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Table des matières/Table of Contents

Editorial

The majority of the so-called "leading cases" selected for this issue reflects the high proportion of football jurisprudence dealt with by CAS Panels lately. Thus, eight out of the ten cases included in the Bulletin are football related.

In a disciplinary context, the unsporting behaviour of a coach towards a referee is examined in Fernando Santos v. FIFA. A match fixing issue is also dealt with in the case Eskişehirspor Kulübü v. UEFA whereas in PAOK FC v. HFF & Panathinaikos, the Panel observes its lack of jurisdiction.

In the field of transfer of players, the case Maritimo de Madeira Futebol SAD v. Clube Atletico Mineiro contemplates the nature of the compensation in a case of breach of contract while in KRC Genk v. AS Monaco FC, the Panel deals with the training compensation issue where the player's transfer takes place within the EU/EEA zone. Finally, in Real Madrid v. FIFA, the issue of transfer of minors is addressed.

The case FC Mets v. NK Nafta deals with a procedural aspect which is the distinction between legal capacity and standing to sue or to be sued and differentiates a buy-out clause and a mutual agreement to terminate the contract.

Of particular note is the case MFK Dubnica v. FC Parma which examines the Panel's discretion to exclude evidence under the amended Article R57.3 CAS Code and probably establishes a jurisprudence which should be applicable in general and not only to football.

The two doping cases selected for this issue deal respectively with the evaluation of the applicable sanction under aggravating circumstances in an athletics related case and with the validity of the testing procedure in an ice hockey related case.

Also included in this Bulletin an interesting article prepared by Dr Minas Khatchadourian entitled "The Arab Countries in the CAS Jurisprudence: a retrospective". Mr Jeffrey Benz and Mr Willian Steinheimer have analyzed together the different types of expedited procedures before the CAS while Ms Despina Mavromati addresses the res judicata effect of the decisions rendered by the judicial instances of sports federations. Ultimately, the article of Ms Estelle de La Rochefoucauld deals with the taking of evidence before the CAS.

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

Of particular interest is the release of "The Code of the Court of Arbitration for Sport: Commentary Cases and Materials" in May 2015. This publication has been co-written by Ms Despina Mavromati and Mr Matthieu Reeb and forms a comprehensive analysis of the provisions of the Code of Sports-related Arbitration. The Commentary will reveal very useful to CAS arbitrators and to anyone interested in the CAS as the authors have explored each article of the Code. In this regard, each provision is completed by relevant case law and doctrine. The book also gathers documents and material from internal practice. What is more, all significant cases related to sport and arbitration disputes are referred and treated under the relevant provisions.

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

Estelle de La Rochefoucauld
Counsel to the CAS, Editor-in-chief

Articles et commentaires
Articles and Commentaries

Expedited Procedures before the Court of Arbitration for Sport

Jeffrey G. Benz and William Sternheimer*

I. Introduction

As a matter of principle, consistent with historic, fundamental principles governing arbitral jurisdiction worldwide, a dispute may only be submitted to the Court of Arbitration for Sport (the "CAS") only if an arbitration agreement exist between the parties or if the regulations of a sports-governing body provides for such an arbitration for appeals against decisions taken in first instance by their judicial bodies. This principle is expressly set forth in Articles R38 and R47 of the CAS Code of Sports-Related Arbitration (the "Code").

Article R27 of the Code specifies that the CAS has jurisdiction to resolve disputes which are "sports-related." While this principle, and the quoted language, appears to be a limit on jurisdiction, a narrow reading is deceptive. "Sports-related" jurisdiction has always been interpreted broadly.

For example, in the case TAS92/81 *L. c. Y. SA*, the fact that the contractual dispute concerned an exclusive licensing agreement for speed sport boats was enough to ground CAS jurisdiction pursuant to Article R27 of the Code. The Panel also found that the agreement was signed with L. not only for technical reasons but also to his reputation as a navigator. The CAS panel in such case, even though it considered that the link with sport could be considered as tenuous, found that the parties' will to submit their disputes to CAS arbitration prevailed:

"[i]n arbitration, the source of jurisdiction of the arbitral tribunal is the common will of the parties to submit their disputes to arbitration. If the parties decide to proceed through arbitration, they have a great liberty in the choice of arbitrators or in the arbitral institution that they approach. CAS in an arbitral institution which provides to the parties arbitral proceedings which are quick and inexpensive. The CAS has been created to favour the resolution of disputes in the specific field of sports. In view of the assets, notably very reduced costs, that it offers, it is normal that its scope of activity be defined and limited to sports-related cases. This is specifically the object of Article 4 of the Statutes[1]. If a dispute does not fall under article 4, the CAS may decide not to deal with it and thus allow parties to benefit from advantages not addressed to them. This is the sense of article 4. However, nothing precludes the CAS from accepting to deal with a dispute that parties submit to it, even if such dispute does not fall within the scope of article 4 of the Statutes. In such case, it is necessary that the members of the Panel also agree. This is a fortiori true with respect to a dispute which has links with sports,

* This article has first been published on the Sport Law's website www.lawinsport.com on 13 March 2015.
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[1] Article 4 of the CAS Statutes provided at the time that the constituted Panels have jurisdiction to address disputes "… *that arise in the practice or development of sport*…".

even though such links could be considered to be insufficient"[2].

Such approach is consistent with the general principle that to avoid court for dispute resolution one must consent to the jurisdiction of an arbitrator and arbitration.

In principle, under Article R27 of the Code, two types of disputes can be submitted to the CAS: disciplinary and commercial disputes. Disciplinary disputes typically concern doping, non-enforcement of a decision, corruption or match-fixing disputes, but as issues in sports continue to develop there is no reason the list of the various types of disciplinary disputes cannot continue to grow. Commercial disputes essentially concern contractual enforcement issues, for example transfers of players between clubs, employment-related disputes between players, coaches, agents and clubs, licensing, broadcast, and sponsorship agreements. While disciplinary disputes are almost exclusively submitted to the CAS appeals arbitration procedure, commercial disputes may be submitted to both the CAS appeals and ordinary arbitration procedures.

Concerning appeals arbitration procedures, Article R59 of the Code provides that the CAS award should be rendered within three months from the transfer of the case file to the Panel. The case file will be transferred to the Panel once the advance of costs will have been paid by the Appellant for cases falling under the provisions of Article R64 of the Code or once the Panel will have been confirmed by the CAS Division President in cases falling under the provisions of Article R65 of the Code. This deadline is subject to possible extensions in view of procedural requests, the complexity of the case etc. In practice, the total average duration of a CAS appeals arbitration procedure from the moment the statement of appeal is filed is five months, with some longer and some shorter, depending on the willingness of the parties to proceed quickly or not. The extensions of time requested by parties and their availability to attend a CAS hearing can considerably affect the procedural calendar of the arbitration. Awards in ordinary arbitration procedures do not need to be rendered within a specific deadline but, practically, the total average duration of such a procedure is less than one year, with big variations between cases (from three months to two years). This is explained by the fact that arbitrations may be suspended to give time to parties to negotiate a settlement, that the Code permits the filing of additional submissions (e.g., statements of claims and defenses in addition to the request for arbitration and answer to the request, costs statements, etc.) and often parties themselves seek extensions of deadlines or the opportunity to file additional submissions as issues surface during the pendency of the case.

Notwithstanding the above, on some specific occasions, time is of the essence and the CAS provides for different types of expedited proceedings in the event that the parties, in their arbitration agreement, or the regulations of the concerned sports-governing body, do not provide for such expedited procedure. These procedures are adapted for situations where competitions or events such as general assemblies, elections, etc. are scheduled. By reference to the CAS and its rules, such procedures become available in all disputes, provided the requisite standards for granting such relief or the application of the rules are met.

With the advent of new rules, within the past two years, from the major international commercial arbitration institutions, provisions for provisional or emergency relief have now become in fashion and are part of the fabric of international commercial arbitration, though data on how often the parties seek to avail themselves of such relief is not easy to obtain. *See, e.g.*, *LCIA Arbitration Rules* Articles 9A, 9B, 9C, 22.1, 25; *ICC Arbitration Rules Articles* 28, 29; *ICDR International Arbitration Rules* Articles 6, 24, E-1 – E-10; *HKIAC International Arbitration Rules* Articles 23, 41, Schedule 4. The CAS has provided rules for provisional and expedited relief since at least 1994, and indeed the ability to render swift and substantial justice with all appropriate due process guarantees is a defining feature of sports arbitration before the CAS. This article briefly examines those provisions

[2] Free translation from French.

and the methods by which parties may avail themselves of or defend themselves against the implementation of these processes.

II. Provisional measures

Article R37 of the Code provides the following:

> "No party may apply for provisional or conservatory measures under these Procedural Rules before all internal legal remedies provided for in the rules of the federation or sports-body concerned have been exhausted.
>
> (…)
>
> The President of the relevant Division, prior to the transfer of the file to the Panel, or thereafter, the Panel may, upon application by a party, make an order for provisional or conservatory measures. In agreeing to submit any dispute subject to the ordinary arbitration procedure or to the appeal arbitration procedure to these Procedural Rules, the parties expressly waive their rights to request any such measures from state authorities or tribunals.
>
> Should an application for provisional measures be filed, the President of the relevant Division or the Panel shall invite the other party (or parties) to express a position within ten days or a shorter time limit if circumstances so require. The President of the relevant Division or the Panel shall issue an order on an expedited basis and shall first rule on the prima facie CAS jurisdiction. (…) In cases of utmost urgency, the President of the relevant Division, prior to the transfer of the file to the Panel, or thereafter the President of the Panel may issue an order upon mere presentation of the application, provided that the opponent is subsequently heard.
>
> When deciding whether to award preliminary relief, the President of the Division or the Panel, as the case may be, shall consider whether the relief is necessary to protect the applicant from irreparable harm, the likelihood of success on the merits of the claim, and whether the interests of the Applicant outweigh those of the Respondent(s).
>
> The procedure for provisional measures and the provisional measures already granted, if any, are automatically annulled if the party requesting them does not file a related request for arbitration within 10 days following the filing of the request for provisional measures (ordinary procedure) or any statement of appeal within the time limit provided by Article R49 of the Code (appeals procedure). Such time limits cannot be extended.
>
> (…)".

Even though Article 183(1) of the Private International Law Act of Switzerland (PILS) can be interpreted to imply that only arbitral tribunals may order provisional measures, Article R37 of the Code provides for the jurisdiction of the CAS, through the CAS Division Presidents, to issue provisional measures even prior to the constitution of Panels.

Since the 2013 revision of the Code, parties may request provisional measures immediately after the notification of a final decision by a sports-body, even before filing a formal request for arbitration or statement of appeal. The only requirement for such application is that "all internal legal remedies provided for in the rules of the federation or sports-body concerned have been exhausted".

Article R37 of the Code as well as Article 183 PILS do not specify or restrict in any way the types of provisional measures that can be ordered.

The procedure when an application for provisional measures is filed is the following:

The CAS Court Office will grant a deadline of ten days for the Respondent(s) to comment on the application. A shorter deadline will be fixed by the CAS Court Office should the circumstances so require or should the Applicant expressly request that its application be dealt on an expedited basis. In the latter case, the CAS Court Office will check whether the circumstance do require a shorter deadline should be granted to comment on the application. Thereafter, the CAS Division President will render an Order on request for provisional and conservatory measures on a short notice thereafter. The CAS Division President may only render the operative part of the Order if the circumstances so require. In exceptional cases only of utmost urgency, the CAS Division President shall issue an Order on request for provisional and conservatory measures *ex parte*.

A recent example concerned the case CAS 2014/A/3571 Asafa Powell v. Jamaican Anti-Doping Commission (JADCO). In his statement of appeal and appeal brief, the Appellant expressed his hope that he could have a hearing and final decision on the merits prior to the deadline to enter the Commonwealth Games Trials which were to be contested in Kingston, Jamaica from June 26 to June 29 2014. The deadline for the submission of entries for the Commonwealth Games Trials was 20 June 2014. On 11 June 2014, after several procedural incidents, when it was determined that a hearing could not take place prior to 20 June 2014, the Appellant filed a request for a stay of execution of the appealed decision. On 18 June 2014, the operative part of the Order on the request for a stay was issued by the CAS panel.

In accordance with regular CAS jurisprudence, which has been codified in the 2013 version of the Code, and as a general rule, when deciding whether provisional or conservatory measures may be accepted, it is necessary to consider whether the measure is useful to protect the Applicant from irreparable harm, the likelihood of success on the merits of the appeal, and whether the interests of the Applicant outweigh those of the opposite party or parties. *See* Award of CAS 2003/O/486; Orders of CAS 2013/A/3199; CAS 2010/A/2071; 2001/A/329; and CAS 2001/A/324. These requirements are cumulative. *See* Orders of CAS 2013/A/3199; CAS 2010/A/2071; and 2007/A/1403. *Accord*, Paolo Patocchi, "Provisional Measures in International Arbitration", in *International Sports Law and Jurisprudence of the CAS* (M. Bernasconi, ed.), pp. 68-72 (2012).

III. Expedited procedures under the provisions of the Code

For CAS ordinary arbitration procedures, Article R44.4 of the Code provides that "[w]ith the consent of the parties, the Division President or the Panel may proceed in an expedited manner and may issue appropriate directions therefor". For CAS appeals arbitration procedures, Article R52 of the Code provides that "[w]ith the agreement of the parties, the Panel or, if it has not yet been appointed, the President of the Division may proceed in an expedited manner and shall issue appropriate directions for such procedure".

Each party may request an expedited procedure and the CAS Court Office may propose one upon initiation of the proceedings. The Panel, once constituted, may also propose one if the circumstances so require. However, no expedited proceedings may be implemented in the absence of an agreement of all the parties involved in the arbitration. The parties will generally be invited to agree on an expedited schedule suggested by the CAS Division President or the Panel. In case the parties disagree on such suggested expedited procedural schedule, the CAS Division President or the Panel may impose an expedited calendar. The CAS Division President or the Panel has total discretion in fixing appropriate expedited proceedings.

Expedited procedures are sometimes provided for in the regulations of some sport federations. For example, the UEFA Champions League Regulations expressly provide that appeals against decisions by its judicial bodies may be appealed to the CAS within ten days from the date of notification and that the proceedings before the CAS shall be conducted in an expedited manner.

In recent times, the CAS has issued many expedited proceedings before the start of the European football competitions (see for example the cases involving the Turkish clubs Fenerbahçe and Besiktas against UEFA – CAS 2013/A/3256 and CAS 2013/A/3258) or before the opening of the transfer windows (see for example the case involving FC Barcelona against FIFA – CAS 2014/A/3793). In such situations, CAS procedures are completed within days or weeks. An interesting expedited doping case was the Cielo case (CAS 2011/A/2495) where the proceedings were held in one week with a hearing in Shanghai, China, where the World Swimming Championships were taking place. The operative part of the award was rendered immediately after the hearing, the date prior to the competitions. More recently, the case of the Czech Cyclist, Roman Kreuziger, against the UCI, concerning his provisional suspension pending an investigation into a possible anti-doping offence (CAS 2014/A/3694), has also been dealt in an expedited manner as the rider intended to compete in the 2014 Tour of Spain and possibly in the UCI World Road Championships.

As a side note, even if there is no agreement from all the parties involved in an arbitration to expedite the proceedings, the CAS will always do its best efforts to conduct the proceedings efficiently and swiftly to meet the parties' needs.

IV. CAS *ad hoc* divisions for special events

For specific events and for a specific duration, the ICAS may, with the event organizer, put into place an *ad hoc* division of the CAS the function of which is to provide for the free resolution by arbitration of the disputes covered by the regulations of the sports-governing body under which the sport event takes place, within 24 hours (or 48 hours for the last edition of the FIFA World Championship 2014 in Brazil).

The CAS *ad hoc* regulations for the Olympic Games provide that the CAS has jurisdiction to hear disputes related to the Olympic Games which arise ten days prior to the opening ceremony until the closing ceremony. Such specific regulations have been implemented for each rendition of the Olympic Games since the ones held in 1996 in Atlanta, Georgia, United States of America. In order to meet the 24 hours deadline to render an award, the proceedings generally comprise only the application (a standard form to be downloaded from the CAS website) and a hearing. The Panel may also invite the Respondent(s) to file written observations if the time allows it, and/or order it to file evidence in its possession. Such deadline may be extended if the case does not present some urgency in view of the competition schedule. Notwithstanding the above, the Applicant may also request that provisional and conservatory measures be granted.

The ICAS has also put into place CAS *ad hoc* divisions for regional Multi-Sport Games such as the Commonwealth Games since 1998, and the Asian Games and Asian Beach Games since 2014. The organization and proceedings for such events are similar to the ones for the Olympic Games, with a smaller group of arbitrators though.

Finally, CAS *ad hoc* divisions have also been put into place for other events such as the UEFA European Championship since 2000 and the FIFA World Cup since 2006. As stated above where, for the 2014 FIFA World Cup in Brazil where the deadline for rendering an award was 48 hours, the proceedings for such events and the settlement of disputes arising from them are similar to those for the Olympic Games with the difference that operations are conducted at a distance, that no CAS delegation is present in the host country during the competition and that hearings may rather be conducted by video-conference. At the World Cup 2014, the CAS *ad hoc* Division could have handled a procedure involving the Uruguayan football player Luis Suarez v. FIFA following disciplinary incidents during a World Cup match between Uruguay and Italy, but since Uruguay was eliminated from the competition, Suarez decided to file his appeal at the CAS in Lausanne.

V. Conclusion

The nature of sport, and the industries surrounding sport, is such that timing of relief is very often the defining nature of the relief itself;

the relief may not be effective if not rendered quickly. Multi-million or billion dollar sports events do not stop or pause to allow legal processes to occur; when an athlete or a federation or other sport participant has a legal problem, the deadlines remain intact which means the relief must be rendered timely. Similarly, construction projects, television broadcast agreements, and sponsorship issues do not stand still while the underlying sporting event or events continue. These cases demand the opportunity for relief that is both fair and fast, and in some cases, involving disputes that satisfy certain pre-requisites, free. A product of sport itself, the CAS has and will always offer an efficient arbitration system specifically adapted to the needs of its customers, those who act in sport worldwide.

The Arab Countries in the CAS Jurisprudence: a retrospective

Dr. Minas Khatchadourian*

I. Introduction

The Arab World consists of 22 countries on the Asia and African continents, respectively, with a total population exceeding 400 million people.

Almost all sports are practiced in the Arab World and several countries have hosted successfully international or continental championships. By far, football is the most popular sport game in this part of the World where national football federations or associations are members of the FIFA.

Sport is practiced at both amateur and professional levels and few Arab countries have established a set of specific rules for professional players. Also, Investment in professional sport is gradually becoming a real commercial enterprise in some of the Arab countries.

This article examines some of the most significant arbitral awards rendered by the Court of Arbitration for Sport (CAS) in cases relating to various Arab countries including Egypt, Qatar, United Arab Emirates, Saudi Arabia, Morocco, Tunisia, Sudan, etc.

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Without being in any way exhaustive, this compilation of cases is simply an attempt of a retrospective analysis of different cases related to Arab associations, clubs, officials or players during the last decade (2004-2014).

Most of the awards are related to football disputes. However, some other awards were rendered in other sports including equestrian sports and swimming.

Accordingly, the cases examined in this article may be regrouped under the following three categories:
II. Football related disputes
III. Equestrian related disputes
IV. Disputes related to other sports

II. Football related disputes

A. The CAS Jurisdiction with regard to the Statutes of the FIFA, the Confederations and the National Associations

In three important cases related relating to Egyptian and Saudi football clubs, the CAS brought clarifications on several provisions in the FIFA Statutes in respect of regarding its jurisdiction and the interplay between the latter these ones and the statutes of the continental and national federations.

1. Ismailia Sporting Club vs. CAF

In the first case (CAS 2004/A/676 Ismailia Sporting Club v. Confédération Africaine de Football (CAF), award of 15 December 2004), Egypt's Ismailia SC was competing against Nigeria's Enyimba SC at the final of the 2003 CAF African Champions League. The Organizing Committee for the championship rejected Ismailia's protest on the non-eligibility of the Nigerian player Ahmed Garbo Yaro to participate in the final. As a result, the matter was submitted to the CAF Appeal Committee which ratified the decision of the Organizing Committee. The Ismailia SC decided also to seize concomitantly the CAS on the same date.

At that time, the 2002-2004 edition of the CAF Statutes in force provided expressly that "National Associations, clubs or members of clubs shall not be permitted to bring before a Court of Justice disputes with the Confederation or other Associations, clubs or members of clubs, and they must agree to submit any such disputes to an Arbitration Tribunal appointed by common consent" (article 30.1). There did not yet exist any recognition of the CAS jurisdiction but only an indication of the possibility of an ad hoc arbitration.

The CAS Panel declined its jurisdiction to hear the case and stated: "During the period that these Statutes were written, neither CAF nor FIFA recognized any jurisdiction of the CAS to arbitrate football disputes. It is only with the implementation by the individual Confederations of the new FIFA Statutes (i.e. 2004 Statutes) into their Statutes, that the CAS can be held to have jurisdiction. The FIFA rules that came into force on 1 January 2004 do not constitute per se a basis for arbitration. Instead, they constitute an instruction to introduce a regulation providing for CAS arbitration. This was implemented by the coming into force of the new CAF regulations on 1 September 2004 . It follows that the CAS has no jurisdiction with regard to the 2003 decision of the CAF Appeal Committee".

2. Telecom Egypt Club v. Egyptian Football Association (EFA)

In the second case (CAS 2009/A/1910 Telecom Egypt Club v. Egyptian Football Association (EFA), award of 9 September 2010), there also arose the question of the CAS jurisdiction in relation to a national football federation.

The Appellant (Telecom Egypt Club) was unsatisfied with the EFA decision in respect of a complaint filed before EFA Competitions Committee and then before the EFA Appeals Committee. The Appellant asserted an accusation of manipulating the result of a game between two other football teams which has adversely affected the Appellant's position in the premier league, relegating it to the second division.

After having its complaint disregarded by the EFA, the Appellant filed a statement of appeal

with the CAS. It added that the FIFA confirmed in a letter to the Appellant that the EFA is "bound by the Statutes of FIFA and also the relevant articles regarding the Court of Arbitration for Sport". The Appellant relied also on Article 63 of the 2009 FIFA Statutes granting jurisdiction to the CAS.

In the award, the CAS Panel stated: "In accordance with consistent CAS jurisprudence on this issue, Article 63 par. 1 of the current FIFA Statutes does not by itself grant jurisdiction to CAS with respect to decisions passed by confederations, members or leagues (see e.g., CAS 2008/A/1656, CAS 2005/A/952, CAS 2004/A/676, CAS 2002/O/422). Indeed, the mere provision that FIFA "recognizes" the CAS is not sufficient in itself for a CAS panel to claim jurisdiction over decisions issued by organizations other than FIFA".

"In contrast, the clear provisions of par. 5 and 6 of Article 63 of the FIFA Statutes , stating that FIFA and WADA, respectively, are "entitled to appeal to CAS against any internally final and binding doping-related decision passed by the Confederations, Members or Leagues" allow a CAS Panel to claim jurisdiction with respect to a national federation's decision on a doping matter through the express reference made by a national federation's statutes to FIFA Statutes (see CAS 2007/A/1370 & 1376, and the Swiss Federal Court's judgment of 9 January 2009, 4A_460/2008, confirming the jurisdiction of CAS in such a case)".

In addition, the CAS Panel had the opportunity to confirm the largely recognized principle of kompetenz-kompetenz where CAS has the power to decide on its own jurisdiction. This principle is also enshrined in article 186 of the 1987 Swiss Private International Law Act (PILA) as amended.

Several CAS panels have insisted on the consensual nature of the arbitration agreement in order to bring the dispute before the CAS. Consequently, any appeal against a national federation's decision requires the parties' agreement to arbitrate, i.e. an "offer" to arbitrate and an "acceptance" thereof. Generally, in a sports environment, federations stipulate in their statutes or regulations that any dispute shall be resolved by arbitration (the offer) and the athletes accept such offer by signing a respective declaration or simply by participating in competitions organized by the federation (the acceptance). Similarly, in the context of the relationship between international federations, national federations and clubs, the organization lower in the hierarchy joins the higher one as member and thereby "accepts" the latter's "offer" to arbitrate.

Therefore, in the absence of such a clause, the mere fact of the Appellant's membership to a national federation cannot be considered as a bilateral agreement satisfying the requirements of Article R47 of the CAS Code.

In this respect, article R47 of the CAS Code states that "An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".

It is noteworthy to indicate that the declaration made by a football club to recognize the exclusive competence of CAS, is considered simply as an express acceptance by the Club of the arbitral clause to be found in the rules of the Football League, Association or Union to which it belongs. As a result, the jurisdiction of an arbitration panel –either the CAS or a national arbitral body – must be expressly set forth in the Association rules" . A CAS panel also ruled that it had jurisdiction to decide a dispute between a professional football club and its national association where the said association has inserted an express provision establishing a right for legal recourse to CAS.

3. Al-Wehda Club vs. Saudi Arabian Football Federation (SAFF)

This 2011 case concerned a Saudi football club (Al-Wehda) which, in the last round of the Professional Saudi League, had intentionally

delayed its march into the field in its match against another Saudi club (Al-Taawon). This delay was intended to follow up the result of other teams playing at the same time and specifically to impact the results of matches of two other Saudi clubs.

Pursuant to the reports of the match referee and commissioner, the Disciplinary Committee of the Saudi Arabian Football Federation (SAFF) issued a decision penalizing Al-Wehda Club with a fine of 300,000 Saudi Riyals and deducting three points from the club's results.This decision was also upheld by the SAFF Appeal Committee which decided to reject the appeal and to support the decision of disciplinary committee.

The Saudi Club decided to challenge the decision of the Appeal Committee (CAS 2011/A/2472 Al-Wehda Club vs. Saudi Arabian Football Federation (SAFF), award of 12 August 2011).

In the Statement of appeal, Al-Wehda alleged that CAS has jurisdiction to decide the present matter and invoked the application of several articles of the Statutes of the Saudi Arabian Football Federation and in particular article 64 which states:

"1. Pursuant to any relevant articles of the Statutes of the International Federation, any appeal against a final and binding decision issued by the International Federation shall be examined by the Court of Arbitration for sport (CAS), in Lausanne, Switzerland. However, the Court of Arbitration for sport does not examine appeals pertaining to the violations of the Laws of the Game, or to temporary suspensions of up to four matches, or to suspensions of up to three months, or to the decisions issued by an independent arbitration panel duly constituted by the Federation or a continental federation.

2. The Federation, as well as its members, the players, the officials, matches agents and players agents, undertake to abide by any final decision issued by the International Federation or the Court of Arbitration for sport (CAS)".

In addition, the Saudi club purported that a letter was addressed to the club in which the SAFF Secretary General declares that "the Federation accepts the jurisdiction of the CAS in compliance with the Statutes of the Saudi Arabian Football Federation which recognize said jurisdiction".

Before the CAS Panel, the Respondent contested the jurisdiction of the CAS and denied that the letter of the Secretary General of the SAFF could be interpreted as a confirmation of the acceptance of CAS jurisdiction.

Al-Wehda attempted by all means to establish the existence of a provision in the SAFF Statutes and Regulations allowing an appeal to the CAS. In addition, it contended that the reference to the "International Federation" contained in Article 64 para. 1 of the SAFF Statutes is "clearly a printing mistake", and that such provision should be read with a reference to the SAFF and not to FIFA (the International Federation).

In reply to the parties' arguments, the CAS Panel referred to article R47 of the Code, in order for the CAS to have jurisdiction to hear an appeal, either the statutes or regulations of the sports federation -from whose decision the appeal is being made- expressly recognise the CAS as an arbitral body of appeal, or a specific arbitration agreement referring to CAS has been concluded between the parties.

The SAFF Statutes did not allow an appeal to CAS against decisions rendered by the federation or its legal or disciplinary bodies. In the meantime, the FIFA Statutes (in fine art. 63) do not contain any mandatory provision that obliges a national federation or a league to allow a right of appeal from its decisions. Therefore, no right of appeal to the CAS could exist until the national federation or the league had made provision for this right in its statutes or regulations.

Clearly, the CAS Panel rejected the appellant's submission that the SAFF Statutes contained in Article 64 was a "printing mistake", which in the meantime was also denied by SAFF itself.

The CAS panel found that Article 64 of the SAFF Statutes confirmed only -within the SAFF system- a provision of the FIFA Statutes, indicating to its affiliated clubs that the decisions

rendered by FIFA can be challenged before the CAS. The Panel, also, noted that no other provision in the articles of the SAFF Statutes invoked by the Appellant required for an obligation of the SAFF to submit its decisions for an appellate review by the CAS.

Based on the foregoing, the Panel concluded that no SAFF rule directly provides for an arbitration clause allowing the clubs affiliated to the SAFF to challenge SAFF decisions before the CAS.

The CAS panel concluded that it lacked jurisdiction to decide upon the appeal filed by Al-Wehda Club against the decision of the SAFF Appeals Committee.

B. Unilateral termination of the contract without just cause & the calculation of due compensation

The five cases to be discussed hereunder arise from appeals submitted either by football clubs or by players. The jurisdiction of the CAS to hear such appeals against decisions made by the FIFA Dispute Resolution Chamber (DRC) derives from several sources:

a- Article 67(1) of the FIFA Statutes as it determines that "[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question".

b-Article 24 of the FIFA Regulations on the Status and Transfer of Players (RSTP) which provides: "Decisions reached by the Dispute Resolution Chamber or the DRC judge may be appealed before the Court of Arbitration for Sport (CAS)".

c-Article R47 of the Code states that "An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".

All the cases involves several articles of the RSTP and in particular article 17 which governs the consequences of terminating a contract without just cause either by the club or by the player. In this matter, article 17 is a unique provision aimed to protect the principle of 'contractual stability' in employment relations between players and clubs. It is a compromise between the principle of 'contractual stability' and 'freedom of movement'. On the one hand, the player may unilaterally and prematurely terminate the contract with the club even without just cause, exercising his fundamental right of freedom of movement. On the other hand, he will be subject to severe consequences for such termination (compensation and sporting sanctions).

As mentioned by the CAS Panel in Shakhtar Donetsk v Matuzalem & Ors (CAS 2008/A/1519-20), the purpose of Article 17 is "...basically nothing else than to reinforce contractual stability, i.e. to strengthen the principle of pacta sunt servanda in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches by a club or by a player...".

1. Ali Bouabé, Hassan El Mouataz & Sporting Lokeren Oost-Vlaanderen vs. Association Sportive des Forces Armées Royales (ASFAR)

In two decisions of 2007, the Belgian Club Lokeren Oost-Vlaanderen SC was ordered to pay in solidarum with its two Moroccan players Ali Bouabé (TAS 2007/A/1314) and Hassan El Mouataz (TAS 2007/A/1315), respectively, a compensation of 325.000 euros to the Association Sportive des Forces Armées Royales (ASFAR) of Morocco.

The two players terminated their contracts with their previous club of Morocco. The latter decided to claim for compensation for the breach of the contract and to request a full repair of the damage.

In the two awards, the CAS Panel drew a very important distinction between the 'loss of profit' and 'the loss of opportunity' or the consequential damages as ASFAR was alleging the loss of the Club's opportunity to negotiate the transfer of its player to another club.

The CAS Panel relied on the rule of certainty in damage and demonstrated that in the light of the Swiss Federal Tribunal jurisprudence, the principle of consequential losses is totally disregarded.

2. FC Sion vs. FIFA & Al-Ahly SC and E. vs. FIFA & Al-Ahly SC

In June 2008, the Egyptian club Al-Ahly (hereafter Al-Ahly) filed a claim at FIFA DRC to argue that its goalkeeper E. had breached his contract unilaterally and that the Swiss club FC Sion had induced the player to act in that way.

Al-Ahly requested FIFA DRC to impose sanctions and to order a financial compensation in its favour.

On 16 April 2009, the DRC ordered E. to pay the amount of EUR 900,000 to Al-Ahly and decided that "FC Sion" shall be jointly liable for such payment. Furthermore, the FIFA DRC imposed a four-month suspension against the player and prevented the FC Sion from registering any new players, either nationally or internationally, for the next two transfer periods.

The new club, the player and the old club appealed the DRC decision simultaneously before the CAS (CAS 2009/A/1880 FC Sion vs. FIFA & Al-Ahly SC - CAS 2009/A/1881 E. vs. FIFA & Al-Ahly SC, respectively, award of 1 June 2010).

The CAS panel stated that the appeal of FC Sion was inadmissible. The appeal of E. was partially upheld and the CAS has reduced the financial compensation for breach of contract, which was initially fixed at EUR 900,000 by FIFA DRC, to an amount of USD 796,500 (approximately EUR 717,500). However, the sporting sanction imposed on the player (four months suspension) was confirmed.

The CAS panel refused to follow a literal application of the factors applied by the FIFA Dispute Resolution Chamber (DRC) in calculating compensation under Article 17 of the FIFA Regulations. Instead, the panel based its assessment on the principle of "positive interest" which places the injured party in the position he would have been had the contract been performed properly. In the meantime, the CAS' confirmation that compensation should be based on the "positive interest" principle was significant in that it takes into account the whole spectrum of an injured party's loss and not merely the residual value of a player's contract.

3. FC Nantes, Ismaël Bangoura vs. Al Nasr Sports Club

The case involved the Guinean football player Ismaël Bangoura, Al-Nasr sports club of Dubai (UAE), and FC Nantes of France in three consolidated appeals before the CAS (CAS 2013/A/3091 FC Nantes vs. FIFA & Al Nasr Sports Club - 3092 Ismaël Bangoura vs. Al Nasr Sports Club & FIFA -3093 Al Nasr Sports Club vs. Ismaël Bangoura & FC Nantes, award of 2 July 2013).

In 2010, Bangoura was transferred from a French club to Al-Nasr and certain commitments were made regarding his salary. The following year, he left Dubai without authorization from Al-Nasr and in early 2012 he signed a contract with FC Nantes.

He took Al-Nasr to the FIFA Dispute Resolution Chamber (DRC) to obtain payment of the balance of his compensation. In turn, Al-Nasr made a counterclaim for breach of contract because the player had joined FC Nantes when he was still under contract with his previous club.

In November 2012, the FIFA DRC ordered both FC Nantes and the player to pay a considerable amount of EUR 4,500,000 to Al-Nasr Sports club for an unjustified breach of contract during a protected period (cf. art. 17 par. 1 and 2 of the Regulations on the Status and Transfer of Players) plus 5% interest, as compensation for the early termination without just cause of the Employment Contract.

In their appeals to the CAS, the French club and the player argued that the breach of contract was justified and that the sanctions should be lifted. For its part, Al Nasr Sports Club also appealed to the CAS to request that the amount of compensation be increased.

The Court of Arbitration for Sport (CAS) upheld the DRC decision, including a temporary sporting sanction affecting both FC Nantes and the player.

Bangoura received playing ban of four months and FC Nantes received a transfer ban for two consecutive transfer windows as a result of the termination without just cause taking place within the protected period.

The three appeals were dismissed and the decision of the FIFA DRC was confirmed in its entirety.

In fact, parties to an employment contract may, pursuant to article 17 par. 1 RSTP, stipulate in the contract the amount of compensation (liquidated damages) for breach of contract. As stated in the appealed decision, where such a clause exists, the wording of such clause should leave no room for interpretation and must clearly reflect the true intention of the parties. In this regard, it needs to be pointed out that the clause as quoted above is drafted in vague and ambiguous terms which does not allow for the Panel to establish the true intention of the parties.

As stated in the CAS ruling " the Panel would like to stress that it found the Appealed Decision to be well reasoned and based on a careful examination of the evidence presented to it and, as such, despite having full power of review of the disputed facts and law it followed the obiter dictum in CAS 2009/A/1870 WADA v Hardy and USADA Hardy pursuant to which “the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence”. As has been clearly set out above, the Panel does not find the sanctions contained within the Appealed Decision to be disproportionate and, as such, is confident in its decision to not interfere therewith".

The CAS panel confirmed the FIFA DRC decision which based the amount of compensation on the offers made by third parties showing "potential market value" of the player without referring to "positive interest".

4. Zamalek Sporting Club vs. Accra Hearts of Oak Sporting Club

This case deals with the claim raised by a Ghanaian Football Club "Accra Hearts of Oak Sporting Club " or "Accra" against an Egyptian Football Club "Zamalek Sporting Club" (hereafter Zamalek) after the transfer of the Ghanaian player "Karimu Elhassan" (CAS 2014/A/3518 Zamalek Sporting Club vs. Accra Hearts of Oak Sporting Club, award of 31 October 2014). Prior being heard by the CAS, Accra submitted the issue to the Dispute Resolution Chamber (DRC) of the FIFA where the DRC judge decided, on 17 May 2013, that Zamalek shall pay to Accra the amount of USD 82,500 as training compensation as well as 5% interest per annum. This decision was notified to Zamalek, via the Egyptian Football Association in February 2014. The latter filed its Statement of Appeal with the CAS which appointed a sole arbitrator to settle the dispute. Article 20 of the FIFA Regulation for the Status of Players was of key importance in this dispute. The said article states: "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) on each transfer of a Professional until the end of the Season of his 23thrd 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 annex 4 of these Regulations".

Pursuant to articles 1 and 2 of Annex 4 to the FIFA Regulations as well as FIFA Circular Letter no. 801 dated 28th March 2002, the transfer of the player was made for 5 consecutive seasons to Zamalek from 2011/2012 to 2015/2016.

The player was registered as a non-amateur football player with Accra since 2008 when he was only 17.5 years old. He was not formed yet as evidenced by his modest financial arrangement during the season 2008/2009. During the second season 2009/2010, the player was named captain of Accra's A-Team, playing 28 matches with his club. Given that the Player was less than 21 years old when he joined Accra and less than 23 years when he left Accra, the training compensation was at issue. The Sole Arbitrator concluded that, as from his second season 2009/2010 with Accra, the Player could not anymore be considered as a young developing talent, but instead had acquired the status of a key player. The Player's training period thus terminated at the end of the first season the Player played for Accra, i.e. the season 2008/2009. Therefore, Zamalek was required to pay a training compensation to Accra for the season 2008/2009, the first season the Player played with Accra.

5. Al-Nasr Sports Club vs. F. M.

In another case dealing with termination of contract between the club and its player, Al-Nasr Sports Club (UAE) invoked three distinct grounds in order to justify the termination of contract with its previous Iranian Player F.M. (CAS 2010/A/2049 Al Nasr Sports Club v. F.M.), namely that (i) the Player had taken an unauthorised leave, (ii) was performing inadequately based on the coach's report, and (iii) was involved in a racist incident.

Following the termination letter, the Player filed a claim with the Dispute Resolution Chamber (DRC) for unjust termination of contract. The FIFA DRC dismissed all grounds for termination advanced by the Club and accepted the Player's claim in part and ordered the Club to pay him USD 822,000.

The CAS Panel dismissed all the grounds invoked by the Club as justification for termination of the contract.

The CAS Panel calculated the compensation due to the Player based on the value of Contract, the compensation that had already been paid to the Player, and also the monetary sums received by the player from his new Iranian club "Esteghlal".

The Panel indicated that the passage of 10 months between the violation by the player of the contractual obligations and the letter of termination created a rebuttable presumption to the effect that the Player might have legitimately believed his exoneration from any liability.

Also, the Panel specified that "in the absence of strict contractual language, inadequate sporting performance can hardly constitute a legitimate breach of contract … unless the parties have reached an agreement in this regard".

Finally, the CAS Panel shed light on the issue of the "signing-on fee" due to the player and differentiated it from the bonuses or premiums. The signing-on fee is a contractual obligation and is not performance-related (unlike premiums or bonuses which necessarily are dependent on a player's performance).

The Club was unable to provide any proof that would cast doubt on the soundness of the DRC Decision. As a result, the Panel did not see "reason to deviate from the DRC findings in this respect and decided that the Club shall pay the Player the sum of USD 822,000".

Under the circumstances, the Appellant was unable to persuade the Panel that these are legitimate grounds for terminating the Contract.

The CAS Panel decided that there was no reason to disturb the relevant findings in the DRC Decision and rejected the claims by Al-Nasr Club in their entirety.

C. The Applicable standard of proof in disciplinary cases

Two cases dealing with disciplinary matters against officials address the issue of the requisite standard of proof. The first one was brought by Mr. Mohamed Bin Hammam from Qatar and the second one was submitted by Mr. Al Birair from Sudan.

1. Mohamed Bin Hammam vs. FIFA

In May 2011, Mr. Mohamed Bin Hammam, the former president of the Asian Football Confederation (AFC) and the FIFA presidential ex-candidate from Qatar (hereinafter Bin Hammam) was accused of trying to purchase votes of various football associations by distributing envelopes containing $40,000 in cash to delegates of the Caribbean Football Union (CFU), following a joint meeting in Trinidad and Tobago.

This accusation was brought first before the FIFA Ethics Committee which issued a decision in the following terms:

- The official, Mr. Mohamed Bin Hammam, is found guilty of infringement of art. 3 par. 1, par. 2 and par. 3 (General Rules), art 9 par. 1 (Loyalty and confidentiality), art. 10 par. 2 (accepting and giving gifts and other benefits) and art. 11 par. 2 (Bribery) of the FIFA Code of Ethics.
- The official, Mr. Mohamed Bin Hammam, is hereby banned from taking part in any kind of football-related activity at national and international level (administrative, sports or any other) for life as from 29 May 2011, in accordance with art. 22 of the FIFA Disciplinary Code and in connection with art. 17 of the FIFA Code of Ethics.

Mr. Bin Hammam appealed this decision to the FIFA Appeal Committee. The appeal was rejected and the decision of the FIFA Ethics Committee was confirmed.

Ultimately, Mr. Bin Hammam filed a Statement of Appeal with the CAS challenging the decision of the FIFA Appeal Committee (CAS 2011/A/2625 Mohamed Bin Hammam vs. FIFA). The Appellant submitted a number of witness statements and sought an opportunity to test the evidence of any witness requested by the FIFA.

Before the CAS, Mr. Bin Hammam alleged that FIFA has disregarded the principle of "due process" in reaching its decision to sanction him. He added that the FIFA Ethics and Appeal Committees failed to apply the standards of due process as guaranteed in the European Convention of Human Rights (ECHR) and specifically article 6 of the said Convention.

The Appellant argued that the FIFA Ethics Committee lacked independence and impartiality and has decided the case based on the "personal conviction" of its members. He also asserted that FIFA has applied absolute discretion and personal conviction as an evidentiary standard of proof rather than recognized standards of "comfortable satisfaction" and that the FIFA adopted its accusations in an arbitrary, inconsistent and unprincipled approach to its own rules.

In its return, the FIFA considered that the cash payments that took place at the CFU meeting to be a violation of the FIFA Code of Ethics (FCE) and the Disciplinary Code (FDC); that Mr. Bin Hammam was the source of these cash gifts which were made in order to gain an advantage or to buy votes for his candidacy.

In its analysis to the alleged facts and witnesses evidence, the CAS Panel (a) eliminated the alleged violations of due process then (b) examined the charges and accusations towards Mr. Bin Hammam before (c) deciding on the case.

a. The alleged violations of due process eliminated by the CAS Panel

Regarding the procedural irregularities and the violation of the due process principle as contended by the Appellant, the CAS Panel noted that pursuant to Article R57 CAS Code "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 addition, a well-established CAS jurisprudence confirms that "an appeal to the CAS arbitration procedure cures any infringement of a due process right that may have been committed by a sanctioning sports organization during its internal disciplinary proceedings".

The Panel considered that " it has offered both Parties every opportunity to present their case fully and to be heard on all issues, both procedural and substantive. In addition, the Parties confirmed at the end of the oral hearing

that they had the opportunity to fully present their case and that the due process rights had been respected."

The Panel concluded that any possible procedural violation that may have occurred in the course of the proceedings before the FIFA Ethics and Appeal Committees had been cured.

b. Examination by the CAS Panel of the bribery charges

The CAS Panel decided to examine whether the evidence provided by FIFA establishes the alleged facts of bribery. To do this, it considered that the applicable "standard of proof" is indicated under par. 3 of article 97 FDC, entitled "Evaluation of proof", which provides:

"1. The bodies will have absolute discretion regarding proof. 2. They may, in particular, take account of the parties' attitudes during proceedings, especially the manner in which they cooperate with the judicial bodies and the secretariat 3. They decide on the basis of their personal convictions".

In this regard, the Panel noted that the consistent CAS jurisprudence has equated this standard to the standard of "comfortable satisfaction" standard in disciplinary proceedings, as confirmed by the panel in the Adamu case (CAS 2011/A/2426 Amos Adamu vs. FIFA).

"The Panel is of the view that, in practical terms, this standard of proof of "personal conviction" coincides with the "comfortable satisfaction" standard widely applied by CAS panels in disciplinary proceedings. It is a standard that is higher than the civil standard of "balance of probability" but lower than the criminal standard of "proof beyond a reasonable doubt". According to this standard of proof, the sanctioning authority must establish the disciplinary violation to the comfortable satisfaction of the judging body bearing in mind the seriousness of the allegation.

It follows that the onus of proof lay on FIFA to prove to the "comfortable satisfaction" of the Panel that the facts it alleged regarding the source of the monies offered to the CFU delegates by Mr. Bin Hammam have been met.

c. The lack of direct evidence on the alleged facts and the lift of a life ban:

The Panel found that FIFA Ethics Committee and the Appeal Committee wholly constructed their evidence based on circumstantial evidence, having regard to the motive that Mr. Bin Hammam might have had for these actions. The fact remains that the Panel was not presented with any direct evidence to link Mr. Bin Hammam with the physical presence of the monies in Trinidad and Tobago.

As a result, the majority of the Panel was unable to conclude to its comfortable satisfaction that the charges against Mr. Bin Hammam were established.

The Panel concluded that the evidence submitted by FIFA is insufficient in that it does not permit the majority of the Panel to reach the standard of "comfortable satisfaction" in relation to the matters on which the Appellant was charged. It is a situation of "case not proven", coupled with concern on the part of the Panel that the FIFA investigation was not complete or comprehensive enough to fill in the gaps on the record.

Therefore, the Panel decided to annul the FIFA Appeal Committee decision and lifted the life ban imposed on Mr. Bin Hammam.

2. Al-Birair vs. CAF

This case is an appeal brought before the CAS by Mr. Al-Birair, the president of the Sudanese football club "Al-Hilal" (CAS 2012/A/2699 Al-Birair vs. Confédération Africaine de Football, award of 20 December 2012). The Appellant was accused of assaulting the referee during the semi-final football game of the CAF Orange Champions League between "Al-Hilal" of Sudan and "L'Espérance de Tunis" of Tunisia, in 2011.

Based on the match commissioner's report and witnesses statements, the President of Al Hilal Club was accused of having punched the referee (Haimoudi Djamal) on his face. Therefore, the

CAF disciplinary board decided to ban the President of Al-Hilal club for a period of 2 years and to impose a fine of 10,000 USD upon him. When the Appellant tried to lessen the sanction imposed by the disciplinary board, in fact the sanction was increased to a ban of 4 years and a fine of 10,000 USD by the CAF Board of Appeal.

Mr. Al-Birair finally decided to appeal the CAF Board of Appeal decision before the CAS. He testified that he felt dizzy and ill before the end of the first-half of the game, that a friend drove him from the stadium to a hospital, where he spent the night and that he could not possibly be the assailant. He claimed that he was not in any way involved in the incident either as the antagonist or as a witness.

After examining the documents and hearing witnesses from both sides, the CAS Panel decided, pursuant to article 33 of the CAF Disciplinary Code, that the onus of proof regarding disciplinary infringements rests on CAF which must establish the facts underlying the alleged violations. In addition, the standard of proof to be applied in disciplinary cases is not the mere "balance of probability" but instead the "comfortable satisfaction" of the Panel.

The evidence adduced by Mr. Al-Birair showed that it would have been nearly physically impossible for the Appellant to have attacked the referee. Furthermore, another person had already admitted the assault.

The Panel was not convinced that the witness statements of the match commissioner and the first assistant referee, on their own merits, would be enough to identify the Appellant as the assailant. It was doubtful for the Panel that the two witnesses would have been able to identify the assailant. They did not previously know him and had met him only for a brief moment before the match, in an attack, which took only a couple of seconds.

The Panel found that the charges made against the Appellant were not established to the comfortable satisfaction of the Panel. It concluded that the Appellant could not have been the person, who attacked the referee at the match. As a result, the disciplinary sanctions imposed on him were set aside.

III. Equestrian Related disputes

Five cases deal with the disciplines of endurance and show jumping. The cases are CAS 2005/A/895 Lissarrague & Fédération Française d'Equitation & Emirates International Endurance Racing, the Organising Committee of the FEI Endurance World Championship 2005 vs. FEI & Sheikh Hazza Bin Sultan Bin Zayed Al Nahyan; CAS 2011/A/2558; Omran Ahmed Al Owais vs. FEI; CAS 2012/A/2807 Khaled Abdullaziz Al Eid vs. FEI; CAS 2012/A/2808 Abdullah Waleed Sharbatly vs. FEI; and CAS 2013/A/3124 Rashid Mohd Ali Alabbar vs. FEI.

They are discussed either under the Equine Anti-Doping Rules (EAD) or the Equine Controlled Medication Rules (ECM).

A. Applications of the Equine Anti-Doping (EAD) Rules

1. Lissarrague et al vs. FEI & Sheikh Hazza

Sheikh Hazza Bin Sultan Bin Zayed Al Nayhan from the UAE (hereinafter Sheikh Hazza) won the FEI Endurance World Championship for 160 Km in Dubai with his horse Hachim while the French rider Barbara Lissarrague (hereinafter Lissarrague) came off second best with her horse Georgat. Sheikh Hazza's horse underwent under a doping test. Hachim's sample A contained Methylprednisolone, a prohibited substance pursuant to the Veterinary Regulations of the FEI. Therefore, the Organizing Committee of the Championship awarded Lissarrague the gold medal, although the official results were recorded with Sheikh Hazza winning. Sheikh Hazza was not given the opportunity to be present at the sample B test. As a result, the FEI Judicial Committee decided that there was a procedural error and that Sheikh Hazza should be awarded the gold medal given to Lissarrague.

The French rider, the Fédération Française d'Equitation and the Organizing Committee of the FEI Endurance World Championship 2005

jointly filed an appeal against FEI and Sheikh Hazza, respectively, at CAS. They requested the annulment of the decision of the FEI Judicial Committee as well as the confirmation of the positive doping result. The CAS Panel set aside the decision of the FEI Judicial Committee and disqualified Sheikh Hazza and Hachim without imposing a fine or ineligibility period. It held that Sheikh Hazza's right to due process was not violated when he was absent for the Sample B test.

2. Omran Ahmed Al Owais vs. FEI

The second case deals with another UAE rider Omran Ahmed Al Owais (hereinafter Al Owais) in a different doping case and subject to the FEI Equine Anti-Doping (EAD) Rules. The purpose of the EAD rules is to preserve "integrity of the horse sport". In addition, the goal of the EAD Rules is to prevent any attempt to alter a horse's performance or to mask an underlying health problem by the administration or application of prohibited substances to the horse's body.

Al Owais is a show jumping rider who participated in an international show jumping competition in 2011, in Abu Dhabi. The event was organized by the Abu Dhabi equestrian club.

Prior to transporting his the horse (Oxillilia Joelle) to the competition site, the rider encountered difficulties loading it the horse onto the truck. The rider administered "Rakelin", a long-lasting tranquilizer, to calm down the horse. Unbeknownst to the rider, this medicine contained "Reserpine" which appears on the 2011 FEI Equine Prohibited substances list.

The rider disclosed the facts to the event organizer by handing him a letter. The rider did not obtain, an Equine Therapeutic Use Exemption (ETUE) prior to the event. The event organizer did not object to his participation and informed the rider orally that he and the horse would be permitted to compete, if his name and the name of the horse's name are on the entry list.

After the competition, the banned substance was detected in the horse blood sample. Subsequently, the FEI Tribunal decided to suspend the rider for a period of two years pursuant to Article 2 of the EAD Rules. It is against this decision that Al Owais submitted an appeal to the CAS.

The case came under the provisions of 10.5.1 (No Fault No Negligence) and 10.5.2 (No Significant Fault or Negligence) of the Equine Anti-doping Rules. The ineligibility sanction is eliminated or the time period is reduced, as the case may be, where the Appellant establishes that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of 'utmost caution', that he had administered the banned substance (art. 10.5.1 EAD). Alternately, the Appellant must establish that "in view of the totality of the circumstances" the degree of his negligence was so slight that a finding of "No Significant Fault or Negligence" is inevitable (art. 10.5.2 EAD). To this end, he must first establish how the banned substance entered the horse's system (art. 2.1.1 EAD).

In order to avoid the ineligibility sanction of two years, before the CAS panel, Al Owais claimed having acted in good faith. He insisted that his participation was not grossly negligent, as considered to be by the FEI Tribunal. He was in full compliance with the organizer's advice and there was no flagrant violation to any of the FEI EAD Rules.

To the contrary, the FEI insisted on the suspension period. The Appellant (Person Responsible or PR) had not fulfilled his duties and responsibilities, given that he has responsibility for what a the horse digests. As a professional rider, experienced competitor and operator of his own stables, the Appellant cannot rely on lack of knowledge of the prohibited character of a substance to obtain a reduced sanction. The Appellant was negligent, as he did not check the contents of the substance to ascertain whether it is prohibited.

The CAS Panel concluded that no sufficient grounds were found to establish the lack of any fault or negligence on the part of Al Owais within the meaning of Article 10.5.1 of the EAD Rules. As a professional and experienced rider, the Appellant acted negligently when he

administered "Rakelin" to the Horse without ensuring that it did not contain a banned substance. Further, he did not check the product description, which was clear and written in English.

Furthermore, the CAS Panel considered that none of the given circumstances of the case could be qualified as "special" in the meaning of art. 10.5.2 of the EAD Rules. A period of ineligibility can be reduced based on "no significant fault or negligence" only in cases where the circumstances are "truly exceptional" and not in the vast majority of cases.

Although the CAS Panel accepted that Al Owais did not administer the substance with the aim of improving the Horse's performance and had acted significantly differently than athletes who wish to cheat, the Panel must apply the relevant laws and regulations as currently in force.

According to the above, the CAS panel decided to maintain the decision of the FEI Tribunal although concluded that the ineligibility period should start from the time of the horse blood testing.

3. Rashid Mohd Ali Alabbar vs. FEI

This was an appeal submitted by Rashid Mohd Ali Alabbar (hereinafter Alabbar), a UAE rider, against the FEI Tribunal decision, which sanctioned the rider by a 30-month suspension for breach of the EAD Rules.

Alabbar participated in an FEI-sanctioned endurance race for 120 km in Dubai on a horse named "Cromwell", where he came in third among the participants. The Horse was tested positive for the substance testosterone at a concentration of (35 ng/ml) above the authorised limit (20ng/ml). The rider explained the presence of this substance arising from feeding the horse a nutritional supplement "The Enhancer". The supplement contained a substance called Dehidroepiandrosterone (DHEA) which has a similar chemical structure as testosterone.

Alabbar argued that he bears "No Significant Fault or Negligence" for the presence of the substance in the horse's sample and asked the CAS panel to reduce the ineligibility period to one year, pursuant to art. 10.5.2. He added that he was concerned about the welfare of the horse and had no intent to enhance the performance. In addition, he asked for the application of the "principle of proportionality" considering that "the severity of the sanction imposed must be commensurate with the severity of the offense".

According to the EAD Regulations, there is a presumption (strict liability) of the intentional administration of the banned substance to enhance the horse performance. In order to rebut this presumption, the Rider (person responsible) must prove (according to a balance of probabilities as the standard of proof) that he bears (No (or No Significant) fault or negligence) for the presence of the banned substance in the horse's system. The Rider or the Person Responsible must also establish how the banned substance entered the horse's system.

Rather than unequivocal statements from an independent and authoritative source, the CAS Panel found that the Appellant had obtained ambiguous assurances from unqualified and partisan persons that the Supplement was "safe", would not harm the Horse and would not lead to a doping violation. The Panel concluded that the requirements of article 10.5 of the FEI EAD Rules were not satisfied.

While the Panel considered that for an amateur sportsman such as Alabbar (27 years old) the duties may appear onerous, it was of the view that the duties are the price necessarily paid nowadays for participating in events regulated by a governing body which subscribes to, or applies the anti-doping Code.

Finally, the CAS Panel found that the standard two-year suspension period must stand.

B. Applications of the Equine Controlled Medication (ECM) Rules

The Appellants Khaled Abdullaziz Al Eid & Abdullah Waleed Sharbatly were members of the Saudi national equestrian jumping team. Both riders were charged by the FEI Tribunal because of the presence of the medications,

Phenylbutazone and Oxyphenbutazone (commonly known collectively, as "Bute"), without the requisite pre-authorisation (ETUE) in their competition horses' systems. The substances are non-steroidal anti-inflammatory and pain-relieving drugs. They are classified as Controlled Medication Substances under the Equine Prohibited Substances List.

The FEI tribunal imposed a sanction of eight months ineligibility on each of the equestrian athletes. They decided to appeal this decision before the CAS.

The two cases which formed the subject of the CAS appeal trigger the FEI Equine Controlled Medication (ECM) Rules. These Rules seek to prevent medication violations and safeguard the health and welfare of the competition horse, by ensuring that medications used to treat horses when they are not competing are not used inappropriately in relation to horses that are in competition.

The Appellants were not accused of doping. Instead, they were held to account for the presence of a medication "Bute" in their competition horses' systems, without the required pre-authorisation.

1. Khaled Abdullaziz Al Eid vs. FEI

Khaled Abdullaziz Al Eid (hereinafter Al Eid) participated in late 2011 at a competition in Riyadh with his horse Vanhoeve. The horses competing in the Riyadh Event, including VANHOEVE, were stabled at the International Riding School, which was located next door to the showground for the Riyadh Event. Some of the stables at the riding school were contaminated by "Bute", which was regularly used by the veterinarians to treat the horses. Due to exceptional weather conditions, including rainfall and flooding in Riyadh, Al Eid found that the stable where Vanhoeve was placed, was not cleaned out, and that the horse nosed around in old bedding and a contaminated wall-mounted feed bucket, before the groom was able to clean the stable.

After the horse having been tested positive, the Person Responsible (PR) or Al Eid was charged in violation of art. 2.1.1 of the ECM Rules which states that "[i]t is each Person Responsible's personal duty to ensure that no Controlled Medication Substance is present in the Horse's body. Persons Responsible are responsible for any Controlled Medication Substance found to be present in their Horse's Samples…".

Al Eid argued that he had established, on the requisite balance of probabilities, the ingestion of residual traces of "Bute" through exposure to a contaminated stable environment at the Riyadh Event as being the cause for the presence of the Controlled Medications.

However, the CAS Panel was not convinced. The Panel referred to art. 10.4 of the ECM rules which cannot be applied to have the period of Ineligibility and other Sanctions eliminated or reduced, unless the Person Responsible is able to establish how the Controlled Medication Substance entered the Horse's system.

2. Abdullah Waleed Sharbatly vs. FEI

Abdullah Waleed Sharbatly (hereinafter Sharbatly) participated with his horse LOBSTER in a completion at Al Ain (UAE) in 2012. After a positive test on the horse, the FEI charged Sharbatly with a violation of art. 2.1 of the ECM Rules. The Appellant accepted the Adverse Analytical Findings of the Laboratory in respect of the 2 samples but was unable to establish how the substances entered into his horse's system.
Sharbatly carried out extensive investigations to identify the explanation for the presence of the Controlled Medications in the Sample. He argued that the cumulative effect of the evidence demonstrates, on a balance of probability, that the source of the positive finding was the contaminated environment at the Riding School where the Horse was stabled prior to and during the Riyadh Event.

Before the CAS Panel, he relied on article 10.4 which provides for the elimination or reduction of a period of ineligibility based on "exceptional circumstances".

The CAS Panel analysis, findings and conclusions for both cases:

In both appeals, the CAS Panel shed light on (i) the extent of its powers to review the decision of the disciplinary body; on (ii) the existing differences between the WADC and the ECM Rules and on (iii) the principle of the sanction proportionality with the offence.

(i) The CAS Panel indicated that although "the measure of the sanction imposed by a disciplinary body (i.e. FEI Tribunal) in the exercise of discretion given to it by the relevant rules should only be reviewed when the sanction is evidently and grossly disproportionate to the offence", it is envisaged that such principle does not limit a CAS Panel from correcting what it believes to have been an erroneous application of the rules or the imposition of a sanction which is unreasonable in all of the circumstances.

(ii) Whereas under article 10.4 of the World Anti-Doping Code (WADC), the task is to determine by how much the presumptive sanction of 24 months should be reduced after having regard to the athlete's degree of fault, the reverse process is followed under Article 10.2 of the ECM Rules where there is no presumption of fault. The starting-point is zero, and the FEI tribunal has to decide to what extent it should go up from there (to the maximum of 24 months) in all of the circumstances of the case.

(iii) Discretion as to the appropriate sanction must be exercised in accordance with the principle of proportionality. In other words, the sanction must be commensurate with the seriousness of the offence, taking into account the underlying objectives of the ECM Rules and the mischief they are aimed at preventing.

The CAS Panel concluded that under art. 10.2 ECM rules, the key consideration should be the principle of proportionality between the offence and its sanction. It decided that an illegibility of two months would be appropriate for both appellants in all of the circumstances of the case.

IV. Disputes related to other sports

Beyond football and horse sports, few Arab athletes have been involved in disciplinary cases in other sports such as swimming. The case of the Tunisian swimmer M is illustrative in this respect.

Fédération Internationale de Natation (FINA) c. M. & Fédération Tunisienne de Natation (FTN)

In this context, the case of the Tunisian swimmer M. is very significant. In 2006, Mr. M. was studying computer engineering at Southern California University (USA) where he participated at the US Open competition in Indiana. The Doping control revealed the presence of amphetamines (originated from an Adderall pill) which the swimmer administered two days prior to the event to prevent himself from falling asleep, while writing a report that counted towards his final university diploma.

The disciplinary commission of the Tunisian Swimming Federation [FTN] concluded that the swimmer had not taken the drug to enhance his swimming performance and sanctioned him with a reprimand and warning.

In March 2007, FINA decided to appeal the FTN's decision requesting that a two-year ban be placed on the swimmer pursuant to DC 10.2 of the FINA Doping Control Rules (TAS 2007/A/1252 Fédération Internationale de Natation (FINA) c. M. & Fédération Tunisienne de Natation (FTN).

Before the CAS, Mr. M. admitted that he had taken an Adderall pill, and requested that in case a suspension should be retained against him, to be reduced as provided in Article DC 10.5.2 by reference to Article DC 10.3 in fine of the FINA Doping Control Rules".

DC 10.5.2 states "If an Athlete or other Person establishes in an individual case where DC 10.5.1 is not applicable that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in DC 10.6, the otherwise applicable period of Ineligibility may be reduced based on the Athlete or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable…."

The CAS Panel indicated that "in order to benefit from the application of Article 10.5.2 DC FINA Doping Control Rules (no significant fault or negligence justifying a reduction of the suspension), an athlete must not only show how the banned substance entered his body but that he bears no significant fault or negligence. According to the CAS jurisprudence, the review of the significant fault or negligence must be made according to the specific circumstances of each case."

The CAS Panel stated "Even under stress and fatigue, an elite athlete cannot totally overshadow his mind the obligation to avoid that any prohibited substance enters his body. The fact that the use of Adderall is becoming more common at North American universities cannot excuse such risk-taking conduct".

The Panel added "Exceptionally, the sanction provided by the strict application of anti-doping rules of a sports federation may appear disproportionate to the alleged conduct of the athlete, and not consistent with the purpose - both repressive and educational - sought by these rules. It would be particularly unfair not to take into account the particular circumstances of each case even if negligence is significant and sanction the same way the one who refuses to admit taking doping products intentionally and the one who contests yet the clear results of the doping analyzes. This is to show a balance between the fault or significant negligence and the sanction in the application of repressive system which by itself wants to be very strict."

The CAS panel decided that Mr. M. shall be banned for 18 months (retroactive to 30 November 2006, backdated to the time when the sample was taken) and shall be stripped of the gold and silver medals he won at the 12th world championships in Melbourne for a doping violation.

V. Conclusion

This overview of the Court of Arbitration for Sport awards relative to different Arab countries has been indicative in many aspects. CAS rulings have notably refined and developed a number of principles in respect of jurisdiction and sports law, such as the concepts of strict liability and fairness, the respect of the contractual stability between clubs and their players and consequently, the application of the positive interest rule in the calculation of compensation in case of an unjust and unilateral termination.

As for the disciplinary proceedings, the CAS panels have applied the standard of "comfortable satisfaction" in the evaluation of evidentiary issues. Furthermore, the CAS panels have admitted that any sanction imposed on an athlete should be proportionate in respect of the gravity of the violation committed. Incontestably, the CAS shall continue its development of a lex sportiva through its jurisprudence and shall try to achieve harmonisation through consistency of its decisions.

In addition, it is notable that at present numerous new cases involving Arab sport federations, clubs, officials and players are pending before the CAS. The awards which shall be rendered in these cases may give the author the opportunity to update this survey in the future.

Finally, the Arab sport organizations should, at all times, enhance healthy competition as a means of cultivating ethics, personal honor, virtue, character, respect and trust.

The Taking of Evidence before the CAS

Estelle de La Rochefoucauld*

I. Introduction

The taking of evidence aims at establishing the facts relevant to the outcome of the case. It implies the ruling on the admissibility, relevance, materiality and weight of any evidence adduced by the parties[1]. This task belongs to all the arbitrators and not just the president[2]. The taking of evidence before a State court as well as before an arbitral tribunal is limited to the relevant facts alleged by a party which are challenged by the other party.

While the choice of means of evidence, the admissibility of evidence and the evaluation of evidence are in principle ruled by procedural law, the burden of proof and the existing presumptions -such as for example the presumption related to doping provided by the World Anti-Doping Code (WADAC)- are ruled by the law governing the merits of the case (*lex causae*)[3]. The general principle is that a party who alleges a fact or a circumstance must prove the same. Under Swiss law, the burden of proof is governed by Article 8 of the Swiss Civil Code.

This article is focused on the procedural aspects of the taking of evidence. Thus, the legal framework, the time limit to present evidence,

the different type of evidence allowed before the Court of Arbitration for Sports (CAS) and finally, the assessment of evidence by CAS Panels will be examined.

II. Legal framework

As a general rule, international arbitrations having their seat in Switzerland are ruled by Chapter 12 of the Swiss private International Act (PILA). The procedure before the CAS is therefore subject to the PILA and to the Code of Sports-related Arbitration (CAS Code).

With respect to evidentiary matters, Article 184, paragraph 1 PILA entitled "[t]aking of evidence" is applicable and provides that "[t]he arbitral tribunal shall itself conduct the taking of evidence". This clause gives arbitrators the power to rule on the admissibility of evidence submitted by the parties[4]. The competent arbitration authority - CAS Panels in our case- is

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[1] Lalive/Poudret/Reymond, n°3 *ad* art. 184 LDIP, p. 371.

[2] See Poudret/Besson, Comparative Law on International Arbitration, 2nd edition, 2007, n° 642.

[3] Ibid, n° 643.

[4] TAS 2009/A/1879 Alejandro Valverde Belmonte c. CONI, AMA & UCI, award of 16 March 2010, para.101 & CAS 2011/A/2384 & CAS/A/2386 UCI v. Alberto Contador & RFEC/WADA v. Alberto Contador & RFEC, award of 6 February 2012, para. 169 with further references.

therefore free to determine the weight of all evidence presented by the parties.

The general provision on arbitral procedure, Article 182 PILA entitled "Principle", provides in paragraph 1 "the parties may directly or by reference to the rules of arbitration, determine the arbitral procedure". Pursuant to paragraph 2 "[i]f the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration". Eventually, paragraph 3 adds that "[r]egardless of the procedure chosen, the Arbitral Tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in adversarial proceedings". Concretely, since the parties are considered to have indirectly determined the arbitration proceedings in reference to the CAS Code when agreeing to arbitrate before the CAS, all matters relating to evidence will be governed according to the procedural rules included in the CAS Code with the exception of possible specific evidentiary rules provided by the applicable sport regulations. CAS procedural rules will therefore determine the time limit to submit evidence, the authorized form of evidence as well as the means and admissibility of evidence.[5] Moreover, in accordance with Article 182 PILA, if the Code is silent on a specific issue, the competent CAS Panel will fill this lacuna.

Under the law of international arbitration, CAS arbitrators are not bound by the rules applicable to the taking of evidence before the Swiss civil or criminal courts of the seat of the arbitral tribunal. In general, the power of the arbitral tribunal related to the taking of evidence is only limited by "procedural public policy"[6], the procedural rights of the parties[7] and, where necessary, by the relevant sporting regulations. Thus, according to established CAS case-law and considering the CAS Panels' full power of review of the facts and law, an arbitration panel is not bound by the decisions of another judicial body as an independent forum.[8] For example, in the Valverde case, the Panel considered that the alleged violations of the rules on judicial cooperation which are not of public policy nature, do not preclude the possibility for the Panel to assess evidence such as the results of analyses of plasma bags declared illegally obtained by a national State tribunal and acquired through a rogatory commission[9]. What is more, as seen above, where the regulations chosen by the parties leave a number of open questions, it is up to the arbitrators to address any lacuna.[10] Furthermore, since the CAS Code does not provide any direction regarding the type of conduct of the proceedings i.e. whether the proceedings shall be directed according to the common law or to the civil law tradition, CAS Panels have more flexibility in particular when conducting the evidentiary proceedings. The Panels may notably take into consideration the specific circumstances surrounding the case.[11] In practice, regarding the production of documents, the CAS's approach is between the strict civil law and the extensive production of documents adopted by Anglo-Saxon systems.

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[5] Berger R. / Kellerhals F., International & Domestic Arbitration in Switzerland, 2nd Edition 2010, para. 1197 and Dutoit B. ,Droit International Privé Suisse, Commentaire de la loi fédérale du 18 décembre 1987, Helbing & Lichtenhahn, 1995, p. 649 at Article 184.

[6] According to the Swiss Federal Tribunal procedural public policy is not easily violated: procedural public policy is violated when fundamental, commonly recognized principles are infringed, resulting in an intolerable contradiction with the sentiment of justice, to the effect that the decision appears incompatible with the values recognized in a state governed by the rule of law" decision 4P.267-270/2002 at para. 4.2.1.

See also TAS 2009/A/1879 Alejandro Valverde Belmonte c. Comitato Olimpico Nazionale Italiano (CONI), award of 16 March 2010, para.102.

[7] Equal treatment of the parties and right of the parties to be heard as stated in Article 182 paragraph 3 PILA.

[8] TAS 2009/A/1879 Alejandro Valverde Belmonte c. Comitato Olimpico Nazionale Italiano (CONI), award of 16 March 2010, para. 99.

[9] Ibid, para. 123 ff. with further references.

[10] Ibid, para. 100.

[11] See D. Reiner-Martens, The Role of Arbitrator in CAS Proceedings, CAS Bull, 2/2014.

With respect to evidence, the doctrine considers in general that the IBA Rules may offer valuable direction to CAS Panels and parties[12].

As will be seen in more details below, Article R44.2 -ordinary proceedings- and Article R57 -appeal proceedings- of the CAS Code highlight the power of the Panel to rule on the admissibility of the evidence submitted by the parties and Articles R44 -ordinary proceedings- and Articles R51, R55 and R56 (appeal proceedings) display the different stages of the procedure before CAS Panels.

III. Procedural aspects

The right of the parties to submit evidence to the Panel, to be informed on the evidence brought by the other parties and to present their comments belongs to the primary procedural rights.[13] Such evidence must however be relevant and produced in due time and in due form.

A. Time limit to present evidence

The right to present evidence, including the right to present witnesses, only applies to the extent that appropriate submissions are in time and in accordance with the applicable rules and procedural formalities. In principle, all evidence must be filed together with the written submissions i.e. at the same time as the written submissions.

The rule established by Article R44.1 paragraph 2 -ordinary proceedings-[14] and R56 paragraph 1 -appeal proceedings-[15] states that it is not possible to supplement or amend the parties' submissions after the exchange of the written submissions or after the filing of the appeal brief and the answer. The parties are therefore expected to file a list of any witnesses including a brief summary of their expected testimony, and a list of any experts with an indication of their area of expertise, and shall state any other evidentiary measure which they request. An exception applies if the parties agree to the late filing of the submissions or if the Panel -ordinary proceedings- or the President of the Panel -appeal proceedings- agrees to admit them on the basis of exceptional circumstances[16].

Moreover, the authority of the President of the Panel to accept new submissions is linked to Article R44.3 paragraph 2 of the Code[17] which is applicable *mutatis mutandis* to the appeal proceedings based on Article R57 of the Code. Accordingly, the President of the Panel may at any time order the production of additional documents or the examination of witnesses, if it deems it appropriate to supplement the presentations of the parties.

Articles R44.1 paragraph 2 and R56 paragraph 1 do not give any examples as to what may constitute such "exceptional circumstances". In practice, the Panel will normally accept the late

[12] Manuel Arroyo, Arbitration in Switzerland,The Practionner's Guide, para. 20, p. 971 & Berger/Kellerhals, International and Domestic Arbitration in Switzerland, para. 1200.

[13] See Mavromati, D. & Reeb, M., The Code of the Court of Arbitration for Sport, Commentary, Cases and Material (Wolters Kluwer – Law & Business ed. 2015), para, 10 p. 453 with further references to ATF 119 II 386 of 7 September 1996, F. SpA, at c. 1b. See 4P. 115/2003, 16 October 2003, X. S.A.L. (ATF 129 III 727: ASA Bull. 2004, p. 364) at c. 4.2.

[14] Article R44.1 para. 2:" Together with their written submissions, the parties shall produce all written evidence upon which they intend to rely. 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".

[15] Article R56 para.1: "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 or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer".

[16] See CAS 2012/A/2750 Shaktar Donetsk v. FIFA & Real Zaragoza S.A.D., award of 15 October 2012, para. 111. See also CAS 2007/A/1434 & 1435 IOC v. FIS & J. Pinter & WADA v. FIS & J. Pinter, award of 20 November 2008, para. 79.

[17] Article R 44.3 para.2: "If it deems it appropriate to supplement the presentations of the parties, the Panel may at any time order the production of additional documents or the examination of witnesses, appoint and hear experts, and proceed with any other procedural step. The Panel may order the parties to contribute to any additional costs related to the hearing of witnesses and experts".

filing of the submissions where good reasons such as difficulties to obtain evidence justify the late filing.

It is also possible to accept late submissions "if the new documents merely confirm statements already made in the appeal brief, and such late submission could thus not harm the respondent".[18]

CAS jurisprudence also considered that the fact for the parties to send letters prior to the appeal brief reserving their right to file additional documents at a later point will have no effect: "A party has no vested right to 'reserve' any right that is not granted to it under the CAS Code and such 'right' cannot be artificially created by a self-declaration of an alleged preservation of a 'right'".[19]

In CAS case 2079, the Panel held that a witness mentioned in the Appellant's brief but without a brief summary of his expected testimony as Article R51 of the CAS Code prescribes, can be allowed to testify at the hearing where on the basis of the written submissions and the documents in the file, it is obvious that the witness in question will testify about. Conversely, pursuant to Article R51, witnesses not mentioned at all in the Appeal brief and requested to testify out of time will not be allowed to testify at the hearing as long as the Respondents did not give their consent to hear these witnesses or the Panel did not consider that exceptional circumstances justify such testimonies.[20] Likewise, in CAS case 2384, the Panel stressed that under Article R51 of the CAS Code, an expert testimony on a specific issue requested by the Appellant has to be mentioned in the expert opinion included in the Appellant's written submissions. Addressing questions to an expert on a specific issue not included in the expert opinion at the stage of the hearing is not allowed in principle under Article R56 of the CAS Code[21].

Furthermore, the Swiss Federal Tribunal (SFT) confirmed that a party's right to present evidence, including witness testimonies, only applies to the extent that appropriate submissions are made in time and in accordance with the applicable rules and procedural formalities.[22] As a consequence, the Panel's decision to reject late evidence where no exceptional circumstance is deemed to exist cannot be reviewed by the SFT on the basis of the breach of the parties' right to be heard[23] and the parties are not allowed to require that any late submissions be accepted based on their right to be heard.[24]

B. Type of evidence

1. Written evidence

Regarding the form of submission or production of documents, Article R44.1 paragraph 2 -ordinary proceedings- provides that the parties' submissions must be accompanied by "all written evidence upon which they intend to rely" whereas Articles R51 paragraph 1 and R55 paragraph 1 -appeal proceedings- state that the parties' submissions must be accompanied by "any exhibits and specification of other evidence upon which they intend to rely".

[18] See Mavromati, D. & Reeb, M., The Code of the Court of Arbitration for Sport, Commentary, Cases and Material (Wolters Kluwer – Law & Business ed. 2015), para. 10 p. 498 with further references to CAS 2011/A/2681, KSC Cercle Brugge v. FC Radnicki, award of 19 September 2012, para. 80.

[19] CAS 2011/A/2681, KSC Cercle Brugge v. FC Radnicki, award of 19 September 2012, para.80.

[20] CAS 2010/A/2079 Ricardo David Pàez Gòmez v. Baniyas & FIFA, award of 12 April 2011, paras. 8.11 & 8.12.

[21] CAS CAS 2011/A/2384 UCI v. Alberto Contador Velasco & RFEC & CAS 2011/A/2386 WADA v. Alberto Contador Velasco & RFEC, para. 405 a.

[22] See SFT Judgment 4A_162/2011, paragraph 2.3.2. The case before the Swiss Federal Tribunal concerned an appeal against CAS 2010/A/2108, in which the panel had denied hearing a witness because X's request to hear this new witness was late according to the procedural rules of the CAS.

[23] ATF 4A_312/2012 of 1 October 2012, X. v. Y., at 4.2.2.

[24] The SFT held that CAS panels have the discretion to accept or deny late evidence based on 'exceptional circumstances'. See 4A_312/2012, X v. Y., at 4.3.2 and ATF 4A_274 of 5 August 2013, FC X. v. FC Z & FIFA, at 3.2.

There is no definition of the terms 'written evidence' and 'documents' (referred to in Article R44.3 paragraph 1 designated under the heading "Evidentiary Proceedings Ordered by the Panel"). From the CAS case law rendered so far, we can see that documentary evidence may include paper documents, witness statements, video materials, press articles and bank account reports.[25] The IBA rules on the Taking of Evidence in International Arbitration can also be used as guidance. Accordingly, the word "Document" is defined as "writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means"[26]. With respect to the form of submission or production of documents, copies of documents conform to the original, documents in electronic forms, translation of documents together with the original language identified shall be produced. Except if the authenticity of a document is challenged, it is not necessary to file the original of a document.[27]

2. Witnesses and witness statements

As part of the written evidence, the parties are expected to list the names of any witnesses with a brief summary of their intended testimony. As a general rule, any witness statement shall be filed in writing together with the parties' submissions.[28] Witness statements may also be oral where witnesses testify at the hearing.

The CAS Code does not provide any specific rule relating to the definition of witness or to the preparation of witnesses for testimony. Article 182 paragraph 2 Swiss PILA confers the power to the CAS Panels to define in which way it may take the witness evidence.[29] In practice, any person may present evidence as a witness including a coach, a club's director etc. The parties are responsible for the presence of the witnesses at the hearing.

In case of absence of a witness at the hearing, any witness statement in connection with this person is in principle removed from the file and the evidence is not taken into account[30]. However, the presence of a witness at the hearing can be exempted by the President of the Panel in case of agreement of the parties and if a witness statement has been previously filed.[31] On the other hand, in case of non-appearance of a witness supposed to be cross-examined by the other party, based on Article R44.3 paragraph 2, the President of the Panel may decide to hold an additional hearing to hear this particular witness. If the witness refuses however to appear to the hearing, the Panel does not have the power to summon him. Nevertheless, pursuant to Article 184(2) PILA, the Panel may request judicial assistance from the competent state court.[32] Moreover, according to CAS doping related CAS case law, Panels have a right and power to draw an adverse inference from the athlete's refusal to testify[33]. Therefore, in doping cases in particular, the presence of the athlete at the hearing is encouraged as well as his or her availability for questioning.

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[25] See CAS 2009/A/1920 FK Podeba, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA, award of 15 April 2010, para. 29.

[26] See IBA Rules on the Taking of Evidence in International Arbitration 29 May 2010, p.4.

[27] See CAS 2010/A/2196 Al Qadsia v. FIFA & Kazma SC and CAS 2010/A/2205 Jovancic v. FIFA & Kazma SC, paras. 45-49.

[28] See Article R44.1 para. 3.

[29] See Mavromati, D. & Reeb, M., The Code of the Court of Arbitration for Sport, Commentary, Cases and Material (Wolters Kluwer – Law & Business ed. 2015), para. 25 p. 333 with further reference to F. Schlabrendorff, Interviewing and preparing witnesses for testimony in international arbitration proceedings: the quest for developing transnational standards of lawyer's conduct, in Liber Amicorum Bernardo Cremades, p. 1173.

[30] Ibid, para. 28 p. 334.

[31] See Article R44.2 para.4 CAS Code: "With the agreement of the parties, [the President of the Panel] may also exempt a witness or expert from appearing at the hearing if the witness or expert has previously filed a statement".

[32] See Noth, Arbitration in Switzerland, The Practitioner's Guide, Arroyo M. (ed), Wolters Kluwer – Law & Business ed. 2013, Article 44 CAS Code, para. 29, p. 973.

[33] See CAS 2004/O/645, USOC v. M. & IAAF, award of 13 December 2005, para. 55 and CAS 2004/O/649, USOC v. G. & IAAF, award of 13 December 2005, para. 58.

In any event, the President of the Panel will invite the witnesses and the experts to tell the truth, subject to the sanctions of perjury under Swiss criminal law before any examination.[34]

If a misjudgment of the evidence does not lead to a violation of the parties' right to be heard, a complete ignorance of a contention or of a fact could lead to such violation in the sense that such party lacked the opportunity to present its case".[35]

Finally, in case of inability of the witnesses to attend the hearing or in order to avoid expense, witnesses can be heard by video or telephone conference provided their presence is not crucial.

3. Expert Evidence

The principles applicable to expert evidence are identical to the one applicable to witness evidence in CAS arbitrations. The parties are expected to list the names of any experts with their area of expertise.

Written expert reports should be filed prior to any hearing in order to be effective. Indeed, the parties should be aware of the contents and specific issues treated by the experts before the holding of the hearing.

In practice, expert evidence are often used in doping cases which sometimes involve complex medical or scientific issues. For example, expert reports have been requested to evaluate the consequences of the use of medications or supplements[36], the effect of the ingestion of a particular food[37] or of the recreational drug use of an athlete[38].

When considered relevant, CAS Panels may also appoint an independent expert for assistance.[39] Experts appointed by CAS arbitrators are required to be independent and impartial whereas there is no such request for parties' appointed experts. The parties may also request the Panel to appoint an expert concerning a specific issue. In this regard, "legal opinion" prepared by a legal expert can be produced by the parties when the arbitrators are not familiar with the law applicable to the case or where no precedent exists concerning a specific issue.[40]

4. Request for evidentiary measures

Article R44.3 confers to the Panel the power to order evidentiary measures upon request by one of the parties or on its own initiative in order to complete the submissions of the parties.[41] Based

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[34] See Article R44.2 para. 6 of the CAS Code and Article 309 (a) of the Swiss Criminal Code.

[35] See Mavromati, D. & Reeb, M., The Code of the Court of Arbitration for Sport, Commentary, Cases and Material (Wolters Kluwer – Law & Business ed. 2015), para. 26, p. 333 with further references to ATF 121 III 331 of 25 April 1995, at E. (ASA Bull 1995, p. 708) and to Poudret, J.-F./Besson, S. Comparative Law of International Arbitration, 2nd ed. (London: Sweet and Maxell, 2007), p. 478.

[36] CAS 2011/A/2645, UCI v. Kolobney RCF.

[37] CAS 2011/A/2384 UCI v. Alberto Contador Velasco & RFEC and CAS 2011/A/2386, WADA v. Alberto Contador Velasco & RFES.

[38] CAS 2008/A/1515, WADA v. Swiss Olympic & Daubney and CAS 2009/A/1926 ITF v. Richard Gasquet and CAS 2009/A/1930 WADA v. ITF & Richard Gasquet.

[39] This possibility is mentioned in Article R44.3 (ordinary proceedings) to which Article R57 refers. As a result, the nomination of an independent expert is also possible in appeal proceedings: see CAS 2009/A/1752 Vadim Devyatovskiy v. IOC and CAS 2009/A/1756 Ivan Tsikhn v. IOC, para. 3.37 ff.

[40] CAS 2008/A/1583 Sport Lisboa e Benfica Futebol SAD v. UEFA & FC Porto Futebol SAD; CAS 2008/A/1584 Vitória Sport Clube de Guimarães v. UEFA & FC Porto Futebol SAD; CAS 2010/A/2252 Oleksandr Zavarov v. FC Arsenal Kiev.

[41] Article R44.3: "A party may request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall demonstrate that such documents are likely to exist and to be relevant.

If it deems it appropriate to supplement the presentations of the parties, the Panel may at any time order the production of additional documents or the examination of witnesses, appoint and hear experts, and proceed with any other procedural step. The Panel may order the parties to contribute to any additional costs related to the hearing of witnesses and experts.

The Panel shall consult the parties with respect to the appointment and terms of reference of any expert. The

on Article R57 CAS Code, Article R44.3 applies also by analogy to the appeal procedures. This power includes the production of additional documents, the examination of witnesses, experts and 'any other procedural act'. In practice this power can also be directed at third parties although CAS Panels have no coercive power in this respect.

- Production of evidence Requested by a Party

Under Article R 44.3 and provided a document is likely to exist and to be relevant, a party may request the Panel to order the other party to submit such document in its custody or under its control. [42] However, the provision does not allow CAS Panels to force a third party to produce documents.[43] It is for example possible to request the sport authority having rendered a challenged decision to produce the applicable regulations or any other pertinent document.[44]

The Panel has no discretion to deny the party's request to produce evidence or to appoint an expert based on Article R44.3 CAS Code if such request is on time and is likely to be relevant for the outcome of the case.[45]

Nevertheless, the mere fact for the Panel to refuse, for valid reasons, to use its investigatory powers to hear a witness does not violate the principle of equality of arms provided for in the European Convention for Human Rights (ECHR). As a general rule, only shortcomings in legal representation which are imputable to the State authorities can give rise to a violation of Article 6(3)(c) ECHR[46]. Articles R44.2 and R44.3 apply also by analogy to the appeal procedures based on Article R57 CAS Code.

In any event, the right to be heard of the parties should always be respected.

- Production of additional evidence ordered by the Panel

According to Article R44.3 paragraph 2 "[I]f it deems it appropriate to supplement the presentations of the parties, the Panel may at any time order the production of additional documents or the examination of witnesses, appoint and hear experts, and proceed with any other procedural step".

The Panel can therefore request the file of the previous proceedings[47], the translation into English or French -CAS working languages according to Article R29 of the Code- of documents submitted by the parties in another language[48], proceed to the identification of a witness[49], order a legal opinion to an expert in order to answer specific questions due to the application of a national law with which the Panel is not familiar[50], order the appointment of an expert graphologist for the authentication of documents or signatures[51] or accept late submissions by the parties if they are useful to

expert shall be independent of the parties. Before appointing him, the Panel shall invite him to immediately disclose any circumstances likely to affect his independence with respect to any of the parties".

[42] Article R44.3 para. 1 CAS Code.

[43] CAS 2010/A/2079 R. Gómez v. Baniyas & FIFA, award of 12 April 2011, paras 3.10 ff.

[44] CAS 2002/O/372 N. et al. v. IOC, award of 18 December 2003, para. 8.

[45] See Mavromati, D. & Reeb, M., The Code of the Court of Arbitration for Sport, Commentary, Cases and Material (Wolters Kluwer – Law & Business ed. 2015), para. 37 & 39 p. 337 with further reference to ATF 4A_274/2012 of 19 September 2012, Federation X v. ECU, paras 3.1 and 3.21.

[46] CAS 2011/A/2463 Aris FC v. Javier Edgardo Campora & Hellenic Football Federation (HFF), award of 8 March 2012, paras. 25 ff.

[47] CAS 2008/A/1745 Stichting Ronde van Nederland v. UCI and Eneco Holding N.V., award of 5 February 2010, para. 64.

[48] CAS 2014/A/3477 Pro Duta FC v. PSSI CLAC & FAI, award of 24 September 2014, para. 45.

[49] TAS 2011/A/2616 UCI v. O. & RFEC, award of 15 May 2012, para. 82.

[50] CAS 2009/A/1801 Aris Football Club v. D. Bajevic, award of 17 March 2010, paras 23-25 and para. 33.

[51] CAS 2012/A/2957 FC Khimki v. E. Raça, award of 5 February 2014, para. 3.26.

the Panel to better understand the facts and their legal consequences.[52]

Again, the right to be heard of the parties should always be respected.

IV. Admissibility and evaluation of evidence

A. Principle: admission of evidence presented by the parties and evaluation of evidence by CAS Panels

In compliance with the right to be heard which is a procedural principle universally recognised in all fields of law, the parties have the right to participate to the process of collecting evidence or at least, to express himself/herself on the result of the said process.[53] As a rule, the right to be heard confers to the interested person the right to explain his actions before a decision is taken against him, to produce evidence likely to influence the final decision, to access to the file, to participate in the taking of evidence, to inspect it and to determine one's position in that connection[54], to know the allegations made against him, to question them and to refute them. [55]

As seen previously, according to Article 184 paragraph 1 PILA, international arbitral tribunals sitting in Switzerland not only have the power to rule on the admissibility of evidence but also to decide on their relevance.[56] CAS Panels are therefore free to rule on the weight of any evidence provided that the parties' right to be heard is respected.

Moreover, Article R57 of the CAS Code gives CAS Panels the full power to review the facts and the law. In other words, CAS Panels have a *de novo* power of review i.e. the violation of a procedural right such as the right to be heard is cured by an appeal before CAS.[57] It also means that previous proceedings do not limit the evidence presented by the parties before the CAS or influence the hearing before CAS. This source of appraisal is the core of the CAS system in appeals before the CAS. The admission of new evidence under Article R57 CAS Code is therefore the rule.

The following examples illustrate the discretion of CAS Panels regarding the admission and assessment of evidence.

- Testimony as sufficient evidence to establish doping

In two longstanding doping-related cases, CAS Panels have admitted that the uncontroverted testimony of a wholly credible witness can be sufficient to establish a doping offence absent any adverse analytical finding. The arbitrators also held the existence of a right and power to draw an adverse inference from the athlete's refusal to testify. However, in the circumstances, the witness' testimonies established the admission by the athlete of the use of a prohibited substance and were sufficient to establish the commission of a doping offence. The evidence alone was therefore sufficient to convict. [58]

- Use of anonymous witness statements

CAS Panels have also admitted testimonies of protected witnesses as mean of evidence subject to strict conditions. It is true that facts based on anonymous witness statements affect the right

[52] CAS 2008/A/1429 & 1442, Bayal Sall & Asse Loire v. FIFA & IK Start, award of 25 June 2008, para. 6.7.

[53] ATF 124 II 132, ATF 122 II 464.

[54] ATF 126 I 15; 124 I 49; 124 II 132; 124 V 180.

[55] ATF 130 III 35, ATF 119 II 386, ATF 117 II 346, ATF 116 II 639.

[56] See Rigozzi, Arbitrage International, 2006, no. 478.

[57] Article R57 of the CAS Code : "The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. The President of the Panel may request communication of the file of the federation, association or sports-related body, whose decision is the subject of the appeal. Upon transfer of the CAS file to the Panel, the President of the Panel shall issue directions in connection with the hearing for the examination of the parties, the witnesses and the experts, as well as for the oral arguments".

[58] CAS 2004/O/645 USADA v. M. & IAAF, award of 13 December 2005, paras 45 ff. and CAS 2004/O/649 USADA v. G, award of 13 December 2005, paras 46 ff.

to be heard guaranteed by article 6 of the European Convention of Human Rights (ECHR) and by article 29 paragraph 2 of the Swiss Constitution. However, according to the SFT, anonymous witness statements do not violate this right when such statements support the other evidence provided to the court. The SFT considers that if the applicable procedural rules establish the possibility to prove facts by witness statements, it would break the court's power to evaluate the witness statements if a party was not able to rely on anonymous witness statements. [59] Incidentally, the SFT referred to the jurisprudence of the ECHR which recognizes the right of a party to rely on anonymous witness statement and to prevent the other party from cross examining the witness if the personal safety of the witness is at stake. [60] However, the use of an anonymous witness although admissible is subject to strict conditions i.e. the right to be heard and to a fair trial must be ensured through other means namely the witness must be concretely facing a risk of retaliations by the party he is testifying against if his identity was known, the witness must be questioned by the court itself which must check his identity and the reliability of his statements, and the witness must be cross-examined through an "audio-visual protection system".[61]

- Polygraph evidence/lie detector

The discretion of the Panel related to the assessment of evidence is also highlighted in the Contador case. In this jurisprudence, the Panel admitted, under certain conditions, the polygraph method as evidence. Polygraphic analysis involves the verification of the veracity of the statements made by persons related to specific events under investigation. Based on the power conferred by Article 184 PILA regarding the taking of evidence, considering the acceptance by the Appellants of the admissibility of polygraph method *per se* as evidence and of the application of the World Anti-Doping Code providing "Facts related to anti-doping rules violations may be established by any reliable means"[62], the Panel admitted that the results of the polygraph analysis of the athlete were eligible in the particular case, underlying however that their credibility had to be checked in light of other evidence submitted.[63]

- Unlawfully obtained evidence

As a general rule, in civil and criminal law procedure, the principle of good faith prevents the judges from admitting evidence obtained illicitly by a party. Yet, Panels of arbitrators must weigh the protection of the right violated by obtaining illicitly the evidence against the establishment of the truth.[64]

In this respect, in a doping related case, the CAS Panel considered as admissible a piece of evidence i.e. a blood sample which (a) had been expressly declared to have been illegally obtained by a national Court of Appeals and (b) had expressly been prohibited to be used in any judicial or disciplinary proceedings. The CAS Panel considered that the alleged violations of the rules on judicial cooperation which are not of public policy nature, do not preclude the possibility for the Panel to assess evidence such as the results of analyses of plasma bags obtained through a commission. The CAS Panel held on the basis of such evidence that the athlete had at least tried to engage in prohibited doping practices and, consequently, imposed on him a disciplinary sanction. The athlete sanctioned lodged an appeal before the Swiss Federal Tribunal, which upheld the CAS decision

[59] ATF 133 I 33.

[60] ECHR-cases Doorson, Van Mechelen and Krasniki.

[61] See CAS 2009/A/1920 FK Podeba, A. Zabrcanec, N. Zdraveski v. UEFA, award of 15 April 2010, paras 72-75 and CAS 2011/A/2384 UCI v. Alberto Contador Velasco & RFEC & CAS 2011/A/2386 WADA v. Alberto Contador Velasco & RFEC, award of 6 February 2012, paras 172 ff.

[62] Article 3.2 WADA Code 2009.

[63] CAS 2011/A/2384 UCI v. Alberto Contador Velasco & RFEC & CAS 2011/A/2386 WADA v. Alberto Contador Velasco et RFEC, award of 6 February 2012, paras 392-395.

[64] See Manuel Arroyo, Arbitration in Switzerland – The Practioner's Guide, para. 22, p. 972.

without however dealing with this evidentiary issue.[65]

In a case involving the infringement of the Code of Ethics by a FIFA official, the Panel had to determine whether a number of audiovisual recordings taken by journalists had been obtained illegally and as such ought to be considered inadmissible. The Panel reminded that an international arbitral tribunal sitting in Switzerland is not bound to follow the rules of procedure, and thus the rules of evidence, applicable before Swiss civil courts, or even less before Swiss criminal courts. Therefore, an international arbitral tribunal sitting in Switzerland is not necessarily precluded from admitting illegally procured evidence into the proceedings and from taking it into account for its award. The same approach has been taken by the Federal Tribunal and by most scholars and has been codified in the Swiss Code of Civil Procedure (CCP) at Article 152 paragraph 2 which was entered into force on 1 January 2011.[66] Even supposing the illicit acquirement of the Recordings, "this does not prevent their use as evidence in disciplinary proceedings conducted within a private association or in related appeal proceedings before an arbitral institution" like the CAS.[67]

Hair test

Another CAS Panel admitted a hair test as mean of evidence. Under the circumstances, the tennis Player's hair test revealed that the latter was not a regular user of cocaine whereas another hair test evidenced the fact that the Player "girlfriend" was a regular user. This fact was likely to explain on the balance of probability the contamination of the Player through the kiss of his "girlfriend".[68]

Skype message

A recent jurisprudence has admitted skype messages as mean of evidence. The Panel found that Skype messages can be considered to be admissible means of evidence with probative value to the proceedings to the extent that the "chain of custody" of the laptop was intact.[69]

B. Discretion of the Panel under Article R57 paragraph 3

Since the 2013 modification of the CAS Code, a new provision has been inserted in the third paragraph of Article R57 providing "[T]he Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered". According to the authors of the Commentary of the Code of the Court of Arbitration for Sport, the provision should not be interpreted as a limitation imposed on the Panel but rather as a "right not to admit systematically all evidence filed by the parties"[70].

In this respect, the application of Article R57 paragraph 3 represents an exception to the rule of the admission of new evidence under Article R57 CAS Code. The exclusion of evidence

[65] See CAS 2009/A/1879 Alejandro Valverde Belmonte v. CONI paras. 134 ff. and SFT Judgment of 29 October 2010, 4A_234/2010, ATF 136 III 605.

[66] Article 152 para. 2 Swiss Code of Civil Procedure (CCP): "the discretion of the arbitrator to decide on the admissibility of evidence is exclusively limited by procedural public policy. In this respect, the use of illegal evidence does not automatically concern Swiss public policy, which is violated only in the presence of an intolerable contradiction with the sentiment of justice, to the effect that the decision appears incompatible with the values recognized in a State governed by the rule of law".

[67] See CAS 2011/A/2425 Ahongalu Fusimalohi v. FIFA paras 80-82. See also Arbitration CAS 2011/A/2426 Amos Adamu v. FIFA, paras. 61-78 and CAS 2014/A/3625 para. 142, regarding the admissibility of wiretaps as evidence in a match fixing context – evidence which had been rejected as fraudulent by a State : "[…]even if evidence may not be admissible in a civil or criminal state court, this does not automatically prevent a sport federation or an arbitration tribunal from taking such evidence into account".

[68] CAS 2009/A/1926 ITF v. Gasquet & WADA and CAS 2009/A/1930 WADA v. ITF & Gasquet, award of 19 December 2009, para 5.12-5.23

[69] See CAS 2014/A/3467 G. v.TIU, award of 30 September 2014, paras 89-92.

[70] See Mavromati, D. & Reeb, M., The Code of the Court of Arbitration for Sport, Commentary, Cases and Material (Wolters Kluwer – Law & Business ed. 2015), para. 44 p. 519.

under Article R57 paragraph 3 should be reserved to exceptional circumstances in order to avoid abusive procedural conduct by one of the parties. A recent CAS jurisprudence confirmed that "the *de novo* basis of the CAS power of review is, in essence, the foundation of the CAS appeals system and the standard of review should not be undermined by an overly restrictive interpretation of Article R57.3 of the Code". The Panel's inherent discretion to exclude certain evidence under this provision of the Code is just that the Panel is free to accept or reject evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. Article R57.3 of the CAS Code should therefore be construed in accordance with the fundamental principle of the *de novo* power of review. [71]

What is more, the full power of review of CAS Panel should be preserved to the extent that the previous instance is the internal body of a sports federation. The application of Article R57 para.3 should be "limited in those cases where the previous instance proceedings were conducted by an independent tribunal and parties were given the opportunity to submit their arguments and evidence, whereas the newly adduced evidence constitutes an evidently abusive behaviour by one of the parties". [72]

In any event, the risk of violation of Article 190 paragraph 2 (d) PILA providing for the equality of the parties and for the respect of their right to be heard in an adversarial procedure should be avoided. "The control of good faith should therefore be the key element prior to the application of Article R57 paragraph 3".[73]

The WADA Code 2015 has not inserted the modification of the 2013 version of Article R57 para. 3 granting the CAS panel the right to refuse evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. The comment to Article 13.1.2 WADA Code repeats the *de novo* principle and clarifies that "prior proceedings do not limit the evidence or carry weight in the hearing before CAS".

The question is whether Article R57 para. 3 CAS Code will apply to cases conducted under the WADA Code i.e. whether CAS Panels will have discretion to refuse evidence submitted for the first time before them based on Article R57 para. 3 CAS Code for cases falling under the WADA Code. The likely answer is that WADA Code shall be considered as *lex specialis* for cases falling under its scope. In other words, the scope of review provided under Article 13.1 WADA Code shall supersede the general procedural provision of Article R57 para. 3 CAS Code[74]. It is however important to note that the *lex specialis* will only be applicable as long it does not deviate from mandatory CAS rules, in particular from provisions of the CAS Code pertaining to the well-functioning of the institution.[75]

V. Concluding remarks

In summary, CAS Panels are free to determine the weight of all evidence presented by the parties. Their power is only limited by

[71] See CAS 2014/A/3486 MFK Dubnica v. FC Parma, award of 2 February 2015, para. 53 "The Panel is of the opinion that Article R57.3 of the Code should be construed in accordance with the fundamental principle of the de novo power of review. As such, the Panel also considers that the discretion to exclude evidence should be exercised with caution, for example, in situations where a party may have engaged in abusive procedural behaviour, or in any other circumstances where the Panel might, in its discretion, consider it either unfair or inappropriate to admit new evidence."

[72] See Mavromati, D. & Reeb, M., The Code of the Court of Arbitration for Sport, Commentary, Cases and Material (Wolters Kluwer – Law & Business ed. 2015), para. 48 p. 520 with further reference to Rigozzi, A. / Hasler, E. 'ad Article R57', n. 4, p. 1036, in Arbitration in Switzerland – The practioner's Guide, ed. Arroyo, M. (Alphen aan den Rijn, Wolters Kluwer, 2013).

[73] See CAS 2014/A/3486, para. 47-53.

[74] See Mavromati, D. & Reeb, M., The Code of the Court of Arbitration for Sport, Commentary, Cases and Material (Wolters Kluwer – Law & Business ed. 2015), para. 49, p. 521 and Mavromati D., The Panel's right to exclude evidence based on Article R57 para. 3 CAS Code: a limit to CAS' full power of review? in CAS Bulletin 1014-1.

[75] See Arbitration CAS 2012/A/2943 Bulgarian Chess Federation v. Fédération Internationale des Echecs (FIDE), award of 8 April 2013, paras. 8.38 & 8.39.

procedural public policy, the procedural rights of the parties and where necessary by the relevant sporting regulations. In particular, the parties' right to be heard shall always be respected.

It can also be seen that although the type of evidence which can be submitted by the parties is very large, the evidence shall be relevant and in time. What is more, CAS Panels have full power to review the facts and the law. According to this fundamental principle, previous proceedings do not limit the evidence presented by the parties before the CAS.

Res judicata in sports disputes and decisions rendered by sports federations in Switzerland

Despina Mavromati*

I. Overview

The nature of the decisions of a sports federation's judicial instance has long been discussed, also in connection with *res judicata* considerations in case the same claim involving the same parties is subsequently brought before the Court of Arbitration for Sport (CAS). In such a case, the CAS Panel must examine if it may entertain the claim and issue a decision. If the previous decision has already dealt with the same issue in a final and binding way, it should refuse to entertain the case. We may also encounter situations in which e.g. the previous decision terminated the proceedings (due to the lack of action by the claimants) and the Panel has to establish whether such decision had a *res judicata* effect. If the previous judicial instance was not a state court, the Panel must further check whether the instance that rendered the previous judgment is an "arbitral institution" comparable to state courts and vested with the power to render "arbitral awards" according to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (New York Convention, NYC58). And, finally, the CAS Panel seized with the same claim should also proceed to a control of the first decision under Article V (2) (c) NYC58. This paper deals with the broader issue of *res judicata* in sports arbitration proceedings and, more precisely, with the steps that should be taken by CAS Panels when they control whether the decisions rendered by other judicial instances are vested with *res judicata* effect.

II. Introduction: overview of *res judicata* in Switzerland and in the NYC58

A. *Res judicata*: definition and rationale

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Generally, *res judicata* prevents a party from bringing a new claim against the same counter-party, based on a claim that was previously contested and decided in a litigation.[1] *Res judicata* (claim preclusion) applies only to the significant issues of the judgment and not to the *obiter dictum* of the earlier judgment. In the majority of common law jurisdictions, preclusion is divided into two categories: *res judicata* (claim preclusion) and issue estoppel (collateral estoppel or issue estoppel): both doctrines require a final judicial judgment on the merits, rendered by a competent jurisdiction and involving the same parties.[2]

In most civil law jurisdictions, the aforementioned principles are not formulated in detail and the basic principle of preclusion is the one of claim preclusion, i.e. *res judicata*.[3] There is no doctrine of issue preclusion in civil law jurisdictions.[4] The principle of *res judicata* is strongly linked to the guarantee of legal certainty and the economy of procedure. The rather restrictive approach of *res judicata* is followed by the majority of civil law jurisdictions, *inter alia* also under Swiss law as shown by the jurisprudence of the SFT that will be presented below. Indeed, and although *res judicata* is a global term,[5] for the purposes of this paper we will anchor in Swiss doctrine and the jurisprudence of the SFT.

It is widely accepted that *res judicata* applies not only with respect to decisions rendered by state courts but also to arbitral awards, at national and international level.[6] Although the Swiss Private International Law Act (PILA) does not contain explicit provisions on the termination of the arbitrators' mandate, Article 190 PILA sets forth that the award is final from the time it is communicated and arbitrators would then unable to modify the terms of the award.[7] While the authority of *res judicata* is generally attached only to the operative part of the award,[8] some parts of the reasoning may be crucial for the understanding and the interpretation of the meaning, the nature or the effect of the operative part.[9] Generally, therefore, the judge called to rule on another dispute is not bound by the factual findings and the legal considerations of the previous judgment.[10]

According to Swiss doctrine, *res judicata* ("*L'autorité de la chose jugée*", "*la force de chose jugée au sens materiel*" or "*materielle Rechtskraft*") is a general principle which prevents a judgement involving the same parties and the same object from being discussed anew by the

[1] See G. Born, *International Arbitration: Law and Practice*, 2012, Kluwer Law International, p. 2883. In fact, res judicata has two effects: it precludes from filing a new claim if it is identical to the previous claim and binds the tribunal if the decision in the first proceedings is prejudicial for the decision in the second proceedings.

[2] See G. Born (op. cit. fn 1), p. 2882.

[3] See G. Born (op. cit. fn 1), p. 2885. See also International Law Association (ILA) Berlin Conference, Interim Report: *Res judicata* and Arbitration (ILA Report on *res judicata*), 2004, p. 13.

[4] See the ILA Report on res judicata op. cit. fn. 3, p. 11.

[5] Knoepfler F. / Schweizer Ph. (eds), *Arbitrage International*, 2003, Schulthess, p. 528, para. 3 (TF République de Pologne c. Saar Papier Vertriebs – GmbH et tribunal arbitral CCI Zurich, Bull ASA 2001, p. 487).

[6] See Berger, B. / Kellerhals, F., *Internationale und Interne Schiedsgerichtbarkeit in der Schweiz*, Stämpfli, 2006, p. 532. See Poudret, J.-F. / Besson, S., *Droit comparé de l'arbitrage international*, Schulthess, 2002, n. 475, p. 423. See also the ILA Report on *res judicata* (above fn 3), p. 3.

[7] See generally, F. Hohl, *Procédure civile*, Stämpfli, Vol. I, Introduction et théorie générale, 2001, n. 244.

[8] See 2010/A/2052 & 2010/A/2053, *Panathinaikos FC v. Sotirios Kyrgiakos & FIFA and Sotirios Kyrgiakos v. Panathinaikos FC & FIFA*, award of 8 December 2010.

[9] See ATF 125 III 7, p. 13. See also ATF 128 III 191, at 4 a *in fine*. See also CAS 2005/O/880, award of 6 July 2006 (confidential award) and TAS 2008/O/1566, partial award on applicable law of 10 February 2009 (confidential award), para. 39.

[10] See F. Hohl, (*op. cit.* fn 10), No. 1309. See also TAS 2008/O/1566, partial award on applicable law of 10 February 2009 (confidential award), para. 42.

court.[11] The existence of two contradicting decisions in a same legal order is contrary to public policy,[12] and such situation can only be avoided by applying the principle of *res judicata*.[13] It is therefore impossible to take a subsequent decision about the same object, among the same parties and relying on the same facts. The only possibility to attack a final judgment vested with *res judicata* power seems to be through a request for revision,[14] whereas the underlying purpose of *res judicata* is to achieve legal certainty.[15] In other words, the plea of *res judicata* is based on the principle of public interest and is intended to safeguard the certainty of rights already adjudicated upon and defined by a judgment.[16]

In CAS proceedings, the exception of *res judicata* must be taken into consideration already by the Panel during the proceedings[17] but can also be alleged as a ground for annulling the CAS award before the SFT on the ground of the procedural public policy of Art. 190 para. 2 (e) PILA. As it will be shown below, CAS panels have dealt with the issue of *res judicata* on numerous occasions.

B. *Res judicata* in the NYC58

Although there is a limited agreement on the precise preclusion rules that apply to international arbitral awards (in that there is no provision in the NYC58 explicitly addressing the preclusive effects of arbitral awards), there seems to be a consensus that final arbitral awards have *res judicata* effect like state court judgments.[18]

The NYC58 does not explicitly refer to *res judicata* but only to awards that may be recognized when they are "binding". However, the termination of the panel's mandate (the "functus officio" rule, meaning that "once an arbitrator has issued his final award he may not revise it") applies widely to the majority of legislations on arbitration.[19] In this respect, the NYC must be interpreted in such a way as to guarantee the binding character of arbitral awards and prevent states from denying preclusive effects to arbitral awards.[20] Under Article III NYC « *[E]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles (particularly Article V)* ». This provision sets forth a requirement of recognition of arbitral awards as binding.

C. Differences from *lis pendens*

[11] "…*[U]n principe général permettant de s'opposer à ce qu'un jugement soit remis en discussion par les mêmes parties sur le même objet*", see F. Hohl, Procédure civile, tome I, n. 1289 ff. See also BGE 133 III 580 p. 582. See also „*Ordre public ist verletzt, wenn ein Schiedsgericht die materielle Rechtskraft (res iudicata) eines früheren Entscheids in derselben Sache zwischen denselben Parteien missachted oder wenn es in seinem Endentscheid von der Auffassung abweicht, die es in einem Vorentscheid geäussert hat*" (BGE 136 III 345 at E. 22.).

[12] See G. Born (*op. cit.* fn 1) p. 2887.

[13] See CAS 2011/A/2370 & 2402, *CS Pandurii Lignitul Tg-Jiu v. Romanian Professional Football League (RPFL)*, award of 9 August 2011.

[14] See also CAS 2008/A/1740, *SC FC Vaslui c. Fédération Roumaine de Football & SC Dinamo 1948 SA*, award of 30 April 2009, "*Aucune voie de droit, à l'exception d'une éventuelle action en constatation de nullité, n'est ouverte à l'appelant pour exiger le réexamen de la décision contestée*". See CAS 2010/A/2058, *British Equestrian Federation v. Fédération Equestre Internationale*, award of 13 July 2010, para 18 and CAS 2013/A/3061, *Sergei Kuznetsov v. FC Karpaty Lviv*, award of 16 April 2014, para. 179.

[15] On the relationship between *res judicata* ("materielle Rechtskraft") and material justice ("materielle Gerechtigkeit") see however BGE 127 III 496 p. 499.

[16] See CAS 2013/A/3061, *Sergei Kuznetsov v. FC Karpaty Lviv*, award of 16 April 2014, para. 177 f. See also CAS 2006/A/1029, *Maccabi Haifa F.C. v. Real Racing Club Santander*, award of 26 September 2006, para. 6.4.

[17] See CAS 2010/A/2058, *British Equestrian Federation (BEF) v. Fédération Equestre Internationale (FEI)*, award of 13 July 2010, para. 54.

[18] See S. Brekoulakis, *The effect of an arbitral award and third parties in international arbitration: res judicata revisited*, American Review of International Arbitration, vol. 16, 2005, p. 177 f.

[19] See G. Born (*op. cit.* fn 1), p. 2514.

[20] See G. Born (*op. cit.* fn 1), p. 2891.

Res judicata must be distinguished from a similar concept, to which it is indirectly linked, namely the one of *lis pendens*, which relates to the suspension effect against a second seized court of arbitration.[21] The International Law Association's Final Report on *Lis pendens* defines it as "a situation in which parallel proceedings, involving the same parties and the same cause of action, are taking place in two different states at the same time". In Switzerland, the effect of *lis pendens* has been modified after the introduction of Article 186 (1bis) PILA. Said provision stipulates that the second seized arbitral tribunal decides on its own jurisdiction irrespective of another pending claim before another arbitral tribunal. In case where one party filed a claim before a foreign state court and the same claim was subsequently filed before an arbitral tribunal seated in Switzerland, Article 186 (1bis) PILA applies and the arbitral tribunal will not suspend the proceedings but will first decide on its own jurisdiction, irrespective of the state court proceedings,[22] unless there are important grounds that justify suspension. Such important grounds may be e.g. the clearly abusive claim before the arbitral tribunal or the fact that the procedure before the foreign state court is already at a very advanced stage and will very likely be recognized in Switzerland.[23] Other important ground may be a case in which the defendant raised (or could have raised) the jurisdiction of the arbitral tribunal /state court before the state court /arbitral tribunal too late and this would amount as an acceptance of the new proceedings.[24]

Lis pendens is indirectly linked to *res judicata* (whose violation forms part of the procedural public policy) but at a later stage (i.e. once the parallel proceedings have been terminated with a final judgment). At the stage of parallel proceedings, *lis pendens* is part of the jurisdictional control (based on Article 186 PILA) made by the arbitral tribunal[25] and as such can be dismissed if it is filed clearly late. For the acceptance of *lis pendens*, the aforementioned conditions cited in article 186 PILA should be met. Once a parallel case ends with a final award, the issue of *lis pendens* is not relevant anymore as there is no parallel case still pending. Therefore the issue then centres only on *res judicata*.[26]

D. *Res judicata* considerations in sports disputes – a case study

In sports-related disputes, decisions are most often rendered by the judicial instances of sports federations and in many cases an appeal is subsequently possible before the CAS. Generally, the judicial instances of sports federations do not qualify as "arbitral institutions" and their decisions are decisions / resolutions of a sports association.[27] Since the *res judicata* exception is a part of procedural public policy, CAS Panels should examine whether the conditions for *res judicata* are fulfilled in a given case. As it will be shown below, the control has different steps and is not exhausted upon finding a

[21] The principle of *lis pendens* applies equally to arbitral proceedings, see BGE 121 III 495 E. 6c, see also S. Pfisterer, in Honsell/ Vogt/ Schnyder (eds), *Basler Kommentar zum IPRG*, Helbing & Lichtenhahn, 2013, 3rd ed., ad art. 181 IPRG n. 14, p. 1820.

[22] Schott, M. / Courvoisier, M., in Honsell/ Vogt/ Schnyder (eds), *Basler Kommentar zum IPRG*, Helbing & Lichtenhahn, 2013, 3rd ed., ad art. 186 (1bis), p. 1907.

[23] Schott, M. /Courvoisier, M. (*op. cit.* fn. 22), ad art. 186, n. 22, p. 1908. See BGE 133 III 139 ff., 143 f.

[24] Idem.

[25] See CAS 2009/A/1880-1881, *FC Sion & E. v. FIFA & Al-Ahly SC*, award of 1 June 2010, para. 69.

[26] CAS 2010/A/2091, *Dennis Lachter v. Derek Boateng Owusu*, award of 21 December 2011, paras. 78-83 (the condition is the recognition of the arbitral award in the Swiss legal system). See also Kaufmann- Kohler G. / Rigozzi, A., Arbitrage international – Droit et pratique à la lumière de la LDIP, 2nd ed., Bern 2010, p. 262.

[27] On the differences between the two dispute resolution mechanisms and the practical consequences in sport see Haas, U. / Strub, Y., *Rechtsprechungstätigkeit zwischen Verfahrens- und materiellem Recht*

Eine Nachlese zu BGE 140 III 520, p. 11 f.

final judgment and passing the identity test (i.e. identity of claims and identity of persons). It must be noted, however, that there is no issue of *res judicata* if there is an appeal procedure (before the CAS) foreseen from the pertinent rules of the federation in question and such appeal is timely filed with the CAS.[28] *Res judicata* can only arise if there is a final decision and there are no other legal remedies foreseen against such decision.[29]

We can take the example of a recent judgement of the SFT involving a decision passed by the judicial instance of a sports federation and a subsequent appeal to the FIFA instances and then the CAS: The case involved two Argentinean coaches, who filed a claim against a Mexican Football Club before the Commission on Conciliation and Dispute Resolution (CCDR) of the Mexican Football Federation (MFF), based on an arbitration clause in their contract. In 2009, the CCDR issued a decision (CCDR 2009) suspending the proceedings and inviting the parties to submit their claim before any other instance they deemed appropriate. Two years later, the CCDR issued a final decision (CCDR 2011), terminating the proceedings due to the lack of any action by the claimants for two years. Meanwhile, in 2009, the coaches had seized the FIFA Dispute Resolution Chamber (DRC) with the same requests for relief. In 2012, the FIFA DRC Single Judge admitted the claim (thereby dismissing any *res judicata* arguments) but dismissed it for lack of jurisdiction *ratione personae*. In 2013, the coaches filed an appeal with the CAS, which issued an award in March 2014, partially admitting the appeal and annulling the DRC Decision. The Club appealed against the CAS award to the SFT claiming inter alia violation of procedural public policy (*res judicata*) under Article 190 para. 2 (e) of the Private International Law Act (PILA). The SFT subsequently dismissed the appeal, although it recognized that the CCDR was an independent arbitral tribunal and the award issued was a "final award", finding that such an award could not be recognized and enforced in Switzerland due to the obvious violation of the parties' right to be heard. In the following pages, we will browse the different steps of control of *res judicata*, also following the reasoning of the SFT judgement in the aforementioned case.[30]

III. Different steps of control of *res judicata* according to Swiss law and CAS case law

A. Procedural public policy and *res judicata*

Procedural public policy is breached in case of violation of fundamental and widely recognized procedural principles, resulting in a decision absolutely incompatible with the values and the legal order of a state of law.[31] *Res judicata*, which is considered as a corollary to – or the positive aspect of - the principle of *ne bis in idem*[32] is a form of procedural public policy and it must be controlled by the arbitral tribunal *ex officio*.[33] When raised by the parties, *res judicata* is considered as an admissibility objection (therefore not a jurisdictional objection, since the party objects to the claim itself) with public policy implications.[34] *Res judicata* is examined

[28] See e.g. ATF 4A_392/2011 of 12 January 2011, at 6.2.1.

[29] In this respect, even decisions rendered by the judicial instances of an association become final once the time limit to attack them (before an independent state court or a true court of arbitration, in accordance with the applicable rules) has elapsed, see H. M. Riemer, *Berner Kommentar*, 1990, Stämpfli, p. 863, at 62. See also Heini, A. / Scherrer, U., in Honsell /Vogt / Geiser (eds), *Zivilgesetzbuch* I, 4th ed., 2010, ad art. 75 at 8, p. 514.

[30] See SFT 4A_374/2014 of 26 February 2015.

[31] See BGE 140 III 278 p. 279.

[32] See SFT 4A_386/2010 of 3 January 2010, at 9.3. See also SFT 2P.35/2007 of 10 September 2007 at 6 or the negative aspect SFT 6B_961/2008 of 10 March 2009 at 1.2.

[33] See SFT 4A_374/2014 of 26 February 2015, at 4.3.1. See also ATF 128 III 191 of 3 April 2002. See the first SFT judgment overturning a CAS award on this ground SFT 4A_490/2009 of 13 April 2010.

[34] See G. Walters, *Fitting a square peg into a round hole: do res judicata challenges in international arbitration constitute jurisdictional or admissibility problems?*, Journal of

according to the law of the seat (in CAS proceedings according to Swiss law)[35] and is violated when the arbitral tribunal ignores the material legal force of an earlier judgment or when it departs from what it expressed in a preliminary award as to a material preliminary matter.[36] The *res judicata* effect is limited to the operative part of the judgment and does not encompass its reasons, in that the reasons have no binding effect as to another issue in dispute, but they may clarify the scope of the operative part of the judgment.[37]

B. Identity of claims and identity of persons

As seen above, from a Swiss law perspective, *res judicata* presupposes identity of claims and identity of persons / parties. The SFT has repeatedly held that *res judicata* entails both the identity of claims and the identity of persons and the two conditions have to be cumulatively fulfilled.[38] Contrary to other civil law jurisdictions, Swiss, Austrian and German law do not include the legal arguments that were discussed in the first proceeding into the scope of *res judicata*.[39]

1. Identity of claims

Identity of claims means that the disputed claim is identical to the one being the object of a previous judgement that has come to force.[40] In this respect, decisions rendered by the judicial instance of a federation against the same person dealing with different infringements do not violate the principle of *res judicata* (or even the principle "*ne bis in idem*").[41] As a general rule, the examination of whether there is identity of claims between the claim handled by the foreign tribunal and the claim submitted before a Swiss tribunal is a question of *lex fori*, in accordance with the principles established by the SFT.[42]

There is identity of claims if the claim is the same to the one that was the subject of a final judgment. This is the case when the same parties submitted the same claim based on the same facts. It is generally not necessary to include the legal cause to the definition of the "identity of claims", in that the identity of claims is determined by the submissions of the request and the facts invoked.[43] In Swiss law it is therefore not decisive, when determining the *res judicata* effects of a decision, to examine what legal arguments were debated and discussed in the first proceedings.[44] Identity of claims must be understood as identity of substance and not from a grammatical point of view.[45]

Furthermore, the existence of the same facts at the time that the first judgment was rendered is not sufficient to establish the identity of claims.[46] The aforementioned facts

International Arbitration, 2012, Vol. 29, pp. 651-680, in particular p. 674.

[35] See CAS 2009/A/1968, *FC Politehnica Timisoara v. The Romanian Football Federation (RFF) & SC FC Timisoara*, award of 5 July 2010.

[36] See SFT 4A_490/2009 of 13 April 2010, at 2.1; see also SFT 4A_374/2014 of 26 February 2015, at 4.2.1.

[37] See BGE 136 III 346, at 2.1.

[38] See BGE 140 III 278 p. 282.

[39] CAS 2012/O/2989, *M. v. R.*, award of 17 April 2013. However, some Panels (mostly in earlier CAS procedures) had applied the triple-identity test, see CAS 2006/A/1029, *Maccabi Haifa F.C. v/Real Racing Club Santander*, award of 26 September 2006, para. 6.4. See also G. Walters (*op. cit.* fn 34), p. 654.

[40] See BGE 140 III 278 p. 282. See also CAS 2010/A/2091, *Dennis Lachter v. Derek Boateng Owusu*, award of 21 December 2011 paras 78-83. See also CAS 2010/A/2248, *Prosper Nkou Mvondo c. Fédération Camerounaise de Football (FECAFOOT)*, award of 23 March 2011.

[41] See CAS 2011/A/2421 & 2011/A/2450, *General Taweep Jantararoj v. International Boxing Association (AIBA) & General Taweep Jantararoj v. AIBA*, award of 10 October 2011.

[42] Walter G. / Domej, T., Internationales Zivilprozessrecht der Schweiz, 5e éd. 2012, Haupt Ed., p. 417; see ATF 140 III 278, at 3.2 and references including therein.

[43] See ATF 139 III 126 at 3.2.2, 3.2.3. See also 140 III 278 at 3.3.

[44] See CAS 2012/O/2989, *M. v. R.*, award of 17 April 2013.

[45] See ATF 139 III 126 at 3.2.3.

[46] See BGE 140 III 278 at 4.2.2.2.

should also be alleged before the authority that rendered the first-instance decision, where necessary proof was also submitted and the tribunal could take these facts into consideration.[47]

It is also possible to consider that *res judicata* applies to part of the claims submitted before the second tribunal. In a recent CAS award, the Panel held it could not review part of the claims submitted before it because they were vested with *res judicata* effect, but there was no *res judicata* issue with respect to some other questions of the claim (the Panel was therefore not prevented from adjudicating these particular questions).[48]

2. Identity of parties

Identity of parties means that *res judicata* can be invoked only if the second procedure brings together the same parties or their successors by law (except for declaratory judgements vested with *erga omnes* effect.[49] This criterion does not depend on the role that the parties played in the first or the second procedure[50] and does not require the presence of all the claimants / respondents in both proceedings, as long as the parties in the second procedure have also participated in the previous procedure.[51]

For an example from the CAS proceedings, a person who was not a party to previous CAS proceedings, cannot be bound by the judgement linked to subsequent proceedings.[52] If the parties to two different CAS cases are not the same and the set of circumstances has changed due to the results of domestic court proceedings, there is no issue of *res judicata* either.[53] If the parties to the CAS proceedings are not the same as those in the proceedings before a foreign state court, the decision of said foreign state court cannot have *res judicata* effect on the subsequent CAS proceedings.[54]

In case of a simple consority of respondents,[55] the consorts are independent the one from the other. The decision may be different for each of the consorts and this "separability" also applies to the appeal.[56] A consort may attack a decision (and may also withdraw his appeal) independently of the others.[57] Viewed from the angle of jurisdiction, in the event that a simple consort withdraws from the procedure before the CAS, the proceedings are considered to be terminated on his behalf and the CAS has no jurisdiction "*ratione personae*" on this party anymore. In the case 4A_6/2014 the SFT did not tackle the issue from the angle of *res judicata* because the award issued by the CAS annulled the 1st instance decision and reverted the case back to the previous instance for a new decision, thereby constituting an "interlocutory award" appealable to the SFT only on the grounds of Article 190 para. 2 (a) and (c) PILA.[58]

C. Qualification of the decision as an "arbitral award"

[47] See BGE 140 III 278 p. 287.

[48] See CAS 2013/A/3061, *Sergei Kuznetsov v. FC Karpaty Lviv*, award of 16 April 2014, para. 184.

[49] See BGE 140 III 278 p. 284; 4A_545/2013 at 3.2.1.

[50] ATF 105 II 229 at 1b p. 232.

[51] See ATF 127 III 279 at 2c, p. 285.

[52] See CAS 2006/A/1029, *Maccabi Haifa F.C. v. Real Racing Club Santander*, award of 2 October 2006, para. 6.4.

[53] See CAS 2011/O/2610, *FC T. v. FC. C.*, award of 15 March 2012.

[54] See CAS 2011/A/2336 & 2011/A/2339, *WADA v. Federación Colombiana de Levantamiento de Pesas (FCL) & Margarita Mercado Villarreal WADA v. FCL & Katerine Mercado Villarreal*, award of 2 March 2012, para. 87. In this doping-related case the previous decision ruled on the effectiveness and / or validity of the sample collection.

[55] "*Consorité matérielle simple passive*", see F. Hohl (op. cit. fn 10) n. 521 ff. See N. Jeandin, *Code de procédure civile (CPC) commenté*, 2011, ad art. 71 CPC, n. 6. See also SFT 4A_6/2014 of 28 August 2014, at 3.2.2.

[56] See N. Jeandin, op. cit. fn. 55, ad art. 71 CPC, n° 11.

[57] See M.-F. Schaad, *La consorité en procédure civile*, 1993, ed. Messeiller, p. 281 ff.

[58] See a critical analysis of the SFT judgment in Haas, U. / Strub, Y. (op. cit. fn 27).

In arbitration, both at national and international level, an important condition that has to be controlled with respect to the exception of *res judicata* is the existence of an "arbitral award" assimilated to a decision of a state court.[59] If e.g. a party seizes the arbitral tribunal with its seat in Switzerland with a request identical to the one that has made the object of a decision / arbitral award in another country, the Swiss arbitral tribunal must declare such request inadmissible, to the extent that such judgment / arbitral award can be recognized in Switzerland based on Articles 25 and 194 PILA.[60] Article 194 PILA provides that the recognition and the execution of a foreign arbitral award in Switzerland is ruled by the NYC58. The panel determines the proceedings based on the evidence submitted before it as true arbitral proceedings or not.[61]

While the term "arbitral award" is not further defined in the NYC58, the doctrine seems to favour an autonomous definition.[62] A decision issued by a private institution is an "arbitral award" if it is comparable to a decision rendered by a state tribunal: it should therefore offer sufficient guarantees of impartiality and independence. By the same token, the decision rendered by a judicial instance of a sports federation does not constitute an arbitral award to the extent that such judicial instance is a party to the proceedings and constitutes merely an expression of will of the federation in question.[63]

Specifically in football-related cases, CAS panels have ruled on numerous occasions that the FIFA-PSC adjudicating bodies are not true arbitral proceedings but rather "intra-association" proceedings,[64] and the decisions passed by those bodies are not true arbitral awards but decisions of a Swiss private association.[65] The same was also confirmed by the SFT, which has often made reference to FIFA-PSC decisions as decisions of a Swiss association.[66] It should be noted that said decisions are normally subject to and appeal and a subsequent control by the CAS, whose awards are considered as arbitral awards.[67]

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[59] For the criteria see generally ATF 117 Ia, p. 365 at 7, p. 369. See the same judgment for the difference between an arbitral award and the « expertise-arbitrage » in terms of *res judicata*.

[60] See SFT 4A_374/2014 of 26 February 2015, at 4.2.1. At this point, we examine the notion of the "arbitral tribunal". The notion of an "arbitral award" that can be recognized in Switzerland will be shown below.

[61] See CAS 2010/A/2091, *Dennis Lachter v. Derek Boateng Owusu*, award of 21 December 2011, paras 78-83.

[62] See SFT 4A_374/2014 of 26 February 2015, at 4.3.2.1 including doctrinal references.

[63] See ATF 119 II 271 at 3b p. 275 f. See SFT 4A_374/2014 of 26 February 2015, at 4.3.2.1.

[64] See CAS 2009/A/1880-1881, *FC Sion & E. v. FIFA & Al-Ahly SC*, award of 1 June 2010, para. 50.

[65] See CAS 2003/O/460, *Wüstenrot Salzburg v. Bukran*, award of para. 5.3. However, we should distinguish between cases in which the FIFA acts as the adjudicating body in a dispute between e.g. two clubs from cases in which the FIFA adjudicating body acts as an intra-association judicial organ.

[66] See SFT 4A_490/2009 of 13 April 2010. We should distinguish between two different concepts: decisions of an association can be attacked before the competent court within one month according to Article 75 CC. If not acting within the applicable time limits, the addressee of the intra-association decision will lose the right to attack said decision and the decision will become binding. However, the concept of this binding effect is one of substantive law, other than res judicata which is a procedural concept.

[67] There is a difference between the scope of res judicata of the review under Article 75 CC and the review by the CAS. If a decision of an association is attacked under Article 75 CC before the competent state courts and said courts annul the association's decision, the annulment has an *erga omnes* effect (i.e. applies to all members of the association, therefore the identity of parties criterion does not need to be fulfilled) and not only to the addressee of the decision. On the other side, if the CAS (as an arbitral tribunal) is subsequently seized with an appeal against a decision of an association and annuls the decision of the association, such a decision will only have a res judicata effect *inter partes*, see SFT 4A_490/2009 of 13 April 2010, at 2.2.2. See also Arbitration Newsletter Switzerland, http://thouvenin.com/wp-content/uploads/2010/07/20100706-Federal-

Generally, intra-association decisions do not have res judicata effect. Res judicata is considered to be a procedural concept, whereby decisions from state courts (or arbitral tribunals, in lieu of state courts) are granted "binding effect" on the basis of national law.[68] However, there seems to be no provision under Swiss law granting this kind of binding effect to decisions of associations. If it were otherwise, an appeal filed out of time would have to be rejected before state courts because of res judicata under Article 59 of the Swiss Code on Civil Procedure (but this is not the case), because an appeal filed out of time will be dismissed on the merits.[69] The binding effect of decision of an association could only be explained through substantive law, in the sense that a party not filing an appeal on time will subsequently loose its right to appeal.[70]

Against this background, Article 22 lit. c of the FIFA Regulations on the Status and Transfer of Players (RSTP) provides that FIFA has jurisdiction on disputes of international nature, unless an independent arbitral tribunal exists at national level. This exception may then be used by the national federations and, to the extent that there is recourse to such an arbitral tribunal, there is no need (and probably no possibility once the tribunal has been seized, because of *lis pendens* or *res judicata*) to provide for a subsequent control by the CAS or a state tribunal. In line with the judgment SFT 4A_374/2014, the control of whether the decision of a sports judicial instance constitutes an arbitral tribunal includes the following steps: in order to qualify as an arbitral tribunal, the national judicial instance must be a joint body representing all interests (constituted by a president, a secretary, and representatives of the different stakeholders). The decision should be based on a majority decision and respect the parties' right to be heard in an adversarial trial. Notwithstanding these important clarifications, the SFT leaves the qualification of each judicial instance of a sports federation to the control of the second tribunal (and to the subsequent control by the SFT, if applicable), depending on the specific circumstances surrounding each case.

D. Final decision on the merits – rule and exceptions

Once it has been established that the first decision is an "arbitral award" issued by and independent arbitral tribunal, the second question to answer is whether such arbitral award constitutes a "final decision on the merits".[71] Finality is the principle underlying *res judicata*.[72] As a general rule, and under Swiss law, only final decisions on the merits and procedural judgments on admissibility are vested with the power of *res judicata*.[73]

According to Article 25 PILA, a foreign decision is recognized in Switzerland if the authority of the country in which the decision was issued had jurisdiction.[74] The SFT has also held that article 25 PILA should also refer to Article III NYC.[75] When it comes to

Supreme-Court-annuls-CAS-Award-for-Violation-of-Public-Policy_HJS.pdf.

[68] See the ILA Report on res judicata (op. cit. fn 3), p. 26. The Committee considered that "*[B]ecause res judicata is a rule of evidence in Common Law jurisdictions, and is codified in procedural codes in Civil Law jurisdictions, the Committee is of the view that it is part of procedural law.*"

[69] This is also the predominant view that seems to apply also to the time limit to file an appeal with the CAS according to Article R49 CAS Code, see also Rigozzi, A. / Hasler, E., in Arroyo, M., *Arbitration in Switzerland : A Practitioner's Guide*, ad art. R49, n. 20, p. 1007 and references included therein (in particular BGE 136 III 345 para. 2.2.1).

[70] Idem.

[71] See BGE 115 II 187 E. 3a p. 189; BGE 127 I 133 E. 7a p. 139. See SFT 4A_374/2014 of 26 February 2015, at 4.3.2.2.

[72] F. Ferrand, *Res Judicata - From National Law to a Possible European Harmonisation?*, in Festschrift für Peter Gottwald, Hess, B. / Kolmann, S. / Adolphsen, J. / Haas, U. (eds), Beck Ed., 2014, p. 144.

[73] See ATF 134 III 467 at 3.2, p. 469.

[74] See ATF 140 III 278: at 3.2.

[75] See ATF 124 III 83a at 5b p. 87.

an arbitral award issued in another country, the control must not be made according to the *lex fori* (this could lead to dilatory tactics) but rather according to Article 178 PILA.[76]

The SFT has offered definitions to the different types of arbitral awards. The SFT qualifies the type of the award irrespective of the name given by the arbitrators / panel.[77] Accordingly, the SFT has held that a final award puts an end to the arbitral proceedings on substantial or procedural grounds.[78] A partial award puts an end to a specific claim or puts an end to the proceedings regarding a part of the claimants.[79] An interlocutory / interim award deals with some preliminary questions of the merits or of the procedure.[80]

However, the SFT has noted that the aforementioned definitions are not necessarily well adapted to the particularities of sports arbitration.[81] This is also related to the particularities of sports arbitration and in particular the appeal character of the proceedings (when a party appeals against a decision rendered by a sports federation). When the CAS is the appeal venue, the panel may render final awards, terminating the proceedings before CAS, but not terminating and ruling on the substantive part of the claim. The substantive part will therefore not be terminated and could continue in the event that the arbitral tribunal makes use of the possibility offered by Article R57 and reverts the case back to the previous instance.

According to the SFT, this type of procedure is similar to the state court proceedings and the two instances.[82] We should therefore examine if the CAS award has the effect of terminating the procedure of first instance: if the CAS award annuls the first-instance decision and reverts the case back to the previous instance, such decision is an interlocutory decision even if it terminates the CAS proceedings and has no *res judicata* effect.[83] The SFT confirmed that this applies to the CAS proceedings and justified this for reasons of economy of procedure, in that the SFT should only deal with the case once, with a few exceptions.[84]

Therefore, an interlocutory decision does not have *res judicata* effect and can be attacked before the Swiss Federal Tribunal only for irregular constitution of the arbitral tribunal and on jurisdictional grounds.[85] By the same token, in order to qualify as a final decision, a decision has to be rendered in accordance with the rules of the judicial body. A previous CAS Panel found that a communication issued by the Head of the legal committee of a federation is clearly not a final decision vested with *res judicata* effect. According to the Panel in this case, a "final and binding decision passed by a deciding body" should have been rendered by a three-member panel

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[76] I.e. control of the existence of a valid arbitration agreement and a valid arbitration clause, see M. Liatowitsch, *Schweizer Schiedsgerichte und Parallelverfahren vor Staatsgerichten im In- und Ausland*, Helbing & Lichtenhahn, 2002, p. 75-84.

[77] See ATF 136 III 200 at 2.3.3 p. 205, 597 at 4.

[78] See SFT 4A_6/2014 of 28 August 2014, at 2.2.1.

[79] See ATF 116 II 80 at 2b p. 83. See also Berger/Kellerhals (op. cit. fn. 6), para. 1503. See also Girsberger D. / Voser, N., *International Arbitration in Switzerland*, Schulthess 2012, paras. 963, 972.

[80] An interlocutory award has therefore no *res judicata* effect, see ATF 130 III 755 at 1.2.1 p. 757. See also

ATF 5A_766/2013 of 08.04.2014 at 4.3.

[81] ATF 133 III 235 at 4.3.2.2 p. 243.

[82] See also Art. 75 para. 2, 80 para. 2 et 86 para. 2 of the Loi sur le Tribunal Fédéral (LTF).

[83] See ATF 137 V 314 at 1 p. 315; 135 V 141 at 1.1; 135 III 329 at 1.2. See e.g. CAS 2014/A/3695, *Alain Serge Ouombleon Guedou v. Al Nassr Saudi Club of Riyadh*, award of 13 April 2015.

[84] See ATF 130 III 755 at 1.2. See SFT 4P.298/2006 of 14 February 2007, Bull ASA, 2008, p. 313 ff.

[85] Art. 190 para. 2 lit. a and b PILA. See ATF 130 III 76 at 4. See Berger/Kellerhals (op. cit. fn 6), para. 1503, Girsberger, D. / Voser, N., op. cit. fn 79, paras. 963, 972. See Von Segesser, G. / Schramm, D., in L. Mistelis (ed.) *Concise Intl Arbitration*, Kluwer Law International, 2010, ad. Art. 190, n. 13. See M. Noth, *CAS Commentary*, in *international arbitration in Switzerland: a practitioner's guide*, M. Arroyo (ed.), p. 982.

chaired by the legal representative of the federation in question.[86]

Moreover, the exception to the rule that final awards have a *res judicata* effect is the assimilation of some unilateral acts of the parties to a judgment, like the withdrawal of the claim.[87] Such withdrawal means that the claimant abandons the requests for relief at the trial. It relates to the claim and has the power of *res judicata*, in the sense that it does not only terminate the pending proceedings before a given tribunal but also excludes any new claim on the same subject.

After confirming that all the aforementioned conditions are met (there is a final decision on the merits, rendered by an independent arbitral tribunal, on the same claims including the same parties), any tribunal subsequently seized with a claim should not enter into the merits based on the exception of *res judicata*. Even then, however, the tribunal may accept the claim and rule on the merits without violating the procedural public policy, as it will be shown below.

E. Recognition of the arbitral award on the merits in Switzerland under Article V (2) (c) NYC58

If the *res judicata* effect is produced by a decision rendered in another state, we have to search the law of this state in order to determine the conditions and the limits of such effect.[88] The subjective, objective and temporal scope of *res judicata* may vary from one legal system to another. However, we can achieve a certain degree of harmonisation as follows: a foreign judgment can be recognized in Switzerland to the extent that such judgment would be recognized in Switzerland. Therefore it will only have effect for the claim and the parties involved in the proceedings.[89] By the same token, if *res judicata* extends to the legal findings of the judgment, it would only apply in Switzerland for the operative part of the judgment.[90] On the other hand, the foreign judgment cannot go beyond the scope of *res judicata* under the legal system from which it emanates.[91]

Therefore, and even if all the aforementioned conditions are met and speak in favour of the *res judicata* exception, the second tribunal seized with the same claim must further control whether the first final decision can be recognized / executed in Switzerland under Article V (2) NYC58.[92] In this respect, the Panel first examines whether the two countries involved (i.e. Switzerland, for CAS and the country of the seat of the tribunal issuing the other judgment) are contracting states and have ratified the NYC58.[93]

A fundamental condition for the recognition of an arbitral award is that there was a valid agreement to arbitrate establishing the jurisdiction of the arbitration body which issued the decision.[94] Also, the public policy of the country where the recognition of a decision is sought imposes the respect of the fundamental rules of procedure according to the Swiss Constitution (Article V (2) lit b NYC58). The respect of the right to be heard in adversarial proceedings is one of these fundamental rules and equally applies to arbitration.[95] Against this background, a

[86] See CAS 2014/A/3695, *Alain Serge Ouombleon Guedou v. Al Nassr Saudi Club of Riyadh*, award of 13 April 2015, paras 89-90.

[87] This is the so-called « désistement d'action » under Article 241 para. 2 of the Swiss Code on Civil Procedure.

[88] See Bucher, A. / Bonomi, A., *Droit international privé*, Helbing & Lichtenhahn, 3e éd. 2013, n. 254. See also ATF 140 III 278, at 3.2.

[89] See ATF 139 III 126 at 3.1 p. 128.

[90] See ATF 136 III 345 at 2.1 p. 348.

[91] See Knoepfler, F. / Schweizer, Ph. / Othenin-Girard, S., *Droit international privé suisse*, 3e éd. 2005, n. 717a and references.

[92] See SFT 4A_374/2014 of 26 February 2015, at 4.3.2.3.

[93] See e.g. CAS 2006/O/1055, award of 9 February 2007 (confidential award),

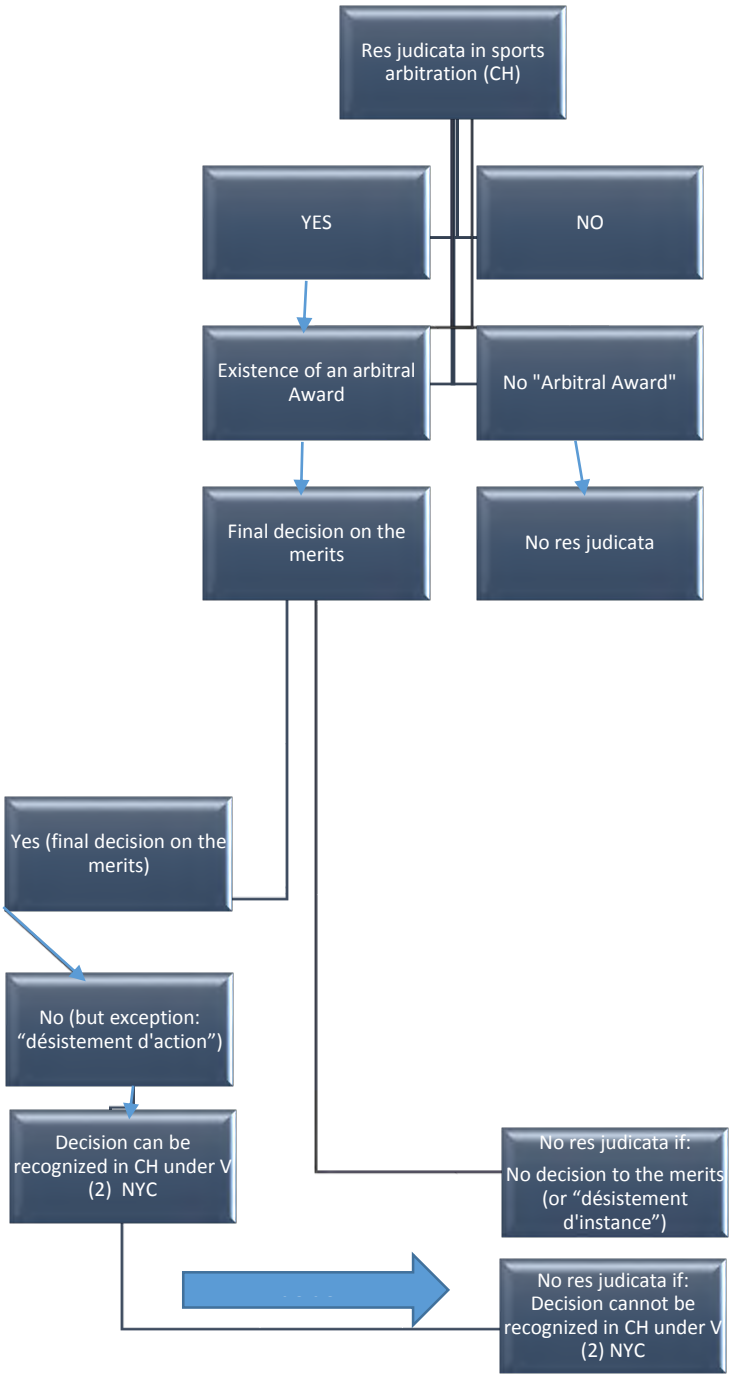
[94] See CAS 2006/O/1055, award of 9 February 2007 (confidential award).

[95] See SFT 4A_374/2014 of 26 February 2015, at 4.2.2.

decision issued in manifest violation of the right to be heard of the parties, rendered on the sole basis of a secretarial report and without inviting the parties to this session, has been found by the SFT to constitute a ground for refusal for the recognition of such decision and the subsequent tribunal seized with the same claim should therefore not take it into account, even if said decision may constitute *res judicata* in Switzerland.

IV. Concluding remarks

As a general legal principle also applying to arbitration, *res judicata* aims at ensuring that a final decision rendered by a competent authority will not be reheard by another tribunal subsequently seized with the same claim and involving the same persons. Respect of *res judicata* entails a control by the subsequently seized authority, which, according to Swiss law, should be made *ex officio* and falls within the scope of procedural public policy. In arbitration, only "arbitral awards" assimilated to state court decisions rendered by "true arbitral tribunals" are vested with *res judicata* effect. In sports-related disputes, SFT has logically not offered a clear answer as to the character of the judicial bodies of federations but has only establish some general criteria for this characterisation, leaving thereby this determination to the panel based on the specific circumstances surrounding the case. Furthermore, an arbitral award should also be "final" as per the definition given by the SFT after taking into consideration the specificities of sports disputes. The issue of *res judicata* does not arise if there is an appeal procedure (before the CAS) foreseen from the pertinent rules of the federation in question and such appeal is timely filed with the CAS. *Res judicata* can only arise if there is a final decision and there are no other legal remedies foreseen against such decision. Even then, however, the Panel must further seek to establish whether such a final decision can be recognized / executed in Switzerland and prone to be recognized and executed in Switzerland under the conditions enumerated in Article V (2) the NYC58. In this respect, the SFT has found that the manifest violation of the parties' right to be heard constitutes a ground for refusal for the recognition of a decision and the subsequent tribunal seized with the same claim is therefore not prevented from examining it anew based on *res judicata*.


Res judicata in sports arbitration (CH)
YES
NO
Existence of an arbitral Award
No "Arbitral Award"
Final decision on the merits
No res judicata
Yes (final decision on the merits)
No (but exception: “désistement d'action”)
Decision can be recognized in CH under V (2) NYC
No res judicata if:
No decision to the merits (or “désistement d'instance”)
No res judicata if:
Decision cannot be recognized in CH under V (2) NYC

Jurisprudence majeure*
Leading Cases

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

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

CAS 2013/A/3373
International Association of Athletics Federations (IAAF) v. Turkish Athletics Federation (TAF) and Nevin Yanit
6 March 2015

Athletics; Doping; Aggravating circumstances; Evaluation of sanctions under aggravating circumstances

Panel
Mr Yves Fortier QC (Canada), President
Mr. Romano F. Subiotto QC (Belgium and United Kingdom)
Mr. Michele A.R. Bernasconi (Switzerland)

Facts

This appeal is brought by the International Association of Athletics Federations (the "Appellant" or "IAAF") which is the international federation governing the sport of athletics worldwide against the Turkish Athletics Federation (the "First Respondent" or "TAF") and Ms. Nevin Yanit (the "Second Respondent" or "Ms. Yanit" or "Athlete"), an athlete of Turkish nationality born on 16 February 1986, and specialized in the 60m and 100m hurdles events.

In September 2010, the IAAF received what it describes as a "tip-off" from an anonymous source warning the IAAF that a number of elite Turkish athletes were engaged in doping practices, including the Athlete.

As a result of this information, the IAAF started monitoring the Athlete more closely. Under the auspices of the "Athlete Biological Passport" ("ABP") programme, the IAAF collected, on an advance notice basis, a blood and serum sample from the Athlete at the 2011 World Championships in Daegu, South Korea. The Athlete's blood and serum samples returned results within the normal expected range for females.

In June 2012, the IAAF was advised of an incident relating to an attempt by the Turkish Anti-Doping Commission (TAC) to conduct an unannounced doping control test on the Athlete at the Turkish Athletics Super League competition in Ankara, Turkey on 5 June 2012. The IAAF was informed that the mission had proven unsuccessful because the TAF's head coach, had intervened to prevent TAC testers from notifying the Athlete and thereby prevented a sample from being collected from her.

As a result of this incident, the IAAF began to target the Athlete for testing. On 28 June 2012, at the European Outdoor Championships held in Helsinki, the IAAF collected an unannounced pre-competition blood and serum sample from her as part of its ABP programme. While her serum sample raised no specific concern, her ABP blood sample returned a different (which the IAAF regarded as "highly suspicious") set of results to her previous ABP blood sample in Daegu in August 2011.

Just over a month after the European Championships, the Athlete was due to represent Turkey at the 2012 Olympic Games in London and the IAAF took this further opportunity to collect a pre-competition blood and serum sample from the Athlete under its ABP Programme which revealed suspicious.

On 10 September 2012, the IAAF received a further anonymous "tip-off" that the elite Turkish athletes were engaged in doping, including the Athlete. As a result, the IAAF continued to target test the Athlete.

On 17 October 2012, the IAAF collected an out-of-competition blood and serum sample from the Athlete in Istanbul as part of a mass ABP screening of Turkish athletes. The Athlete's out-of-competition blood values proved to be lower in all relevant parameters compared to the in-competition high seen at the Olympic Games. Her serum values were also lower in the main, although the total testosterone value still remained elevated compared to the normal range of values for females.

The IAAF continued to target test the Athlete into 2013 and, on 7 February 2013, it conducted an unannounced and targeted out-of-competition test on her on the eve of a lower level indoor meeting in Dusseldorf, Germany.

The next day, on 8 February 2013, the Athlete was targeted by the IAAF for a further in-competition urine test at the meeting in Dusseldorf.

A sample was further collected on 14 February 2013 in Istanbul, Turkey.

The Dusseldorf out of completion test of 7 February 2013, the Dusseldorf in competition test of 8 February 2013 and the Istanbul test of 14 February 2013 revealed positive.

The IAAF charged the Athlete with violation of IAAF Anti-Doping Rules 32.2(a) and (b), namely an anti-doping violation for the presence of two prohibited substances in her sample provided on 8 February 2013 and imposed a 2-year sanction on her.

By a statement of appeal dated 24 October 2013, the IAAF appealed to the Court of Arbitration for Sport ("CAS") against the decision of the TAF Disciplinary Board dated 27 August 2013, seeking an increased sanction of 4 years in accordance with the aggravating circumstances provisions of IAAF Rule 40.6.

On 25 November 2013, (after having been given an extension of time) the IAAF filed its appeal brief pursuant to Article R51 of the Code. On 26 March 2014, the IAAF filed its Amended Appeal Brief.

On 26 September 2014, after having been granted a short extension, the Athlete filed her Answer pursuant to Article R55 of the Code. The First Respondent did not file an Answer.

On 4 December 2014, the Appellant submitted a Skeleton Argument with the consent of the Athlete, subject to the Athlete's right to respond as necessary at the hearing.

Reasons

1. The IAAF mainly submitted that there were multiple aggravating circumstances pursuant to Rule 40.6 justifying the increase of the penalty up to a four-year period of ineligibility.

   The TAF did not make any submissions.

   The Athlete submitted that while, she had no objection to the presentation of evidence that is specific to her case, she considered that the suggestion that all elite Turkish athletes were doped or that there was a coordinated effort at a national level by Turkey to dope its athletes to achieve national success was discriminatory towards all Turkish citizens and should not be tolerated. The Athlete also submitted that the Appellant failed to adequately establish aggravating circumstances sufficient to justify the requested sanction of four years.

   Rule 40.6 of the IAAF Competition Rules provides as follow:

   "If it is established in an individual case involving an anti-doping rule violation other than violations under Rule 32.2(g) (Trafficking or Attempted Trafficking) and Rule 32.2(h) (Administration or

Attempted Administration) that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four (4) years unless the Athlete or other Person can prove to the comfortable satisfaction of the hearing panel that he did not knowingly commit the anti-doping rule violation.

(a) Examples of aggravating circumstances which may justify the imposition of a period of Ineligibility greater than the standard sanction are: the Athlete or other Person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations; the Athlete or other Person used or possessed multiple Prohibited Substances or Prohibited Methods or used or possessed a Prohibited Substance or Prohibited Method on multiple occasions; a normal individual would be likely to enjoy performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of Ineligibility; the Athlete or other Person engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation. For the avoidance of doubt, the examples of aggravating circumstances referred to above are not exclusive and other aggravating factors may also justify the imposition of a longer period of Ineligibility.

(…)".

Regarding the existence of aggravating circumstances, the Panel considered that the IAAF had discharged its burden of proof to the requested comfortable satisfaction standard for the following reasons:

Firstly, the clear evidence before the Panel is that the Athlete tested positive for two Prohibited Substances i.e. Testosterone and Stanozolol. The detection of those two Prohibited Substances on its own, amounts to the aggravating circumstances of multiple use under Rule 40.6 IAAF Competition Rules.

Secondly, the use of those Prohibited Substances on multiple occasions for a period of approximately 6 months constitutes another aggravating circumstance. The evidence in this respect is based upon the virtually uncontroverted testimony of the IAAF's experts and on the absence of exonerating explanations provided by the Athlete for that evidence, despite numerous opportunities to do so. Moreover, the Panel was satisfied that even though the IRMS test was inconclusive, when considering the existence of aggravating circumstances it was reasonable to deem the samples collected from the Athlete on 5 August 2012 (value 3) and 17 October 2012 (value 4) as an indication that the Athlete was using anabolic steroids at that time and that she had therefore used Prohibited Substances on multiple occasions.

Thirdly, the Athlete committed a distinct anti-doping rule violation, namely blood doping for a period of approximately 7 months. In this respect, all five experts, who analysed the Athlete's profile in her ABP, concluded that the values in the profile were not physiological and that it was highly likely that the Athlete was blood doping in the period starting before 28 June 2012 and continuing until February 2013.

Fourthly, having considered the totality of the evidence on this issue, the Panel was comfortably satisfied that the Athlete did organize her blood doping and her use of anabolic steroids in a repetitive and sophisticated manner designed to boost her performance in major competitions in which she knew it was likely she would be

tested while avoiding detection by in-competition testing thus committing an ADRV as part of a doping plan or scheme. This constitutes another aggravating circumstance.

2. Regarding the sanction applicable, the Panel stressed that although consistency of sanctions is a virtue, correctness remains a higher one. In this respect, The Panel considered that unduly lenient (or, indeed, unduly severe) sanctions may set a wrong benchmark inimical to the interest of sport.

   In this regard, the words "shall be increased up to a maximum of four (4) years" in Rule 40.6 do not mean that in every case in which aggravating circumstances are found a period of ineligibility of four years must be imposed. These words only impose a maximum. Having regard to the circumstances of the case and to the CAS jurisprudence which does not constitute binding precedents but however offers helpful guidance, a just and proportionate sanction would be a period of ineligibility of 3 years, being one year more than the penalty imposed by the Turkish Athletics Federation (TAF).

Decision

The Panel allowed the appeal of the IAAF to the extent that the period of ineligibility which Ms. Nevin Yanit should serve was increased from two to three years as of the date of this Award but credit shall be given to the Athlete for the period of ineligibility already served.

CAS 2013/A/3417
FC Metz v. NK Nafta Lendava
13 August 2014

Football; Distinction between legal capacity and standing to sue/to be sued; Distinction between a buy-out-clause and a mutual agreement to terminate a contract; Training compensation not due in case of signature of an employment contract with a free agent

Panel
Mr. Hans Nater (Switzerland), President
Mr João Nogueira Da Rocha (Portugal)
Mr Stuart C. McInnes (United Kingdom)

Facts

This appeal is brought by FC Metz ("the Appellant" or "Metz"), against a decision of the Dispute Resolution Chamber ("the DRC") of the Fédération Internationale de Football Association ("FIFA") dated 25 April 2013 ("the Appealed Decision") mainly imposing on FC Metz the payment of EUR 400,000, plus interest, to NK Nafta Lendava ("the Respondent" or "Nafta") as training compensation in the context of the alleged transfer of the player Vedran Vinko ("the Player") from Nafta to Metz.

The Appellant is a French football club, affiliated with the French Football Federation ("FFF"), which in turn is affiliated with FIFA which is the governing body of football at worldwide level, whose headquarters are located in Switzerland.

Nafta is a Slovenian football club, affiliated with the Slovenian Football Association ("SFA"), which in turn is affiliated with FIFA.

The Player, born on 22 February 1990, was registered with the Respondent from 8 September 1998 until 30 June 2009 as an amateur, and from 1 July 2009 until 5 October 2011 as a professional.

On 25 July 2009, the Respondent and the Player concluded an employment agreement valid until 30 June 2013 (the "First Employment Agreement"). In accordance with Clause 4 of this contract, the Player was entitled to a monthly salary of EUR 589.19, plus the reimbursement of expenses in a maximum total amount of EUR 350.00 per month.

On 1 February 2011, the Respondent and the Player signed a new employment agreement valid until 30 June 2014 (the "Second Employment Agreement"). In accordance with Clause 4 of this contract, the Player was entitled to a monthly salary of EUR 1,500.00, plus the reimbursement of expenses in a maximum total amount of EUR 350.00 per month.

In the season 2010/2011, the Respondent faced financial difficulties. On 31 March 2011, the Respondent and the Player signed an agreement in order to amicably settle their contractual relationships, in particular with regard to the remaining outstanding salaries and the future of the Player with the Respondent (the "Settlement Agreement").

On 17 August 2011, the Appellant and the Player signed an employment agreement.
On 5 October 2011, the Player was registered with the Appellant, as a professional.

On 17 January 2012, the Respondent filed a claim before FIFA, requesting the payment of training compensation from the Appellant, on the ground that the Player, on 5 October 2011, was transferred as a professional from the Respondent to the Appellant before the end of the season of his 23rd birthday. In particular, the Respondent was claiming the payment of the amount of EUR 400,000.

On 25 April 2013, the Appealed Decision was rendered, under which the Appellant was ordered to pay to the Respondent the amount of EUR 400,000 plus interest at 5% as training compensation following the transfer of the Player.

On 6 December 2013, the Appellant filed a Statement of Appeal and an Appeal Brief with the CAS pursuant to Article R47 of the Code of Sports-related Arbitration (the "CAS Code").

On 14 January 2014, the Appellant filed its Answer.

On 25 April 2014, the Appellant addressed a letter to the CAS Court Office. In this letter, the Appellant was, in substance, explaining that it had received information from the Slovenian Football Association (the "SFA") that the Respondent, although it was "*still registered in sport association records*", was not competing in any competition of the SFA since the season 2011/2012, as it did not receive its license for the 2012/2013 season. The Appellant therefore considered that the Respondent was not more than an "*empty shell*" and that it had no more legitimacy to "*claim any rights/compensation related to organized football*".

On the same day, the Respondent answered the above Appellant's letter, stating in particular that it was still registered "*in the sport association records*" and that in any circumstances, the payment of the training compensation in question was due at a time when it was still competing in the First Division of the SFA.

Reasons

1. On the one hand, the Appellant asserts that, according to Article 22.d RSTP, FIFA has the competence to deal with disputes related to training compensation only between clubs belonging to different associations, and that the Respondent shall not be entitled to claim for training compensation, as it is not registered anymore as a member of the SFA.

   On the other hand, according to the Respondent, it is still registered "*in the sports association records and, as such, is still the holder of all rights and liabilities*". In the course of the hearing, the Respondent confirmed that it was still a member of the SFA, and consequently of FIFA, and that therefore it was entitled to claim for training compensation.

   The Panel considers that two separate legal issues regarding the status of the Respondent are in point, *i.e.* (i) its legal capacity, *i.e.* the capacity to be a party, and (ii) its standing to sue or to be sued.

   Pursuant to the jurisprudence of the Swiss Federal Tribunal, the standing to sue or to be sued in civil proceedings pertains to the substantive basis of the claim; it relates to the (active or passive) entitlement to the right claimed and its absence does not entail the inadmissibility of the appeal but rather its dismissal. By contrast, the capacity to be a party consists in the ability to participate in proceedings as a party. It is a condition of admissibility of the claim and its absence constitutes a bar to hearing of the case. It also determines the jurisdiction of the arbitral tribunal. The legal capacity of a football club shall be governed by the law

of the place of incorporation of that club. In this regard, convincing evidence was provided by the Respondent that it was still in existence in accordance with the legal requirement of Slovenian law, in particular that it was registered in the Commercial Register. Therefore the Respondent has the capacity to be a party to the present proceedings.

2. To determine if a training compensation is owed by the Appellant to the Respondent the Panel needs to determine whether there was, or not, a transfer of the Player between the Respondent and the Appellant. In this respect, the interpretation of Clause 3 para. 3 of the Settlement Agreement stating "[T]he parties consent that by signing this Agreement they have finally settled mutual legal relations and have no further claims towards each other" is disputed by the parties. The Respondent agrees with the reasoning of the DRC according to which the Settlement Agreement contains a "buy-out clause" and that the training costs are not affected by this transaction. On the contrary, the Appellant contests it, arguing in substance that the Player was a "free agent" when he was hired and that therefore no training compensation is due.

   According to CAS jurisprudence, a buy-out-clause included in an employment agreement of a professional football player is a clause that determines in advance the amount to be paid by a party in case of breach and/or unilateral premature termination of the employment relationship. The wording of the clause included in the Settlement Agreement is not addressing a situation of unilateral termination, but rather the certain departure of the Player at the end of the 2010/2011 season, subject to the payment, at an undetermined time of EUR 50.000,00 by the Player. Therefore, the clause at stake of the Settlement Agreement is not a buy-out-clause but, on the contrary, a mutual agreement to terminate the employment relationship.

3. As the contractual relationship between the Respondent and the Player ended in June 2011, the player was a free agent when he signed his employment contract with the Appellant. Consequently, there was no transfer in the meaning of Article 2 of Annex 4 RSTP 2010 whereby "1. Training compensation is due when: (i) a player is registered for the first time as a professional; or (ii) a professional is transferred between clubs of two different associations (whether during or at the end of his contract) before the end of the season of his 23rd birthday" and therefore, no training compensation is payable by the Appellant to the Respondent.

Decision

The Panel found that the Appeal shall be upheld and the Appealed Decision annulled.

CAS 2013/A/3419
Marítimo da Madeira – Futebol SAD v. Clube Atlético Mineiro
14 November 2014

Football; Loan of a player; Scope and purpose of the amendment providing the extension of the loan agreement; Nature of the compensation provided in the contract; Breach by the Appellant of its duties to release the player in case of a transfer; Absence of any breach of contract by the Respondent; Moderation of the penalty

Panel
Mr José Juan Pintó (Spain), President
Mr João Nogueira Da Rocha (Portugal)
Mr Nicolas Ulmer (Switzerland)

Facts

Marítimo da Madeira – Futebol SAD ("Marítimo" or the "Appellant") is a Portuguese football club with seat in Funchal, Portugal. It is a member of the Federação Portuguesa de Futebol ("FPF"), affiliated to the Fédération Internationale de Football Association ("FIFA") which is the governing body of football at worldwide level, whose headquarters are located in Switzerland.

Clube Atlético Mineiro (hereinafter "Atlético" or the "Respondent") is a Brazilian football club with seat in Belo Horizonte, Brazil. It is a member of the Confederação Brasileira de Futebol **(**CBF**)**, affiliated member of FIFA.

On 26 August 2009, the parties entered into a loan agreement named (the "Contract") concerning the player Kléber Laube Pinheiro ("the Player"), expiring on 30 June 2010.

On 2 January 2010, the parties signed an amendment to the Contract (the "Amendment"), whereby they extended the duration of the loan period of the Player by one additional year, until 30 June 2011.

On 24 June 2010, the Portuguese club Futebol Clube do Porto – Futebol SAD ("Porto") made a formal offer to Atlético for the definitive transfer of the Player's federative rights and for the acquisition of 50 % of his economic rights, for the total amount of EUR 2,300,000.

On 25 June 2010, pursuant to clause 9.e) of the Contract, Atlético sent a formal notification to Marítimo informing it about the official proposal received from Porto for the definitive transfer of the Player's federative rights and the acquisition of 50% of his economic rights, so that Marítimo could exercise its preferential right over the Player's federative and economic rights within 8 days upon receipt of the aforesaid notification.

In the same correspondence, Atlético informed Marítimo that in the event that Marítimo chose not to exercise its preferential right, Atlético would accept the offer received from Porto, thereby terminating the relationship between the Player and Marítimo, and Atlético would pay the latter the amount corresponding to 20% of the offered transfer sum (i.e. EUR 460,000).

On 7 July 2010, Atlético sent a letter to Marítimo informing that its preferential right had expired and requesting it to immediately release the Player within a maximum term of 10 days so that the Player could be transferred to Porto, after which Atlético would pay Marítimo the amount corresponding to its 20% of the transfer price.

On 9 July 2010, Atlético sent Marítimo the draft document for early termination of the Contract.

On the same day, Marítimo answered Atlético's correspondence, denying that there was any understanding between both clubs with regards to the termination of the Contract. Specifically, Marítimo rejected that with the payment of the EUR 460,000 corresponding to 20% of the transfer fee, it would have *"nothing more to receive from Atlético regarding the contract"*. On the contrary, Marítimo claimed that Atlético was obliged to pay (1) 20% of the transfer fee agreed with Porto, (2) 20% of the remaining 50% of the Player's economic rights and (3) EUR 1,000,000 as penalty clause for the breach of its preference right.

On 15 July 2010, Atlético informed Marítimo that the time limit to deliver the Player's contract termination expired by the end of the following 48 hours and that in case Marítimo failed to honor such contractual obligation, it would be subject to all the legal consequences set forth in the Contract.

On 16 July 2010, Marítimo requested Atlético to make immediate payment of EUR 460,000 as a pre-condition to release the Player and informed that the document effecting the termination of the Contract was ready to be delivered to Atlético from 8 July 2010.

On 19 July 2010, Marítimo sent a letter to Atlético rejecting the breach of its contractual duties towards the Player that Atlético had attributed to Marítimo in its correspondence of 14 July 2010.

On 21 July 2010, Atlético sent to Marítimo a draft of a proposal of settlement agreement to be signed before 23 July 2010, the date of expiry Porto's offer.

On 26 July 2010, Marítimo informed Atlético that it would execute the termination agreement of the Player's sports employment contract upon receipt of the payment of EUR 460,000. Furthermore, Marítimo reiterated that it did not waive any of its rights arising out of the Contract. With this correspondence Marítimo enclosed an amended version of the draft of the settlement agreeement, reflecting its claims against Atlético.

In the end, Marítimo did not release the Player and the Player was not transferred to Porto.

On 12 August 2010, Atlético filed a claim before the FIFA Players' Status Committee against Marítimo.

On 30 January 2011, Sporting Clube de Portugal – Futebol SAD ("Sporting") made an offer to Atlético for the definitive transfer of the Player and for 50% of his economic rights for the total amount of EUR 2,530,000.

On 31 January 2011, Atlético rejected Sporting's offer, as in its view the proposed amount was insufficient.

On 29 July 2011, the Player was registered with Porto. According to the information obtained from the Transfer Matching System (TMS), Porto paid a transfer compensation of EUR 1,680,000 to Atlético.

On 23 April 2013, the Single Judge of the FIFA Players' Status Committee rendered his decision in this matter whereby the claim of Club Atlético Mineiro, was partially accepted. Club Maritimo de Madeira, was ordered to pay to Club Atlético Mineiro, within 30 days as from the date of notification of this decision, the amount of EUR 2,530,000 with an interest rate of 5%.

On 4 December 2013, Marítimo filed before the CAS a Statement of Appeal against Mineiro, challenging the Decision of the Single Judge of the PSC dated 23 April 2013 ("Appealed Decision").

On 3 March 2014, Atlético filed its Answer to the Appeal, in accordance with Article R55 of the CAS Code.

Reasons

1. The Panel shall start the analysis of the case by dealing with (1) the nature and the scope of the Amendment of the Contract.

   Following the amendment to the Contract, the parties agreed the following:

   > *"**Clause One:** Starting from the date this amendment is signed, the parties extend the duration of the Temporary Assignment of the ATHLETE'S Federative Rights, which now will be due to expire on 30.06.2011.*
   > ***Clause Two:** All other CONTRACT terms and conditions remain in force and unaffected".*

   In spite of the wording of these clauses, the Appellant argues that the Amendment's purpose was not limited to extending the loan period of the Player for one additional year, but to extend, *mutatis mutandis,* for the same period of time, all the dates and deadlines initially agreed in the Contract.

   The wording of the Amendment of the loan agreement is clear and does not lead to any doubt of interpretation (*in claris non fit interpretatio).* In this respect, the Amendment makes clear that its scope is limited to extending the duration of the loan of the player only and exclusively; the rest of the terms and conditions remained unaffected, including the terms related to preference right and right to 20% of the transfer fee, and to the release of the Player within 10 days in case of a transfer. Moreover, as it was the Appellant who drafted the agreement, the *contra proferentem* principle applies. Consequently, if there were any ambiguity in the aim and scope of the Amendment, such ambiguity would be construed against the party who drafted it, and thus interpreted in the sense that fits better with the interests of the party who did not draft it.

2. Pursuant to Clause 9.b) of the Contract:

   > *"b) In case of transfer of the athlete after 30/05/2010, MARITIMO undertakes the obligation to immediately release the ATHLETE to ATLETICO or to whom it indicates, within 10 (ten) days after formal notification, subject to penalty of paying compensation to ATLETICO on the amount equivalent to the value of the transfer negotiation that ATLETICO intended to conclude, increased by 10% (ten percent), frustrated due to the noncompliance of MARITIMO".*

   The parties have been discussing whether this is a true penalty clause, as stated by the Respondent, or rather a genre of liquidated damages clause, as asserted by the Appellant (with the exception of the 10% increase on the transfer fee that, the latter recognized as a true penalty).

   The Panel considers that the Contract contains all the necessary elements required under Swiss law (Article 160 CO) to establish a penalty clause. A penalty clause can be defined as an accessory provision whereby the debtor promises an agreed penalty to the creditor in case the debtor does not perform or improperly performs a defined obligation. In this regard, the Contract provides that the infliction of the penalty is directly linked to the Appellant's failure to execute the principal obligation

established in the relevant clause; i.e. to release the Player *"within 10 (ten) days after formal notification"* from the Respondent. As such, the clause responds to the key nature of a penalty clause under Swiss law: it is accessory to the main obligation (to release the Player on time) and it is autonomous (the failure to perform the obligation automatically generates an autonomous obligation or debt towards the other party). The fact that the parties did not explicitly use the words "penalty clause" to name the compensation established under the Contract and did not provide a fixed amount for the penalty does not change the nature of this clause.

3. It follows from the above determination of issues that the Panel should now determine whether the Appellant breached Clause 9.b) of the Contract, in connection with the offer that Porto made for the Player on 24 June 2010.

   The Panel is of the view that the Appellant neither exercised its preferential right over the Player nor released the Player within the term contractually agreed, hence failing to fulfil its obligation under the Contract. In this respect, none of the reasons advanced by the Appellant can support or justify its refusal to release the Player. Therefore, the Appellant breached of the Contract and, as a consequence, the penalty established therein (EUR 2,300,000 plus EUR 230,000 - i.e. EUR 2,530,000) should in principle be paid to the Respondent, without prejudice to its potential moderation.

4. The Panel shall now determine if, as maintained by the Appellant, the Respondent, also breached the Contract. All the alleged breaches of the Contract that the Appellant attributes to the Respondent (and their corresponding consequences) are linked to the ownership of the Player's economic rights. In particular, the Appellant maintains that when the Respondent signed the Contract, it owned 100% of the Player's economic rights and that, surprisingly, when it received the offer from Porto, it only owned 50% of such rights. This leads the Appellant to believe that after the signature of the Contract the Respondent transferred the other 50% of the Player's economic rights to an unknown third party without having informed the Appellant and thus breaching Clauses 4 (for not having paid it the 20% of the relevant transfer fee), 9.e) (for not having informed it about the essential conditions of the business) and 9.d) (for having preventing it to exercise its preferential right) of the Contract. The Respondent rejects this approach by arguing that the contractual provision stipulating that Atlético owned 100% of the Player's economic rights was but a material error, and that the Appellant was aware of this from the beginning of their contractual relationship.

   In this regard, the Panel considers that The ownership of 100% of the Player's economic rights by the Respondent was not an essential element of the Contract, and, in any case, the Appellant's preferential right did not refer to 100% of the Player's economic rights, but to the specific percentage of such rights that the Respondent could potentially transfer to a third party. Therefore, the fact that the Respondent would have only had 50% of the Player's economic rights when it signed the Contract (as the Respondent states) does not imply *per se* a breach of the Contract, because even in case the Respondent would have had 100% of these rights, this would not automatically entitle the Appellant to receive the 20% of the compensation paid for the transfer of the 100% of the rights. More specifically, the Respondent could have transferred only

part of these total rights, with the result that the Appellant's 20% would be only applicable to the transfer fee paid for that partial transfer. There is no convincing evidence of an alleged hidden transfer by the Respondent of 50% of the Player's economic rights. As a result, the Respondent did not breach the Contract.

5. The Panel has already mentioned that the Appellant breached Clause 9.b) of the Contract and thus the penalty established in that clause (in an amount of EUR 2,530,000) should in principle apply. However, pursuant to Article 163(3) CO *"Le juge doit réduire les peines qu'il estime excessives"*.

   According to the applicable provisions and to the CAS jurisprudence (i.e. CAS 2011/O/2397, CAS 2013/A/3205) and based on the circumstances of the case, an excessive penalty should be reduced. In this respect, the interest of the Respondent in the execution of this obligation which justifies a penalty must be balanced with its actual risk and damage exposure. Where such actual risk and damage exposure are relatively moderate in comparison to the amount of the penalty inflicted, where the Appellant has a latent economic dependence on the Respondent and finally, where there is an evident disproportion between the damage caused by the Appellant and the penalty stipulated, this penalty amount shall be reduced in accordance with article 163 (3) CO.

Decision

The appeal is partially upheld. The Decision taken by the FIFA Single Judge of the Players' Status Committee is confirmed, except that the Appellant is ordered to pay Clube Atlético Mineiro the amount of EUR 1,530,000, together with interest at 5% per annum.

CAS 2014/A/3486
MFK Dubnica v. FC Parma
2 February 2015

Football; Panel's discretion to exclude evidence under Article R57.3 CAS Code; Training compensation where a player moves from one association to the other inside the UE; Completion of the training period by the player; Calculation of the training compensation

Panel
Mr Manfred Nan (Netherlands), President
Mr Alasdair Bell (Switzerland)
Mr Efraim Barak (Israel)

Facts

MFK Dubnica ("Dubnica" or the "Appellant") is a football club with its registered office in Dubnica, Slovak Republic. The "A" team of Dubnica currently plays in the second highest football competition in the Slovak Republic. Dubnica is registered with the Slovak Football Association (the "SFA"), which in turn is affiliated to the Fédération Internationale de Football Association (the "FIFA") which is the governing body of football at worldwide level.

FC Parma ("Parma" or the "Respondent") is a football club with its registered office in Parma, Italy. The "A" team of Parma currently plays in the highest football competition in Italy. Parma is registered with the Italian Football Federation (*Federazione Italiana Giuoco Calcio* – the "FIGC") which in turn is also affiliated to FIFA.

According to the international player passport issued by the Slovak Football Association, Mr Pavol Bajza, born on 4 September 1991 (the "Player") was registered as a "*non-amateur*" with Dubnica on 6 August 2007 (at the age of 15).

At the beginning of 2009, the Player appeared for the first time in Dubnica's "A" team in a friendly match.

On 11 July and 30 August 2009, the Player played two official games in Dubnica's "A" team.

On 1 February 2010, the Player and Dubnica signed a professional employment contract for a period of two and a half seasons, *i.e.* valid until 30 June 2012, which provides *inter alia* as follows:

> *"For the term of this Contract (…) the FC undertakes to pay the monthly financial reward to the player in the amount of EUR 600.00 (…)."*

From 27 February 2010 (during the 2009/2010 season) until the 18th round of the subsequent 2010/2011 season, the Player was fielded in 32 successive matches as the starting goalkeeper of the "A" team of Dubnica in the highest football competition in Slovak Republic. During the second half of the season 2010/2011, the Player became a substitute goalkeeper. At the end of this season Dubnica relegated to the second highest football competition in Slovak Republic.

In the 2011/2012 football season, the Player started again as the first goalkeeper of Dubnica and played all 33 games.

On 30 June 2012, the Player's employment contract with Dubnica expired.

On 20 August 2012, the Player was officially registered with Parma.

On 31 August 2012, Dubnica requested Parma to pay training compensation in respect of the Player.

On 26 September 2012, Dubnica lodged a claim against Parma with the Dispute Resolution Chamber of FIFA (the "FIFA DRC"). Dubnica maintained that it was entitled to receive training compensation in the amount of EUR 300'000 from Parma on the ground that the Player was transferred as a professional player from Dubnica to Parma before the end of the season of his 23rd birthday, while it had offered the Player a renewed employment contract until 30 June 2014.

Parma rejected Dubnica's claim, maintaining that the Player had already finished his training period before he was transferred to Parma and that it was insufficiently proven on which date the contractual offer was sent to the Player and if such offer had actually been received by the Player.

On 31 July 2013, the FIFA DRC rejected the claim (the "Appealed Decision").

On 6 February 2014, Dubnica lodged a Statement of Appeal, pursuant to Article R48 of the CAS Code of Sports-related Arbitration (the "CAS Code").

On 18 February 2014, Dubnica filed its Appeal Brief, pursuant to Article R51 of the CAS Code mainly claiming that all conditions arising out of the Regulations on the Status and Transfer of Players were fulfilled and that therefore the Respondent should be condemned to compensate the Appellant in the amount of EUR 298.333,00 (two hundred ninety-eight thousand three hundred thirty three) as a Training Compensation and/or any other amount Panel deems appropriate in accordance with the FIFA Regulations and/or in the alternative.

On 28 April 2014, Parma filed its Answer, pursuant to Article R55 of the CAS Code, whereby it mainly requested CAS to decide to reject the appeal of MFK Dubnica and no training compensation is due.

Reasons

1. Parma argues that Dubnica relies on new evidence in the present procedure that was not part of the proceedings before FIFA. Parma requests such new evidence to be dismissed on the basis of article R57 of the CAS Code and argues that CAS cannot go beyond the scope of the previous litigation.

   Article R57 of the CAS Code provides as follows - as relevant:

   "The Panel has full power to review the facts and the law. (…)
   The Panel has the discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered (…)".

   In this regard, the Panel considers that the Panel's inherent discretion to exclude certain evidence under Article R57.3 of the Code is just that the Panel is free to accept or reject evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. Article R57.3 of the Code should therefore be construed in accordance with the fundamental principle of the *de novo* power of review which is well established in a long line of CAS jurisprudence and is, in essence, the foundation of the CAS appeals system. Therefore, the standard of review should not be undermined by an overly restrictive interpretation of Article R57.3 of the Code. As such, the discretion to exclude

evidence should be exercised with caution, for example, in situations where a party may have engaged in abusive procedural behaviour, or in any other circumstances where the Panel might, in its discretion, consider it either unfair or inappropriate to admit new evidence.

It is the Panel's understanding that Dubnica – after having received the Appealed Decision on 31 July 2013 – attempted to collect additional evidence to support its position, which additional evidence is completely in line with the arguments and evidence already presented during the proceedings before the FIFA DRC. As such, the Panel finds that Dubnica neither engaged in abusive procedural behaviour, nor does the Panel consider it unfair or inappropriate to admit the "new" evidence adduced by Dubnica.

The Panel finds that – by admitting this new evidence to the file – it does not go beyond the claims submitted to it within the meaning of Article 190(2)(c) of Switzerland's Private International Law Act (the "PILS") or beyond the scope of the previous litigation as argued by Parma.

2. With regard training compensation, Article 6(3) of Annex 4 to the FIFA Regulations sets out an exception which applies specifically to players moving from one football association to another inside the territory of the EU/EEA. In this regard, article 6(3) is a *lex specialis*. The second and third sentence of article 6(3) of Annex 4 to the FIFA Regulations apply to situations where a professional contract is already in existence, setting out requirements which the training club must meet in order to retain a right to compensation if a player moves to another club i.e. (i) an offer in writing for a new contract 60 days before the expiry of the current contract, (ii) a notice of the offer sent by registered mail and (iii) financial terms of the offer at least as favourable as those in the current contract.

The positions of the parties particularly divert in respect of whether Dubnica had indeed made a new contractual offer to the Player. It remained uncontested by Parma that Dubnica's offer – if indeed filed – was filed within the deadline of 60 days before expiry of the Player's employment contract with Dubnica.

There is sufficient evidence to prove that Dubnica sent the Player a contractual offer via registered mail on 13 March 2012, which offer was delivered at the home address of the Player on 15 March 2012, which is 107 days before the expiry of the employment contract. As such, the Panel considers that Dubnica has discharged its burden of proof and has complied with the prerequisites set out in Article 6(3) of Annex 4 of the FIFA Regulations. Even if the Player had no knowledge of the content of the delivery made on 15 March 2012, the fact that a delivery was made at his home address results in a shift of the burden of proof to the Player to establish that this letter did not contain a contractual offer from Dubnica. The Player's argument according to which he did not take note of the content of the envelope – even if it were true – is in itself not sufficient because it does not mean that Dubnica did not comply with the regulatory requirements in order to be entitled to training compensation, *i.e.* sending a new contractual offer to the Player by registered mail. Consequently, the Panel finds that Dubnica complied with article 6(3) of Annex 4 to the FIFA Regulations and that Dubnica is therefore entitled to receive training compensation from Parma in respect of the Player.

3. According to article 6(2) of Annex 4 to the FIFA Regulations, the amount of training compensation payable shall be based on the years between 12 and 21, unless it is evident that a player has already terminated his training period before the age of 21. Pursuant to FIFA circular letter no. 801, the burden of proof to demonstrate that the training of the Player actually ended before the Player's 21st birthday lies with the club that is claiming this fact. In this regard, according to CAS jurisprudence, the mere fact that a player regularly plays in the "A" team of his club, albeit an important factor, is not decisive, since following such an approach would be inconsistent with the case-by-case analysis contemplated in FIFA circular letter no. 801. The level of the relevant league, the fact to be included or not in the national representative team, to be the first choice goalkeeper of the club and to attract the attention of a club playing in one of the top European League are factors that should also be taken into account. Although as a matter of fact a distinction can be made between the "training" of a player which implies a termination point in the sense of the FIFA Regulations and the "development" of a player in the sense that a football player does not stop learning and might still improve as a football player after the end of his training period, the definitions section of the FIFA Regulations defines "training compensation" as "the payments made in accordance with Annexe 4 to cover the development of young players" (emphasis added). This provision may indicate that in the relevant and justified circumstances, to be determined indeed on a case-by-case basis, the training compensation may also refer to the period in which the young player's skills are still in the process of development.

   The Panel considers the fact that the Player was only fielded in Parma's "A" team 9 months after signing with the club and that he currently still is a substitute goalkeeper at Parma, is not necessarily because he was not fully trained at Dubnica, but more likely because the Player is now subjected to a higher level of football in a more competitive environment. As a result, the Panel concludes that the Player had completed his training period.

4. In case of the transfer of a professional player, training compensation is calculated on a *pro rata* basis for the time the player was effectively trained by his previous club (article 3(1) of Annex 4 to the FIFA Regulations). When a player is transferred from a lower to a higher category club within the EU, the calculation shall be based on the average of the training costs of the two clubs. The general rule is to consider the costs that would have been incurred by the "new" club if it had trained the player itself. The assessment of the category to which the training club and the new club belonged during the timeframe is also to be taken into account.

Decision

The Panel found that the Player completed his training period at the beginning of the 2011/2012 season and that Dubnica is entitled to receive training compensation from Parma in respect of the Player in a total amount of EUR 219'897 with an interest of 5% *per annum* until the date of effective payment.

TAS 2014/A/3587
KRC Genk c. AS Monaco FC
18 décembre 2014

Football ; Indemnité de formation dans le cadre d'un transfert de joueur dans la zone UE/EEE (article 6 al. 3 Annexe 4 RSTJ) ; Respect du droit d'être entendu ; Portée de l'article 6 al. 3 Annexe 4 RSTJ; Conditions requises pour l'obtention d'une indemnité de formation selon l'article 6 al. 3 Annexe 4 RSTJ

Formation
Me Fabio Iudica (Italie), Président
Me Olivier Carrard (Suisse)
Prof. Gérald Simon (France)

Faits

KRC Genk est un club de football professionnel dont le siège social est à Genk, Belgique. Il participe à la Pro League, et est membre de l'Union Royale Belge de Sociétés de Football – Association («URBSFA»). Cette dernière est affiliée à la Fédération International de Football Association («FIFA»), organe faîtière du football au niveau mondial, dont le siège est à Zurich, en Suisse. Selon l'URBSFA, l'Appelant est un club de 1ère catégorie au sens de la réglementation de la FIFA en matière d'indemnités de formation.

AS Monaco FC est un club de football dont le siège social est à Monaco. Il participe à la Ligue 1, et est membre affecté à la Fédération Française de Football («FFF»). Cette dernière est affiliée à la FIFA. Selon la FFF, l'Intimé est un club de 1ère catégorie au sens de la réglementation de la FIFA en matière d'indemnités de formation.

M. Yannick Ferreira Carrasco est un joueur de football professionnel de nationalité belge, né le 4 septembre 1993 («le Joueur»).

Le Joueur a évolué au sein du Club de l'Appelant en qualité de joueur amateur à compter de la saison 2006/2007 jusqu'à la saison 2009/2010.

Le Joueur a signé un contrat de joueur-stagiaire en date du 1er juillet 2010 avec l'Intimé, puis, le 24 septembre 2010, un contrat de joueur professionnel avec prise d'effet le 3 juillet 2010.

Le 5 juillet 2011, l'Appelant a soumis une requête auprès de la FIFA en vue d'obtenir une indemnité de formation en relation avec le transfert du Joueur vers l'Intimé. Après avoir amendé sa plainte, il réclame EUR 315.000,00 plus 5% d'intérêt sur ce montant du 24 octobre 2010 au 1er septembre 2012, soit EUR 29.257,00.

Dans sa réponse à la FIFA, l'Intimé a affirmé n'être redevable d'aucune indemnité de formation car l'Appelant aurait dû «*faire parvenir une offre de contrat par courrier recommandé avec avis de réception au moins soixante jours avant l'expiration de son contrat en cours pour être éligible à d'éventuelles indemnités de formation*».

Dans sa réplique devant la FIFA, l'Appelant a affirmé que bien qu'il ne puisse en fournir ni la preuve ni spécifier les dates des pourparlers, il a bien engagé des négociations avec l'agent du Joueur et la mère du Joueur au sujet d'un éventuel contrat avec le Joueur. En outre, l'Appelant a souligné notamment, en se référant à la jurisprudence du Tribunal Arbitral du Sport («TAS») (CAS 2006/A/1152), qu'il

avait droit à indemnité de formation tant qu'il avait montré un intérêt de bonne foi à garder le Joueur.

Enfin, l'Appelant a affirmé qu'il avait déjà proposé un contrat au Joueur en juin 2010 avant que celui-ci ne signât son premier contrat en tant que professionnel avec l'Intimé. A cet égard, l'Appelant a fourni à la FIFA un projet de contrat non signé et non daté en flamand.

Dans sa position finale, l'Intimé a souligné que l'Appelant n'a fourni aucune preuve écrite des offres de contrat qu'il a invoquées. Par conséquent, les conditions de l'Article 6, alinéa 3, de l'Annexe 4 du Règlement du Statut et du Transfert des Joueurs FIFA («RSTJ») n'ont pas été remplies. Finalement, l'Intimé a également déclaré qu'un cas exceptionnel tel qu'établi dans la jurisprudence de la Chambre de Résolution des Litiges («CRL») et du TAS n'est pas constitué en l'espèce car l'Appelant n'a pas prouvé son intention de garder le Joueur, par exemple en fournissant une preuve des négociations contractuelles invoquées.

Le 12 décembre 2013, la CRL a rejeté la demande du demandeur.

Le 5 mai 2014, l'Appelant déposait une déclaration d'appel auprès du TAS. Le 14 mai 2014, l'Appelant déposait son mémoire d'appel.

Le 6 juin 2014, l'Intimé déposait sa réponse.

Le 16 juin 2014, KRC Genk sollicitait auprès de la Formation arbitrale de pouvoir procéder à un second échange d'écritures dans la mesure où l'Intimé avait développé partiellement une nouvelle argumentation encore inconnue dans sa réponse. La requête de l'Appelant pour un nouvel échange d'écritures a été rejetée le 29 août 2014 par la Formation arbitrale.

Considérants

1. La Formation arbitrale a pris bonne note des arguments de l'Appelant quant aux violations des droits de la défense qui auraient entachée la procédure du TAS car la Formation arbitrale n'a pas autorisé l'Appelant à effectuer un deuxième échange d'écritures.

   Les raisons pour lesquelles la Formation arbitrale n'a pas accordé de deuxième échange d'écritures sont dues au fait qu'il n'est prévu dans le Code qu'en cas de circonstances exceptionnelles ou d'accord entre les parties. Or l'Intimé a expressément objecté à la requête de l'Appelant et la Formation arbitrale n'a trouvé aucune circonstance exceptionnelle justifiant un second échange d'écritures étant donné qu'il n'existait pas de faits nouveaux. A l'audience, l'Appelant a affirmé que la Formation arbitrale l'a empêché de produire de nouveaux documents. Toutefois, une telle demande n'a jamais été formulée par l'Appelant dans sa requête visant à un second échange d'écritures. En tout état de cause, et quand bien même la Formation arbitrale aurait pu considérer de nouveaux documents à l'audience, l'Appelant n'a finalement pas requis la production de nouveaux éléments de preuve.

   En conclusion, la Formation arbitrale est d'avis que, dans la présente procédure devant le TAS, l'Appelant a eu tout loisir de défendre sa cause et d'exercer son droit d'être entendu. L'Appelant a d'ailleurs reconnu à la fin de l'audience que son droit d'être entendu avait été respecté.

2. Les transferts des joueurs d'une association à une autre dans la zone UE/EEE sont régis par les dispositions spéciales prévues à l'article 6, alinéa 3, de l'Annexe 4 du RSTJ. L'édition 2010, applicable dans le cas

présent, dispose ce qui suit: «*Si le club précédent ne propose pas de contrat au joueur, aucune indemnité de formation n'est due, à moins que ledit club puisse justifier le droit à une telle indemnité. Le club précédent doit faire parvenir au joueur une offre de contrat écrite par courrier recommandé au moins soixante jours avant l'expiration de son contrat en cours. Une telle offre sera au moins d'une valeur équivalente à celle du contrat en cours. Cette disposition est applicable sans préjudice du droit à l'indemnité de formation du ou des ancien(s) club(s) du joueur*».

Il est nécessaire d'établir si l'article 6, alinéa 3, de l'Annexe 4 du RSTJ 2010 s'applique dans le cas présent; dans l'affirmative, la Formation arbitrale devra vérifier si l'Appelant a satisfait aux conditions nécessaires pour obtenir le droit au paiement d'une indemnité pour la formation assurée au Joueur.

Au vue de la jurisprudence majoritaire (voir, par exemple CAS 2009/A/1810 & 1811; CAS 2008/A/1521; CAS 2007/A/1213; CAS 2006/A/1181; CAS 2006/A/1152) et des principes envisagés dans la Circulaire FIFA n. 769, la disposition contenue dans la première phrase de l'article doit être appliquée aussi bien aux transferts des joueurs professionnels qu'aux amateurs qui signent leur premier contrat professionnel lors d'un transfert vers un autre club dans la zone UE/EEE. En ce qui concerne la deuxième et la troisième phrase de l'article 6, alinéa 3 de l'Annexe 4 RSTJ 2010, la disposition concernée est susceptible d'application analogique aux transferts des joueurs amateurs dans la mesure où cela est compatible avec les spécificités de leur statut. Par conséquent, les dispositions faisant référence au «*contrat en cours*» ne seront applicables qu'aux transferts des joueurs professionnels.

3. L'Appelant pourra bénéficier de l'indemnité de formation s'il démontre avoir proposé au Joueur une offre de contrat professionnel, ou, à défaut d'une telle offre, si le club peut "*justifier le droit à une telle indemnité*», en application de l'exception prévue dans la première phrase de l'article 6, alinéa 3, de l'Annexe 4 RSTJ 2010.

   A défaut d'offre de contrat professionnel faite au joueur par le club par courrier recommandé, ce dernier ne pourra bénéficier de l'indemnité de formation que s'il peut "justifier le droit à une telle indemnité», en application de l'exception prévue dans la première phrase de l'article 6, alinéa 3, de l'Annexe 4 RSTJ 2010. Selon la jurisprudence du TAS (voir CAS 2006/A/1152), le droit du club formateur au paiement d'une indemnité de formation par rapport à un joueur peut être fondé sur l'«attitude proactive» du club à l'égard du joueur se traduisant par une conduite de bonne foi et un intérêt authentique à retenir le joueur pour le futur. Cette attitude proactive peut se manifester par le fait d'avoir investi en termes de formation et d'éducation pour le joueur pendant plusieurs saisons ; par l'envoi d'une lettre au joueur pour lui manifester son intention de le garder, comme amateur, pour la saison sportive suivante, également adressée à la fédération nationale à laquelle le club était affilié en conformité avec les règlements internes de ladite fédération ; par la démonstration de l'existence de pourparlers avec le joueur en vue de signer un contrat professionnel.

   Il n'est pas suffisant pour obtenir une indemnité de formation que le joueur soit talentueux, qu'il ait joué dans les équipes nationales juniors et que le club précédent ait élevé et formé le joueur. En outre, la valeur économique du Joueur est un élément factuel qui ne peut être lié avec

l'attitude proactive ou avec la conduite de bonne foi de l'Appelant. En tout état de cause, l'Appelant n'a aucunement démontré un intérêt réel pour le Joueur en conformité avec l'Article 6, alinéa 3, de l'Annexe 4 RSTJ 2010.

Décision

La Formation arbitrale considère que l'Appelant n'a pas rempli les conditions préalables de l'article 6, alinéa 3, de l'Annexe 4 du RSTJ 2010 et qu'en conséquence il n'est pas en droit de recevoir une quelconque indemnité de formation pour le Joueur.

CAS 2014/A/3604
Ralfs Freibergs v. International Olympic Committee (IOC)
17 December 2014

Ice-Hockey (Sochi Olympic Games); Doping (anabolic steroids); Presumption of regularity under Article 3.2 WADC and lack of registration of a laboratory as a legal entity; Need to separately validate a technique used for an athlete's sample; Purpose of the laboratory documentation packages; Form of consent for the opening of the B-sample; Validity of a DC decision if it was signed only by the Chairman of the DC

Panel
Mr Michael Beloff Q.C. (United Kingdom), President
Mr Olli Rauste (Finland)
Prof. Luigi Fumagalli (Italy)

Facts

This is a case with a single issue, namely whether the Appellant had on 19 February 2014, when he was a participant in the XXII Winter Olympic Games at Sochi, a prohibited substance in his body. Mr Ralfs Freibergs ("Appellant" or the "Player"), a scholarship student at Bowling Green State University in the USA ("the University") was a member of the Latvian Hockey Team, which took part in the Games. The International Olympic Committee ("Respondent" or "IOC") is the world governing body of Olympic Sports having its registered offices in Lausanne, Switzerland. The IOC is incorporated as an association with respect to articles 60 et seq. of the Swiss Civil Code ("SCC")

The Appellant appeals a decision of the IOC Disciplinary Commission ("DC") dated 23 April 2014 ("Decision") which disqualified him from the Men's Play-Off Quarter Finals Canada v. Latvia, removed his 8th place diploma and excluded him from further participation in the Games. On 19 February 2014, the Appellant competed with his team in the Men's Play-offs Quarter finals Canada v. Latvia. After the match, which ended up late in the evening, the Appellant was requested to provide a urine sample for a doping control. The collection occurred just after midnight, i.e. effectively on 20 February 2014 at 00:15. The Doping Control Form signed by his representative, the team doctor, Dr Janis Kveps, confirmed that the collection "was in accordance with the relevant procedures".

According to the analytical report issued by the laboratory on 22 February 2014, the analysis of the A-sample revealed the presence of a Prohibited Substance, i.e. the metabolite of an anabolic steroid "dehydrochloromethyl-testosterone metabolite 18-nor-17b–hydroxymethyl-17a-methyl–4-chloro–5b–androst–13–en–3a–ol", it being on the 2014 Prohibited List of the World Antidoping Code ("WADC"), operative at the Sochi Games, as an exogenous Anabolic Androgenic Steroid "AAS". Its trade name is "Turinabol" which for convenience the Panel will use hereafter.

On 23 February 2014 at 10:44 am, and in accordance with Art. 6.2.6 of the IOC Antidoping Rules applicable to the Games ("ADR"), the notification of the adverse analytical finding and of the opening of the disciplinary proceedings were accomplished by delivery of the notice to the Latvian Deputy Chef de Mission Mr Raitis Keselis.

The B-sample opening took place as scheduled in the presence of Mr Gorbunovs, the laboratory director, the IOC representative and an independent witness Mr Thierry Boghosian, one of the WADA independent observers in Sochi. Mr Gorbunovs, the laboratory director and the IOC representative confirmed in writing on the B-sample Opening Protocol that the bottle was opened in their presence and part of the B-sample removed for analysis, and the remainder of the B-sample was resealed with number degree and security cap. The B-sample analysis confirmed on its face the A-sample analysis result and the presence of the same prohibited substance.

On 10 March 2014, the Appellant was informed that he had the opportunity to attend the hearing of the DC scheduled on 4 April 2014 and/or to provide a defence in writing.

On 23 April 2014, the DC issued its decision, signed by the Chairman Dennis Oswald on behalf of the Commission, dismissing all of the arguments raised by the Appellant which called into question the validity of the analytical results.

On 19 May 2014, the Appellant filed his Statement of Appeal serving as Appeal Brief and on 4 July 2014, the IOC filed its answer.

Reasons

1. The principle "omnia praesumuntur rite esse acta" – the presumption of regularity is codified in Article 3.2 of the WADC. A challenge of irregularity of an anti-doping laboratory based on the contention that the latter was not registered in Russia as a legal entity and such an unregistered organization is not authorized to carry out any activity is a very formalistic approach. While it might have been preferable for all the formal requirements of local laws to be strictly observed, in the context of international sport, the competence of laboratories to carry out analysis of doping samples is defined in the WADC. Whatever the consequences of non-registration might be, they don't seem to matter.

2. Authority and competence of the Sochi Laboratory: The Appellant's challenge to the competence of the Sochi Laboratory, if well made out, would put in doubt not only the Appellant's own test results but that of all such results obtained during the Sochi Games. If the premise of laboratory incompetence was sound, the Panel would not shrink from so stating, however serious the consequences may be. But the Panel is unpersuaded by the Appellant's challenge. The Appellant's challenge is based on the contention that the Sochi Laboratory was not registered in Russia as a legal entity, and according to the Appellant, such an unregistered organization is not authorized to carry out any activity in Russia, indeed did not even exist in a point of law. According to the Appellant, even branches of legal entities must be registered in the enterprise registry of the Russian Federation in order to be authorised to perform any activities in Russia. The Sochi Laboratory lacked such registration as a satellite laboratory of the WADA accredited Laboratory in Moscow and thus the capacity to perform any testing at the Sochi Olympic Games. The Panel notes that the Appellant's approach to this issue is a very formalistic one. While it might have been preferable for all the formal requirements of local laws to be strictly observed, the Panel emphasizes that, in the context of international sport, the competence of laboratories to carry out analysis of doping samples is defined in the WADC. The Panel had no expert evidence from either side as to the consequences of non-registration in Russian law but, in its view whatever those consequences might be matters not. The

use of a satellite facility is a familiar feature of Olympic Games which take place in a location where there is no permanent accredited laboratory (see for example Torino 2006, the satellite facility of the WADA accredited Laboratory of Rome in Orbassano, and Vancouver 2010, the satellite facility of the WADA accredited Laboratory of Montreal in Vancouver).

3. The Appellant further alleges that the techniques used to identify Turinabol in the Sochi Laboratory had not been validated. As far as this allegation is concerned, the Panel adopts the IOC's analysis presented during the hearing. The technique used to detect this particular metabolite of Turinabol is not a completely new method, but only an extension of the well-established method of mass spectrometry which has been in general use for the detection of anabolic steroids for decades. The feasibility of identifying this particular metabolite in the detection of Turinabol has become known only recently and is based on a study published in 2012. The identification of this metabolite in mass spectrometry was previously impossible because of the lack of reference samples which have now become commercially available. The Panel therefore concludes that there was no need separately to validate the technique used for the Appellant's sample since it was a mere development of the long time ago validated mass spectrometry method and not something completely different.

4. The Panel must nonetheless consider the point given that Section 5.4.4.4.1.5 of the ISL provides as follows: "All data entry, recording of reporting processes and all changes to reported data shall be recorded with an audit trail. This shall include the date and time, retention of original data, reason for change to original data and the individual performing the task." The ISL requires that such corrections be appropriately documented and reasoned. Indeed common sense dictates that if a "negative" marking on the report is afterwards reversed to a "positive", such amendment must be appropriately documented. In the Appellant's documentation package for his A-sample such documented and reasoned corrections are absent. Although the classic case for explaining corrections will be where the analytical material itself is corrected (for example where the first analysis was based on an insufficient sample and had to be reviewed after analysis of a fuller sample), this is not the only incidence where explanation for corrections may be required. The very purpose of the laboratory documentation packages is to provide the accused athlete an insight into the internal procedures of the laboratory in connection with the analysis of his sample. In this sensitive area where so much is at stake, it is important that there is no doubt as to what has occurred at the relevant laboratory. In this case, however, insofar as the burden of proof shifts pursuant to article 3.2.1 of the WADC to the IOC to prove that such departures from the ISL were not material, the Panel is persuaded that such burden is discharged for four main reasons. First, the charts in the two documentation packages clearly demonstrate the presence of a prohibited substance. Second, the fact that the same analyst who first concluded the sample was negative has signed the final conclusion that the sample was positive. Third, the absence of any challenge of equivalent kind to the B sample documentation. Fourth, the Appellant has not provided any expert evidence to challenge the analytical findings.

5. Opening of the B-sample. The Appellant claims that he did not give his consent to the opening of his B-sample on the form specially designed for this purpose, and for this reason the B-sample has not been opened in accordance with the rules. The Panel rejects the criticism made in relation to the circumstances of analysis of the B sample for the following reasons: The notification of the A-sample result to the Deputy Chief of Mission represented a valid notice to the Appellant pursuant to Article 6.3.3 ADR. There is no requirement in the applicable rules that an athlete's consent must be issued in writing or on a specific form in order to be effective. It is only essential that the athlete concerned has in fact given his consent to the opening and analysis of his B-sample. There is no dispute that this requirement has been observed in this case. The fact that he only received the approved IOC form on 6th Match 2014 and therefore did not - indeed could not - use it as the vehicle for granting his consent matters not.

Decision

The Panel dismissed the appeal filed by Mr Ralfs Freibergs and confirmed the decision issued by the IOC Disciplinary Commission.

CAS 2014/A/3611
Real Madrid FC v. Fédération Internationale de Football Association (FIFA)
27 February 2015

Football; FIFA Transfer Matching System (TMS) and transfer of minors; Time limit to appeal a decision to the CAS and specific provisions in the regulations of the sports federations; Structure and nature of the proceedings in front of the Single Judge regarding the registration of minors; Role of a federation as a "representative" in the proceedings before the FIFA Single Judge

Panel
Mr. Michele Bernasconi (Switzerland), Sole Arbitrator

Facts

Real Madrid FC ("Real Madrid" or "Appellant") is a football club with its registered office in Madrid, Spain. Real Madrid is registered with the Spanish Football Federation (Real Federación Española de Fútbol) (the "RFEF"), which in turn is affiliated to the Fédération Internationale de Football Association ("FIFA"). FIFA is the governing body of football at worldwide level, whose headquarters are located in Zurich, Switzerland. FIFA is an association incorporated under Swiss law.

On 18 October 2013, the RFEF introduced in the FIFA Transfer Matching System ("TMS") a request for approval by the FIFA Players' Status Sub-Committee for the first registration of the minor player Manuel Alejandro Godoy Torrealba (the "Player"), born on 21 January 2000, in favour of Appellant. The RFEF based its request on the exception provided for in Art. 19 para. 2 lit. a) of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP"), which reads as follows: "The player's parents move to the country in which the new club is located for reasons not linked to football".

By means of a decision taken on 1 November 2013 (the "Appealed Decision"), the Single Judge decided to reject the request made by the RFEF, in the name of Appellant, for the first registration of the Player with Appellant. The Appealed Decision was uploaded, in its motivated version, onto TMS on 30 April 2014. On 5 May 2014, it was forwarded by the RFEF to the Federación de Fútbol de Madrid. It is undisputed that the Appealed Decision was forwarded on the same day also to Appellant.

On 26 May 2014, Appellant submitted a Statement of Appeal to the Court of Arbitration for Sport ("CAS").

Reasons

1. According to Art. R49 of the CAS Code, "the statutes or regulations of the federation, association or sports-related body concerned" may establish a time limit for the filing of a Statement of Appeal. The CAS Code confers the power to define the deadline for the filing of a Statement of Appeal against a decision primarily to the sports organisation that renders such decision. Accordingly, Art. 67 para. 1 of the FIFA Statutes states that the time limit to file a Statement of Appeal against a decision passed by FIFA's legal bodies is 21 days upon notification of the decision in question. Furthermore, Annexe 2, Art. 9 of

the FIFA RSTP establishes specific provisions with respect to the registration of a minor player. In essence, the FIFA Statutes and the FIFA RSTP not only define the time limit to file a Statement of Appeal as such, but they also define, in particular by means of Annexe 2, Art. 9 para. 2, in fine, of the FIFA RSTP, the point in time when such deadline starts running. It is within the power conferred to a sports organisation to establish a deadline for appeals against its decisions to also establish when such deadlines start running.

2. The ultimate aim of the proceedings in front of the Single Judge regarding the registration of minors is that a minor player may be registered with a club (in casu the Appellant), but that all the actions which are taken to this effect must be executed by the federation of the club concerned (in casu the RFEF). In other words, in order to achieve the legal effect of registration of a minor player with a club, actions by a federation of the respective club are required.

3. The role of a federation in the proceedings in front of the Single Judge bears strong similarities to that of a "representative" under Swiss law, pursuant to Art. 32 of the Swiss Code of Obligations (CO). In particular, under Swiss law, it is typical for a "principal-agent" relationship that one person, the representative, may undertake actions, which cause a legal effect for another person, the principal. In this respect, under Swiss law, it is possible that one person takes actions with legal effect for another person not only in legal transactions stricto sensu, but also in quasi-contractual relationships or quasi-legal transactions (so-called "rechtsgeschäftsähnliche Handlungen". Therefore, the actions taken by a national federation in the context of the proceedings in front of the Single Judge bear strong similarities to actions taken by a representative (or an "agent") under Swiss law, with legal effects for the respective principal. A representative under Swiss law is legally entitled not only to actively take actions with legal effect for the represented person, but he or she can also passively receive legal statements, to the effect that such statements are deemed to be legally received directly by the represented person. In consequence, a legal statement received by the national federation can, from a Swiss law perspective, be deemed to be legally received directly by Appellant, since the national federation acted in a way strongly similar to that of a representative in the meaning of Art. 32 para. 1 CO. In consequence, by uploading the Appealed Decision onto TMS, and thus by validly notifying such decision to the national federation, the Appealed Decision shall be deemed legally notified to Appellant.

Decision

The Sole Arbitrator declared the appeal inadmissible for being filed late.

CAS 2014/A/3613
PAOK FC v. Hellenic Football Federation (HFF) & Panathinaikos FC
6 October 2014

Football; Disciplinary sanction for incidents during a match; CAS jurisdiction (no); Obligation imposed by FIFA on the national federation and HFF Statutes; Lack of an arbitration clause for CAS or for an independent arbitration court in the rules of the national federation; Article 61 of the UEFA Statutes and CAS appeal procedures

Panel
Mr. Henrik Kessler (Netherlands), President
Mr. Efraim Barak (Israël)
Prof. Luigi Fumagalli (Italy)

Facts

On 16 April 2014, a football match (the "Match") took place at PAOK's home ground between PAOK and Olympiakos Piraeus ("Olympiakos"). This Match was the second leg of the semi-final of the Greek cup. PAOK won the Match with a score of 1-0. Because the first leg was won by Olympiakos with a score of 2-1, PAOK qualified for the final of the Greek Cup.

During the Match a considerable number of flares, fire crackers and smoke bombs were used by the supporters of PAOK, several of which made their way on to the field of play. PAOK supporter attempted to enter the field of play, but a private security firm engaged by PAOK "intervened, immobilized him and removed him outside the field of play". Following the conclusion of the Match, a number of PAOK supporters gained entry to the field of play.

On 22 April 2014, the HFF Football Prosecutor filed an indictment with the HFF Disciplinary Committee in respect of the events occurred at the Match. The HFF DC Decision concluded the following: "Consequently, all conditions occur, indeed accumulatively, for the classification of said disturbances as extensive, as above, which took place before, during and after the end of the Match and in which a significant number of people were involved and which include the cause of minor bodily harm and which (disturbances) took place in the main area of the Stadium (article 15 par. 6 cases d and f of the D.C./EPO) […]. Following from the above the reproached FC must, with respect to this deed in the Disciplinary Indictment, be convicted. On the contrary it must be released with respect to the infringement of article 23 of the D.C./EPO on Racism […]." As a result, the HFF Disciplinary Committee sentenced PAOK as follows: "(a) disciplinary fine amounting to fifty thousand (50,000) Euros; (b) sanction to play two (2) matches without spectators and (c) deducts three (3) points from it in the league table."

On 2 May 2014, PAOK filed an appeal with the HFF Appeals Committee against the HFF DC Decision. No appeal was filed by the HFF Football Prosecutor. On 6 May 2014, the HFF Appeals Committee issued the operative part of its decision (the "Appealed Decision"), which modified a portion of the sanction to be imposed

On 26 May 2014, PAOK filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS"), in accordance with Article R48 of the CAS Code of Sports-related Arbitration

(the "CAS Code"). PAOK also named the Super League Greece and Panathinaikos as interested parties. On 4 June 2014, Panathinaikos filed a request for intervention which was confirmed on 5 June 2014.

PAOK challenged the Appealed Decision, and requested in essence that the appeal be upheld and that the operative part of the decision made by the Appeal Committee of the HFF be set aside. In its Answer, the HFF requested, in essence, the Panel to declare the appeal of PAOK inadmissible in view of the CAS' lack of jurisdiction.

Reasons

1. The Panel finds that the obligation imposed by FIFA leaves the national federations a certain discretion as to how to furnish the judicial system in domestic matters. This view is consistent with CAS jurisprudence: "The Appellant cannot ignore that the system proposed by FIFA in its own Statutes leaves room for manoeuvre to national associations which can decide whether they want to recognize an arbitration tribunal other than CAS for their domestic disputes, as rightly put forward in Iraklis 1 [CAS 2010/A/2170, §46]. Article 63 [which does not materially differ from the present article 67 of the FIFA Statutes] therefore refers to the association's rules, namely its Statutes and Regulations, as bearing on the question of CAS jurisdiction vel non in domestic football disputes.

2. More importantly, nothing in article 63 FIFA Statutes can lead to the conclusion that it is directly applicable and therefore forms part per se of the national association's rules, as alleged by the Appellant in its written submissions. The members of FIFA remain independent legal entities with their own sets of rules. In other words, the regulations of FIFA, notably of article 63 FIFA Statutes, need to be adopted in the federation's rules either word by word or by reference to apply to domestic matters"(CAS 2011/A/2483, §§66-67).

3. The Panel observes that article 2(3)(A)(l) of the HFF Statutes does not specifically refer to CAS, but to "another independent and impartial court". The Panel finds the reference to "another" in article 2(3)(A)(l) important. The preceding provision (i.e. article 2(3)(A)(k) of the HFF Statutes) specifically refers to CAS. This might therefore lead one to conclude that the reference to "another" in article 2(3)(A)(l) of the HFF Statutes was intended to determine that the disputes covered by article 2(3)(A)(l) of the HFF Statutes could only be referred to another independent and impartial court than CAS. The view that the jurisdiction of CAS does not derive directly from article 2(3)(A)(l) of the HFF Statutes is consistent with the findings of another CAS panel (CAS 2011/A/2483, §§87-91).

4. The Panel finds that it appears that the HFF used the discretion, or "room for manoeuvre", granted to it by FIFA to create the HFF Court of Arbitration, to the exclusion of CAS. The only relevant provision for the present matter that clearly provides competence is article 41(G) of the HFF Statutes. There is however no statutory basis in the HFF Statutes on the basis of which it can be concluded that CAS would be competent in case the HFF Court of Arbitration is not competent. On the basis of the above, it appears to the Panel that the HFF by means of article 2(3)(A)(l) of the HFF Statutes merely acknowledged the obligations imposed on it by FIFA, but that this is not an expression of intent to refer appeals to CAS arbitration by and of itself. As such, the Panel finds that it cannot be concluded that the HFF, by means of

article 2(3)(A)(l) of the HFF Statutes, intended to be bound to submit disputes to any means of arbitration (including by arbitration at CAS) other than by arbitration through the HFF Court of Arbitration.

5. Whereas PAOK, with reference to jurisprudence of the SFT (cf. ATF 138 III 29, §2.2.3) maintained that "[i]t is decisive that the intention of the parties should be expressed to have an arbitral tribunal, i.e. not a state court, decide certain disputes (BGE 129 III 675 at 2.3 p. 679 ff)", the Panel observes that the SFT continues by saying that "[t]he arbitral tribunal called upon to decide must be either determined or in any case determinable". The Panel finds that it is not determined, nor determinable, that CAS is the arbitral tribunal called upon. Consequently, the Panel concludes that article 2(3)(A)(l) of the HFF Statutes is not an arbitration clause providing the members of the HFF with a general right to appeal final decisions of the HFF to CAS arbitration.

6. The Panel is aware that another CAS panel reasoned in a different way (CAS 2013/A/3107, §101). However, the Panel finds that it is not bound by this precedent since the CAS panel in CAS 2013/A/3107 came to the conclusion that article 1.5 of the Statutes of the Belarus Football Federation granted the members a right to appeal to arbitration, whereas the Panel in the present case finds that article 2(3)(A)(l) of the HFF Statutes does not by itself grant a right to appeal to arbitration, but is merely an acknowledgement of its obligation to do so.

7. Finally, PAOK argues that CAS is competent to hear the present case on the basis of article 61(1)(b) of the UEFA Statutes. The Panel observes that article 61(1)(b) of the UEFA Statutes determines the following: "The CAS shall have exclusive jurisdiction, to the exclusion of any ordinary court or any other court of arbitration, to deal with the following disputes in its capacity as an ordinary court of arbitration: […] disputes of European dimension between associations, leagues, clubs, players or officials." Notwithstanding the fact that this argument was raised at a late stage and is thus inadmissible, the Panel observes that article 61 of the UEFA Statutes forms part of a section in the UEFA Statutes named "CAS as Ordinary Court of Arbitration". Also paragraph 1 of article 61 of the UEFA Statutes clearly refers to CAS jurisdiction "in its capacity as an ordinary court of arbitration". In view of the fact that PAOK lodged a "Statement of Appeal" with CAS and thereby specifically referred to Article R48 of the CAS Code, which is a provision that forms part of the "Special Provisions Applicable to the Appeal Arbitration Procedure" of the CAS Code, the Panel finds that, in the absence of any additional arguments of PAOK to explain this discrepancy, it is not competent on the basis of this provision.

Decision

The Panel found that CAS was not competent to entertain the appeal.

2014/A/3628
Eskisehirspor Kulübü v. Union of European Football Association (UEFA)
2 September 2014 (operative part notified on 7 July 2014)

Football; Eligibility following match-fixing allegations; Nature of the ineligibility measure provided by Article 2.08 UEFA Europa League Regulations; Scope of the ineligibility measure provided by Article 2.08 UEFA Europa League Regulations; Burden and standard of proof regarding the involvement of the Appellant's coach and of one of its player in an activity aimed at arranging or influencing the outcome of the games; Indirect involvement of the Appellant in an activity aimed at arranging or influencing the outcome of the games; Inapplicability of the principle of criminal law "nulla poena sine culpa" to an administrative measure; Proportionality of the sanction and mitigating circumstances

Panel
Mr. José Juan Pintó Sala (Spain), President
Mr. Jean-Philippe Rochat (Switzerland)
Mr. Mark Andrew Hovell (United Kingdom)

Facts

Eskişehirspor Kulübü ("Eskişehirspor", the "Club" or the "Appellant") is a Turkish professional football club with seat in Eskişehir, Turkey. It is a member of the Turkish Football Federation (the "TFF") which is affiliated to the Union des Associations Européennes de Football ("UEFA") which in turn is affiliated to the Fédération Internationale de Football Association ("FIFA") which is the governing body of football at worldwide level, whose headquarters are located in Zurich, Switzerland.

UEFA (also referred to as the "Respondent") is an association under Swiss law and has its headquarters in Nyon, Switzerland. It is the governing body of European football.

Eskişehirspor's qualification for the UEFA Europa League 2014/2015

During the 2013/2014 Turkish sporting season, Eskişehirspor achieved the sporting results needed to qualify for the participation in the UEFA Europa League 2014/2015 ("UEL").

On 9 May 2014, Eskişehirspor submitted an admission criteria form for the UEFA Club Competitions 2014/2015 ("the Admission Criteria Form"), where it disclosed the information in connection with match-fixing allegations regarding club officials and professional players.

On 19 May 2014, pursuant to article 2.13 of the Regulations of the UEFA Europa League 2014/15 (the "UEL Regulations"), the UEFA General Secretary forwarded the Admission Criteria Form to the UEFA Control and Disciplinary Body, on the grounds that the Club appeared not to have met all the conditions for the admission into the competition. At the same time, the UEFA General Secretary informed Eskişehirspor that UEFA had initiated an investigation with regard to its potential breach of the UEL admission criteria.

The UEFA Disciplinary Inspector Report

On 20 May 2014, the UEFA Disciplinary Inspector (the "DI") filed a report (the "DI Report") before the UEFA Control and Disciplinary Body (the "UCDB"), which relevant part reads as follows:

> "On 3 July 2011, the Turkish police arrested and detained 61 individuals as part of its investigation into alleged match fixing within Turkish football. It emerges from the file provided by the Turkish prosecutor to the TFF that two matches in the domestic league were concerning the club of Eskişehirspor.
> In the context of the investigation, criminal as well as disciplinary proceedings were opened against the Eskişehirspor head coach A. and the player B.

In the DI Report, the DI requested the UCDB to:

1. "Refer the case to the UEFA Appeals Body in accordance with Article 34 (3) of the UEFA Statutes and Article 24 (4) UEFA DR.
2. Based on Article 2.08 of the UEL Regulations, declare Eskişehirspor ineligible to participate in the UEFA Europa League 2014-2015.
3. Based on Article 2.09 of the UEL Regulations, impose an additional sanction against Eskişehirspor of one additional season of exclusion from any future UEFA Competitions as well as a EUR 300.000 fine (three hundred thousand euro)."

The proceedings before the UCDB and the UEFA Appeals Body

On 21 May 2014, the UEFA administration informed Eskişehirspor of the instigation of proceedings in accordance with the UEFA Disciplinary Regulations ("UEFA DR" or the "DR"), attaching the DI Report along with its correspondence.

On 2 June 2014, a hearing took place before the UEFA Appeals Body (the "UAB"). On the same day the UAB rendered a decision (the "Appealed Decision"), ruling that "1. Eskişehirspor is not eligible to participate in the next (1) 2014/15 UEFA Europa League season."

The proceedings before the Court of Arbitration for Sport (CAS)

On 13 June 2013, Eskişehirspor filed a Statement of Appeal with the CAS Court Office.

On 30 June 2014, the Appellant filed before the CAS a "Supplemental Submission" to its Appeal Brief, producing, as a new fact to take into account in the proceedings, the judgment passed on 25 June 2014 by the 13th Court of Aggravated Felony of Istanbul.

On the same day, the CAS Court office informed UEFA about the "Supplemental Submission" that the Appellant had filed, inviting it to file its position with regard to the admissibility of this new submission. In a separate letter dated the same day, the CAS Court Office informed Eskişehirspor that the Panel had decided to reject its request for evidentiary measures and that the grounds of this decision would be included in the award on the merits.

On the same date, the Respondent filed a brief before the CAS with its comments on the admissibility of the "Supplemental Submission" filed by the Appellant.

Reasons

1. Preliminary issue: the dismissal of the evidentiary measures requested by the Appellant

With its Statement of Appeal, the Appellant requested the CAS to order UEFA to produce some documents. After studying the petition filed by the Appellant, the Panel decided to dismiss it as the Appellant failed to prove that the documents requested are relevant to the case as provided by article R44.3 of the CAS Code. Both evidentiary measures refer to facts and cases that are not related to the dispute, and the Appellant did not produce convincing arguments as to the potential relevance of them to this case. In addition, the entire file and documentation produced by the parties within a procedure are and shall remain confidential, and thus cannot be disclosed to a third party (except for the decision where the case may be).

2. Legal nature of the "administrative measure of declaring a club ineligible" under article 2.08 of the UEL Regulations

Articles 2.08 UEL Regulations foresees:

> "2.08 If, on the basis of all the factual circumstances and information available to UEFA, UEFA concludes to its comfortable satisfaction that a club has been directly and/or indirectly involved, since the entry into force of Article 50(3) of the UEFA Statutes, i.e. 27 April 2007, in any activity aimed at arranging or influencing the outcome of a match at national or international level, UEFA will declare such club ineligible to participate in the competition. Such ineligibility is effective only for one football season. When taking its decision, UEFA can rely on, but is not bound by, a decision of a national or international sporting body, arbitral tribunal or state court. UEFA can refrain from declaring a club ineligible to participate in the competition if UEFA is comfortably satisfied that the impact of a decision taken in connection with the same factual circumstances by a national or international sporting body, arbitral tribunal or state court has already had the effect to prevent that club from participating in a UEFA club competition.

Match-fixing activities constitute one of the most serious breaches of sport principles and, in particular, those of loyalty, integrity, sportsmanship and fair play, and thus clearly jeopardizes the most essential objectives of UEFA. Consequently, to protect the essence of football competitions, it is necessary to be extremely inflexible with match-fixing.

As declared by CAS jurisprudence, measures taken by an association with respect to its affiliates can be mainly divided into acts of administration and disciplinary measures (i.e. CAS 2007/A/1381 and CAS 2008/A/1583). To prevent and prosecute match-fixing activities, UEFA has implemented within its regulations a double regulatory regime, establishing two different kind of measures i.e. administrative measures and disciplinary measures. The ineligibility measure under article 2.08 of the UEFA Europa League Regulations (UEL Regulations) is merely an administrative measure resulting from an infringement of the admission criteria of the UEL competition, which deprives the club that has been directly or indirectly involved in match-fixing of the right to participate in the UEL competition during one year, without prejudice of the potential sanctions that UEFA may impose due to this infringement. This "administrative measure" is not to be considered as a sanction. Article 2.08 is aimed not to

sanction the club but to protect the values and objectives of UEFA's competition, its reputation and integrity.

3. Scope of the ineligibility measure provided by Article 2.08 UEFA Europa League Regulations:

   The Panel noted that the conduct described in article 2.08 of the UEL Regulations is very broad and thus needs to be determined on a case by case basis.

   The Panel shall reject the Appellant's statement in accordance to which "accepting bonus for winning a match cannot be qualified as "match-fixing". First of all, article 2.08 of the UEL does not make any explicit reference to a "match-fixing" activity, but to any activity aimed at arranging or influencing the outcome of a match at national or international level. In addition, the Panel considered that a third party bonus for playing well is an activity clearly aimed at influencing the outcome of a match, and hence falls under article 2.08 of the UEL Regulations.

   Therefore, in line with the broad interpretation given by CAS jurisprudence and with UEFA's zero tolerance to match-fixing, not only those activities intended to fraudulently determine the result of a match but also those activities that could somehow have an unlawful influence on the match fall under the scope of article 2.08 of the UEL regulations. In this respect, third party bonuses are not only included in the activities envisaged under article 2.08 of the UEL Regulations, but also (i) constitute a breach of the UEFA's statutory objectives and principles, (ii) exert an influence on the competition - the fact that a third party is paying a bonus to provide "extra motivation" for a team to perform well evidently exerts influence not only over the outcome of the match but over the competition itself, jeopardizing the integrity of the competition and potentially giving an undue advantage to the third party that is paying this bonus-, and (iii) could imply an undue advantage for the offeror. Moreover, third party bonuses infringe the proper fair play that shall govern the world of football and are a clear breach of the sporting values.

4. Burden and standard of proof regarding the involvement of the Appellant in an activity aimed at arranging or influencing the outcome of the games

   To determine which party has the burden of proof, the Panel should follow the rule established in article 8 of the Swiss Civil Code (the "CC"), according to which "Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact". Therefore, the burden of proof lies on the Respondent.

   With regard to the applicable standard of proof, according to Swiss law and to CAS jurisprudence UEFA must establish the relevant facts to the comfortable satisfaction of the Panel having in mind the seriousness of allegations made. In this respect, the involvement of the club in the prohibited activities should result from and be proven in accordance with the UEL Regulations and the UEFA Statutes, as well as with Swiss law.

   After having taken into account all the evidence produced by the parties, it has been established to the comfortable satisfaction of the Panel that the Appellant's coach and one of its players were involved in an activity aimed at arranging or influencing the outcome of 2 games. The Panel has taken into account in particular (i) the content of the wiretaps provided – in

this regard, even if evidence may not be admissible in a civil or criminal state court, this does not automatically prevent a sport federation or an arbitration tribunal from taking such evidence into account (CAS 2013/A/3297 and CAS 2009/A/1879)-, (ii) the evidence and findings from the criminal investigation performed by the Turkish authorities (i.e. Police Digest), (iii) the different judgments passed by Turkish Criminal Courts - however UEFA must make its decision autonomously and independently on the basis of all of the factual circumstances and evidences available to it, UEFA is entitled to rely or not on the findings of a state Court, especially in cases of match-fixing where it does not have the same resources and cannot undertake the same type of investigation that the public authorities do (CAS 2013/A/3258)-, (iv) the secret code used and (v) the secret meetings held. The fact that corruption is, by its nature, concealed, has also been considered.

5. Indirect involvement of the Appellant in an activity aimed at arranging or influencing the outcome of the games

   The Appellant has raised several objections in connection with the responsibility of the Club for the activities carried out by the Coach and the Player. First of all, the Appellant considers that the Coach was not a legal representative of the Club or an official, but a mere employee.

   Taking into account the broad scope of article 2.08 of the UEL Regulations and the particular and specific circumstances, the Panel considered that the Appellant was indirectly involved in an activity aimed at influencing the outcome of a match. Evidence was sufficient to conclude to the comfortable satisfaction of the Panel that such an involvement took place at least through the acts executed by the Coach of the Club –as for the purpose of article 2.08 of the UEL Regulations, the Coach has to be considered as a club official-, aiming at arranging or influencing the outcome of a match in a non-sportive way.

6. Inapplicability of the principle of criminal law "*nulla poena sine culpa*" to an administrative measure

   The Appellant considers that the Club was a "victim" of the aforesaid match-fixing activities and that it cannot be responsible for the action of its former Coach and Player, because this would be in breach of the legal principle *"nulla poena sine culpa"*.

   Considering the purpose and the wording of article 2.08 of the UEL Regulations, to declare a club ineligible under this provision it is irrelevant whether the latter had any degree of culpability in connection with the prohibited activities. Even recognizing that the principle of criminal law *"nulla poena sine culpa"* could be applicable in some cases to the relationships between a sport association and a club, this principle nevertheless does not apply to every measure taken by an association, especially when this measure is not of a disciplinary nature but of an administrative one.

7. Proportionality of the sanction and mitigating circumstances

   The Panel did not find that the consequence under article 2.08 of the UEL Regulations for the breach of the admission criterion is unjustified, disproportionate or unconnected with the purpose underlying to its adoption, nor contrary to mandatory law or to the fundamental principles and values of Swiss Law. Therefore, the interpretation given to article 2.08 of the

UEL Regulations was in line with and did not infringe Swiss Law.

The Panel further noted that by signing the Admission Criteria Form, the Appellant expressly accepted to fulfill UEFA's Admission Criteria and, in particular, that if it was to be found to have been involved in activities aimed at arranging or influencing the outcome of a match at national or international level it would be declared ineligible to participate in any UEFA competition for one year. Therefore, the Appellant shall accept the consequences for not meeting these criteria and for having infringed the regulations of the federation or association.

Finally, the Club one-year ineligibility for participating in the next UEFA Europa League competitions was not unjustified or disproportionate. Considering that the measure under article 2.08 of the UEL Regulations is an administrative measure and does not have a disciplinary nature, the one-year ineligibility period cannot be subject to a probationary period and pursuant to the applicable regulations, the mitigating circumstances alleged by the Appellant are deemed irrelevant.

Decision

The Panel decided to dismiss the appeal filed by Eskişehirspor Kulübü against the decision adopted by the UEFA Appeals Body on 2 June 2014 and to confirm the said decision.

CAS 2014/A/3762
Fernando Santos v. Fédération Internationale de Football Association (FIFA)
23 March 2015

Football; Unsporting behavior of a coach toward the referee; Breach of Article 18 para. 3 FIFA DC; Measure of the disciplinary sanction; Interpretation of Article 38 FDC; Partial suspension of the sanction according to Article 33 FDC

Panel
Prof. Luigi Fumagalli (Italy), President
Mr José Juan Pintó (Spain)
Mr Herbert Hübel (Austria)

Facts

Mr Fernando Manuel Fernandes da Costa Santos ("Mr Santos" or the "Appellant") is a football coach of Portuguese nationality, who has been the trainer of several high-profile clubs. Mr Santos, in particular, at the time of the facts, was the coach of the representative team of the Hellenic Football Federation (the "HFF"), and as a coach of the Greek national team he participated in the 2014 FIFA World Cup in Brazil.

The Fédération Internationale de Football Association ("FIFA" or the "Respondent") is an international association of national and international football associations/federations, and is the governing body of football worldwide.

On 29 June 2014, a round of 16 match of the final competition of the 2014 FIFA World Cup (the "Match") took place in Recife (Brazil), between Costa Rica and Greece. The Match was won on penalties by Costa Rica with the result of 5-3. At the end of extra time, a substitute player of the Greek team started a discussion with the assistant referee, complaining that while the Greek substitute players and staff would have been insistently urged to leave, the whole Costa Rican team would be allowed to stay on the field undisturbed. The discussion in question became animated and Mr Santos intervened pushing aside his substitute player and continuing the same discussion with the assistant referee. The discussion was immediately joined by the referee, who promptly approached Mr Santos and the assistant referee and resolutely urged the former to leave the field along with his substitute players and staff. Mr Santos, however, kept on talking to the referee, complaining about an alleged difference of treatment granted to Costa Rica. The referee, thus, indicated to Mr Santos that he had to leave the field. Mr Santos continued speaking to the referee who, then, blew his whistle and indicated again to Mr Santos to leave the field. The Greek team manager, Mr Takis Fyssas, with whom Mr Santos briefly discussed the reasons of his expulsion went to the referee to talk about his decision regarding Mr Santos, while the latter waited outside the pitch without talking to anybody. After his discussion with the referee, Mr Fyssas turned to Mr Santos and indicated to him that he had to leave the field, which he did by going to the exit tunnel.

On 2 July 2014, disciplinary proceedings were opened against Mr Santos.

On 11 July 2014, the FIFA Disciplinary

Committee issued a decision whereby the official Fernando Manuel Fernandes Da Costa Santos was regarded as having breached art. 49 par. 1 a) of the FIFA Disciplinary Code for displaying several acts of unsporting conducts towards match officials in the scope of the match of the final competition of the 2014 FIFA World Cup Brazil™ played between Costa Rica and Greece on 29 June 2014 and was therefore suspended for eight (8) matches in accordance with art. 19 par. 1 of the FIFA Disciplinary Code and ordered to pay a fine to the amount of CHF 20,000, in application of art. 49 par. 2 of the FIFA Disciplinary Code.

On 19 September 2014, at the conclusion of the proceedings on the appeal filed by Mr Santos, the FIFA Appeal Committee rejected the appeal and confirmed the decision of the FIFA Disciplinary Committee rendered on 11 July 2014.

On 6 October 2014, the Court Office of the Court of Arbitration for Sport (CAS) acknowledged receipt of a Statement of Appeal filed by Mr Santos against the Appealed Decision.

On 20 October 2014, the CAS Court Office acknowledged receipt of the copies of the footage of the Match which were provided to the Appellant on the same day.

The Appellant's request for relief was principally to set aside the decision of the FIFA Appeal Committee dated 19 September 2014, or amend the decision of the FIFA Appeal Committee dated 19 September 2014 to significantly reduce the sanctions imposed.

In its Answer FIFA requested the Panel *to reject* all the prayers for relief sought by the Appellant and to confirm in its entirety the decision of the FIFA Appeal Committee. The Respondent principally argued that the conduct held by the Appellant fell within the scope of Article 49 of the FDC.

Reasons

1. The Parties disagreed on the conduct exhibited by the Appellant prior to his expulsion. In particular, while it is not contested that the Appellant left his technical area without permission on various occasions during the Match, the Appellant submitted that he did never exceed the limits of what should be considered perfectly admissible for a coach in the course of a match, bearing in mind the kind of tension which agonistic competitions unavoidably put on the protagonists. The Respondent maintained, on the contrary, that the Appellant had repeatedly exceeded those limits before he was sent off.

   In the Panel's opinion, the conduct held by the Appellant in the course of the Match did not represented any serious infringement. However, the conduct of a coach, as shown on the footage, who after having pushed his player aside who was protesting against the assistant referee about the different treatment allegedly granted to the other team during the match, started to vividly protest, first, against the fourth official and, then, the referee and who continued questioning the referee's decision although being urged to stop protesting, was not appropriate.

2. As for the conduct shown by the Appellant from the moment he was sent off by the referee to the moment he actually entered the exit tunnel, the Panel noted that the Parties strongly disagreed as to whether the Appellant committed a further breach of the rules or not. In this regard, the Panel considered that with regard to the expulsion of a team official, Article 18, para. 3 of the FIFA Disciplinary Code (FDC) expressly

allows the official sent off (most of the time, a coach) to instruct the person replacing him on the substitute's bench, before leaving the field. Of no avail to the Respondent's position can be the fact that the Circular No. 21 - according to which "an official who has been sent off (…) is not allowed to contact any person involved in the match"- is subsequent to the provision of Article 18, par. 3 of the FDC, since the principle of the hierarchy of the rules prevails over the principle *lex posterior derogat priori*. If important circular letters may be as a guidance for the FIFA practice, circulars cannot be considered as a legal source of the same kind and level as the FDC.

However, the Panel could not concur with the Appellant's argument that Article 18, par. 3 of the FDC granted him the right to instruct his players and his team staff for the steps to be taken in the remainder of the Match. On the contrary, it should be concluded that in addressing and instructing his players after having been sent off, the Appellant clearly exceeded the right granted by the provision at issue.

3. According to the Panel, the Appellant's overall conduct could theoretically fall within either the scope of Article 49, par. 1 lit (a) of the FDC or Article 57 of the FDC. Both Article 49, par. 1 lit. (a) and Article 57 (in relation to Article 10 ff.) of the FDC providing that the person committing a breach of the relevant rule may be sanctioned with a match suspension and, additionally, with a fine (see also Article 19, par. 6 of the FDC). What is more, the length of a suspension on the basis of Article 57 of the FDC is further specified by Article 19, par. 3 of the FDC, from the content of which it can be inferred that such suspension could be set between a single match suspension and a twenty-four-match suspension.

   In the Panel's view, the most appropriate sanction to be imposed on the Appellant because of his conduct – irrespective of whether the sanctions set forth in Article 49 or those listed in Article 10 ff. of the FDC (and the ample discretion provided by Article 39 of the FDC) are considered –, is that of an overall four-match suspension instead of a eight-match suspension, pursuant to Article 19 of the FDC, plus a fine of CHF 10,000 instead of CHF 20,000. This assessment took into account all of the circumstances, such as the fact that the Appellant did not merely protest against the referee's decision, but also cast doubts on his impartiality, abused the right to instruct the person who had to replace him on the substitutes' bench but was not prevented from giving any instruction whatsoever.

4. The Panel considered that according to Article 38 FDC, the sanction imposed on the Appellant has to be served by him notwithstanding the fact that the team of which he is currently an official of is not the same as it used to be when he committed the above breach of the FDC. The FDC implicitly establishes a principle that a sanction imposed on any "natural person" shall be served by him/her (although it is clear that such sanction may indirectly affect the team for which he is providing his services) and that the basis of such imposition is the responsibility of the offender.

5. Finally, Article 33 FDC stipulates the possibility to suspend the implementation of the sanction partially by the body that pronounces a match suspension. Since the prerequisites provided for in this article are fulfilled i.e. the sanction does not exceed six matches or six months and the Appellant previous record is that of a person committed to respect and teach sporting

and moral values, half of the sanction of the four-match suspension imposed on the Appellant should be suspended. As a consequence, a sanction of two matches with a probationary period of six months starting on the day following the date of the second match served on the suspension shall be pronounced against the coach.

Decision

The appeal filed by Mr Santos is partially upheld. The Appellant is sanctioned with a suspension of four matches, two of which suspended for a probationary period of six months, and a fine in the amount of CHF 10,000.

Jugements du Tribunal Fédéral*
Judgements of the Federal Tribunal

* Résumés de jugements du Tribunal Fédéral suisse relatifs à la jurisprudence du TAS
Summaries of some Judgements of the Swiss Federal Tribunal related to CAS jurisprudence

Judgement of the Swiss Federal Tribunal 4A_304/2013
3 March 2014
A. (Appellant) v. Z., FIFA, X. (Respondents)*

Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 3 June 2013

Extract of the Facts

X. is a Guinean professional football player born on January 2, 1985. Since 2005 he has been a regular member of the Guinean national team and became one of its best-known players.

Z. is a professional football club and a member of the Football Federation of the United Arab Emirates (hereafter: FAUAE) which is itself affiliated with the Fédération Internationale de Football Associations (FIFA).

A. is a French professional football club and a member of the French Football Federation (FFF) which is affiliated with the Union des Associations Européennes de Football (UEFA) as well as with FIFA. At the time of the events, which will be described hereafter, it was playing the League 2 championship (second division). Since then, it has been promoted to League 1 (first division).

On September 2, 2010, X. was transferred from State B., a French club in League 1, and entered into an employment contract valid until June 30, 2014, with Z. The parties agreed that in the first year the player would be entitled to a total compensation of EUR 1'200'000 comprised of an advance of EUR 240'000, with the balance to be paid in installments the first week of each month. These terms also applied to the second year but the advance was increased to EUR 360'000.

On October 24, 2011, Z. deregistered X. from the list of foreign football players authorized to play for the club. On January 31, 2012, X., who had definitively left [name of place omitted] without Z.'s authorization on December 20, 2011, signed an employment contract with A.

The FAUAE refused to send the International Transfer Certificate (ITC) to the FFF because the Guinean player was still under contract with Z. However, in a decision of February 9, 2012, the single judge of the FIFA Players' Status Committee authorized the FFF to provisionally register X. as a player for A.

On January 3, 2012, X. made a claim against Z. in the FIFA Dispute Resolution Chamber (DRC) with a view to obtaining the payment of EUR 3'400'000. In a decision of November 16, 2012, the DRC partially upheld the main claim and ordered Z. to pay an amount of EUR 180'000 to X.. Also granting the counter claim in part, it ordered the player and A. to jointly pay an amount of EUR 4'500'000 to Z., with interest accruing at 5% annually from November 16, 2012. Moreover, it banned X. from participating in any official games for four months, less three months already served. Finally, it forbade A. from registering any new players, whether at the national or international level, during the next two consecutive registration periods after the decision was notified.

On February 21, 2013, A. seized the Court of Arbitration for Sport (CAS) of an appeal against the DRC decision (case CAS/2013/A/3091). X. and Z. did the same the next day (cases CAS2013/A/3092 and

* The original decision is in French.

CAS/2013/A/3093). The cases were joined. A three-member Panel was constituted to handle them. FIFA participated in the arbitral proceedings. In an award of June 3, 2013, the CAS rejected the three appeals and confirmed the decision under appeal.

On June 10, 2013, A. (the Appellant) filed a civil law appeal with the Federal Tribunal against the CAS award of which only the operative part had been communicated to the parties.

Extract of the Legal considerations

1. In a first argument, the Appellant claims that its right to be heard was violated.

According to the Appellant, the arbitrators simply failed to decide the issue of the "amount of the salary" of the player for the year 2010/2011. It adds that the issue was "essential" to decide the case, in particularly to establish the existence of an infringement upon the player's fundamental rights.

The right to be heard in contradictory proceedings within the meaning of Art. 190(2)(d) PILA certainly does not require an international arbitral award to be reasoned. However, it imposes upon the arbitrators a minimum duty to examine and dispose of the pertinent issues. This duty is violated when, inadvertently or due to a misunderstanding, the arbitral tribunal does not take into consideration some submissions, arguments, evidence, and offers of evidence presented by one of the parties and important for the decision to be issued.

If not inadmissible for its lack of sufficient reasons, this argument is deprived of any basis. On the one hand, and no matter what the Appellant says, the Arbitrators held that, on the basis of their factual findings and their interpretation of the employment contract, the Second Respondent had complied with all its financial obligations towards the player for the 2010/2011 season (award n. 210 to 219). This conclusion is outside the review of this Court because it results from the assessment of the evidence and the application of the law.

2. In a second argument divided into several parts, the Appellant claims that the award under appeal violates substantive and procedural public policy in several respects.

Under the caption "violation of the player's economic freedom," the Appellant first argues that the Panel violated this freedom, guaranteed by Art. 27 CST,11 by depriving the player of part of his salary and indirectly of the free exercise of gainful activity. According to the Appellant, the Arbitrators reached this result by finding the facts in a manifestly incorrect manner and interpreted the pertinent clause of the employment contract in disregard of the prohibition of arbitrariness within the meaning of Art. 9 CST.

Merely stating the argument shows its inanity. The Appellant's attempt to challenge the fixed factual findings of the Panel and the legal conclusions it drew from them is immediately doomed for the reasons indicated above. Be this as it may, the premise of the Appellant's reasoning is obviously erroneous because the Arbitrators held that the player had received his entire salary for the 2010/2011 season. The debate is therefore closed.

The Appellant further argues that the Panel violated the player's personal rights (Art. 28 CC12) and his personal freedom (Art. 10(2) CST) by deregistering him, which caused him to be banned lastingly from the competition and deprived him of the very opportunity to work.

It is true that, depending on the circumstances, a violation of a player's personality rights may be contrary to

substantive public policy. It is also true that a worker may have legitimate interest to carry out his profession effectively in order to avoid losing his value on the employment market and jeopardizing his professional future; this is particularly true for professional football players. The Panel acknowledges this by admitting with the SRT that the deregistration of a player may per se carry a violation of his personality rights (award n. 222). However, in its view, the circumstances of the case at hand were such that no such conclusion could be drawn. The provisional nature of the sanction, which extended only to a maximum of five games, the fact that the player had continued to train with the Second Respondent and to receive his salary during the deregistration period and finally, the lack of any grievances before January 23, 2012, by the alleged victim of a violation of personality rights, were all elements of the case at hand which ruled out the violation alleged by the Appellant. Such assessment of the situation makes plenty of sense and therefore escapes any criticism. Indeed, to challenge it, the Appellant once again has to depart from the factual findings in the award and to allege in particular that the player's deregistration was for an undefined period (appeal n. 75). Moreover, assuming that he would have considered his temporary ban as a violation of his personal rights, contrary to what can be deduced from his lack of reaction at the time, the player should have started by inviting the Second Respondent to reregister him immediately under threat of immediate termination of the employment relationship. If such prior notice had remained unheeded, only then, he could have terminated the contract immediately for just cause.

Consequently, the Appellant wrongly bases its argument of a violation of substantive public policy on the alleged infringement upon the player's personal rights that the Second Respondent would have committed. From the circumstances of the player's temporary deregistration described above, the Arbitrators drew the conclusion that he had consented to the measure (award n. 248). From the point of view of a violation of public policy, the Appellant argues that this conclusion disregards the rules concerning the burden of proof and Art. 8 CC in particular.

Such rules are not part of substantive public policy within the meaning of Art. 190(2)(e) PILA. Moreover, the Panel reached a conclusion as to the player's acceptance of his temporary deregistration on the basis of its own assessment of the pertinent factual circumstances. Yet, when the assessment of the evidence convinces the judge that a fact has been established, the issue of the burden of proof becomes moot. Under such conditions, the argument under review can only be rejected, even if it were admissible.

In the last part of the argument, the Appellant claims that the Arbitrators disregarded the prohibition of excessive commitments deriving from Art. 27(2) CC by failing to take into account the harmful consequences of the deregistration for an undefined period to which the player had consented. Here too it has to face the provisional nature of the sanction as described in the award under appeal, which deprives the argument of any merit.

Therefore the Federal Tribunal rejects the appeal, to the extent that the matter is capable of appeal.

Judgment of the Swiss Federal Tribunal 4A_362/2013
27 March 2014
X. (Appellant) v. The Football Federation of Ukraine (FFU, Respondent)*

Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 2 August 2013

Extract of the Facts

X. (Appellant), domiciled in M., Ukraine, is the sports director of FC Metalist, a football club in Kharkiv. He had held this position during the 2007/2008 season of the Ukrainian Championship. The Ukraine Football Federation (FFU; Respondent), is the national football league of Ukraine and as such, a member of Fédération Internationale de Football Association (FIFA) and of Union des Associations Européennes de Football (UEFA).

On April 19, 2008, FC Karpaty, a football club from Lviv, played against FC Metalist – which at the time was in the third place – in the 26th Championship Round. The game took place in Kharkiv and FC Metalist won 4:0. During the game, A., an experienced player of FC Karpaty, both scored an own goal and received a red card.

On April 21, 2008, B., the president of FFU, met C., the honorary president of FC Karpaty, in Lviv to discuss the organization of the 2012 European Championship. Among other topics discussed was the April 19, 2008, game and the rumors that the players of FC Karpaty lost the game intentionally.

Shortly after this meeting, C. started an internal investigation in FC Karpaty to clarify if the game had indeed been manipulated.

On May 15, 2008, C. had a conversation in his home with A. with regard to the background to the April 19, 2008, game. The following day, he met him again in Lviv; this time in the office of C. and that conversation was recorded on video (hereafter referred to as "the Lviv-Video"). A. stated that the evening before the game, his acquaintance, X. from Club FC Metalist, had called him and offered money to lose the game while mentioning that the referees would otherwise, in any event, "fix" the FC Karpaty game. X. had suggested that he should discuss the offer with the team captain. A. further stated that he had talked about this with D., then the team captain, and the core team. They agreed to accept the money. Together with the experienced players, D., E., and F., he called all other members of the team to discuss the offer. A. also stated that while he was at his hotel, he was handed a total of USD 110'000 from a car. All members of the team – the substitute players as well – received money. He divided the money among the players with the team captain, D., which they got in the hotel room in the presence of D., E., and G. Each up player in the original lineup received USD 10'000 and USD 1'000 was withheld from the younger players in favor of the substitute players.

In a decision of August 9, 2010, the FFU Control and Disciplinary Committee pronounced fines and other sanctions against various players, officials, and the FC Metalist. X. was barred for life from any activities connected to football. The Committee held on the basis of testimony of the witnesses and of the evidence available that it was

* The original decision is in German.

proved that the April 19, 2008, football game had been manipulated.

On October 19, 2010, upon appeal by X., the FFU Appeal Committee reduced the ban to 5 years in its decision on appeal; moreover, a fine of USD 10'000 was pronounced, payable in Ukranian Hrywnja.

In an arbitral award of August 2, 2013, the Court of Arbitration for Sport (CAS) rejected an appeal against the October 19, 2010, decision of the FFU Appeal Committee and confirmed the decision under appeal. The CAS held that the Lviv-Video had been recorded without A.'s agreement and therefore examined its admissibility, among other things. The Arbitral Tribunal held that after balancing the interests at hand the Lviv-Video should be admitted while also holding that the transcription of a telephone conversation illegally recorded with one of the football players involved could not be admitted and finally admitted another video tape only because X. and other Appellants themselves had used it in support of their position. The CAS concluded, based on the Lviv-Video and other clues, that it was proved that X. had offered and paid money to fix the April 19, 2008, game, thereby violating the rules of the league involved.

In a civil law appeal, X. asks the Federal Tribunal to annul the CAS award of August 2, 2013, insofar as it concerns him.

Extract of the Legal Considerations

The Appellant argues that the Arbitral Tribunal violated public policy (Art. 190(2)(e) PILA) in many respects.

1. The Appellant argues that the Arbitral Tribunal violated public policy by relying on the Lviv-Video.

The principle that illicitly obtained evidence is inadmissible is generally recognized in Swiss legal writing, corresponds with the case law of the Federal Tribunal, and is found in both Art. 140 f. of the Swiss Code of Criminal Procedure (CCrP; SR 312.0) and in Art. 152(2) of the Swiss Code of Civil Procedure (CCP; SR 272). The principle is also recognized in other legal orders; it may only be derogated from exceptionally and in a very limited way, particularly in an adversarial system.

The Arbitral Tribunal apparently balanced the interests before it only in appearance; the result was actually preordained: While there is per se a major public interest in fair football and considering that the investigative tools of the state failed to enforce it, any illegally gathered evidence would always be admissible. The reasoning of the Arbitral Tribunal is contradictory and directly contradicts the principles established by the Federal Tribunal to derogate from the principle that illegally gathered evidence is inadmissible.

The Appellant rightly refrains from arguing that illegally obtained evidence would be excluded in all cases according to the Swiss view; the interests at hand must instead be balanced; they are, on the one hand, the interest in finding the truth and, on the other hand, the interest in protecting the legal protection infringed upon by the gathering of the evidence. The Arbitral Tribunal did not disregard this at all but to the contrary, reviewed the admissibility of the Lviv-Video – and of other evidence – in the light of the prevailing procedural principles, according to Swiss law. Contrary to the view presented in the appeal, the Arbitral Tribunal did not assume that, in view of the significant interest in fair football and the absence of an investigation by the state to enforce these principles, any evidence illegally obtained would always be admissible. The Arbitral Tribunal definitely undertook a review of each interest involved individually and did not admit all evidence but instead held, after balancing the interests at hand, that the transcription of an illegally recorded phone

conversation with a player involved was not admissible but admitted an additional video because the Appellant and other Appellants had relied upon it as exculpatory evidence.

Furthermore, the Appellant rightly refrains from arguing that it would not have been possible for him to challenge the accuracy and the admissibility of the disputed video in the arbitral proceedings and to submit his own evidence; to the contrary, during more than two years in the arbitral proceedings, he decided not to argue the inadmissibility of the Lviv-Video and challenged the admissibility of this evidence only in a submission of February 26, 2013, therefore too late, according to the applicable procedural rules. The Appellant disregards that free judicial review of the applicable procedural provisions are excluded in an action against an arbitral award according to Art. 190(2) PILA and that the wrong or even arbitrary application of a specific procedural rule does not, by itself, constitute a violation of public policy. In his argument that the reasons of the Arbitral Tribunal were contradictory, the Appellant fails to show any incompatibility of the arbitral award with public policy. Moreover, the Appellant rightly does not dispute that the sport federations – the Respondent, among others – have a strong interest in fighting game fixing (as to combating manipulations in sport.

Moreover, the Appellant merely submits some inadmissible criticism of the assessment of the evidence by the Arbitral Tribunal when he now tries to cast doubt before the Federal Tribunal as to the validity of the evidence or the truthfulness and the scope of the statements made by A. He does not show the violation of any fundamental and broadly recognized procedural principles in the argument that the latter later withdrew his statement, or when the Appellant submits that the Ukrainian prosecutor's office eventually dropped its investigation. The Appellant's argument shows no violation of procedural public policy.

2. The Appellant argues, furthermore, that the Arbitral Tribunal violated public policy by unduly restricting the standards of evidence.

Relying on the evidentiary provisions of the Swiss civil and criminal procedural laws and on the presumption of innocence according to Art. 10 CCrP and Art. 6(2) ECHR, the Appellant argued that the standard of evidence applied in the arbitral proceedings to determine the existence of a manipulation of the game was inaccurate. In this respect he argues – inaccurately – that the Arbitral Tribunal disregarded the significance of the legal consequences for the people involved. The Arbitral Tribunal reasoned in an understandable way as to why it applied the principle used in doping cases to the assessment of a game manipulation as to the burden and the scope of evidence and pointed out, among other points, that the seriousness of the allegation was to be taken into consideration as well, which the Appellant does not address. Contrary to the view taken in the appeal brief, the reasoning of the CAS that the Respondent would have to show the existence of a manipulated game "to the comfortable satisfaction of the Panel" does not violate public policy. In doing so, the Arbitral Tribunal established the burden of proof and the scope of the evidence needed, by reference to the pertinent rules of the federation and its case law, which in private law – even when disciplinary measures of private sport federations are to be assessed – cannot be determined from the point of view of criminal concepts such as the presumption of innocence or the principle of "in dubio pro reo," or on the basis of the guarantees arising from the ECHR, as the Federal Tribunal mentioned several times in particular in cases involving doping violations. In this respect as well, the Appellant did not succeed in showing a violation of fundamental and generally recognized procedural principles, the

disregard of which would lead to the award being incompatible with public policy.

3. On the basis of Art. 27 ZGB, the Appellant argues that the professional ban "in combination with the reduced evidentiary standard" violates public policy.

His argument ignores that a violation of Art. 27 ZGB does not necessarily mean a violation of public policy; the sanction levied against him can lead to a violation of public policy in the award under appeal only if it represents an obvious and severe infringement of privacy. The ban confirmed by the Arbitral Tribunal from any activities connected to football for five years may indeed be severe for a football executive. However, the Appellant cannot use anything from the judgment he quotes (BGE 138 III 32223 ff.) to his advantage. In that judgment, the Federal Tribunal held that the sanction issued by a federation was inconsistent with public policy when a football player was faced with an unlimited ban as long as he did not pay the amount imposed on him. Contrary to the case quoted, the ban against the Appellant is limited in time and does not remain in force merely due to the failure of making a payment and rather is the consequence of a violation of the applicable provisions covering sanctions against manipulations of games or bribery in sport.

The ban seeks to enforce the obviously important interest of the Respondent in ensuring sporting and fair football games, which the Appellant also acknowledges. He cannot be followed in his argument that such an infringement of economic freedom would be inappropriate to the goal sought; contrary to his view (which he does not develop any further), it cannot be argued that as a consequence of the standard of evidence applied to prove the manipulation, the members of the federation would be exposed to the arbitrariness of the federation. Besides the fact that the Appellant does not substantiate his argument at all, it is wrong to say that the interest in football games being played without corrupt influence – that the Appellant seeks to enforce with the sanction at issue – clearly has less weight and could not justify the infringement of the Appellant's privacy. The argument that the award under appeal would be inconsistent with public policy as to the professional ban it confirmed is unfounded.

Therefore the Federal Tribunal pronounces that the appeal is rejected insofar that the matter is capable of appeal.

Arrêt du Tribunal fédéral 4A_374/2014
26 février 2015
Club A. (recourant) v. B. et C. (intimés)

Recours en matière civile contre la sentence rendue le le 28 mars 2014 par le Tribunal Arbitral du Sport (TAS)

Extrait des faits

Les entraîneurs professionnels de football B. et C. (ci-après désignés collectivement: les entraîneurs ou les intimés), de nationalité argentine, ont conclu un contrat de travail le 25 février 2009 avec le Club A. (ci-après: le club ou le recourant), membre de la Fédération Mexicaine de Football (FMF). Le club, qui évolue en première division dans le championnat national, est administré par une société dénommée D. SA de CV (ci-après: D.). Par ce contrat, conclu pour le club par D., le club a engagé les entraîneurs afin qu'ils assument la direction technique de sa première équipe jusqu'au 30 juin 2009. Une clause arbitrale, insérée dans ce contrat, invitait les parties à soumettre les différends pouvant les opposer à l'avenir aux tribunaux en matière de travail de l'Etat de ... et à la FMF. Au terme de la durée dudit contrat, le club, qui s'était maintenu en première division, a engagé un nouvel entraîneur.

Le 24 juillet 2009, les entraîneurs ont saisi la Commission de Conciliation et de Résolution des Conflits (ci-après: la CCRC) de la FMF d'une réclamation pécuniaire dirigée contre le club. Ils alléguaient, à son appui, avoir conclu avec le club, le 25 février 2009 également, un second contrat, comportant la même clause arbitrale, pour la période du 1er juillet 2009 au 30 juin 2011, contrat dont l'entrée en vigueur dépendait du maintien du club en première division. Selon eux, dès lors que cette condition s'était accomplie, le club avait rompu illégalement leurs rapports de travail en engageant un nouvel entraîneur. Le club défendeur a conclu au rejet des prétentions avancées par les entraîneurs. Il a nié l'existence du second contrat de travail invoqué par ceux-ci, arguant de faux la signature prétendument apposée au pied du contrat par le président du club, ce qui l'avait du reste poussé à saisir la justice pénale en date du 12 juin 2009.

Ayant pris connaissance de ce moyen de défense, la CCRC a rendu, le 9 septembre 2009, une décision (ci-après: la décision CCRC 2009) au terme de laquelle elle a décidé de « suspendre la procédure concernant ce différend, de sorte que les droits des parties sont réservés pour qu'elles les fassent valoir dans la forme et les termes qu'elles estiment convenables... ». Deux ans plus tard, plus précisément le 6 octobre 2011, la CCRC a rendu une décision (la décision CCRC 2011) et a classé l'affaire en tant qu'affaire définitivement close (en considérant, vu que la forclusion opère par le temps qui s'écoule, que la partie demanderesse est désistée tacitement de toutes et chacune des actions dans cette procédure).

Entre-temps, le 1er octobre 2009, soit moins d'un mois après la notification de la décision CCRC 2009, les entraîneurs avaient saisi la Commission du Statut du Joueur de la FIFA (ci-après: la CSJ), lui soumettant les mêmes conclusions que celles qu'ils avaient formulées devant la CCRC. Statuant le 11 mai 2012, le juge unique de la CSJ a admis sa compétence de jugement sur la base de l'art. 22 let. c du Règlement du Statut et du Transfert des Joueurs (ci-après: le RSTJ), eu égard au caractère international du litige, mais a rejeté la demande des entraîneurs pour manque de compétence ratione personae.

Le 10 janvier 2013, les entraîneurs ont interjeté appel auprès du Tribunal Arbitral du Sport (TAS). Ils ont conclu à l'annulation de la décision précitée, qui leur avait été notifiée le 21 décembre 2012, et à l'allocation des montants réclamés par eux.

La formation TAS a rendu sa sentence le 28 mars 2014. Admettant partiellement l'appel des entraîneurs, elle a annulé la décision du juge unique de la CSJ du 11 mai 2012 et condamné le club à indemniser ses anciens employés à différents titres.

Le 16 juin 2014, le club a formé un recours en matière civile assorti d'une requête d'effet suspensif. Dénonçant une violation de l'art. 190 al. 2 let. b et e LDIP, il invite le Tribunal fédéral à annuler la sentence du 28 mars 2014.

Extrait des considérants

Dans son principal moyen, le recourant, se fondant sur l'art. 190 al. 2 let. e LDIP, soutient que la Formation a méconnu l'ordre public en rendant la sentence attaquée sans égard à l'autorité de la chose jugée attachée à la décision CCRC 2011.

Un tribunal arbitral viole l'ordre public procédural, inclus dans la notion plus générale d'ordre public au sens de l'art. 190 al. 2 let. e LDIP, 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.

L'autorité de la chose jugée vaut également sur le plan international et régit, notamment, les rapports entre un tribunal arbitral suisse et un tribunal étatique ou arbitral étranger. Si donc une partie saisit un tribunal arbitral ayant son siège en Suisse d'une demande identique à celle qui a fait l'objet d'un jugement ou d'une sentence en force rendu (e) entre les mêmes parties par un tribunal étatique ou arbitral ayant son siège sur un territoire autre que la Suisse, le tribunal arbitral suisse devra déclarer cette demande irrecevable, pour autant que le jugement étranger ou la sentence étrangère soit susceptible d'être reconnu (e) en Suisse en vertu de l'art. 25 LDIP ou de l'art. 194 LDIP. A ce défaut, il s'exposera au grief de violation de l'ordre public procédural.

Conformément à l'art. 194 LDIP, la reconnaissance et l'exécution des sentences arbitrales étrangères sont régies par la convention de New York du 10 juin 1958 pour la reconnaissance et l'exécution des sentences arbitrales étrangères (RS 0.277.12; ci-après: CNY). Aux termes de l'art. V ch. 2 let. b CNY, la reconnaissance et l'exécution d'une sentence arbitrale pourront aussi être refusées si l'autorité compétente du pays où la reconnaissance et l'exécution sont requises constate que la reconnaissance ou l'exécution de la sentence serait contraire à l'ordre public de ce pays.

La CNY ne définit pas ce qu'il faut entendre par sentence arbitrale. Tout au plus assimile-t-elle expressément l'arbitrage institutionnel à l'arbitrage ad hoc sous ce rapport (art. I ch. 2 CNY). Pour le reste, savoir si la qualification de sentence arbitrale, au sens de la CNY, dépend du droit de l'Etat d'origine de la décision, du droit de l'Etat requis ou d'une définition autonome propre à la Convention est une question disputée, même si la dernière approche semble avoir la préférence au sein de la doctrine. Quoi qu'il en soit, pour être qualifiée de sentence arbitrale, une décision d'origine privée doit être comparable à celle d'un tribunal étatique. La décision prise par l'organe d'une association sportive ayant qualité de partie au procès, cet organe fût-il dénommé tribunal arbitral, ne constitue qu'une simple manifestation de volonté émise par l'association intéressée; il s'agit d'un acte relevant de la gestion et non d'un acte judiciaire.

L'art. 22 let. c RSTJ attribue à la FIFA la compétence pour trancher, notamment, les litiges de dimension internationale entre un club et un entraîneur relatifs au travail, à moins qu'un tribunal arbitral indépendant garantissant une procédure équitable existe au niveau national. Selon le commentaire du RSTJ publié par la FIFA, la dimension internationale du litige vient de ce que l'entraîneur est étranger dans le pays concerné. La FMF a fait usage de la réserve formulée dans la disposition citée. L'art. 77 de ses Statuts attribue à la CCRC la connaissance de toutes les réclamations que ses membres auraient entre eux. D'après son règlement, la CCRC est un organe paritaire permanent constitué d'un président, désigné par la Commission du Joueur et par le représentant des clubs - président assisté d'un secrétaire nommé par le conseil national -, d'un représentant des clubs désigné par les clubs professionnels ainsi que d'un représentant des joueurs choisi par les joueurs professionnels et chargé également d'y faire valoir les intérêts des entraîneurs.

En principe, seul un jugement au fond définitif jouit de l'autorité de la chose jugée, tandis qu'un jugement de procédure en force ne peut en être revêtu, tout au plus, qu'en rapport avec la condition de recevabilité dont le tribunal a admis ou nié l'existence. Cependant, le droit de procédure civile suisse assimile certains actes unilatéraux des parties au jugement. Ainsi en va-t-il du désistement d'action (art. 241 al. 2 CPC; voir aussi l'art. 208 al. 2 CPC pour la procédure de conciliation), par opposition au désistement d'instance, dont les conditions sont fixées à l'art. 65 CPC. Le désistement d'action à proprement parler, qui constitue l'une des formes du passé-expédient, est l'acte par lequel le demandeur abandonne les conclusions qu'il a prises au procès; il porte sur l'action et bénéficie de l'autorité de la chose jugée. Le désistement d'instance ou retrait de la demande, en revanche, qui n'en est pas revêtu, est un acte qui met exclusivement fin à l'instance et qui ne fait pas obstacle à la réintroduction de l'action à certaines conditions. Le droit de procédure civile mexicain distingue, lui aussi, le désistement d'action du désistement d'instance et attribue à ces deux actes de procédure unilatéraux des effets comparables à ceux qu'ils sortissent d'après le droit de procédure civile suisse.

Il y a lieu d'admettre que la décision CCRC 2011 en force n'a pas uniquement mis un terme à l'instance pendante devant le tribunal arbitral sportif de la FMF, mais a eu pour effet d'exclure toute nouvelle action portant sur le même objet. Or, il n'est pas contestable, ni contesté d'ailleurs, que l'action ouverte le 1er octobre 2009 par les entraîneurs devant la CSJ était identique, quant à ses auteurs et à son objet, à celle qui avait été soumise, le 24 juillet 2009, à la CCRC. Par conséquent, le juge unique de la CSJ, lorsqu'il avait statué sur cette action, le 11 mai 2012, en ayant connaissance de la décision définitive rendue le 6 octobre 2011 par la CCRC, aurait dû la déclarer irrecevable pour cause de chose jugée. Le TAS, pour sa part, n'aurait pas dû entrer en matière sur l'appel des entraîneurs ni rendre une sentence sur le fond, sauf à violer l'ordre public procédural.

Encore faut-il, pour pouvoir reprocher au TAS d'avoir méconnu l'autorité de la chose jugée de la décision CCRC 2011, que cette décision soit susceptible d'être reconnue en Suisse sur la base de la CNY. C'est ce qu'il reste à examiner.

L'ordre public du pays où la reconnaissance de la sentence est requise, dont l'art. V ch. 2 let. b CNY érige la violation en motif de refus à retenir d'office, exige, lorsque ce pays est la Suisse, le respect des règles fondamentales de la procédure déduites de la Constitution, tel le droit d'être entendu. En l'espèce, la décision CCRC 2011 a été rendue en violation manifeste du droit d'être entendu des intimés. De fait, elle a été prise le 6 octobre 2011, par le président de la CCRC, sur la seule base d'un rapport de la secrétaire

de ce tribunal arbitral attestant qu'aucune démarche n'avait été effectuée par les parties depuis le 9 septembre 2009, date à laquelle la CCRC avait ordonné la suspension de la cause (décision CCRC 2009). Force est d'admettre, dès lors, que la violation crasse du droit d'être entendu des entraîneurs par la CCRC constitue un motif de refus de la reconnaissance de la décision CCRC 2011.

Les intimés n'ont pas eu l'occasion de se défendre contre cette violation de leur droit d'être entendus *pendente lite* puisqu'ils n'ont appris l'existence de la décision CCRC qu'après son prononcé. Il appert de cet examen que la sentence rendue le 6 octobre 2011 par la CCRC, quoique revêtue de l'autorité de la chose jugée selon le droit mexicain, est contraire à l'ordre public de la Suisse, si bien que sa reconnaissance doit être refusée en vertu de l'art. V ch. 2 let. b CNY. Aussi le juge unique de la CSJ et, à sa suite, le TAS, en entrant en matière sur la demande des entraîneurs, nonobstant la décision CCRC 2011, n'ont-ils pas violé l'ordre public procédural au sens de l'art. 190 al. 2 let. e LDIP. Le moyen soulevé de ce chef par le recourant tombe ainsi à faux.

Par ces motifs, le Tribunal fédéral a rejeté le recours.

Informations diverses
Miscellanous

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