consiste uniquement à contrôler les décisions des associations dans certains cas, non pas à se substituer aux organes de ces associations.

En l'espèce, la décision portée devant le TAS était celle du CNCDD de ne pas donner suite à la requête de l'UCI tendant à l'ouverture d'une procédure disciplinaire à l'encontre du recourant. Or, le TAS au lieu de se contenter de vérifier si cette décision était justifiée ou non, est entré en matière sur le fond et a sanctionné le cycliste espagnol, statuant ainsi au-delà de sa compétence.

De surcroît, la décision du CNCDD, qui ne comprenait pas les indications prescrites par les art. 242 et 243 du Règlement antidopage de l'UCI, version 2004 (ci-après: le Règlement UCI), n'était pas couverte par la convention d'arbitrage, soit l'art. 280 du Règlement UCI, ce qui constitue un motif supplémentaire d'incompétence.

Il convient d'observer, enfin, que le recourant a d'emblée soulevé l'exception d'incompétence, conformément à l'art. 186 al. 2 LDIP, et que la sentence préliminaire du 10 juillet 2008 ne tranchait pas la question de compétence présentement litigieuse, si bien que le recourant n'avait aucune raison de l'attaquer.

5.1.2 Contrairement au recourant, l'AMA soutient, dans sa réponse, que la sentence préliminaire précitée a scellé ladite question. Elle considère, en outre, que l'intéressé commet un abus de droit en revenant sur celle-ci, du moment qu'il a expressément accepté, dans sa réponse du 31 juillet 2009, i.e. postérieurement au prononcé de la sentence préliminaire, que le TAS statue sur le fond.

Pour l'AMA, la compétence du TAS n'est, de toute façon, pas sujette à caution. Elle résulte, d'une manière générale, du Règlement UCI et, sur le point controversé, de l'art. R57 du Code qui permet au TAS de substituer sa décision à celle prise en première instance.

Par surabondance, l'AMA relève que le recourant n'a jamais prétendu qu'il n'y aurait pas de décision au sens de l'art. 242 du Règlement UCI, partant qu'il ne saurait avancer aujourd'hui un argument qu'il aurait dû présenter au plus tard lorsque le TAS avait statué sur sa compétence.

5.1.3 A l'instar de l'AMA, l'UCI soutient, elle aussi, que le grief d'incompétence soulevé par le recourant est irrecevable pour cause de forclusion. Selon elle, le TAS aurait admis sa compétence sans aucune restriction dans sa

sentence préliminaire, ce qu'il aurait d'ailleurs confirmé au n. 5.9 de sa sentence finale.
A titre subsidiaire, l'UCI souligne qu'il ne peut y avoir de doute quant à la compétence du TAS pour connaître du fond du litige. Pour étayer cette affirmation, elle se réfère, en particulier, à l'art. 289 du Règlement UCI dont elle déduit le pouvoir du TAS de juger les affaires de novo.

5.1.4 Le TAS ne s'est pas déterminé sur le point litigieux dans sa réponse.

5.2 Saisi du grief d'incompétence, le Tribunal fédéral examine librement les questions de droit, y compris les questions préalables, qui déterminent la compétence ou l'incompétence du tribunal arbitral (**ATF 133 III 139** consid. 5 p. 141 et les arrêts cités).

Le recours pour le motif prévu à l'art. 190 al. 2 let. b LDIP est ouvert lorsque le tribunal arbitral a statué sur des prétentions qu'il n'avait pas la compétence d'examiner, soit qu'il n'existât point de convention d'arbitrage, soit que celle-ci fût restreinte à certaines questions ne comprenant pas les prétentions en cause (extra potestatem) (**ATF 116 II 639** consid. 3 in fine p. 642). Un tribunal arbitral n'est en effet compétent, entre autres conditions, que si le litige entre dans les prévisions de la convention d'arbitrage et que lui-même n'excède pas les limites que lui assignent la requête d'arbitrage et, le cas échéant, l'acte de mission (arrêt 4A_210/2008 du 29 octobre 2008 consid. 3.1 et les références).

Aux termes de l'art. 186 al. 2 LDIP, l'exception d'incompétence doit être soulevée préalablement à toute défense au fond. Il s'agit là d'un cas d'application du principe de la bonne foi, ancré à l'art. 2 al. 1 CC, qui régit l'ensemble des domaines du droit, y compris la procédure civile. Enoncée différemment, la règle posée à l'art. 186 al. 2 LDIP implique que le tribunal arbitral devant lequel le défendeur procède au fond sans faire de réserve est compétent de ce seul fait. Dès lors, celui qui entre en matière sans réserve sur le fond dans une procédure arbitrale contradictoire portant sur une cause arbitrable reconnaît, par cet acte concluant, la compétence du tribunal arbitral et perd définitivement le droit d'exciper de l'incompétence dudit tribunal. Toutefois, le défendeur peut se déterminer à titre éventuel sur le fond, pour le cas où l'exception d'incompétence ne serait pas admise, sans que pareil comportement vaille acceptation tacite de la compétence du tribunal arbitral (**ATF 128 III 50** consid. 2c/aa p. 57 s. et les références).

Si une partie entend contester une décision incidente du tribunal arbitral sur sa propre compétence, elle doit attaquer cette décision par un recours immédiat, au sens de l'art. 190 al. 3 LDIP, sous peine de forclusion (**ATF 130 III 66** consid. 4.3 p. 75; **121 III 495** consid. 6d p. 502 et les références).

5.3 Appliqués au cas particulier, ces principes jurisprudentiels commandent de faire les remarques suivantes.

5.3.1 Il est constant que, lorsque l'AMA et l'UCI ont interjeté appel auprès du TAS en octobre 2007 contre les décisions du CNCDD et du président de la RFEC, le recourant a d'emblée contesté la compétence du TAS, en conformité avec les art. 186 al. 2 LDIP et R55 du Code. Il ne saurait donc encourir de forclusion du chef du comportement adopté par lui in limine litis.

5.3.2 Le 10 juillet 2008, la Formation a rendu une sentence préliminaire portant, entre autres points, sur sa propre compétence. Le recourant n'a pas attaqué cette sentence. Dès lors, à supposer que la question de compétence qu'il soulève dans le présent recours ait déjà été tranchée à l'époque par la Formation, il serait déchu du droit de la soumettre à l'examen du Tribunal fédéral. Pour vérifier si cette supposition correspond ou non à la réalité, il convient d'interpréter la sentence préliminaire.

Certes, comme le relève l'AMA, le chiffre 1 du dispositif de cette sentence énonce ce qui suit: «The CAS has jurisdiction». L'UCI a sans doute aussi raison lorsqu'elle souligne que cette phrase ne contient aucune limitation. Elle a tort, en revanche, quand elle soutient que les motifs de ladite sentence ne contiendraient rien qui puisse donner à penser «qu'une quelconque partie de la compétence serait encore à discuter» (réponse, n. 28). En effet, il faut admettre, avec le recourant, que la sentence préliminaire du 10 juillet 2008 a tranché uniquement la compétence du TAS au regard des art. 9 et 10 du Règlement UCI, qui règlent le problème de la compétence de l'UCI en cas de violations du règlement antidopage ne concernant pas un prélèvement d'échantillon. Il s'est agi, plus particulièrement, pour la Formation d'interpréter le terme discovered utilisé dans la version anglaise de chacune de ces deux dispositions. Ainsi, la sentence préliminaire ne tranchait en aucun cas la question de savoir si le TAS était compétent, non seulement pour annuler les

décisions du CNCDD et du président de la RFEC et leur renvoyer la cause pour nouvelles décisions, mais encore pour se prononcer lui-même sur le fond. La remarque faite par la Formation au n. 5.9 de sa sentence finale, qui va apparemment en sens contraire, n'infirme en rien cette conclusion, car, si tel n'était pas le cas, on ne comprendrait pas pourquoi la Formation a consacré plusieurs paragraphes de cette sentence à la démonstration de son pouvoir décisionnel (The Issues to be Decided: The Scope of Review; n. 7) et au problème de la double instance (The question of the two instances; n. 8).

D'où il suit que le recourant ne peut se voir opposer le fait de n'avoir pas recouru contre la sentence préliminaire, laquelle ne traitait le problème de la compétence qu'in parte qua.

5.3.3 De même l'intéressé n'est-il pas forclos, quoi qu'en dise l'AMA, pour avoir conclu, dans son mémoire de réponse du 31 juillet 2009, à ce qu'il soit déclaré innocent, si une décision était prononcée sur le fond (ch. 4: «If a decision is announced on the merits of the case, to declare Alejandro Valverde innocent.»). En effet, ladite conclusion n'avait qu'un caractère subsidiaire par rapport à la conclusion principale visant à faire constater l'irrecevabilité des appels de l'UCI et de l'AMA, conclusion à l'appui de laquelle le recourant alléguait, entre autres motifs, que la compétence du TAS s'épuisait dans une éventuelle injonction faite à la RFEC de commencer une procédure disciplinaire (mémoire de réponse, p. 17).

5.3.4 En l'espèce, il n'est pas contesté que le TAS est l'autorité d'appel compétente selon le Règlement UCI. Le recourant ne remet pas davantage en cause sa soumission à la juridiction du TAS selon le mécanisme de la clause arbitrale par référence (cf. **ATF 133 III 235** consid. 4.3.2.3).

A teneur de l'art. 280 let. a du Règlement UCI, il peut être fait appel des «décisions de l'instance d'audition de la fédération nationale en vertu de l'art. 242». Le recourant soutient que la décision du CNCDD ne contenait pas les indications prescrites par cette dernière disposition et par l'art. 243 du Règlement UCI. Pour lui, la décision en question n'était ainsi pas couverte par une convention d'arbitrage (en l'occurrence, l'art. 280 du Règlement UCI), ce qui constitue un motif supplémentaire d'incompétence du TAS. C'est le lieu d'observer, avec l'UCI (réponse, n. 42) et l'AMA (réponse, n. 37), que l'intimé n'a pas fait valoir pareil argument avant le prononcé de la sentence préliminaire sur la compétence. La Formation a du reste relevé dans cette décision incidente que, si sa compétence était donnée sur la base des art. 9 et 10 du Règlement UCI, elle le serait aussi d'après le chapitre XI du même règlement où figure l'art. 280 précité (n. 6.2). Par conséquent, le recourant n'est plus recevable à dénoncer la prétendue violation de cette dernière disposition. Il ne précise pas, de surcroît, pourquoi la décision, au sens de l'art. 280 let. a du Règlement UCI, devrait également contenir les indications prescrites par l'art. 243 du Règlement UCI, que la première de ces deux dispositions ne mentionne pas, pas plus qu'il n'expose quelles sont les exigences de forme posées par l'art. 242 du Règlement UCI ni en quoi la décision du CNCDD les méconnaîtrait. Il y a là une seconde cause d'irrecevabilité de cette branche du moyen considéré.

La jurisprudence préconise de ne pas admettre trop facilement qu'une convention d'arbitrage a été conclue, si ce point est contesté. Cependant, une fois le principe de l'arbitrage acquis, elle fait preuve de souplesse quant à l'étendue du litige couvert par la convention d'arbitrage, même si cette interprétation large, conforme aux principes d'utilité et d'économie de la procédure, ne saurait impliquer une présomption en faveur de la compétence des arbitres (arrêt 4A_562/2009 du 27 janvier 2010 consid. 2.1 et les références). En l'espèce, il est vrai que la décision du CNCDD de ne pas ouvrir une procédure disciplinaire à l'encontre du recourant constituait une décision de non-entrée en matière, à l'instar de la décision identique prise le même jour par le président de la RFEC. Cela n'interdisait cependant nullement au TAS, s'il estimait cette décision injustifiée, de statuer lui-même sur le fond et d'infliger une sanction disciplinaire au coureur cycliste espagnol pour violation des règles antidopage. Semblable compétence découlait de l'art. R57 al. 1 du Code (sur ce point, cf. Rigozzi, op. cit., nos 1079 ss). Cette disposition énonce que «la Formation revoit les faits et le droit avec plein pouvoir d'examen» et qu'elle peut «soit rendre une nouvelle décision se substituant à la décision attaquée, soit annuler cette dernière et renvoyer la cause à l'autorité qui a statué en dernier». Le TAS a opté pour la première de ces deux solutions. On ne discerne pas à quel titre il pourrait se le voir reprocher. Contrairement à ce que soutient le recourant, une telle solution n'est pas du tout incompatible

avec la nature de la procédure d'appel. C'est bien plutôt l'une des caractéristiques de ce moyen de droit que d'être une voie de réforme permettant à l'instance supérieure de prononcer elle-même sur le fond. La solution choisie par le TAS ne va pas non plus à l'encontre de la mission de cette juridiction arbitrale, quoi qu'en dise le recourant: elle est propre à favoriser une liquidation rapide des litiges et peut constituer le moyen adéquat de remédier au refus catégorique d'une association sportive nationale d'ouvrir une procédure disciplinaire contre un athlète ressortissant du pays où elle a son siège.

Cela étant, le moyen tiré de l'incompétence du TAS sera rejeté en tant qu'il est recevable.

6.

6.1 Le grief ultérieur est intitulé «Manque d'indépendance et d'impartialité du TAS (Art. 190 al. 2 let. a LDIP), ou violation du droit d'être entendu ou de l'ordre public (Art. 190 al. 2 let. d et e LDIP)».

Le recourant précise que ce grief multiforme est le pendant, du point de vue de la constitution du tribunal arbitral, du grief précédent. Il reproche, en substance, au TAS d'avoir méconnu les garanties découlant de l'art. 7 ch. 2 let. d.i de la Convention contre le dopage conclue à Strasbourg le 16 novembre 1989 (entrée en vigueur pour la Suisse le 1er janvier 1993; RS 0.812.122.1), des art. 225 ss du Règlement UCI et de l'art. 8 du Code mondial antidopage (CMA), en tant qu'elles visent à assurer l'indépendance et l'impartialité de l'autorité d'appel ainsi que le droit de l'athlète d'être entendu, lesquelles garanties font partie, selon lui, de l'ordre public procédural. Soutenant qu'il n'y a pas eu de première instance en l'espèce, le recourant reproche au TAS d'avoir voulu assumer les fonctions d'organe d'instruction, d'organe disciplinaire et d'organe d'appel dans une seule et même procédure. Il ajoute, en citant une décision récente (sentence du TAS du 25 juin 2010 dans la cause TAS 2010/A/2031), que le pouvoir d'examen que l'art. R57 du Code confère au TAS ne permet nullement à ce dernier de guérir le vice de procédure.

6.2 Comme les intimées le soulignent à juste titre dans leurs réponses respectives, la recevabilité du grief en question est des plus douteuses. Force est, en effet, de constater avec elles que le recourant fait valoir simultanément trois moyens qu'il présente pêle-mêle, sans indiquer en quoi chacune des garanties qu'il invoque serait violée par la sentence attaquée. Quoi qu'il en soit, les critiques qu'il formule en bloc tombent à faux.

Ainsi, lorsqu'il se fonde sur la susdite convention internationale, le recourant ignore le fait qu'elle s'adresse uniquement aux Etats signataires et que la disposition citée par lui se borne à encourager les organisations sportives de ces Etats «à clarifier et à harmoniser leurs droits, obligations et devoirs respectifs, en particulier en harmonisant [...] leurs procédures disciplinaires, en appliquant les principes internationalement reconnus de la justice naturelle et en garantissant le respect des droits fondamentaux des sportifs sur lesquels pèse un soupçon», l'un de ces principes voulant que l'organe d'instruction soit distinct de l'organe disciplinaire. Il appert de cet énoncé que la disposition conventionnelle invoquée par le recourant ne contient qu'une simple recommandation faite aux Etats signataires et qu'il ne s'agit donc pas d'une norme self executing qui aurait un effet contraignant pour une juridiction arbitrale privée, tel le TAS.

De même, le recourant ne précise pas en quoi les dispositions du Règlement UCI et du CMA, qu'il se contente d'énoncer sans en citer le contenu, imposeraient à toute instance chargée de sanctionner une violation des règles antidopage l'obligation de séparer les fonctions d'organe d'instruction et d'organe disciplinaire.

On ne voit pas, au demeurant, pourquoi le TAS, fort du large pouvoir que lui confère l'art. R57 al. 1 du Code, ne pourrait pas instruire lui-même l'affaire sur laquelle il doit statuer en appel, lorsque l'autorité de première instance a refusé d'ouvrir une procédure disciplinaire. A cet égard, le précédent cité par le recourant ne lui est d'aucun secours, car il a trait à une affaire dans laquelle la Formation avait choisi la seconde option prévue par cette disposition, à savoir le renvoi de la cause à l'autorité ayant statué en dernier.

Enfin, l'exigence d'une double instance ou d'un double degré de juridiction ne relève pas de l'ordre public procédural au sens de l'art. 190 al. 2 let. e LDIP, contrairement à ce qui semble être l'avis du recourant. Il suffit de rappeler, à ce sujet et à titre d'exemple, qu'avant que l'art. 75 al. 2 LTF ne formule pareille exigence, avec certaines exceptions du reste, aucune règle de droit privé fédéral n'imposait le principe du double degré de juridiction, qui n'était d'ailleurs pas commun à toutes les lois de procédure civile cantonales (cf.

arrêt 4P.152/2002 du 16 octobre 2002 consid. 2.2).

7.

7.1 Le recourant se plaint ensuite de la violation de son droit d'être entendu (art. 190 al. 2 let. d LDIP). Il fait grief à la Formation d'avoir statué sans attendre le résultat de deux commissions rogatoires qu'elle avait délivrées pour établir un fait pertinent et sans justifier au moins sa décision de renoncer à cette preuve.

7.2 De jurisprudence constante, le droit d'être entendu en procédure contradictoire, consacré par les art. 182 al. 3 et 190 al. 2 let. d LDIP, est violé lorsque, par inadvertance ou malentendu, le tribunal arbitral ne prend pas en considération des preuves et offres de preuve présentées par l'une des parties et importantes pour la décision à rendre. Il incombe à la partie soi-disant lésée de démontrer, dans son recours dirigé contre la sentence, que le tribunal arbitral n'a pas examiné certains des éléments de preuve qu'elle avait régulièrement avancés à l'appui de ses conclusions et, d'autre part, que ces éléments étaient de nature à influer sur le sort du litige (**ATF 133 III 235** consid. 5.2 p. 248).

En l'espèce, comme cela ressort de l'ordonnance du TAS du 22 décembre 2009, les commissions rogatoires susmentionnées ont été mises en oeuvre sur requête de l'UCI et non du recourant. Dès lors, seule l'UCI pourrait se plaindre de ce que la Formation a rendu sa sentence sans avoir administré ce moyen de preuve. Le recourant ne saurait déplorer une violation de son droit à la preuve au seul motif qu'une preuve offerte par son adverse partie n'a pas été administrée. Il serait d'autant plus malvenu de le faire qu'il s'était opposé, à l'époque, à l'exécution de ces commissions rogatoires (mémoire de réponse du 31 juillet 2009, p. 52), ainsi que le relève l'UCI.

Par conséquent, le moyen pris de la violation du droit d'être entendu ne peut qu'être rejeté.

8.

8.1 Se plaignant d'une violation de l'ordre public, au sens de l'art. 190 al. 2 let. e LDIP, le recourant soutient, par ailleurs, qu'il existerait, en l'espèce, une contradiction claire entre le dispositif de la sentence et les motifs de celle-ci. Il expose, à ce propos, que le dispositif de la sentence rejette les requêtes de l'UCI et de l'AMA tendant à le disqualifier pour les résultats sportifs obtenus avant le 1er janvier 2010, ce qui signifierait implicitement que ces requêtes seraient admises pour ceux qu'il a obtenus après cette date. Or, poursuit le recourant, les considérants de la sentence indiquent, sans ambiguïté, que lesdites requêtes sont entièrement rejetées, la sentence précisant, de manière explicite, qu'aucune raison ne justifie une disqualification pour les résultats «jusqu'à ce jour». Il y aurait là une contradiction irréductible et inadmissible du point de vue de l'ordre public, de l'avis du recourant.

8.2 Dans leurs réponses, les intimées et le TAS dénient l'existence de la contradiction alléguée par le recourant. L'UCI et l'AMA contestent, de surcroît, qu'une telle contradiction, fût-elle avérée, ressortisse à l'ordre public.

8.3

8.3.1 Dans l'arrêt 4A_464/2009 du 15 février 2010, le Tribunal fédéral, revenant sur la jurisprudence qu'invoque le recourant (arrêts 4P.198/1998 du 17 février 1999 consid. 4a et 4P.99/2000 du 10 novembre 2000 consid. 3b/aa), a jugé, sur le vu d'arrêts plus récents, tels que le précédent publié aux **ATF 132 III 389** consid. 2.2.1, que le moyen pris de l'incohérence intrinsèque des considérants d'une sentence n'entre pas dans la définition de l'ordre public matériel (consid. 5.1). Auparavant, il avait déjà exclu du champ d'application de cette définition une sentence arbitrale dont le dispositif comportait une incohérence interne (**ATF 128 III 191** consid. 6b). La jurisprudence actuelle est fondée sur la prémisse que, du point de vue qualitatif, il n'est guère justifiable de considérer une sentence affectée de pareil vice avec plus de sévérité qu'une sentence reposant sur des constatations de fait insoutenables ou sur l'application arbitraire d'une règle de droit, sentence qui, elle, n'entre pas dans les prévisions de l'art. 190 al. 2 let. e LDIP.

Le recourant objecte que cette jurisprudence ne vise pas les cas, telle la présente espèce, où il existe une contradiction évidente, non pas entre les différents motifs de la sentence ou entre les différents chefs du dispositif de celle-ci, mais entre le dispositif et les motifs censés le justifier. Toutefois, sa démonstration s'arrête là. Il est impossible de savoir, à la lecture du mémoire de recours, quelle raison déterminante commanderait de faire la distinction préconisée par le recourant. Qu'une contradiction insoluble entache la prémisse (motifs) ou la conclusion (dispositif) d'un syllogisme judiciaire n'apparaît, en effet, pas moins grave, à première vue, que celle qui vicie le raisonnement déductif permettant d'aboutir à celle-ci en partant de celle-là. Du

moins le recourant n'explique-t-il pas pourquoi il n'y aurait pas de commune mesure entre ces différents types d'incohérence. Celle dont il se plaint donne d'ailleurs lieu, en règle générale, à une demande d'interprétation ou de rectification plutôt qu'à un recours proprement dit (cf., par ex., l'art. 334 al. 1 du Code de procédure civile du 19 décembre 2008 [CPC; RS 272] et l'art.129 al. 1 LTF).

Le grief examiné est, dès lors, irrecevable. Ne l'eût-il point été qu'il aurait dû être rejeté pour les motifs indiqués ci-après.

8.3.2 Sur le fond, la Cour de céans fait siennes les explications fournies tant par le TAS que par les intimées au sujet de la contradiction supposée exister entre le dispositif de la sentence attaquée et les motifs de celle-ci.

Les points controversés du dispositif de la sentence énoncent ce qui suit:

«3. Alejandro Valverde is suspended for a period of two years, starting on 1 January 2010. 4. The requests of the UCI and WADA for disqualification of the competitive results obtained by Mr Valverde before 1 January 2010 are denied.»

Le recourant leur oppose le passage suivant des motifs de la sentence (n. 19.14):

«There is no evidence that any of the results obtained by Mr Valverde since 6 May 2006 until now was through doping infraction. Thus, the Appelants' Request to annul those results should be denied.»

Il sied de bien distinguer la question de la durée de la suspension du coureur cycliste espagnol de celle de l'annulation des résultats des compétitions auxquelles l'intéressé a pris part à compter du 6 mai 2006, autrement dit de sa disqualification pour la période postérieure à cette date.

S'agissant du premier élément, la sentence précise clairement, sous le n. 19.12, que le début de la période de suspension, au sens de l'art. 275 du Règlement UCI, doit être fixé au 1er janvier 2010. A ce considérant fait écho le ch. 3 du dispositif de la sentence.

Les deux paragraphes suivants de la sentence (n. 19.13 et 19.14) concernent le second des deux éléments précités. La Formation y traite la question de la disqualification du recourant et, plus précisément, de la date à partir de laquelle les résultats obtenus en compétition par ce dernier doivent être annulés. Elle se demande si les résultats du coureur cycliste espagnol postérieurs au 6 mai 2006 - date de la découverte de la poche n° 18 - doivent être annulés ou non. A son avis, tel n'est pas le cas, étant donné qu'il n'est pas établi que les résultats obtenus par le recourant depuis cette date aient été acquis par la violation de règles antidopage. C'est la raison pour laquelle la Formation rejette la requête des intimées, qui visait à l'annulation de tous les résultats obtenus par le recourant depuis le 4 mai 2004. Ce rejet est énoncé sous ch. 4 du dispositif de la sentence.

Les termes «until now», figurant sous le n. 19.14 de la sentence ne sauraient, de toute évidence, être interprétés, comme le voudrait le recourant, en ce sens que les résultats obtenus depuis le 1er janvier 2010 jusqu'au prononcé de la sentence (31 mai 2010) ne tomberaient pas sous le coup de la disqualification. Il va de soi que, lorsqu'un athlète est suspendu avec effet rétroactif, les résultats qu'il a obtenus depuis le moment où la suspension a pris effet jusqu'à celui où elle a été prononcée ne peuvent pas être maintenus. C'est ce que la Formation a exposé dans le corps de sa sentence et qu'elle a traduit, au ch. 4 du dispositif de celle-ci, en renonçant à disqualifier le recourant pour les résultats obtenus avant le 1er janvier 2010, c'est-à-dire, a contrario, en disqualifiant le coureur cycliste espagnol pour les résultats acquis en compétition après cette date.

Ainsi, quoi qu'en dise le recourant, le dispositif de la sentence attaquée ne contredit en rien les motifs de ce prononcé.

9.

9.1 Dans un dernier moyen, fondé sur la violation de l'ordre public (art. 190 al. 2 let. e LDIP), le recourant reproche à la Formation d'avoir violé le principe ne bis in idem ou le principe de la res iudicata. Selon lui, le TAS a rendu, le 16 mars 2010, une sentence dans une cause portant sur les mêmes faits et sur la même infraction que ceux qui caractérisent la présente affaire. Avoir méconnu l'existence de ce précédent reviendrait aussi, de l'avis du recourant, à ne pas s'être avisé d'un motif d'inarbitrabilité faisant échec à la compétence de la Formation et lui interdisant de se prononcer derechef sur une question déjà tranchée dans une sentence antérieure revêtue de l'autorité de la chose jugée. Considérée sous

cet angle, la sentence attaquée devrait être annulée en vertu de l'art. 190 al. 2 let. b LDIP (incompétence du tribunal arbitral).
A l'appui de cet ultime grief, le recourant soutient avoir été puni deux fois pour la même infraction; il précise, à cet égard, en s'appuyant sur un avis de droit, qu'une peine de suspension s'apparente à une sanction pénale et justifie pleinement l'application du principe ne bis in idem. Que la première sanction ait été limitée géographiquement au territoire italien n'y changerait rien, à le suivre, car la suspension qu'il s'est vu infliger en second lieu, sur le plan mondial, englobe nécessairement ce territoire-là. Aussi le recourant est-il d'avis que, pour respecter le principe de l'autorité de la chose jugée, le TAS aurait dû renoncer à le sanctionner derechef ou, à tout le moins, reporter le point de départ de la sanction au 11 mai 2009 en tant qu'elle s'applique au territoire italien, soit à la date à laquelle la suspension de deux ans dont il a écopé pour ce territoire a pris effet.

9.2

9.2.1 Dans sa réponse, l'UCI commence par mettre en doute la neutralité de l'avis de droit produit par le recourant. Elle fait valoir, à ce propos, que l'auteur de cette expertise privée a cosigné, avec le conseil du recourant, un avis de droit qui a été versé par ce dernier au dossier de l'affaire ayant abouti au prononcé de la sentence arbitrale du 16 mars 2010 (TAS 2009/A/1879), puis à l'arrêt du Tribunal fédéral du 29 octobre 2010 (cause 4A_234/2010).

L'intimée s'emploie ensuite à démontrer que les conditions d'application de l'exception ne bis in idem ne seraient pas réunies en l'espèce. Selon elle, en effet, dans la sentence rendue le 16 mars 2010 à l'encontre du recourant et dans la sentence formant l'objet du présent recours, le TAS n'aurait pas appliqué les mêmes règles puisque celle-là se fondait sur les normes antidopage italiennes (NSA) et celle-ci sur le Règlement UCI. De plus, l'inibizione, dont il est question dans la première sentence en date, ne constituerait pas une sanction disciplinaire, mais une mesure de prévention pouvant s'ajouter à une telle sanction lorsque l'athlète convaincu de dopage est licencié auprès d'une fédération nationale.

9.2.2 De son côté, l'AMA, après avoir rappelé les conditions d'application du principe ne bis in idem, souligne que, à la différence de l'inibizione, qui est une «mesure de droit public italien» pouvant être prise à l'encontre de tout individu, la suspension est une sanction disciplinaire, prise par une fédération sportive internationale à l'encontre d'un licencié, c'est-à-dire une sanction de nature privée. A ses yeux, les deux décisions successives n'avaient ni le même objet ni le même but: l'une constituait «une mesure d'intérêt public de portée nationale prise en Italie par une autorité publique»; l'autre, une sanction privée infligée par une fédération sportive internationale à l'un de ses affiliés; la première visait l'exclusion territoriale de participer à des compétitions; la seconde, l'interdiction de pratiquer un sport professionnel. Dès lors, il n'y avait pas matière à appliquer le susdit principe.

9.2.3 Le TAS a renoncé, pour sa part, à se déterminer sur les arguments du recourant, au motif que la question controversée a été examinée en détail dans la sentence attaquée.

9.3

9.3.1 Un tribunal arbitral viole l'ordre public procédural, au sens de l'art. 190 al. 2 let. e LTF, s'il statue sans tenir compte de l'autorité de la chose jugée d'une décision antérieure ou s'il s'écarte, dans sa sentence finale, de l'opinion qu'il a émise dans une sentence préjudicielle tranchant une question préalable de fond (**ATF 136 III 345** consid. 2.1 p. 348 et les arrêts cités).

La jurisprudence qualifie le principe ne bis in idem de corollaire (arrêt 2P.35/2007 du 10 septembre 2007 consid. 6) ou d'aspect négatif (arrêt 6B_961/2008 du 10 mars 2009 consid. 1.2) de l'autorité de la chose jugée. En droit pénal, ce principe interdit de poursuivre deux fois la même personne pour le même fait délictueux (dernier arrêt cité, ibid.). Il est consacré tant par le droit international (art. 14 al. 7 du Pacte international relatif aux droits civils et politiques [Pacte ONU II], RS 0.103.2; art. 4 ch. 1 du Protocole n° 7 à la CEDH [ci-après: le Protocole], RS 0.101.07) que par le droit suisse (**ATF 128 II 355** consid. 5.2), qui l'a codifié récemment (art. 11 du Code de procédure pénale suisse [CPP] du 5 octobre 2007, RS 312.0). L'importance et la généralisation du «droit à ne pas être jugé ou puni deux fois» (titre de l'art. 4 ch. 1 du Protocole) ou de l'»interdiction de la double poursuite» (titre de l'art. 11 CPP) sont telles qu'il convient d'inclure le principe ne bis in idem dans la notion de l'ordre public au sens de l'art. 190 al. 2 let. e LDIP (pour la définition de cette notion, cf. **ATF 132 III 389** consid. 2.2). Dire si ce principe relève de l'ordre public

procédural ou de l'ordre public matériel est une question plus délicate, qu'il n'est cependant pas nécessaire de trancher ici.

Que la violation du principe ne bis in idem puisse tomber sous le coup de l'art. 190 al. 2 let. e LDIP est une chose. Que le droit disciplinaire sportif soit également soumis à ce principe, propre au droit pénal, en est une autre, qui ne va pas de soi (sur cette question, cf. CHRISTOPH LÜER, Dopingstrafen im Sport und der Grundsatz «Ne bis in idem», 2006, passim). Force est toutefois de constater que le TAS lui-même a jugé qu'il convenait d'appliquer ce principe en l'espèce, à tout le moins par analogie, eu égard à la sévérité de la sanction disciplinaire imposée au recourant (sentence, n. 18.5). Point n'est, dès lors, besoin d'approfondir ici la question de l'applicabilité dudit principe, propre au droit pénal, au droit disciplinaire sportif. Il suffira de vérifier l'application qui en a été faite in concreto par la Formation.

9.3.2 Se fondant sur un ouvrage de doctrine relatif au droit judiciaire suisse (GÉRARD PIQUEREZ, Traité de procédure pénale suisse, 2e éd. 2006, n° 1541), la Formation rappelle que, pour être efficacement invoquée, l'exception de chose jugée suppose l'existence d'une triple identité d'objet, de parties et de fait (dans le même sens, voir l'arrêt 2P.35/2007, précité, ibid.). Pour elle, les deux dernières identités sont clairement réalisées en l'espèce puisque le recourant a été mis en cause dans les deux procédures disciplinaires parallèles ayant abouti aux sentences rendues les 16 mars et 31 mai 2010 par le TAS (sentence, n. 18.12). Tel ne serait pas le cas, en revanche, de la première. En effet, l'objet de la procédure disciplinaire ouverte en Italie était de protéger le bon déroulement des compétitions sportives se déroulant sur sol italien, tandis que la seconde procédure disciplinaire visait à sanctionner l'athlète pour avoir adopté un comportement contraire aux règles du sport qu'il pratique à titre professionnel, ce qui justifiait une extension mondiale de la sanction prononcée contre lui. Ainsi, de l'avis des arbitres majoritaires, faute d'une identité d'objet, le principe ne bis in idem ne trouvait pas à s'appliquer in casu. Quoi qu'il en soit, l'importance d'une suspension sanctionnant au niveau mondial la violation d'une règle antidopage l'emporterait, selon eux, sur le fait qu'une suspension plus limitée territorialement avait été prononcée auparavant à l'encontre de la même personne (sentence, n. 18.13 à 18.16).

L'application du principe ne bis in idem suppose que les biens protégés soient identiques (identité d'objet). Aussi l'interdiction de la double poursuite ne fait-elle pas obstacle à l'introduction de poursuites contre la même personne, lorsque le même comportement peut avoir des conséquences non seulement pénales, mais également civiles, administratives ou disciplinaires (MICHEL HOTTELIER, in Commentaire romand, Code de procédure pénale suisse, 2010, n° 8 ad art. 11 CPP). En l'espèce, comme la Formation le souligne dans la sentence attaquée, suivie en cela par l'UCI et l'AMA, et comme une autre Formation l'avait déjà mis en évidence de manière plus détaillée dans la sentence du 16 mars 2010 (cf., notamment, les n. 62, 73, 90 et 182), l'inibizione est une mesure d'ordre essentiellement préventif, applicable à tout individu (athlète ou non, affilié à la fédération italienne ou non), qui vise principalement à faire en sorte que le déroulement des compétitions sportives sur le territoire de l'Italie ne soit pas faussé par la participation de personnes convaincues de violation des règles antidopage et qui déploie des effets limités au territoire de ce pays. En cela, elle se distingue de la suspension qui a été infligée au coureur cycliste espagnol dans la sentence du 31 mai 2010, cette mesure-ci revêtant avant tout un caractère répressif en tant qu'elle a pour objet de sanctionner, avec effet sur le plan mondial, un sportif professionnel affilié à une fédération sportive. Dans son mémoire, le recourant ne démontre pas que la Formation se serait trompée en refusant d'admettre que les deux mesures prises à son encontre seraient de même nature. Il se contente d'affirmer la chose, en soutenant que «le fondement normatif de ces deux procédures est identique», étant donné que les règlements antidopage édictés par le CONI et par l'UCI incorporeraient tous deux le mécanisme et la réglementation du CMA (recours, n. 143). Pareille affirmation ne saurait toutefois remplacer la démonstration motivée de son contenu.

Dans ces conditions, la Formation n'a pas violé le principe ne bis in idem, faute d'une identité d'objet entre les deux mesures prises à l'encontre du recourant. Le reproche qui lui est fait d'avoir rendu une sentence incompatible avec l'ordre public ou qu'elle n'avait pas la compétence de rendre tombe, dès lors, à faux.

10.
Le présent recours doit ainsi être rejeté. Succombant, son auteur paiera les frais judiciaires (art. 66 al. 1 LTF); il versera, en outre, des dépens à l'AMA et à l'UCI (art. 68 al. 1 et 2 LTF). La RFEC, 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.

2.
Les frais judiciaires, arrêtés à 4'000 fr., sont mis à la charge du recourant.

3.
Le recourant versera à l'Agence Mondiale Antidopage (AMA) une indemnité de 5'000 fr. à titre de dépens. Il versera la même indemnité à l'Union Cycliste Internationale (UCI) au même titre.

4.
Le présent arrêt est communiqué aux mandataires des parties et au Tribunal Arbitral du Sport (TAS).

Lausanne, le 3 janvier 2011

Au nom de la Ire Cour de droit civil du Tribunal Fédéral Suisse

La Présidente:	Le Greffier:
Klett	Carruzzo

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