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Editorial

The move of the offices of the Court of Arbitration for Sport (CAS) to its new headquarters at the Palais de Beaulieu in Lausanne will take place in March 2022, just after the Olympic Winter Games Beijing 2022. The Palais de Beaulieu, inaugurated in 1921, is a historic building in a complex called the “Beaulieu Congress and Exhibition Centre” which hosted many exhibitions, ceremonies and public events. The new seat of the CAS will be integrated in the south wing of the existing (renovated) building which should give a new specific visual identity to the CAS. The restoration undertaken by the CAS, including new facilities such as 3 large hearing rooms, an auditorium and several meeting rooms, contributes to the revitalization of an emblematic place for Lausanne. The other parts of the building will accommodate the renovated theatre, a restaurant and a convention centre. The south wing of the Palais de Beaulieu has been extensively transformed and modernised to benefit from equipment adapted to the CAS needs, including the possibility to organize public hearings. The new CAS headquarters, which are considerably larger than the current CAS premises, will be able to group together on a single site all CAS staff, i.e. 44 employees, who are currently divided between Béthusy and a temporary office on Avenue de Rhodanie in Lausanne. The recruitment of additional staff in 2022, made necessary by the constant increase in the number of cases registered by the CAS - almost 900 cases registered in 2021 - will also be facilitated.

The Court of Arbitration for Sport (CAS) is preparing to open two temporary offices in Beijing for the 2022 Olympic Winter Games (the Games) that will be held from 4 to 20 February 2022 in Beijing. The first, the CAS Ad Hoc Division, will resolve any legal disputes that arise during the Games. This temporary tribunal has operated at every edition of the Summer and Winter Olympic Games since 1996, as well as at other major sporting events. The CAS Ad hoc Division

will be able to render decisions within 24 hours in case of urgent matters. The second temporary office is a section of the CAS Anti-Doping Division which will be in charge of anti-doping-related matters arising during the Games as a first-instance authority. This structure, in operation for the fourth time since its inauguration at the Rio 2016 Olympic Games, will handle potential doping cases referred to it by the International Testing Agency (ITA) in accordance with the International Olympic Committee (IOC) Anti-doping Rules. Due to the evolution of the COVID19 pandemic, the sanitary conditions applicable in Beijing will be even stricter than at the last Olympics in Tokyo, with all participants being restricted to a “Closed Loop” throughout the duration of the Games. Likewise, strict sanitary controls and the absence of foreign spectators - outside the Olympic accredited persons - will ensure the safest environment possible.

As usual, because the vast majority of CAS cases are football-related, this new issue of the Bulletin includes a majority of selected “leading cases” related to football, namely nine football cases and two doping cases.

In the field of football, the case 7008 Sport Lisboa e Benfica SAD v. FIFA & 7009 Sport Lisboa e Benfica SAD v. FIFA deals with disciplinary sanctions for violation of Art. 18bis RSTP; it is one of the few awards regarding Art. 18bis RSTP, with special interest as regards the concept of “influence”. The case 7503 N. v. FIFA interprets the exception of Art. 19 para. 2 lit a RSTP regarding the international transfer of minor players. In 7252 BFC Daugavpils v. FC Kairat & FIFA, the issuance of “proposals” by FIFA in the field of training compensation is analysed for the first time by a CAS panel. The cases 7290 ARIS FC v. Oriol Lozano Farrán & FIFA and 6713 Nilmar Honorato da Silva v. FIFA contemplates notably the sporting succession of clubs. In 7276 Suphanburi FC v. Michael Seroshtan, the validity of a contractual clause related to the termination of the contract between a player and a club is examined. The

case 4717 Arsenal F.C. v. FIFA addresses the breach of FIFA regulations on third party Influence. In 6040, the term “surroundings” is interpreted in relation to a club’s liability for the conduct of its supporters. Finally, the case 7266 Perak Football Association v. Jeon Hyoseok deals with the admissibility of an appeal, in particular in case of filing of the statement of appeal by email.

Turning to doping, the case Anna Knyazeva-Shirokova v. Russian Anti-Doping Agency RUSADA examines the validity of the suspension of an athlete for having collaborated/trained with a coach already convicted for doping-related offences. This case is related to the proper notification of the rule, the interpretation of the rule and the different steps that need to be taken to sanction someone. Lastly, the case World Athletics v. Salwa Eid Naser relates to a whereabouts failure. It determines what a reasonable attempt to locate an athlete for out-of-competition testing is and addresses WADA’s right to recharacterize a charge against the athlete.

Finally, 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 are the decisions 4A_644/2020 and 4A_612/2020 rendered in French by the Federal Tribunal which confirm the independence and the specific jurisdiction of the CAS and of the CAS Anti-Doping Division respectively. Likewise, the decision 4A_600/2020 translated into English confirms that the ECtHR, like the Federal Tribunal, recognizes that recourse to arbitration is possible in sports matters notwithstanding the absence of an expressed consent by a party, that however, in the case of so-called compulsory arbitration (“*arbitrage forcé*”, according to the terminology of the ECtHR), the arbitral tribunal must offer the guarantees provided for by Article 6(1) ECHR, in particular those of independence and impartiality, which is the case for the CAS.

We are pleased to publish in this issue an article written in English by Björn Hessert, CAS Counsel, related to sports investigations in anti-doping matters, as well as an article co-written in French by Pauline Pellaux, CAS counsel and Matthieu Reeb, CAS Director General, entitled “La désignation de la partie défenderesse devant le TAS”.

We 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
Artículos y comentarios



Sports investigations in anti-doping matters

Björn Hessert*

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I. Introduction

Unannounced testing and other forms of investigations are fundamental in the fight against doping in sport. Article 5 of the World Anti-Doping Code (“WADA Code”) deals with the testing and gathering of other evidence to prevent and detect anti-doping rules violations in national and international sports competitions.¹ In addition, the International Standard for Testing and Investigations (“ISTI”) and the International Standard for Results Management (“ISRM”) are an integral part of the provisions governing the investigation of doping offences. These two International Standards are not only a source of inspiration for the administration of testing and investigations in anti-doping matters, but they also form an integral part of the anti-doping program of Signatories to the WADA Code.² Given the importance of anti-doping investigation proceedings for both sportspersons and

Anti-Doping Organisations (“ADOs”), it is all the more surprising that insufficient research has been conducted in this area of anti-doping procedures.³ This issues arising from anti-doping investigation proceedings is most aptly demonstrated by the decision of the Court of Arbitration for Sport (“CAS”) taken in the *Sun Yang*⁴ case.⁵ In this procedure, the CAS panel had to examine whether or not the sample collection process was compliant with the ISTI. In addition, the question arose as to whether the notification or behaviour of the sample collection personnel constituted a compelling justification for athletes to terminate the sample collection procedure or whether “*the proper path for an Athlete is to proceed with a Doping Control under objection, making available immediately the complete grounds for such objection*”⁶ (completion “under protest”).⁷ Similar questions may also arise in anti-doping investigation proceedings related to the (attempted) Use of Prohibited

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¹ Cf. WADA Code, art. 5.1 and 5.7.

² WADA Code, art. 23.3; for the sake of simplicity, reference is made to the provisions of the WADA Code.

³ See e.g. Marjolaine Viret, *Evidence in Anti-Doping at the Intersection of Science and Law*, TMC Asser Press, 2016.

⁴ CAS 2019/A/6148.

⁵ Ibid; see also CAS 2007/A/1332; CAS 2020/A/5885 & 5936.

⁶ CAS 2019/A/6148 (first decision), para. 209.

⁷ CAS 2019/A/6148, para. 291.

Substances⁸, Whereabouts Failures⁹, Tampering¹⁰ or other Anti-Doping Rule Violations (“ADRV”) under the WADA Code¹¹.

The *Sun Yang* case demonstrates the importance of a comprehensive and rigorous understanding of the provisions particularly contained in the ISTI and ISRM. This is all the more true when considering the severe consequences that sportspersons may face when they are in violation thereof. This article therefore aims at to shed some light on anti-doping investigation proceedings. Firstly, it will discuss the term of “anti-doping investigations”. This work will examines sample collection proceedings and the gathering of evidence in non-analytical cases, i.e. when an ADRV cannot be established by a positive doping test and therefore require other reliable means.¹² Lastly, the article will briefly discuss the consequences of a positive or negative outcome of the anti-doping investigations conducted.

II. What constitute “anti-doping investigations”?

The starting point to define the term of “anti-doping investigations” is the WADA Code and its International Standards. A first reference to investigations in anti-doping matters can be found in Article 5.1 of the WADA Code which states that “*Testing and Investigations may be undertaken for any anti-doping purpose*”.¹³ However, a definition of “investigations” is not contained in Appendix 1 or any other part of the WADA Code.¹⁴ Surprisingly, the International Standard for Testing and *Investigations* does also not define what shall constitute an anti-

doping investigation. Instead, the pertinent parts of Article 1 of the ISTI (“Introduction and Scope”) only provide as follows:

“The first purpose of the International Standard for Testing and Investigations is to plan for intelligent and effective Testing, both In-Competition and Out-of-Competition, and to maintain the integrity and identity of the Samples collected from the point the Athlete is notified of his/her selection for Testing, to the point the Samples are delivered to the Laboratory for analysis. [...] The second purpose of the International Standard for Testing and Investigations is to establish mandatory standards for the efficient and effective gathering, assessment and use of anti-doping intelligence and for the efficient and effective conduct of investigations into possible anti-doping rule violations”.

Considering the provisions contained in the WADA Code and the ISTI, it is noticeable that both documents generally distinguish between “Testing”, on the one hand, and “Investigations”, on the other hand.¹⁵ Accordingly, drafters of the WADA Code deemed it essential to form a strict distinction between “Testing” and “Investigations” the fight for doping-free sport. However, it appears to be questionable whether such strict distinction is accurate when one considers the purpose of both testing and investigations in anti-doping matters.

The purpose of anti-doping investigations is well-described in Article 12.1.1 of the ISTI which states as follows:

“In each case, the purpose of the investigation is to achieve one of the following either:

a) to rule out the possible violation/involvement in a violation;

⁸ WADA Code, art. 2.2.

⁹ WADA Code, art. 2.4.

¹⁰ WADA Code, art. 2.5.

¹¹ Cf. WADA Code, art. 2.

¹² Cf. WADA Code, art. 3.2.

¹³ See also WADA Code, art. 5.7 which provides as follows: “*Anti-Doping Organizations shall have the capability to conduct, and shall conduct, investigations and gather intelligence as required by the International Standard for Testing and Investigations.*”

¹⁴ The WADA Code contains only a definition for “Testing” which is defined as “*The parts of the Doping Control process involving test distribution planning, Sample collection, Sample handling, and Sample transport to the laboratory.*”

¹⁵ See e.g. WADA Code, art. 5.1, Appendix 1 ‘Doping Control’; ISTI, art. 11.1 in which the distinction between the obtainment of intelligence and the conducting of investigations appears to be incorrect.

- b) *to develop evidence that supports the initiation of an anti-doping violation proceeding in accordance with [Article 8 of the WADA Code]; or*
- c) *to provide evidence of a breach of the Code or applicable International Standard”.*

In the light of the foregoing, the purpose of investigations in anti-doping matters is to detect possible ADRVs and, ultimately, to prevent the participation of doped athletes in sports competitions. Investigations should enable the respective ADOs – which have the onus to establish ADRVs¹⁶ – to gather intelligence and probative evidence to prosecute athletes and other persons who are allegedly in violation of the applicable anti-doping rules.¹⁷ The deterrence and prevention of ADRVs as well as the gathering of intelligence to prosecute rule-violating athletes and support personnel are at the core of testing regimes and non-analytical investigations, meaning cases in which ADOs may not benefit from an Adverse Analytical Finding (“AAF”). Therefore, in both scenarios, the overall objective is to establish an ADRV through the support of reliable means and probative evidence.¹⁸ Accordingly, the distinction between testing and investigations in anti-doping matters is inaccurate, because testing is already part of anti-doping investigations. This is because the direct detection of prohibited substances in the athletes’ system provides ADOs with the required evidence to prosecute the alleged athletes for an ADRV under Article 2.1 and 2.2 of the WADA Code.

The question then, however, becomes whether there are differences between testing and other investigations in anti-doping matters, particularly in non-analytical intelligence cases. In this regard, it is

important to examine the purpose of the specific anti-doping investigation conducted. More specifically, when looking at the use of different investigatory measures in anti-doping investigations, it is crucial to first clarify whether the investigation has a *preventive* or *repressive* nature at the material time of the investigation.¹⁹ This is so important because different prerequisites may apply to intelligence gathering in preventive or repressive anti-doping investigations. For example, sample collection sessions are carried out for preventive purposes. In the material moment of the sample collection, the athlete is not alleged of any specific ADRV. Instead, all athletes must submit to sample collection on the mere fact that they are bound by the anti-doping rules as part of their contractual obligations with sports organisations. In other words, the main purpose of the testing regime under the WADA Code and the ISTI is to prevent anti-doping rule violations in the future. Otherwise, the collection of blood or urine samples may appear to be unreasonable and disproportionate in consideration of, e.g., the athlete’s privilege against self-incrimination.²⁰ Anti-doping investigations have a repressive nature, in turn, if the investigatory measure is applied at a time when the sportsperson is already accused of a specific ADRV. The distinction between preventive and repressive anti-doping investigations can also be illustrated when looking at the investigatory nature of the so-called Athlete Biological Passport (“ABP”)²¹, the objective of which is described in Annex I.1 of the ISTI as

“[t]o collect an Athlete’s blood Sample, intended for use in connection with the measurement of individual Athlete’s blood variables within the framework of the Athlete Biological Passport program, in a manner appropriate for such use”.

¹⁶ WADA Code, art. 3.1.

¹⁷ Cf. ISTI, art. 11.1.

¹⁸ WADA Code, art. 3.2.

¹⁹ Björn Hessert, *Sports investigations in the light of the European Convention on Human Rights - Gathering, use and exchange of intelligence in sports proceedings* (forthcoming).

²⁰ *Ibid.*

²¹ For more information on the ABP see, e.g. Marjolaine Viret, *Evidence in Anti-Doping at the Intersection of Science and Law*, Asser Press, 2016, pp. 727 et seq; Jean-Pierre Moran, Ross Wenzel and Nicolas Zbinden, *Tackling New Forms of Doping: The Legal Challenge* in Rabin and Ornella Corazza (eds.), *Emerging Drugs in Sport*, Springer, 2022, pp. 97, 102 et seq.

The objective of the ABP is therefore to convict athletes of the Use of Prohibited Substances or Methods (cf. Article 2.2. of the WADA Code) in cases where a direct detection of Prohibited Substances in their systems is not available.

Accordingly, Atypical Passport Findings provide useful evidence in order to prosecute athletes for an asserted violation of the Use of Prohibited Substances or Methods under Article 2.2 of the WADA Code. However, the blood samples for the ABPs are always collected from the individual athlete at a time when they are not accused of any misconduct. In other words, the collection of blood samples for ABP purposes falls within the ambit of Testing, i.e. “*Testing involving longitudinal profiling*”²², and therefore constitutes a preventive measure in anti-doping investigations.

Consequently, the decisive criterion to determine whether the anti-doping investigation has a preventive or repressive nature is whether the ADO is investigating a specific allegation of an ADRV at the material time of the application of investigatory measures.²³ Against this background, the following sections takes a closer look at the requirements of the different investigatory measures under the WADA Code and International Standards.

III. Testing

The testing regime under the WADA Code and the ISTI can generally be divided into different stages. The first stage is the notification of the athlete and the second stage is the collection of urine or blood samples. The third stage is the analysis of the collected samples that falls within the scope

of the International Standard for Laboratories (“ISL”), which is not the focus of this paper.

When discussing the first two stages of testing under the WADA Code and ISTI – to which athletes need to submit in order to pursue a professional career in sport – it is important to keep in mind that testing procedures may have a severe impact on the personality rights of athletes, for example guaranteed under Article 28(1) of the Swiss Civil Code (“SCC”). It is therefore critical for the present analysis to bear in mind that a balance between the interests of sports organisations and rule-abiding athletes in doping-free sports competitions, on the one hand, and the personality rights of athletes, on the other hand, shall be stricken, see e.g. Article 28(2) of the SCC.²⁴ Accordingly, this balancing process is critical when discussing the legitimacy of intelligence gathering in anti-doping matters, including the collection of blood and urine samples of athletes pursuant to the provisions of the ISTI.²⁵

A. Notification of athletes

Once the ADO with testing authority has finalised its so-called Test Distribution Plan and an athlete has been selected for In-Competition and/or Out-of-Competition testing, the selected athlete must be properly notified in order to protect their rights and bodily integrity from any abusive behaviour by third parties.²⁶ In sample collection sessions involving sportspersons under the age of 18, the Testing Authority and/or Sample Collection Authority must ensure that (a) the parental consent for Testing is given and (b) the athlete and their guardians/parents are notified in protection of the less experience and more vulnerable minor athletes.²⁷

²² ISTI, art. 4.6.1. lit. d).

²³ Björn Hessert, *Sports investigations in the light of the European Convention on Human Rights - Gathering, use and exchange of intelligence in sports proceedings* (forthcoming).

²⁴ Cf. FNASS and Others v. France, ECtHR (App no 48151/11 and 77769/13, 18 January 2018) para. 188.

²⁵ CAS 2019/A/6148, para. 316.

²⁶ Cf. ISTI, art. 5.

²⁷ ISTI, art. 5.3.7 in conjunction with Annex B.3 and B.4; see also Björn Hessert, The protection of minor athletes in sports investigation proceedings (2021) *International Sports Law Journal* 62, 67 et seq.; exceptions may also apply for athletes with impairments.

Selected athletes must not only be informed about their rights and responsibilities, but the Sample Collection Personnel must also identify themselves and provide documents of the sports organisation that ordered the sample collection.²⁸ In this respect Article 5 of the ISTI provides – in its pertinent parts – as follows:

“5.4.1 When initial conduct is made, the Sample Collection Personnel, DCO or Chaperone, as applicable, shall ensure that the Athlete and/or a third party if required in accordance with Article 5.3.7 [e.g. guardians] is informed:

- a) That the Athlete is required to undergo Sample collection*
- b) Of the authority under which the Sample collection is to be continued*

[...]

5.4.2 When contact is made:

[...]

- b) Identify themselves to the Athlete using the documentation referred to in Article 5.3.3 [...].”*

In addition, Article 5.3.3 of the ISTI provides that the

Sample Collection Personnel shall have official documentation, provided by the Sample Collection Authority, evidencing their authority to collect a Sample from the Athlete, such as an authorization letter from the Testing Authority. DCOs shall also carry complementary identification which includes their name and photograph (i.e., identification card from the Sample Collection Authority, driver’s license, health card, passport or similar valid identification) and the expiry date of the identification”.

According to the aforementioned provisions, the Sample Collection Personnel must provide the selected athletes with official documents of the sample collection authorising ADO and their own identity during the notification process. However, these provisions only roughly describe which

information is to be provided and therefore lack any clarification as to what specific information is to be presented to the athlete by the Doping Control Officer (“DCO”) or other Sample Collection Personnel²⁹ (the “SCP”) for the purpose of authorisation and identification.

a. Actors involved in the sample collection process

Before looking at this issue in more detail, it seems necessary to explain the different actors that are mentioned in Article 5.3.3 of the ISTI and that are involved in the sample collection process, i.e. the Testing Authority (“TA”), the Sample Collection Authority (“SCA”), the DCO and the SCP.

Every athlete is subject to the testing regime of a specific ADO that requires them to submit to sample collection “*at any time and at any place*”³⁰. The person whom the ADO has authority over is specified in more detail in Articles 5.2 and 5.3 of the WADA Code. A closer look at these provisions reveals that more than one ADO can have testing authority over one athlete, depending on a confluence of factors set forth in Article 5.2 of the WADA Code. Interestingly, the testing authority of national and international ADOs in major events may exist only with respect to *Out-of-Competition* testing upon approval of the TA for such events, for example the International Olympic Committee (“IOC”) for the Olympic Games, the International Paralympic Committee (“IPC”) for the Paralympic Games or the Fédération Internationale de Football Association (“FIFA”) for the FIFA World Cup. The fact that those tests collected by the ADO – which would otherwise have testing authority over athletes – may only be considered as *Out-of-Competition* testing can have consequences for the outcome of the investigation process. In other words, in case an athlete is tested positive for a substance that is only prohibited *In-Competition*, the otherwise responsible TA is generally not

²⁸ ISTI, art. 5.4.2 lit. b).

²⁹ WADA Code, art. 5.3.2.

³⁰ WADA Code, art. 5.2.

able to prosecute and sanction the athlete for a breach of its anti-doping regulations, unless they have been authorised by the Major Event Organization to conduct *In-Competition Testing*, cf. Article 5.3.2 of the CAS Code.

TAs can conduct their own sample collection session as a SCA. For whatever reason, the TA may also decide to delegate their power to collect doping samples – as an aspect of Doping Control – from the athletes they have authority over to a so-called Delegated Third Party, i.e. the SCA. An example for the delegation of the power to conduct sample collection proceedings is explicitly provided in Article 5.2.6 which provides that International Federations or Major Event Organisations can “[*delegate or contract*] any part of Testing to a National Anti-Doping Organization directly or through a National federation”.³¹ ADOs may also engage specialized service provider to collect blood and urine samples on behalf of the TA, such as the International Testing Agency (“ITA”), a foundation with seat in Lausanne, Switzerland. A mandatory requirement of agreements between the TA and the SCA is that the latter consents to comply with the WADA Code and the International Standards.³² This seems to be necessary and reasonable, because in delegated sample collection procedures, athletes should be in the same position that they would have if the TA had collected the doping samples. The TA and the SCA may even agree that the SCA manages not only the sample collection procedures (i.e. the preventive investigation process), but may also take care of the first part of the results management process mentioned under Article 7 of the WADA Code. However, it is pertinent to mention that the TA remains responsible for any flaws in the testing process. In this

regard, Article 20 of the WADA Code stipulates that

“[e]ach Anti-Doping Organization may delegate aspects of Doping Control ... for which it is responsible but remains fully responsible for ensuring that any aspect it delegates is performed in compliance with the Code”.³³

The person in charge of the sample collection process is the DCO who is accompanied by the SCP, such as the Blood Collection Officer (“BCO”) or Chaperone. The DCO is generally a person who “*has been trained and authorized by the Sample Collection Authority to carry out the responsibilities given to DCOs in the International Standard for Testing and Investigations*”. The SCP in charge of the respective sample collection sessions must further fulfil the requirements mentioned under Article 5.3.2 of the ISTI. For example, they must not be conflicted or minors.

b. Authorisation of sample collection

As an initial matter, it should be noted that the *authorisation* of the SCA (cf. Art. 5.4.1 lit. b) of the ISTI) should be strictly separated from the question of the *identification* of the DCO and/or the SCP under Article 5.4.2 lit. b) of the ISTI, as they serve different purposes. The authorisation of the TA delegates authority to the SCA and consequently to its SCP to collect samples on behalf of the TA, whereas the *identification* serves the purpose to establish a link between the SCA and SCP.

The legal document to delegate authority to the SCA regarding the sample collection process, on behalf of the TA, is the so-called “Letter of Authorisation” (also referred to as “LoA”, “Letter or Authority” or “authorisation letter”) provided by the TA³⁴.

³¹ WADA Code, art. 5.2.6.

³² WADA Code, art. 20.

³³ See also Definition of ‘Testing Authority’ contained in the ISTI: “*It may authorize a Delegated Third Party to conduct Testing pursuant to the authority of and in accordance with the rules of the Anti-Doping Organization. Such authorization shall be documented. The Anti-Doping*

Organization authorizing Testing remains the Testing Authority and ultimately responsible under the Code to ensure the Delegated Third Party conducting the Testing does so in compliance with the requirements of the International Standard for Testing and Investigations.”

³⁴ Cf. ISTI, art. 5.3.3.

In other words, the purpose of the LoA is to (a) provide proof that the SCA has been granted general permission by the TA to carry out urine and blood sample collection sessions and (b) to ensure athletes that the “*Sample Collection Personnel is acting [on behalf and] under the authority of the Testing Authority.*”³⁵ In the *Sun Yang* case, however, the question arose whether there are any other requirements to be placed on such letter. More specifically, the Respondents were of the view that a generic LoA, meaning the confirmation that the TA delegates its testing authority to the SCA, is not sufficient. Instead, the athlete argued that authorisation pursuant to Article 5.4.1. lit. b) of the ISTI in conjunction with Article 5.3.3 of the ISTI requires individualised LoAs and therefore provide the authorisation of each member of the SCP individually, i.e. a combination of Doping Control Authority and Testing Order. The position of the Respondents in CAS 2019/A/6148 was summarised by the CAS Panel as follows:³⁶

“Sample Collection Personnel not only provide a Letter of Authority authorizing the team as a whole, but also show documentation that: (i) names each individual Sample Collection Personnel member, (ii) identifies a specific testing mission, and (iii) lists the specific athlete(s) to be sampled. In other words, they say that the ISTI require that each and every member of the Sample Collection Personnel be individually identified and authorized to partake in the mission”.

An answer to the mandatory prerequisites of the LoA would – at first sight – be expected to be found in the ISTI itself, in the *Guidelines for Sample Collection*³⁷, or the *Guidelines for Sample Collection Personnel*³⁸. However, all documents are either ambiguous or silent on this matter. The *Guidelines for Sample Collection* states that “[t]he TA/SCA must also provide official documentation to SCP validating their

authority to collect a sample from the athlete, e.g., an authorization letter from the TA”³⁹, but does not specify what requirements are placed on the content of the letter of authorisation in order to establish the delegated authority from the TA. The above-mentioned Article 5.3.3 of the ISTI could be the starting point to establish the appropriate criteria for the content of the LoA. However, in contrast to the identification under Article 5.4.2 lit. b) of the ISTI, Article 5.4.1 lit. b) of the ISTI makes no explicit reference to Article 5.3.3 of the ISTI. Accordingly, it appears at least questionable to find a clear and direct answer to the prerequisites of the LoA in Article 5.3.3 of the ISTI. These concerns are further reinforced by the wording of said provision. The second sentence of Article 5.3.3 of the ISTI expressly refers to the *identification* of the DCO, whereas the first sentence merely states that a LoA as such is required to delegate authority (“*official documentation, provided by the Sample Collection Authority, evidencing their authority to collect Sample from the Athlete, such as an authorization from the Testing Authority*”).⁴⁰ Therefore, in order to analyse whether or not individualised and mission-specific LoAs are mandatory under Article 5.4.1 lit. b) of the ISTI in conjunction with Article 5.3.3 of the ISTI, it deems necessary to take into account the leading jurisprudence of the CAS in this regard, which is without any doubt the *Sun Yang* decision.

In the *Sun Yang* case, CAS panel discussed the issue raised by the Respondents that each member of the Sample Collection Personnel should explicitly be mentioned in the LoA. In this context, a lot of the discussion revolved around the interpretation of “*official documentation*” in Article 5.3.3 of the ISTI to which Article 5.4.2 lit. b) of the ISTI – as mentioned before – makes express reference. In this regard, it should be remembered that

³⁵ CAS 2019/A/6148, para. 323; see also CAS 2018/A/5885 & 5936 para. 168 and 170.

³⁶ CAS 2019/A/6148, para. 323

³⁷ Available at https://www.wada-ama.org/sites/default/files/resources/files/isti_sample_collection_guidelines_en_final_2_feb_2021_0.pdf, accessed on 22 December 2021.

³⁸ https://www.wada-ama.org/sites/default/files/resources/files/isti_sample_collection_personnel_guidelines_final_en_feb_2021_0.pdf, accessed on 22 December 2021.

³⁹ ISTI Guidelines for Sample Collection, p. 20

⁴⁰ CAS 2019/A/6148, para. 311.

a demarcation between *authorisation* and *identification* is necessary due to their different functions under the ISTI. Bearing this distinction in mind, the wording of Article 5.3.3 of the ISTI does not offer any help with respect to the issue in question, i.e. the requirement of individualised authorisation letters. Instead, Article 5.3.3 of the ISTI also makes a distinction between authorisation and identification in the sense that the first sentence of the provision refers to the former and the second sentence to the latter.⁴¹ Accordingly, the documents mentioned in Article 5.4.2 lit. b) of the ISTI refer to the documents stated in the second sentence of Article 5.3.3 of the ISTI in order for the DCO to establish a link between themselves and the SCA, i.e. “*identification card from the Sample Collection Authority, driver’s license, health card, passport or similar valid identification*”.⁴² In addition, the second sentence also states that these documents “shall also” be carried by the DCO which further indicates a clear distinction between the documents mentioned in the first and second sentence of Article 5.3.3 of the ISTI. This does not mean that the DCO does not need to show the “*official documentation*” mentioned in the first sentence of Article 5.3.3 of the ISTI to the athlete. This is, however, only required as part of the *authorisation* process pursuant to Article 5.4.1 lit. b) of the ISTI. Accordingly, Article 5.3.3 of the ISTI does not provide for any individualised and mission-specific authorisation letter. Such requirement would also be counterproductive for a swift and “unnecessary burdensome administrative”⁴³ doping sample collection procedure and the fight against doping as such:⁴⁴

“For example, because out-of-competition testing is intended to catch a tested athlete unawares, providing him with detailed documentation that identifies the names of athletes and their prospective test dates would be self-defeating. Likewise, since the ‘typical’ mode for authorizing Sample Collections is through a blanket authorization to the Sample Collection Authority, the identities of individual Sample

Collection Personnel may not be known in advance of the mission, and so cannot be provided on the Letter of Authority. Authorizations for in-competition tests, in turn, may be issued before even knowing the identities of the athletes, much less the individuals (and possible chaperones) who will sample them...given a variety of factual circumstances, and in the light of the range of interests which the doping control process must accommodate, the ISTI adopts a flexible approach, not a bespoke one. It seeks to accommodate many different scenarios while ensuring a basic level of protection for athletes through mandatory documentation and identification requirements”.

The findings of the CAS panel in CAS 2019/A/6148 that the authorisation under Article 5.4.1 lit. b) of the ISTI does not require an individualised and mission-specific LoA is in line with its purpose, i.e. the authorisation of the SCA and SCP to collect urine and blood samples on behalf of the TA. A personalised LoA is not necessary if one considers that the DCO in charge needs to identify themselves in order to establish a link between themselves and the SCA under Article 5.4.2 lit. b) of the ISTI. The requirement of double identification, as raised by the Respondents in the Sun Yang procedure, appears therefore neither necessary nor appropriate for the overarching purposes of the protection of athlete’s rights and the avoidance of the provision of manipulated doping samples.⁴⁵ Nevertheless, this does not prevent the SCA and SCP to use individualised LoAs during the authorisation process. The frequent use of individualised authorisation letters by the SCA and SCP concerned may however lead to a customary practice which would then require TAs to provide individualised LoA in any future urine and blood sample collection session. The onus in this regard rests on the athlete.⁴⁶ The threshold to establish a customary practice that would trigger the provision of individualised LoA is, however,

⁴¹ CAS 2019/A/6148, para. 312.

⁴² Ibid.

⁴³ Ibid, para. 320.

⁴⁴ Ibid, para. 318.

⁴⁵ Cf. ISTI, art. 5.1.

⁴⁶ CAS 2019/A/6148, para. 324.

far from clear and has not been decided to date.

In the light of the above, *“the ISTI does not require documentation above and beyond that of a generic Letter of Authority on behalf of the Sample Collection Personnel as a whole”*⁴⁷.

c. Identification

As mentioned in the preceding part, the DCO (or Chaperone⁴⁸) need to identify themselves *“using the documentation referred to in Article 5.3.3”* either in the paper or electronic version of the identification document.⁴⁹ This issue has been clarified in CAS 2018/A/5885 & CAS 5936 in which the CAS panel held that *“there is no specific rule that requires mandatorily the presentation of a paper identification and a contrario that forbids electronic identification (a modern form of ID increasingly used in other contexts). Consequently, the Panel declares that an electronic identification is satisfactory for the purpose of Article 5.3.3 of the ISTI”*⁵⁰.

In summary, DCOs are required to show athletes the following documents in order to proof their authorisation and identity:

- Letter of Authorisation (= link between TA and SCA/SCP)
- Testing Order (= “personalised authorisation” provided in ADAMS⁵¹)
- Accreditation and documents provided in Article 5.3.3, 2nd sentence of the ISTI

Furthermore, the reference to “themselves” in Article 5.4.2 lit. b) of the ISTI does not mean that the entire SCP need to identify themselves. The wording explicitly and

unambiguously provides that it is the DCO or Chaperone who have to identify themselves during the notification process.⁵²

Accordingly, for example, the Blood Collection Officer (“BCO”), Blood Collection Assistant (“BCA”), or Doping Control Assistant (“DCA”) do not need to identify themselves under said provision. If one of them acts as a chaperone during the doping control session, the legal situation is of course different and can therefore require identification pursuant to Article 5.4.2 lit. b) of the ISTI (*“the DCO/Chaperone shall identify themselves...”*). SCP other than DCOs and Chaperones must, however, be adequately accredited by the SCA in order to be legally involved in the sample collection process in protection of the athletes’ rights and health. The SCA shall only grant accreditation for the respective SCP once the respective person has completed their training to ensure that they are sufficiently qualified for their assigned task during the urine and blood sample collection process.⁵³ Therefore, the DCO generally signs a Letter of Authorisation, which is different from the LoA discussed above, in order to confirm the SCP’s qualification for their role in the sample collection process. The SCP’s letter of authorisation shall be carried and shown to the respective athlete, if required.⁵⁴ Therefore, athletes ought to be entitled, at the very least, to ask for the SCP’s accreditation to ensure that the respective person has the expected expertise and training for the role assigned during the sample collection process. The existence or veracity of the SCP’s medical or other credentials may be a reason to object to the sample collection process as a whole on the Doping Control

⁴⁷ CAS 2019/A/6148, para. 328.

⁴⁸ The term “Chaperone” is defined in the ISTI as follows: *“An official who is suitably trained and authorized by the Sample Collection Authority to carry out specific duties including one or more of the following (at the election of the Sample Collection Authority); notification of the Athlete selected for Sample collection; accompanying and observing the Athlete until arrival at the Doping Control Station; accompanying and/or observing Athletes who are present in the Doping Control Station; and/or witnessing and verifying the provision of the Sample where the training specifically qualifies them to do so.”*

⁴⁹ CAS 2019/A/6148, para. 324

⁵⁰ CAS 2018/A/5885 & CAS 2018/A/5936, para. 175.

⁵¹ The abbreviation “ADAMS” refers to the Anti-Doping Administration and Management System.

⁵² See also CAS 2019/A/6148, para. 313.

⁵³ The required training can be different depending on the assigned task, cf. CAS 2019/A/6148, para. 346.

⁵⁴ WADA’s Guidelines for Sample Collection Personnel, p. 50.

Form, but it is not a justified reason to terminate testing, because “the SCO vouches for [the training of their subordinated colleagues]—in writing, as on the Statement of Confidentiality and orally, as part of a notification. Under the ISTI, the DCO speaks for the Sample Collection Personnel as a whole”.⁵⁵

The DCO/Chaperone are not the only persons who need to identify themselves during the notification process. The athletes also have the obligation to confirm their identity to prevent any manipulation of the sample collection process, cf. Article 5.4.2 lit. c) of the ISTI. The identification of athletes seems to be a “no-brainer” – at first sight – but appears to be an important requirement in the light of a recent discovered doping sample collection manipulation scheme in the sport of weightlifting. The WADA Intelligence and Investigations Department (“WADA’s I&I”) recently carried out two investigations on alleged urine substitution through the use of doppelgänger, namely *Operation Heir* and *Operation Arrow*.⁵⁶ The investigations uncovered that doppelgänger provided urine samples *in lieu* of weightlifters that were selected for testing⁵⁷ and therefore most certainly tempered with the Doping Control Process (cf. Article 2.5 of the WADA Code). These examples show that it is fundamentally important that the TA/SCA have a watertight system in place which does not allow sample substitution cases to occur again in the future.⁵⁸

B. Final remarks to Testing

Unannounced testing procedures – as part of preventive anti-doping investigations – is vital for combating doping in sport and protecting its integrity.⁵⁹ The prevention and detection of the use of doping therefore “demands and expects that, whenever physically,

hygienically and morally possible, the sample provided despite objections by the athlete. If that does not occur, athletes would systematically refuse to provide samples for whatever reasons, leaving no opportunity for testing”.⁶⁰

Accordingly, the termination of the doping control process due to irregularities on the grounds of a compelling justification can only be the last resort for athletes. Athletes must be aware that they may face the risk of a long sanction for the commitment of an ADRV if they prematurely terminate their doping control process on the basis of a subjectively presumed compelling justification if the competent hearing panel, including the CAS Anti-Doping Division (“CAS ADD”) or the CAS as an appellate arbitration tribunal, comes to the conclusion – in its *ex post* review of the circumstances in question – that no such compelling justification existed objectively at the material time of sample collection. To strike a fair balance between the competing interests of athletes and sports organisations, the recommended procedure for athletes is to undergo testing, object to the allegedly flawed doping process on the Doping Control Form and, ultimately, inform the TA about the irregularities immediately.⁶¹ Because of the severe consequences associated with an unjustified termination of the doping sample collection process, the SCP are required to thoroughly inform athletes thereof.⁶² As a consequence of the importance of testing and the resulting above-mentioned principle of mandatory submission to testing at any time, justifying circumstances that would allow athletes to terminate the doping sample collection process can only be assumed in exceptional cases. For example,

⁵⁵ CAS 2019/A/6148, para. 335.

⁵⁶ WADA Intelligence and Investigations Department, *A summary of WADA investigations into the International Weightlifting Federation and the sport of weightlifting* (October 2020).

⁵⁷ *Ibid*, pp. 8 and 12.

⁵⁸ Cf. ISTI, art. 5.3.4.

⁵⁹ See, e.g. Richard McLaren, Independent Investigator Report to the Oversight and Integrity Commission of International Weightlifting Federation (4 June 2020), pp. 102 et seq.

⁶⁰ CAS 2005/A/925, para. 75.

⁶¹ *Ibid*, CAS 2019/A/6148 (first decision), para. 310.

⁶² Cf. ISTI, art. 5.4.1 lit. e); see also WADA Code, arts 2.3 and 2.5.

- DCA of same gender not available during urine sample collection process⁶³;
- Privacy of the athlete and SCP are not guaranteed⁶⁴;
- Suitable qualified person to collect blood samples is not part of SCP⁶⁵; and
- The circumstances of the blood sample collection process do not comply with “recognised standard precautions in healthcare settings”⁶⁶.

In summary, testing is undoubtedly the most important investigatory measure to prevent and detect the use of prohibited substances and methods in sport. It is therefore central to have a temper-proof system in place in order to be prepared against any person who wishes to outwit sports organisations to the detriment of fair and equal sports competitions. However, the doping sample collection process interferes with the athletes’ right to privacy. As a consequence, it is necessary to strike a fair balance between these competing interests as an overarching principle of the testing regime under the WADA Code and ISTI.

In case the samples collected are positive, the Results Management Authority⁶⁷ has to review this AAF as a final step of the analytical anti-doping investigation procedure pursuant to Article 7.2 of the WADA Code in conjunction with Article 5.1 of the ISRM, including the verification of whether a Therapeutic Use Exemption

(“TUE”) had been granted in favour of the athlete.⁶⁸ In the affirmative, investigations against athletes shall be discontinued, unless other circumstances point to an ADRV.

IV. Whereabouts

An increasing number of cases before the CAS revolve around so-called Whereabout Failures.⁶⁹ Whereabout Failures can be twofold – Filing Failure⁷⁰ and Missed Tests⁷¹. Three Whereabouts Failures, e.g. two Filing Failures and one Missed Test, within a period of twelve months constitute an ADRV under Article 2.4 of the WADA Code⁷² (“three strikes and you’re out”) which may be sanctioned with an ineligibility sanction of up to two years pursuant to Article 10.3.2 of the WADA Code. The basic rule referring to the Whereabouts obligations of “high priority and high risk”⁷³ athletes, who are included in so-called Registered Testing Pools (“RTP”), is Article 5.5 of the WADA Code which provides – in its pertinent parts – that

“Athletes who have been included in a Registered Testing Pool by their International Federation and/or National Anti-Doping Organization shall provide whereabouts information in the manner specified in the International Standard for Testing and Investigations...”

For the purpose of this paper, it is important to mention that Whereabouts information of athletes are not an investigatory measure for

⁶³ ISTI, art. C.4.5.

⁶⁴ ISTI, art. C.4.7 in conjunction with ISPPPI.

⁶⁵ ISTI, art. D.1 lit. a).

⁶⁶ ISTI, arts, D.1 lit. a) and D.4.1.

⁶⁷ Cf. WADA Code, art. 7.1.

⁶⁸ ISRM, art. 5.1.1.1.

⁶⁹ See e.g. CAS 2020/A/7516 & CAS 2020/A/7559; CAS 2020/A/7528.

⁷⁰ The term “Filing Failure” is defined under the ISTI as follows: “A failure by the Athlete (or by a third party to whom the Athlete has delegated the task) to make an accurate and complete Whereabouts Filing that enables the Athlete to be located for Testing at the times and locations set out in the Whereabouts Filing or to update that Whereabouts Filing where necessary to ensure that it remains accurate and complete, all in accordance with Article 4.8 of the International Standard for Testing and Investigations and Annex B of the International Standard for Results Management.”

⁷¹ The ISTI defines “Missed Tests” as follows: “A failure by the Athlete to be available for Testing at the location and time specified in the 60-minute time slot identified in their Whereabouts Filing for the day in question, in accordance with Article 4.8 of the International Standard for Testing and Investigations and Annex B of the International Standard for Results Management.”

⁷² WADA Code, art. 2.4 reads as follows: “Any combination of three missed tests and/or filing failures, as defined in the International Standard for Results Management, within a twelve-month period by an Athlete in a Registered Testing Pool.”

⁷³ Jonathan Taylor and Adam Lewis, “Article 2.4 ADRV – Three Whereabouts Failures in Twelve Months” in Jonathan Taylor and Adam Lewis (eds.), *Sport: Law and Practice*, Bloomsbury Professional, 2021, para. C9.1.

the detection of the use of prohibited substances. It is rather a measure that shall enable the sports organisation with testing authority to conduct unannounced testing⁷⁴, which is evidenced by the fact that Whereabouts information falls within the testing planning phase under Article 4 of the ISTI. Whereabouts information provide the respective sports organisations with the required information about the date, time and location in which athletes can be approached and notified for testing.⁷⁵ This is particular important considering that, for example, national-level and international-level athletes are constantly travelling for training and competitions. The associated difficulties to locate athletes is counteracted with the whereabouts information imposed upon them. Given its importance under the WADA Code and the ISTI, the Whereabouts shall be briefly addressed in the following.

Athletes who have been informed about their inclusion in RTP⁷⁶ and who are therefore subject to Article 5.5 of the WADA Code⁷⁷ generally have two Whereabouts obligations under the WADA Code and the ISTI. First, athletes are required to provide the respective ADO with Whereabouts responsibility⁷⁸ with different information as part of their whereabouts obligations.⁷⁹ This includes for each day of the following quarter

“the full address of the place where the Athlete will be staying overnight (e.g. home, temporary, lodgings, hotel, etc.) ... each location where the Athlete will train, work, conduct any other regular activity (e.g. school), as well as the usual time frames for such regular activities...the Athlete’s Competition/Event

*schedule...[and]one specific 60-minute time slot between 5 a.m. and 11 p.m. each day where the Athlete will be available and accessible for Testing at a specific location”.*⁸⁰

Particularly, the 60-minute time slot shall enable the ADOs to conduct unannounced testing, because they will know where athletes can be approached for testing. Given the fact that (i) such information may contain sensible information and (ii) athletes may be located for testing while enjoying private and intimate parts of their lives, it is without doubt that the provision of whereabouts information interferes with the right to respect for a private life of athletes, for example protected under Article 8(1) of the European Convention on Human Rights (“ECHR”).⁸¹ However, such stringent requirements appear to be necessary for the objective of doping-free sport. In this regard, the European Court of Human Rights held that

*“[t]he Court does not underestimate the impact of the whereabouts requirements on the applicants’ private lives. Nevertheless, the general-interest considerations that make them necessary are particularly important and, in the Court’s view, justify the restrictions on the applicants’ rights under Article 8 of the Convention. Reducing or removing the requirements of which the applicants complain would be liable to increase the dangers of doping to their health and that of the entire sporting community, and would run counter to the European and international consensus on the need for unannounced testing”.*⁸²

⁷⁴ CAS 2006/A/1165, para. 7.17; CAS 2014/A/2, para. 21

⁷⁵ Jonathan Taylor and Adam Lewis, “Article 2.4 ADRV – Three Whereabouts Failures in Twelve Months” in Jonathan Taylor and Adam Lewis (eds.), *Sport: Law and Practice*, Bloomsbury Professional, 2021, para. C9.1.

⁷⁶ ISTI, art. 4.8.7.1.

⁷⁷ ISTI, art. 4.8.6.1.

⁷⁸ ISTI, art. 4.8.14.

⁷⁹ The deadline for the whereabouts information to be filed may be specified by each ADO individually, provided that athletes subject to the testing authority of this ADO is duly informed about the applicable

filing deadline. Otherwise, whereabouts information shall be submitted “prior to the first day of each quarter (i.e., 1 January, 1 April, 1 July and 1 October, respectively).” cf. ISTI, art. 4.8.8.2.

⁸⁰ ISTI, art. 4.8.8.2.

⁸¹ FNASS and Others v. France, ECtHR (App no 48151/11 and 77769/13, 18 January 2018) para. 159; Jonathan Taylor and Adam Lewis, “Article 2.4 ADRV – Three Whereabouts Failures in Twelve Months” in Jonathan Taylor and Adam Lewis (eds.), *Sport: Law and Practice*, Bloomsbury Professional, 2021, para. C9.1.

⁸² FNASS and Others v. France, ECtHR (App no 48151/11 and 77769/13, 18 January 2018) para. 191.

On the basis of the overriding reasons in favour of the whereabouts obligations under the WADA Code, athletes commit a Filing Failure if they do not provide the required information in a timely manner. In addition, athletes are also responsible to provide accurate information and to keep their whereabouts information up to date, as inaccurate or incomplete information may also constitute a Filing Failure pursuant to Article 4.8.8.6 of the ISTI.⁸³ For example, the provision of a wrong address may already be sufficient for the establishment of a Filing Failure due to its inaccuracy.⁸⁴ Athletes may delegate their whereabouts information to a third person. However, Article 8.4.14.4 of the ISTI clearly and unequivocally states that it is, ultimately, each athlete's own responsibility to ensure that whereabouts information are duly provided correctly and in time.⁸⁵

The respective ADO uses the whereabouts information to locate athletes for testing. The second obligation of athletes under their whereabouts obligation under Article 5.5 of the WADA Code is therefore to be available for testing according to their provided whereabouts information. If the athlete cannot be found within the specific 60-minute time window at the indicated location, then this will be considered a Missed Test pursuant to Article 4.8.6.2 of the ISTI, provided that the DCO took – objectively⁸⁶ – the necessary and reasonable steps to find the targeted athlete at the specific location.⁸⁷ An additional criterion for a Missed Test is set forth in Article B.2.4 lit. e) of the ISRM which provides that the athlete's behaviour must be “*at least negligent*”⁸⁸. In case of the athlete's

unavailability, it is, however, presumed that the athlete acted negligently and it is therefore upon the athlete to rebut this presumption and to prove, on the basis of the standard of a balance of probability⁸⁹, that s/he was not in violation of their duty of care of the whereabouts obligation. In other words, the athlete will be liable for a Missed Test if s/he is not present at the location at the given time, unless they can establish that s/he did not act negligent at the time of the attempt to test the athlete during the 60-minute time slot.⁹⁰ In this regard, it is also important to mention that athletes may nevertheless be tested outside this period in accordance with their testing obligation under Article 5.2 of the WADA Code. However, if the athlete cannot be located outside the 60-minute time slot, this unavailability will not be counted against the athlete as a Missed Test.⁹¹

Additionally, the failure to file whereabouts information in time, to update them or to be available at the specified location during the 60-minute time slot may only constitute a Filing Failure and Missed Test, respectively, if the athlete has been duly notified about their inclusion in the RTP and the related whereabouts obligation and consequences.⁹²

Another critical criterion when establishing an ADRV under Article 2.4 of the WADA Code, on the basis of the standard of comfortable satisfaction⁹³, is the commencement of the twelve-month period within which the three whereabouts failures must have occurred. In this context, it is important to distinguish between Filing Failures and Missed Tests, because the latter

⁸³ CAS 2015/A/4219 para. 8.7.

⁸⁴ CAS 2020/A/7526 & CAS 2020/A/7559, paras 131.

⁸⁵ ISTI, art. 4.8.14.4 lit. a).

⁸⁶ CAS 2014/A/2, para. 69: in this case, e.g., the CAS Panel found that a telephone call to locate the athlete may only be necessary and reasonable in exceptional circumstances; see also CAS 2020/A/7528, para. 154.

⁸⁷ ISTI, art. 4.8.8.5 lit. d); for example, the CAS Panel in CAS 2014/A/2 found that a telephone call to locate the athlete may only be necessary and reasonable in exceptional circumstances. See also CAS

2020/A/7528, para. 154; CAS 2020/A/7526 & CAS 2020/A/7559, paras 130 et seq.

⁸⁸ Before the 2021 ISRM came into force, this criterion was expressly mentioned in ISTI, art. I.4.3 lit. e); see also CAS 2020/A/7528, para. 146.

⁸⁹ Cf. WADA Code, art. 3.1.

⁹⁰ ISRM, art. B.2.4 lit. e); see also CAS 2020/A/7528, para. 148.

⁹¹ ISTI, art. 4.8.6.2; see also ISRM, art. B.2.2

⁹² WADA Code, art. 3.2.3(iv) in conjunction with ISTI, art. 4.8.7.1; see also ISRM, art. B.2.4.

⁹³ WADA Code, art. 3.1.

*“take place on the exact date of the failed control while Filing Failures automatically take place on the first day of the relevant quarter”*⁹⁴. The notification of the athlete of either the Filing Failure or Missed Test is therefore irrelevant for the commencement of the twelve-month period prescribed in Article 2.4 of the WADA Code.

Although the whereabouts regime under the WADA Code is not an investigatory measure, as mentioned before, the failure to provide proper whereabouts information or to be available for the doping sample collection process within the 60-time window may trigger anti-doping investigations regarding a violation of Article 2.4 of the WADA Code. Accordingly, similar to anti-doping investigations in testing scenarios, the Results Management Authority needs to review the circumstances of the individual case and decide whether the requirements for three Whereabouts Failures are fulfilled, cf. Article B.3.2 of the ISRM.

V. Reliable means and intelligence gathering

The provision of Whereabouts information for the purpose of testing of targeted athletes also provide ADOs with corroborating evidence to prove the Presence and Use of Prohibited Substances under Articles 2.1 and 2.2 of the WADA Code. In this case, the direct detection of a Prohibited Substance in the test sample and therefore in the system of an athlete is sufficient to establish an ADRV and to impose severe consequences on athletes⁹⁵, provided that no exceptions apply, such as a granted TUE.⁹⁶

However, the Use of a Prohibited Substance or Method under Article 2.2 of the WADA Code – in the absence of a positive doping sample – and all of the other ADRVs under Article 2 of the WADA Code may only be

proven by other evidence and intelligence. Such ADRVs are, for example, Tampering, the Possession of a Prohibited Substance or Complicity. Consequently, intelligence gathering plays a major role to put together a strong evidential case against athletes alleged, particularly in cases related to asserted ADRVs that cannot be established through the investigatory measure of testing and analysis of the A and B sample of athletes.

The basic norm for the gathering of non-analytical intelligence in anti-doping investigation proceedings is Article 5.7 of the WADA Code which states that ADOs *“shall have the capacity to conduct and shall conduct, investigations and gathering intelligence as required by the International Standard for Testing and Investigations”*.⁹⁷ This provision legitimises the conduct of anti-doping investigations by ADOs. It is, nevertheless, silent on the question of how compelling evidence can be obtained. As previously mentioned, to find an appropriate answer to this difficult task of ADOs, it is important to distinguish between preventive and repressive investigatory measures when discussing intelligence gathering in anti-doping investigation proceedings. This should be borne in mind because different rules and regulations and therefore requirements apply to preventive and repressive investigatory procedures.⁹⁸

The legitimacy of the use of investigatory measures in anti-doping investigation proceedings is primarily governed by Article 11 of the ISTI. All measures taken in anti-doping investigation proceedings must of course also comply with mandatory statutory provisions. It is therefore essential for ADOs to be clear about the applicable legal regime. Furthermore, it is recommended that ADOs examine whether the investigation serves a general investigatory purpose or if it is addressed against any specific athletes who is alleged of

⁹⁴ CAS 2020/A/7526 & CAS 2020/A/7559, paras 183; see also ISRM, art. B.1.2.

⁹⁵ Cf. WADA Code, art. 2.1.2.

⁹⁶ WADA Code, art. 4.4.1.

⁹⁷ WADA Code, art. 5.7; see also WADA Code, art. 20.7.14.

⁹⁸ Björn Hessert, *Sports investigations in the light of the European Convention on Human Rights - Gathering, use and exchange of intelligence in sports proceedings* (forthcoming).

an ADRV at the material time of the application of the investigatory measure.

Additionally, it is important to distinguish between the phrases “other reliable means” – provided under Article 3.2 of the WADA Code – and “investigatory measures” used for the purposes of this paper. The expression of “other reliable means” refers to all possible information that ADOs may use to prove an alleged ADRV, including information gathered through the application of investigatory measures, such as testing for APB purposes. The range of reliable means is generally wide and may only be limited by the applicable procedural law. The procedural law deems to be the appropriate standard in this regard, because whether a piece of evidence can be qualified as “reliable” is related to the question whether it can be admitted as evidence in the proceedings before the hearing panel or CAS, i.e. the admissibility of the evidence concerned. The information gathered through the use of investigatory measures by ADOs may generally fall within the scope of “other reliable means” under Article 3.2 of the WADA Code, assuming the evidence is admissible. However, this may not necessarily be the other way around. The scope of the term “investigatory measures” is much narrower. It refers only to measures that ADOs may undertake to gather intelligence for the detection of the ADRV in question. In case a specific investigatory measure is challenged by the person under investigation, the question becomes of whether the *collection* of evidence at the

material time of the use of the respective investigatory measures is to be considered lawful. Whether an illegitimate application of investigatory measures may result in the inadmissibility of the information gathered is, however, a different question:⁹⁹

“If a means of evidence is illegally obtained, it is only admissible, if the interest to find the truth prevails (Articles 152, 168 Swiss Code of Civil Procedure (“CCP”); HAFNER P., Commentary to the Swiss Code of Civil Procedure, 2nd ed., para. 8). According to the Swiss Federal Tribunal and the ECHR, the courts shall balance the interest in protecting the right that was infringed by obtaining the evidence against the interest in establishing the truth. If the latter outweighs the first, the courts may declare a piece of evidence admissible for assessment even though it was unlawfully acquired (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., p. 461)”.

Reliable means that do not fall within the scope of “investigatory measures”, but are no less important for the detection and prosecution of ADRVs. For example, the information provided by whistleblowers¹⁰⁰ is important which can be evidenced by the fairly new provision of Article 2.11 of the WADA Code.¹⁰¹ The information provided by whistleblowers has often been the reason and therefore the starting point for conducting anti-doping investigations.¹⁰² A well-functioning system for persons to provide information anonymously is key for the commencement of – mostly – repressive anti-doping investigation proceedings,¹⁰³

⁹⁹ CAS 2016/O/4488, para. 78; SFT 4A_448/2013; see also Björn Hessert, *Sports investigations in the light of the European Convention on Human Rights - Gathering, use and exchange of intelligence in sports proceedings* (forthcoming).

¹⁰⁰ Cf. ISTI, arts. 11.2.1 and 11.4.3.

¹⁰¹ For example WADA Code, art. 2.11.1 reads: “Any act which threatens or seeks to intimidate another Person with the intent of discouraging the Person from the good-faith reporting of information that relates to an alleged anti-doping rule violation or alleged non-compliance with the Code to WADA, an Anti-Doping Organization, law enforcement, regulatory or professional disciplinary body, bearing body or Person conducting an investigation for WADA or an Anti-Doping Organization.”

¹⁰² CAS 2016/O/4488; WADA Intelligence and Investigations Department, *A summary of WADA investigations into the International Weightlifting Federation and the sport of weightlifting* (October 2020).

¹⁰³ Sudarshan Kanagaratnam, Issues in the Gathering and Use of Non-analytical Evidence to Prove Anti-Doping Rule Violations in Ulrich Haas and Deborah Healey (eds.), *Doping and the Law*, Hart, 2016, pp. 107, 108, Gunter Younger, Mike Younger and Sebastien Gaillard, Emerging Trends in Doping: Investigations and Field Operations in Olivier Rabin and Ornella Corazza (eds.), *Emerging Drugs in Sport*, Springer, 2022, pp. 127, 131 et seq.

such as the WADA's "Speak-Up!" program.¹⁰⁴ The importance of whistleblowers for the commencement of sports investigations has also been recognised by the CAS:¹⁰⁵

"What is the role of a 'whistle blower'? To be able to bring matters to the authority's attention that it might not be aware of, so it can look into those matters and potentially sanction a wrong doer? Whilst there should be some basis or foundation to allegations made by a whistle blower, once that basic hurdle is overcome, then it is surely for the authority to take over and to investigate properly and then for it (or its judicial body) to consider guilt or innocence and, if the former, any sanction".

Information provided by journalists and law enforcement agency may be similarly vital as reliable means in order to detect ADRV.¹⁰⁶

Apart from such information provided by third parties, ADOs and WADA¹⁰⁷ may also apply coercive measures to discover the truth about the matter under investigation. Accordingly, ADOs and WADA may have the investigatory power to interview the person under investigation. They can also request the investigated person to produce certain information in their possession, such as information contained on electronic devices or bank statements.¹⁰⁸ ADOs and WADA may legitimately resort to other coercive measures in their anti-doping investigations.¹⁰⁹ Athletes and athletes support personnel generally have a cooperation obligation, and the failure to cooperate may lead to the imposition of disciplinary sanctions under the disciplinary regulations of the respective sports

organisation.¹¹⁰ In this regard, it is important to mention that certain cooperation with the ADOs conducting the investigations may also be beneficial for athletes and athlete support personnel in the sense that this cooperation may be considered as a mitigating circumstance when determining the appropriate sanction under Article 10 of the WADA Code, such as substantial assistance¹¹¹ and admission¹¹². The 2021 WADA Code now also provides for so-called "Results Management Agreements" and "Case Resolution Agreements" under Article 10.8.2.¹¹³

VI. The outcome and consequences of anti-doping investigations

At the end of the investigation process, the respective ADO will have to decide whether the AAF or the information gathered provides sufficient evidence to prosecute an athlete or other person for an ADRV.

In the affirmative, Article 12.3.2 of the ISTI provides that the person alleged shall be notified. The notification of athletes or other persons of an alleged ADRV is provided in Article 7.2 of the WADA and further specified in Article 5.3.2 of the ISRM. According to the latter provision, the person alleged of an ADRV shall be informed about the asserted ADRV and its possible consequences, the facts of the case and the relevant evidence supporting the alleged ADRV, their right to be heard, the opportunity to mitigate the sanction as mentioned above, and information related to a voluntary acceptance of a provisional suspension.¹¹⁴ Furthermore, the athlete or

¹⁰⁴ Ibid.

¹⁰⁵ CAS 2015/A/4328, para. 91.

¹⁰⁶ See e.g. documentaries produced by the ARD-Dopingredaktion available at www.sportschau.de/investigativ/geheimsachedoping/index.html, accessed on 9 January 2022; see also Björn Hessert, The exchange of self-incriminating information of athletes between sports organisations and law enforcement (2021) *International Sports Law Journal*, <https://doi.org/10.1007/s40318-021-00194-y>, accessed 9 January 2022.

¹⁰⁷ Cf. WADA Code, art. 20.7.14.

¹⁰⁸ ISTI, art. 12.2.3; see also CAS 2020/O/6689.

¹⁰⁹ See Björn Hessert, *Sports investigations in the light of the European Convention on Human Rights - Gathering, use and exchange of intelligence in sports proceedings* (forthcoming).

¹¹⁰ ISTI, art. 12.2.4.

¹¹¹ WADA Code, art. 10.7.1.

¹¹² WADA Code, art. 10.7.2.

¹¹³ WADA Code, art. 10.8.2; see Ulrich Haas, The Revision of the World-Anti Doping Code 2021 (2021) *CAS Bulletin Budapest seminar October 2019* 24, 39.

¹¹⁴ ISRM, 5.3.2.

other person concerned shall be informed that the ADO “shall bring forward the proceedings against the Athlete or other Person in question in accordance with Code Article 8”¹¹⁵. The same applies in cases of the allegation of a violation of Article 2.4 of the WADA Code.¹¹⁶

If the ADO, however, comes to the conclusion that an athlete or other person shall not be prosecuted for the initially asserted ADRV based on the results of the investigation procedure, two different scenarios must be distinguished.

If the athlete or other person under investigation had already been notified of the asserted ADRV pursuant to Article 12.3.2 of the ISTI, the ADO must render a so-called “Decision Not to Move Forward” under Article 5.4 of the ISRM which provides as follows:

“If at any point during Results Management up until the charge under Article 7, the Results Management Authority decides not to move forward with a matter, it must notify the Athlete or other Person (provided that the Athlete or other Person had been already informed of the ongoing Results Management) and given notice (with reasons) to the Anti-Doping Organizations with a right of appeal under Code Article 13.2.3”

In turn, if the athlete or other person had not yet been informed of the asserted ADRV and the intention to prosecute them, the anti-doping investigation procedure shall be closed pursuant to Article 12.3.3 of the ISTI in the way that information thereof shall be provided to WADA and the respective national or international federation with reasons.¹¹⁷ That way, WADA and the relevant sports organisation should be enabled to decide whether or not they wish to appeal this decision.¹¹⁸

VII. Summary

The term “anti-doping investigations” refers to preventive and repressive investigation proceedings aiming at detecting and preventing doping in sport. The preventive or repressive nature of an investigation depends on whether a specific anti-doping rule violation is being investigated against a sports person who is alleged to have committed that violation.

Anti-doping organisations can resort to different investigatory measures in anti-doping investigation proceedings. The undoubtedly most frequent measure used in such proceedings is the collection of blood and urine samples, i.e. testing. During the doping sample collection process, the athlete has to be notified in accordance with the requirements set out in Article 5 of the ISTI. Part of this process is to provide the athlete with documents to prove the authorisation to collect doping samples. The letter of authorisation issued by the Testing Authority only requires a generic delegation of its authority to the Sample Collection Authority. In addition, the DCO/Chaperone need to identify themselves when approaching the targeted athlete for testing.

An important means to enable anti-doping organisations to carry out unannounced testing is the obligation of athletes – who are included in registered testing pools – to provide whereabouts information. These athletes have the obligation to provide accurate and updated information about their whereabouts for each single day on quarterly basis. Athletes are also required to be available for testing during a 60-minute time slot at a specific location, as indicated in the athletes whereabouts information. The triple breach of the whereabouts obligation within a twelve-month period may constitute an anti-doping rule violation pursuant to Article 2.4 of the WADA Code and can therefore have serious consequences for the professional career of athletes.

¹¹⁵ ISTI, art. 12.3.2.

¹¹⁶ ISRM, art. B.3.2 lit. d).

¹¹⁷ ISTI, art. 12.3.3.1; see also for whereabouts ISRM, art. B.3.2 lit. c).

¹¹⁸ ISTI, art. 12.3.3.2.

In non-analytical anti-doping investigations, anti-doping organisations may benefit from information provided by third parties, such as whistleblowers, journalists or law enforcement agencies. Additionally, anti-doping organisations may also use investigatory measures of their own for the purpose of intelligence gathering. For example, anti-doping organisations may interview the sportsperson alleged or request the provision of documents and information.

Anti-doping investigation proceedings are necessary to ensure fair and equal sports competitions. The detection and prevention of anti-doping rule violations is at the heart of the fight against doping in sport. In all of these proceedings, it is important to strike a fair balance between the competing interests of sports organisations (and the public) and sportspersons, taking into account “*the constraints inherent in the measures needed to combat that scourge*”.¹¹⁹

¹¹⁹ FNASS and Others v. France, ECtHR (App no 48151/11 and 77769/13, 18 January 2018) para. 188.

La désignation de la partie défenderesse devant le Tribunal Arbitral du Sport (TAS)

Pauline Pellaux / Matthieu Reeb*

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I. Introduction

Le choix de ce sujet nous a été inspiré par les nombreuses discussions qu'il a suscitées avec Gérard Simon. Il voyait, à raison, dans la problématique de la légitimation passive, une spécificité suisse, source de perplexité pour de nombreux utilisateurs du Tribunal arbitral du sport (TAS), même pour les plus expérimentés. Cette question ayant récemment scellé le sort d'un appel, sans que les autres questions *a priori* centrales n'aient à être examinées par Gérard et deux de ses collègues, il lui avait paru opportun de la présenter aux étudiants du Master 2 de droit du sport de l'Université de Dijon. C'est donc à ce sujet que Gérard a consacré sa première leçon sur le TAS comme invité à ce master, qu'il a fondé il y a plus de quinze ans. Ayant

eu la chance de partager cette journée avec lui, nous avons souhaité, en tant que juristes suisses et contributeurs à cet ouvrage au nom du TAS, faire découvrir aux lecteurs de ces "*Mélanges en l'honneur du Professeur Gérard Simon*", les recherches, interrogations et solutions, que Gérard et ses collègues arbitres ont développé sur ce sujet dans leurs sentences.

La présente contribution ne prétend toutefois nullement être un reflet exhaustif de la jurisprudence du TAS sur la question de la légitimation passive mais se concentrera, après une introduction de cette notion, sur quelques sentences qui sont susceptibles de nourrir la réflexion.¹

II. Un élément nécessaire et fondamental

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Chaussard, Ch. Fortier et D. Jacotot (dir.), *Travaux du Credimi*, vol. 57, LexisNexis, 2021, pp. 405-418.

¹ Nous remercions le Prof. Ulrich Haas pour sa lecture de la présente contribution et pour les nombreux échanges qui l'ont tous enrichie.

A. Un élément nécessaire

Selon les termes des articles R38 et R48 du Code de l'arbitrage en matière de sport (le Code), tout acte introductif d'instance² devant le TAS doit contenir le nom et l'adresse complète de la/des parties défenderesse(s). A défaut, la partie appelante (ou demanderesse) bénéficiera d'un bref et unique délai de quelques jours pour compléter son acte. Si, à l'échéance de ce délai, l'adresse complète de la partie intimée n'est toujours pas indiquée, le TAS ne procédera pas.

B. Un élément fondamental

Si le Greffe du TAS s'assure que les actes introductifs d'instance sont complets avant d'initier une procédure arbitrale, il ne lui appartient toutefois pas de vérifier la justesse des choix opérés. Or, le choix du "mauvais" défendeur dans l'acte initiant une procédure entraînera, parfois des mois plus tard, le rejet de l'appel ou de la demande.

En effet, cette erreur matérielle ne peut, en principe,³ pas être corrigée ultérieurement.⁴ En outre, contrairement au demandeur dans le cadre d'une procédure ordinaire,⁵ l'appelant ne pourra presque jamais initier une nouvelle procédure arbitrale, le délai d'appel étant

² A savoir, une déclaration d'appel, dans le cadre d'une procédure arbitrale d'appel, procédure dans laquelle le TAS est appelé à confirmer, annuler ou modifier la décision prise par une fédération ou un autre organisme sportif, ou une requête d'arbitrage, dans le cadre d'une procédure arbitrale ordinaire dans laquelle le TAS est appelé à trancher, en tant que première instance, un litige entre des parties.

³ Il nous paraît y avoir trois exceptions à ce principe : (i) l'appelant réalise son erreur et élargit son appel au « bon défendeur » dans le délai d'appel ; (ii) le « bon » défendeur se voit reconnaître le statut de co-intimé à la suite de l'acceptation de sa demande d'intervention (cf. article R41.1 et R41.3 du Code) ou (iii) ou de son appel en cause par la partie intimée (cf. articles R41.2 et R41.3 du Code).

⁴ Ainsi, dans la sentence *CAS 2017/A/5131 Baker Alajfoo v. Hisham Al Taber, Mebrdad Pablevanzadeh & Babrain Mind Sports Association*, du 7 juin 2018, la Formation arbitrale a relevé que : « *the Appellant has*

presque toujours déjà échoué lorsqu'il est amené à réaliser sa méprise.

Au vu de l'importance cruciale de cette question pour l'appelant et des spécificités de l'appel au TAS, nous consacrons la suite de cette contribution essentiellement à la désignation de la partie intimée à une procédure arbitrale d'appel devant le TAS.

III. Les règles pertinentes

S'il est fondamental pour l'appelant de ne pas omettre de désigner le "bon" intimé dans sa déclaration d'appel, les règles pour l'aider à le déterminer sont rares et leur lecture pas toujours aisée.

Le Code étant muet sur ce point,⁶ il faut se référer à la disposition générale sur le droit applicable, en appel, l'article R58 du Code.

Selon cette disposition, "[l]a Formation statue selon les règlements applicables et, subsidiairement, selon les règles de droit choisies par les parties, ou à défaut de choix, selon le droit du pays dans lequel la fédération, association ou autre organisme sportif ayant rendu la décision attaquée a son domicile ou selon les règles de droit que la Formation estime appropriée. Dans ce dernier cas, la décision de la Formation doit être motivée".

Les réglementations des fédérations sportives ne consacrant souvent aucune disposition à l'identité de la partie défenderesse et de

failed to designate FIDE as a Respondent within the deadline prescribed at Article R49 of the Code, which he could have done to cure any procedural mistake in its initial statement of appeal. It is not possible to circumvent the obligation to name the (right) respondent already with the statement of appeal based on Article R48 CAS Code by requesting to join such party at a later stage. The CAS Code does not allow such a 'correction/substitution' of a respondent, especially when the time limit to file the appeal has expired. The Code does not provide for a mechanism that would allow for third party to be compelled to join ».

⁵ Le demandeur pourra en effet simplement déposer une nouvelle requête, la non-initiation d'une procédure arbitrale à la suite du dépôt d'une requête incomplète ne constituant pas un désistement d'action.

⁶ Le Code ne contient que des dispositions de nature procédurale alors que, comme nous le verrons ultérieurement, la question de la légitimation passive est, en droit suisse, une question de fond.

nombreuses fédérations ayant leur siège en Suisse, le droit suisse sera très souvent le droit applicable à cette question.⁷

Selon la doctrine et la jurisprudence helvétiques, l'intimé a la légitimation passive s'il est l'obligé du droit et s'il est revendiqué quelque chose de sa part.⁸ La légitimation passive relève ainsi, dans un procès civil, du fondement matériel de l'action, "*elle appartient au sujet [passif] du droit invoqué en justice et son absence entraîne, non pas l'irrecevabilité de la demande, mais son rejet*".⁹

Le droit applicable à l'association, forme sociale de la plupart des fédérations sportives, traite de la contestation des décisions associatives à l'article 75 du Code civil suisse (CC). Cette disposition, source de la procédure d'appel devant le TAS, est ainsi libellée : "*Tout sociétaire est autorisé de par la loi à attaquer en justice, dans le mois à compter du jour où il en a eu connaissance, les décisions auxquelles il n'a pas adhéré et qui violent des dispositions légales ou statutaires*" (mises en évidence ajoutées).

Malgré un libellé relativement étroit, le Tribunal fédéral suisse (TF) a élargi son champ d'application aux membres indirects d'une association et aux décisions prises par un organe subordonné à son assemblée générale.¹⁰

Or, si dans le cadre de l'article 75 CC la légitimation passive appartient en principe à l'association dont la décision est contestée,¹¹ cela signifie-t-il, qu'en appel, c'est toujours

l'association qui a rendu la décision appelée qui a la légitimation passive ?

Comme nous allons le voir ci-après les spécificités du droit du sport appellent une solution plus nuancée.

VI. La distinction schématique et ses limites

A. La distinction entre litiges verticaux et horizontaux

La jurisprudence du TAS distingue depuis longtemps les litiges "verticaux" des litiges "horizontaux". Les litiges verticaux sont ceux relatifs à l'exercice par l'association de son autorité sur l'un de ses membres afin de définir son rapport avec ce dernier. Les litiges "horizontaux" sont ceux relatifs à l'exercice par l'association de son autorité dans le cadre d'un litige entre plusieurs de ses membres, définissant ainsi leurs rapports entre eux.

Dans la première catégorie, l'on trouve, par exemple, les décisions traitant de l'octroi de licences, de l'éligibilité à des compétitions, de l'imposition de sanctions disciplinaires, ou de l'acquisition, voire de la perte, de la qualité de membre.

Sous réserve des cas dans lesquels l'association a choisi de déléguer sa

⁷ Cette question étant à la frontière entre la procédure et le fond, et certains pays, comme la France, la traitant sous un angle purement procédural, il serait par ailleurs peut-être approprié, dans un souci d'harmonisation et afin de palier à d'éventuelles lacunes, de toujours la soumettre au droit suisse.

⁸ Pour une référence récente voir *TAS 2019/A/6351 Fédération Guinéenne de Football, Aboubacar Conté & Ahmed Tidiane Keita c. Confédération Africaine de Football*, para. 68 : « Par ailleurs, conformément au droit suisse, tel qu'interprété par le Tribunal Fédéral et appliqué par le TAS, en principe, la légitimation passive, c'est-à-dire la qualité pour défendre, appartient à celui qui est l'obligé du droit et contre qui est dirigé l'action du demandeur (« Under swiss law, as a principle, a party has standing to be sued and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it »)

(*ATF 107 II 82 cons. 2a ; ATF 125 II 82 consid. 1a, CAS 2009/A/1919, CAS 2013/A/3301*) » (para. 68).

⁹ ATF 128 II 50, 55, consid. 2 b) bb), arrêt dans lequel le TF explique la distinction entre capacité d'être partie et légitimation (active ou passive).

¹⁰ Voir, par exemple, ATF 108 II 18 (19) et ATF 132 III 503 consid. 3.2., cités dans PERRIN/CHAPPUIS, *Droit de l'association*, 3^{ème} éd., Schulthess, p. 170, note de bas de page 334 et HAAS, *Standing to appeal and standing to be sued*, dans: BERNASCONI/RIGOZZI (éditeurs), *International Sport Arbitration*, 6th Conference CAS & SAV/FSA, Weblaw, p. 53 à 88, p. 58 note de bas de page 15 et p. 61 note de bas de page 23.

¹¹ Pour un résumé de la doctrine et de la jurisprudence sur ce point, voir HAAS, *op. cit.*, p. 75

prérogative à un tiers,¹² il est alors assez manifeste que le principe de l'article 75 CC est pleinement applicable et que l'association a la légitimation passive. Elle doit ainsi être désignée comme partie défenderesse devant le TAS, sous peine de rejet de l'appel.

Plus spécifiques à l'appel au TAS, les litiges horizontaux prêtent davantage à la discussion. L'association exerce ici une autorité quasi-juridictionnelle en jugeant d'un litige entre au moins deux de ses membres ;¹³ elle définit leurs droits et obligations l'un par rapport à l'autre.

Pour certains, une telle décision ne relève pas même du champ d'application de l'article 75 CC, l'association réglant un litige contractuel entre deux parties et non un litige associatif. Pour d'autres, elle rend toujours une décision associative, l'association veillant alors à la bonne application des règles qu'elle a édictées entre ses membres. Pour tous, la principale partie intimée est non pas l'association mais la partie adverse à la partie appelante devant les organes associatifs "juridictionnels".

L'appelant devra ainsi toujours désigner comme partie défenderesse devant le TAS la partie avec laquelle il a un litige, cette dernière, et non l'association, étant l'obligée du droit qu'il revendique.

L'appelant doit-il en outre désigner l'association comme partie co-intimée? Si, les premières formations du TAS ont parfois paru hésiter, la réponse est aujourd'hui clairement non.¹⁴ La FIFA, par exemple, demande même systématiquement que

l'appel déposé à son encontre soit retiré lorsqu'elle est désignée comme partie co-intimée dans le cadre d'un litige purement contractuel entre deux de ses membres. Si une telle désignation n'est pas nécessaire, est-elle pour autant erronée ? L'association qui a rendu la décision appelée pourrait-elle ne pas se voir également reconnaître la légitimation passive ?

Malgré un éloignement croissant de l'article 75 CC, la réponse nous paraît toujours devoir être négative, quand bien même le TAS agit alors presque comme une cour d'appel étatique. En effet, l'association, dont on requiert l'annulation ou la modification de la décision, n'est, selon le droit étatique, pas liée par la sentence du TAS si elle n'est pas partie à la procédure. Son obligation de la respecter ne résulte alors en effet que de ses propres règlements.¹⁵ L'association pourrait, par ailleurs, être appelée par le TAS à revoir sa décision, si la cause lui était renvoyée par la Formation arbitrale en application de l'article R57 para. 1 du Code.¹⁶ Enfin, l'association se voit systématiquement offrir la possibilité d'intervenir en tant que co-intimée à une procédure mettant en cause l'une de ses décisions et il semblerait paradoxal de nier sa légitimation passive quand elle a été désignée comme co-intimée par l'appelant.¹⁷

Sur la base de ce qui précède, nous pourrions conclure que, dans un litige vertical, l'association doit être désignée comme partie défenderesse, alors que, dans un litige horizontal, c'est la partie adverse au litige contractuel qui doit l'être, l'association

¹² Sur ce point voir HAAS, *op. cit.*, p. 86 à 87, et, pour un exemple récent *CAS 2017/A/5260 WADA v. SAIDS & Demarte Pena*.

¹³ Directe ou indirecte.

¹⁴ Comme le relève HAAS, la jurisprudence du TF paraît également avoir évolué sur ce point, le TF ayant indirectement reconnu dans l'ATF 140 III 520 que la désignation de l'association n'était pas nécessaire, voir HAAS, *op. cit.*, p. 81 à 83.

¹⁵ Sur l'importance pratique de la désignation de la FIFA voir SUBIOTTO/NOVAK, *Standing to Sue and be Sued: Select Issues in the CAS Jurisprudence*, in Sweet &

Maxwell's International Sports Law Review, 2016, I.S.L.R, Issue 2, p. 46 à 50, p. 48.

¹⁶ Selon cette disposition, la Formation peut « soit rendre une nouvelle décision se substituant à la décision attaquée, soit annuler cette dernière et renvoyer la cause à l'autorité qui a statué en dernier ».

¹⁷ Dans une sentence du 5 juin 2020, *TAS 2019/A/6342 & 6347*, à paraître), le Professeur Simon a ainsi jugé que la fédération nationale dont l'un des organes juridictionnels avait rendu la décision appelée devant le TAS avait la légitimation passive « en tant qu'association ayant rendu la décision contestée » (para. 38).

pouvant, mais ne devant pas, être désignée comme partie co-intimée.

Un tel schéma ne saurait toutefois être appliqué automatiquement et il convient de le nuancer, les conclusions de l'appelant rendant parfois nécessaire la désignation d'autres parties défenderesses.

B. La nécessité d'une approche nuancée

a. Conclusions de la partie appelante et choix de la partie intimée

L'appelant doit être particulièrement attentif à la concordance entre, d'une part, ses conclusions, et, d'autre part, son choix de la ou des parties intimées.

Afin d'illustrer cet impératif, nous terminerons cette présentation par quelques exemples concrets choisis parmi des problématiques fréquentes devant le TAS : les litiges mixtes, la contestation de la compétence ou de l'incompétence des organes juridictionnels associatifs et l'impact de la sentence du TAS sur des tiers.

b. Les litiges mixtes

Certains litiges sont "mixtes", ils revêtent un volet horizontal et un volet vertical. L'on pense ici, typiquement, à la rupture du contrat de travail entre un joueur de football et son club pendant la période protégée. Une telle rupture ayant des conséquences tant contractuelles que disciplinaires,¹⁸ les conclusions de l'appelant rendent parfois nécessaire la désignation de deux parties défenderesses.

En effet, si la partie appelante conteste la décision tant quant à l'octroi, le refus ou le montant de l'indemnité pour rupture de

contrat que quant à l'imposition, la non-imposition ou la quotité de la sanction, elle devra désigner son co-contractant et la FIFA comme parties intimées, sous peine de voir rejeter l'un des volets de son appel.¹⁹

c. La contestation de la décision sur la compétence des organes juridictionnels associatifs

Une autre question récurrente devant le TAS à laquelle des réponses *a priori* divergentes ont été apportées est celle de la partie intimée à un appel portant notamment (ou exclusivement) sur la décision de l'association quant à sa compétence pour trancher un litige contractuel. L'appelant doit-il alors obligatoirement désigner l'association comme partie intimée ?

Par exemple, dans les procédures *CAS 2013/A/3278* et *TAS 2018/A/5575*, les arbitres ont répondu par la négative, alors qu'ils ont répondu par l'affirmative dans la procédure *CAS 2016/A/4836*. Cette différence s'explique toutefois à la lumière des conclusions prises.

Dans la sentence *CAS 2013/A/3278 Maritimo de Madeira – Futebol SAD v. Desportivo Brasil Participacoes LTDA* du 2 juin 2014, la formation avait à juger d'un appel contre une décision de la FIFA condamnant l'appelant au paiement d'une somme d'argent à l'intimé en vertu d'un contrat relatif aux droits économiques d'un joueur.

Devant le TAS, l'appelant concluait à l'annulation de la décision de la FIFA, au constat de son incompétence et à la reconnaissance de la compétence exclusive des cours étatiques de Funchal, Madère, Portugal.

seront prononcées à l'encontre du joueur convaincu de rupture de contrat pendant la période protégée ».

¹⁹ Sur ce point, voir DE LA ROCHEFOUCAULD, *Standing to be sued, a procedural issue before the Court of Arbitration for Sport (CAS)*, dans Bulletin TAS, no 1/2010, p. 51 à 56, p. 56 et, pour un exemple plus récent, *CAS 2017/A/5359 Persepolis Football Club v. Rizeşpor Futbol Yatirimlari*.

¹⁸ Selon l'article 17 alinéa 1 du Règlement du Statut et du Transfer du Joueur de la FIFA (RSTJ), « [d]ans tous les cas, la partie ayant rompu le contrat est tenue de payer une indemnité », cette dernière étant « calculée en tenant compte du droit en vigueur dans le pays concerné, des spécificités du sport et de tout autre critère objectif ». L'alinéa 3 de cette disposition stipule toutefois qu'«[e]n plus de l'obligation de payer une indemnité, des sanctions sportives

Estimant que les conclusions de l'appelant visaient à l'exécution de droits contractuels (dont le droit à ne pas être attrait devant la FIFA mais devant les cours étatiques portugaises dont la compétence était contractuellement prévue), la majorité de la formation a estimé que l'appelant avait valablement dirigé son appel exclusivement contre le club intimé.²⁰

Dans la sentence *CAS 2016/A/4836 Raúl González Riancho v. FC Rubin Kazan* du 19 décembre 2017, l'appel était dirigé contre une décision de la FIFA déclarant irrecevable la demande d'un entraîneur visant à l'obtention d'une indemnité pour rupture de contrat sans juste cause de la part de son club.

Devant le TAS, l'entraîneur concluait à l'annulation de la décision appelée et demandait le renvoi de l'affaire à la FIFA afin qu'elle se prononce sur le fond du litige.

La formation a relevé que si le litige n'était certes pas relatif à l'imposition de sanction, il n'y avait pas non plus de décision sous-jacente au fond et qu'aucune demande contractuelle ne lui était soumise. Elle a, partant, estimé qu'il s'agissait d'un litige purement vertical. Dirigé exclusivement à

l'encontre du club qui n'avait dès lors pas de légitimation passive, l'appel ne pouvait qu'être rejeté.²¹

Dans la sentence *TAS 2018/A/5575 Yoann Touzghar c. Club Africain* du 22 janvier 2019, les arbitres ont eu à juger d'un cas très similaire. La FIFA avait alors déclaré irrecevable la demande d'un joueur prétendant au paiement par son club de salaires impayés et d'une indemnité pour rupture de contrat avec juste cause.

L'appel au TAS était ici aussi exclusivement dirigé contre le club mais l'appelant concluait à l'annulation de la décision, à la déclaration de la compétence de la FIFA et au paiement des salaires impayés et de l'indemnité.

La formation a estimé que l'article 75 CCS n'était pas nécessairement applicable aux litiges horizontaux,²² la FIFA étant alors, tout comme le TAS, appelée à trancher un litige purement contractuel.

La formation a considéré que même si la FIFA pouvait être concernée par l'appel, sa position neutre n'était pas modifiée par ce dernier. Elle a ainsi jugé que la désignation de la FIFA comme co-intimée n'était pas

²⁰ « 57. *With its prayers for relief n° 1, 2 and 3, the majority of the Panel takes the view that Appellant is in essence invoking a contractual right not to be subject to the obligation to pay contractual compensation to the Respondent based on a contractual right not to be sued in front of the Single Judge of the FIFA PSC. In other words, the Appellant's prayers are aimed at obtaining the enforcement of contractual rights it alleges to own under the Second Agreement. [...]*

60. *In other words, respective rights and obligations of the Appellant and the Respondent as to the validity, scope and effects of the choice-of-forum clause and their financial rights and obligations under the contract are at stake – meaning that they respectively have standing to sue and to be sued* » (CAS 2013/A/3278).

²¹ « 123. [...] *The issue at hand does not concern sporting sanctions, etc., however, there was not an underlying decision taken by FIFA on the merits either.*

124. *The Panel takes the view that the matter at hand is clearly directed at FIFA. The contractual claim is not before this Panel. Mr González was quite particular with his prayers for relief. It was that the FIFA PSC was wrong to decline jurisdiction, that the Panel should overturn FIFA's decision, tell FIFA that it does have jurisdiction and to take the case back to deal with it on the merits.*

125. *This is clearly a "vertical" issue – a dispute between Mr González and FIFA. The Panel can see that Rubin Kazan has an indirect interest, but it would be able to advance its position on the merits before the FIFA PSC, should the matter have returned there. Article R57 of the CAS Code does provide the Panel with de novo powers and perhaps if both FIFA and Rubin Kazan had been summoned as respondents, then all parties may have asked the Panel to consider jurisdictional issues and subsequently the merits, but this can remain moot, as FIFA were not summoned.*

126. *The Panel is satisfied that Mr González should have summoned FIFA in the matter at hand and that Rubin Kazan lacks the standing to be sued in respect of Appellant's primary prayers for relief. This leaves only his prayers for relief regarding costs, which are dealt with below.*

127. *Based on the foregoing the Panel dismisses the appeal of Mr González.* (CAS 2016/A/4836)

²² Comme évoqué supra ad [20], cette question est controversée. Dans le même sens, voir, par exemple, *CAS 2008/A/1518 Ionikos FC v. L. Pour la thèse inverse, voir, par exemple, CAS 2008/A/1639 RCD Mallorca v. The Football Association (FA) & Newcastle United.*

nécessaire et que l'appelant avait valablement dirigé son appel exclusivement contre le club.

d. Le tiers affecté

i. La place du tiers affecté

Une autre question fréquente et relativement complexe est celle du “tiers” affecté par une décision, quelle doit être sa place, quand n'aurait-il pas dû être tiers, mais partie, sous peine de rejet de l'appel ? Quelle(s) partie(s) défenderesse(s) désignée quand un litige *a priori* entre deux personnes affectent des tiers ?

Nous illustrerons cette problématique à travers trois exemples inspirés de sentences récentes du TAS touchant à des domaines différents : l'octroi de licence, la disqualification d'une équipe et l'octroi de la qualité de membre.

ii. L'octroi de licence

Dans l'affaire, *CAS 2017/A/5205 FC Koper v. Football Association of Slovenia*, le club appelant contestait le refus de la licence, avec laquelle il aurait pu prendre part au championnat national de première division. A la suite de cette décision, la fédération avait adopté une résolution déterminant les dix participants au championnat national de première division.

L'appelant avait dirigé son appel exclusivement contre sa fédération, aurait-il dû également le diriger contre le club promu dans le cadre de la mise en œuvre de la décision appelée ?

En l'espèce non, car l'appelant avait conclu exclusivement à l'annulation de la décision et à l'octroi de la licence,²³ une question entre le club et la fédération qui ne concerne pas nécessairement le club promu.²⁴

Si l'appelant avait conclu à l'octroi de la licence et à sa réintégration dans le championnat national de première division, le club promu à la suite de la décision appelée aurait alors, comme le souligne la formation, dû être désigné comme partie co-intimée.²⁵

C'est par ailleurs un tel manquement qui, dans la sentence examinée ci-après, a empêché une équipe nationale de soumettre à l'examen du TAS le bienfondé de sa disqualification à la Coupe du monde U-17 de la FIFA.

iii. Inéligibilité et disqualification

Dans l'affaire *TAS 2019/A/6351 FEGUIFOOT, Aboubacar Conté & Ahmed Tidiane Keita c. CAF*, l'objet de l'appel soumis à trois arbitres du TAS, dont Gérard Simon, était une décision du Jury disciplinaire de la Confédération africaine de football (CAF), confirmée en appel : constatant l'inéligibilité de deux joueurs de l'équipe guinéenne, imposant diverses sanctions, disqualifiant l'équipe de Guinée du tournoi final de Coupe d'Afrique des nations et réintégrant le Sénégal, dont il était ordonné d'approuver la participation en tant que 4ème représentant de la CAF à la Coupe du monde de la FIFA U17 de l'année 2019.

²³ « *The Panel observes that the Club phrased its primary request for relief as follows:*

“To annul and leave without effect the decision rendered by the NZS Appellate Licensing Committee in the matter of reference, and to render a new decision in which FC Koper shall be granted a license for competing in 1.SNL (the highest division under NZS) for the Competitive year 2017/2018». (CAS 2017/A/5205, para. 75)

²⁴ « [...] *The absence of NK Ankararan-Hrvatini as a party in the present arbitration does not prevent the Panel from potentially ruling that the Club should be granted a license, for*

the issuance of a license is a matter between the Club and the NZS which does not necessarily concern NK Ankararan-Hrvatini». (CAS 2017/A/5205, para. 80)

²⁵ « *The Panel finds that the argument of the NZS related to its standing to be sued makes sense if the Club had requested to be reinstated in the 1.SNL competition, for the Panel would be prevented from deciding that the Club could participate in the 2017/2018 sporting season and possibly to replace NK Ankararan-Hrvatini, because the latter club is not named as a respondent in the matter at hand*». (CAS 2017/A/5205, para. 76)

Devant le TAS, l'appelante avait conclu à l'annulation de la décision appelée "en toutes ces dispositions" mais seule la CAF était désignée comme partie intimée.

Se référant à des précédents du TAS, la formation a souligné que "dans un litige concernant un «problème d'attribution», qui se caractérise par le fait qu'une partie souhaite se voir réattribuer une place dans la compétition qui a été attribuée à une autre partie, il est manifeste que la procédure d'appel doit impliquer la partie qui est, en application de la décision appelée, détentricrice de la place litigieuse" (mise en évidence ajoutée),²⁶ avant de conclure au rejet de l'appel.²⁷

L'on peut déduire de cet extrait que la solution aurait pu être différente si l'appelant avait requis non pas la réattribution de la place octroyée au Sénégal, mais sa réintégration en tant qu'équipe complémentaire... Une telle solution, peut s'avérer inenvisageable en pratique, mais elle avait, par exemple, permis à un club haïtien de voir le TAS ordonner sa participation au Championnat national de première division, malgré l'absence du club, qui avait bénéficié de sa disqualification...²⁸

Par ailleurs, la formation ayant précisé que l'appel aurait également dû être dirigé contre la fédération sénégalaise «afin de mettre la

Formation en mesure de respecter [s]es droits de défense, plus particulièrement le droit d'être entendu", la Formation étant "empêchée de faire droit à toute requête qui affecterait directement la situation d'une tierce partie sans que celle-ci ait pu faire valoir sa position",²⁹ l'on peut également se demander si l'octroi de la possibilité d'intervenir ou du statut de partie intéressée aurait été suffisant.

Cette question s'est posée quelques jours plus tard dans une autre sentence liée, cette fois, à l'octroi de la qualité de membre et au "Ein-Platz-Prinzip".

iv. Affiliation et "Ein-Platz-Prinzip"

Dans la sentence *TAS 2018/A/6030 Kuwait Motor Sports Club c. FIM*, du 14 octobre 2019, le Kuwait Motor Sports Club (KMSC) contestait le refus de son affiliation par la Fédération internationale de motocyclisme (FIM).

Devant le TAS, l'appelant concluait à son enregistrement "comme unique et légitime Membre affilié de la Fédération Internationale de Motocyclisme pour le Koweït" et à la perte par le Kuwait International Automobile Club (KIAC) de son statut de membre affilié. Si son appel était dirigé exclusivement contre la FIM,³⁰ il avait toutefois désigné le KIAC comme "partie intéressée".

²⁶ Para. 70, sentence du 4 octobre 2019, à paraître.

²⁷ Cette jurisprudence est reprise dans la sentence *TAS 2018/A/6030 Kuwait Motor Sports Club c. FIM*, qui sera examinée ci-après et dans laquelle il était précisé: «*La Formation arbitrale relève encore les cas de jurisprudence du TAS relatifs à la question dite du «allocation problem», dans lesquels la décision appelée est celle qui attribue une place de compétition déterminée à un sportif parmi plusieurs: dans un tel cas, la décision faisant l'objet de l'appel est en réalité multiple car elle concerne tant l'attribution de ladite place à un sportif déterminé que celle de ne pas attribuer ladite place aux autres sportifs concernés: dans de telles circonstances, il a été décidé que l'appelant était contraint de citer la partie tierce à qui ladite place – contestée – avait été attribuée* (CAS 2016/A/4642 par. 108 et s.; 2011/A/2399, par. 31 et s.)» (para. 111, *TAS 2018/A/6030*, sentence du 14 octobre 2019, à paraître). S'il est ainsi nécessaire de nommer celui auquel la place avait été attribuée par la décision appelée, ce n'est évidemment pas suffisant, comme l'a rappelé Gerald Simon dans la sentence *TAS 2015/A/4229 Fovu Club de Babam c. Canon Sportif de Yaoundé*. Dans cette affaire, l'appelant avait dirigé son

appel exclusivement contre son « remplaçant » et omis de désigner la ligue concernée comme co-intimée quand bien même il concluait à sa réintégration dans le championnat national de première division.

²⁸ *TAS 2011/A/2399 FICA c. FHF*, paras. 33 et 34. Par ailleurs, si la formulation des conclusions est importante celle de la formulation des réglementations applicables est également élément pertinent. La situation n'est en effet pas la même si la qualification/disqualification d'un autre club est automatique de par l'adoption/l'annulation de la décision appelée ou si elle dépend également d'autres critères.

²⁹ *TAS 2019/A/6351*, para. 73, sentence non publiée.

³⁰ La Formation a d'abord relevé qu'une telle désignation était conforme à la jurisprudence du TF rendue en application de l'article 75 CC, applicable par analogie: «*D'après la doctrine, l'article 75 CC requiert que seule l'association ayant adopté la décision contestée soit citée en tant que partie intimée* (RIEMER, BK-ZGB, Art. 75 no. 60; HEINI/SCHERRER, BSK-ZGB, Art. 75 no. 21). La jurisprudence du Tribunal fédéral va dans le même sens

Informé de l'appel et de sa possibilité de requérir sa participation à la procédure, le KIAC avait souhaité intervenir non pas en qualité de partie, mais de tiers intéressé. La formation avait accédé à cette demande et conféré au KIAC les droits d'accéder au dossier et d'assister à l'audience, de déposer des observations écrites et de soutenir les conclusions des parties mais pas celui de prendre des conclusions propres.

La formation relève que ce dossier diffère des précédents traitant de la question de l'"allocation problem", la seule affaire véritablement pertinente étant la procédure TAS 2015/O/4316, qui opposait déjà l'appelant à la FIM, et dans laquelle il avait été décidé "*qu'il n'était pas nécessaire de citer le KIAC en tant que partie défenderesse en plus de l'intimée étant donné que celui-ci avait eu la possibilité d'intervenir à la procédure mais qu'il y avait renoncé*".³¹

L'appel devant en tout état de cause être rejeté, la formation n'a toutefois pas confirmé cette jurisprudence et a laissé ouverte la question de savoir si la FIM avait, ou non, à elle seule la légitimation passive.

Cette question est toutefois susceptible d'être déterminante dans une prochaine affaire et elle met en exergue la nature parfois ambiguë de la légitimation passive.

Liée à la qualité d'obligé du droit revendiqué, elle est en effet en droit suisse indiscutablement une question de fond. En droit du sport, aucun acte n'est toutefois revendiqué du tiers affecté dans ses droits, seule l'association étant responsable de l'exécution des sentences rendues dans des litiges verticaux. Si le tiers directement affecté a eu l'opportunité de défendre son droit et

d'être entendu, cela nous semblerait ainsi suffisant quand bien même il ne serait pas partie à une procédure civile à l'issue de laquelle un droit lui serait retiré.

V. Conclusion

Le choix de la partie intimée devant le TAS est un élément crucial : La désignation d'une partie n'ayant pas la légitimation passive étant une erreur souvent incorrigible, qui conduira *in fine* au rejet de l'appel.

Pourtant, les règles aidant à déterminer le défendeur sont rares et leur approche peu aisée.

En droit suisse, l'intimé a la légitimation passive s'il est l'obligé du droit revendiqué. Selon le TF, dans le cadre de la contestation d'une décision associative, il s'agit en principe de l'association.

En droit du sport, l'on ne saurait simplement désigner l'association comme partie intimée pour s'assurer de faire le bon choix. Les particularités de l'arbitrage sportif et du rôle quasi-juridictionnel de certains organes fédératifs exigent une approche nuancée.

Les arbitres du TAS, parmi eux Gérald Simon, ont ainsi développé un canevas permettant de guider ce choix : la distinction entre litiges "verticaux" et "horizontaux". Fort utile, ce schéma ne saurait toutefois être appliqué automatiquement, l'appelant devant toujours veiller à ce que ses conclusions soient en adéquation avec son choix de la ou des parties défenderesses.

En l'absence de certitude, il serait par ailleurs avisé de préférer le risque de désigner à tort un intimé sans légitimation passive à celui d'omettre la désignation de son titulaire. En

(ATF 136 III 345 c. 2.2.2 ; ATF 132 III 503 c. 3.1). Partant, il ne serait pas nécessaire de citer toutes les parties affectées par la décision faisant l'objet de l'appel. La question de savoir si ce principe général s'applique sans réserve dans un litige mettant en jeu celui de l'« Ein-Platz », lequel entraîne le cas échéant l'exclusion d'un membre de l'association, situation tombant également sous le coup de l'article 72 CC, peut toutefois

être posée ». Sur ce point voir *supra* [20], HAAS, *op. cit.* p. 81 et 83 et l'ATF 140 III 520, duquel il découle que, dans le cadre d'un litige contractuel, l'appel au TAS peut être valablement dirigé que contre son cocontractant.

³¹ TAS 2018/A/6030, para. 112.

effet, si une partie n'a pas la légitimation passive les conséquences ne sont que financières³² alors que si son titulaire n'est pas attrait, l'appel est rejeté.

Les questions liées à la légitimation passive ne sont aujourd'hui encore pas toutes résolues et illustrent bien la place si particulière de l'arbitrage sportif.

En constante évolution, le droit du sport est un domaine vivant, qui appelle à la résolution de nombreuses questions, souvent inédites. Les membres des formations du TAS ont été les premiers à trancher en appel des décisions associatives quasi-juridictionnelles, à trouver le chemin entre droits étatiques, droit associatif et droit de l'arbitrage, à devoir veiller à près de 400 arbitres à une harmonisation fondamentale à l'égalité entre tous les athlètes.

Une mission qui exige de la curiosité, de la réflexion, de l'ouverture d'esprit, de la collégialité. Des qualités majeures, que Gérard Simon réunit et qui en font un arbitre du TAS estimé par tous, toujours disponible, passionné et prêt à relever ces nombreux défis !

³² L'appelant pourrait être condamné au paiement d'une partie des frais de l'arbitrage car son appel

serait alors rejeté dans la mesure où il était dirigé contre cette partie ainsi qu'au versement de dépens.

Jurisprudence majeure*

Leading Cases

Casos importantes



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

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

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

CAS 2018/A/6040

Club Atlético Boca Juniors v. CONMEBOL
& Club Atlético River Plate

4 February 2020

Football; Disciplinary sanctions against a club for improper conduct of supporters; Scope of the CAS' power of review; Legal basis to request specific sanctions under the CONMEBOL's rules; Validity of a waiver of the right to introduce a complaint against another club; Strict liability of a club for the misconduct of its supporters under the CONMEBOL's rules; Application of spatial limitation to strict liability and interpretation of the "surroundings" of a stadium; Distinction between the purpose of sporting disciplinary regulations and local laws with respect to sporting events; Principle of non reformation in peius; Proportionality of the sanction

Panel

Prof. Massimo Coccia (Italy), President;
Mr Juan Pablo Arriagada (Chile);
Mr Andrés Gurovits (Switzerland)

Facts

The Appellant, Boca Juniors, is a professional football club based in Buenos Aires affiliated with the Argentinian football federation/"AFA"); in 2018, it competed in the *Primera División*, as well as in the Copa Libertadores.

The First Respondent, CONMEBOL, is recognized by FIFA as the continental governing body of football in South America; each year it organizes the Copa Libertadores, the most prestigious transnational club competition in South America.

The Second Respondent, River Plate, is a professional football club based in Buenos Aires and affiliated with the AFA; in 2018, it competed in the *Primera División* as well as in the Copa Libertadores.

At the end of October 2018, Boca Juniors and River Plate won the respective semi-finals of the 2018 edition of Copa Libertadores, qualifying for the final to be played in two legs at the respective clubs' home stadiums in Buenos Aires.

On 6 November 2018, in view of the upcoming Final and of the historical rivalry between Boca Juniors and River Plate, a meeting was held at the Ministry of Justice and Security in Buenos Aires with the purpose of "*coordinating and supervising the proper actions to guarantee the optimal functioning of the security system designed for the matches*".

On 11 November 2018, Boca Juniors and River Plate played the first leg of the Final, which ended in a 2-2 tie. No incidents occurred on route to the stadium in the first leg.

A second security meeting was held on 20 November 2018 with the teams scheduled to play the return leg of the Final on 24 November 2018 at 17:00 (hereinafter the "Match") at the home stadium of River Plate, the Antonio Vespucio Liberti stadium in Buenos Aires (hereinafter the "Stadium").

At the Security Meeting it was agreed *inter alia* that:

- "*the participating clubs must coordinate with the police the safekeeping of the teams*".
- three "*security rings*" would be set up outside of the Stadium, the third of which would be "*reinforced with Federal Law Enforcement personnel*".

On the day of the Match, a bus drove the Boca Juniors team from the hotel to the Stadium. As evident from video evidence on file, while the bus was approaching the Stadium, at a little more than 700 metres from the Stadium, and just outside of the outer security ring (the third one), a significant number of River Plate supporters launched various things, including rocks, at the Boca Juniors' bus, breaking some bus

windows and hurting some players (hereinafter the “Bus Attack”). In addition, some tear gas entered through the bus’s broken windows affecting the bus passengers. The Bus Attack is not disputed, but the type and degree of the resulting injuries and whether further incidents occurred inside the security rings on route to the Stadium.

According to a medical report by Dr. Pablo Ortega Gallo (Medical Director of the Appellant) issued the day of the Bus Attack, the Boca Juniors players suffered the following injuries:

- *corneal abrasion by foreign bodies,*
- *cephalea, nausea and irritative coughing,*
- *anaphylactic reaction with breathing problems,*
- *Irritation of the mucosae, breathing difficulty, repeated nausea and vomits,*
- *Cut from injury by impact of a stone or glass,*
- *Headache, Dyspnea.*

After arrival to the Stadium, two players were transferred to the Hospital.

Due to the traumatic experience suffered by the players, they were not in the psychological or emotional state to compete in a football match, let alone in one the magnitude of the Copa Libertadores Final.

As a consequence of the above circumstances, CONMEBOL decided to postpone the start of the match twice on 24 November 2018— first until 18:00 and then until 19:15.

Thereafter, the presidents of the two clubs and the president of CONMEBOL met and agreed to postpone the Match once more until 17:00 of the next day, 25 November 2018.

On 25 November 2018, Boca Juniors lodged a complaint against River Plate at the CONMEBOL Disciplinary Unit “*in relation to the incidents that occurred in the vicinity of the Club*

Atlético River Plate stadium when our club’s first division team arrived to play the [Match]”.

Due to all of the aforementioned incidents, the Appellant demanded (i) the immediate suspension of the Match as its players had not yet recovered from the injuries sustained, and (ii) that River Plate be sanctioned with a disqualification from the Copa Libertadores 2018 pursuant to Articles 8, 13.2 and 18 of the CONMEBOL Disciplinary Regulation (CDR).

On the basis of Boca Juniors’ complaint, the CONMEBOL Disciplinary Unit commenced disciplinary proceeding No. O-212-18 and notified River Plate of its opening.

On 26 November 2018, the CONMEBOL Disciplinary Tribunal opened *ex officio* disciplinary proceeding no. O-213-18 against River Plate. The proceeding was opened on the basis of incidents occurring “*inside the Stadium Antonio Vespucio Liberti and in the first security ring*”. Boca Juniors was neither a party nor was formally notified of the decision to open *ex officio* another disciplinary proceeding against River Plate. Boca Juniors also never requested to intervene in such *ex officio* proceeding.

On 27 November 2018, CONMEBOL decided to play the Match on 9 December 2018 in a place outside of Argentina i.e. at the Santiago Bernabeu stadium in Madrid.

On 29 November 2018, in relation to the *ex officio* disciplinary proceeding, the CONMEBOL Disciplinary Tribunal issued the operative part of Decision No. O-213-18, sanctioning River Plate with two matches behind closed doors and a fine of USD 400,000.

Also on 29 November 2018, the CONMEBOL Disciplinary Tribunal issued Decision No. O-212-18, rejecting Boca Juniors’ request to have River Plate disqualified from the Copa Libertadores 2018.

In reaching its decision, the Disciplinary Tribunal reasoned *inter alia* that River Plate

was not strictly liable for any supporter misconduct occurring *outside* of the security rings delineated in the Security Meeting; that area fell under the exclusive responsibility of the police.

On 30 November 2018, Boca Juniors appealed Decision No. O-212-18 to the CONMEBOL Appeals Chamber and challenged the decision of the CONMEBOL Disciplinary Tribunal to divide the dispute into two separate proceedings, i.e. Nos. O-212-18 and O-213-18.

On 6 December 2018, the Appeals Chamber issued the Decision No. A-21-18 (the decision appealed in the present case), rejecting Boca Juniors' appeal and confirming the Disciplinary Tribunal's Decision No. O-212-18. The Appeals Chamber made the following considerations *inter alia*:

- Cases No. O-212-18 and O-213-18 may not be consolidated, as the facts on which they are respectively based are distinct and dividable as follows: (i) the Bus Attack, and (ii) the incidents occurring around or inside the Stadium.
- Clubs are strictly liable for their supporters' behaviour. However, strict liability must have certain limits. It can only apply to incidents occurring inside and around the Stadium. River Plate is not strictly liable for the Bus Attack because it has occurred at a distance that cannot be imputed on the club.

On 7 December 2018, in accordance with Articles R47 and R48 of the 2017 edition of the Code of Sport-related Arbitration (the "CAS Code"), the Appellant filed a statement of appeal against Decision No. A-21-18 taken by the CONMEBOL Appeals Chamber on 6 December 2018 (the "Appealed Decision").

Reasons

The Appellant argues that the Second Respondent is strictly liable for its fans'

misconduct and must be sanctioned appropriately.

The Respondents, in essence seek to (i) dismiss the case on the basis of scope of review, *res judicata* or other preliminary issues and, alternatively, (ii) to uphold the merits of the Appealed Decision as the Second Respondent may not, in their view, be held strictly liable for incidents occurring outside of the area for which it was responsible under local law and predefined security perimeters.

1. What is the scope of the Panel's review?

The Panel's power of review is *de novo* but at the same time is limited to the objective and subjective scope of the Appealed Decision i.e., the Panel's power of review is limited to the parties, facts and legal issues related to the Appealed Decision.

It is undisputed between the Parties that both Boca Juniors and River Plate were parties to the CONMEBOL disciplinary proceeding No. O-212-18 and, in particular, were parties to the CONMEBOL appeal proceeding No. A-21-18 that yielded the Appealed Decision. Therefore, there is no disputed issue to be determined as to the subjective scope of the Appealed Decision; it evidently comprises all three parties to the present appeal proceeding.

To understand the objective scope of the Appealed Decision, the Panel must first turn to the Appellant's complaint filed on 25 November 2018 before the CONMEBOL Disciplinary Unit. In that complaint the Appellant requested the disqualification of the Second Respondent based on *all* of the incidents that occurred on the occasion of the Match including the incidents that allegedly occurred inside the stadium; the Appellant did not limit its claim to only the Bus Attack. Further, in the complaint's motions for relief, the Appellant requested the immediate suspension of the Match and the Second Respondent's disqualification from the competition based on all of the incidents, not just the Bus Attack. Therefore,

the objective scope of that proceeding and all appeals stemming therefrom – i.e. Decision No. A-21-18 of the CONMEBOL Appeal Chamber and the present CAS appeal – extends in principle to *all* of the incidents that occurred in relation to the Match.

In principle, the scope of the CAS proceedings of proceeding No. O-212-18 is not limited by the second proceeding initiated *ex officio* by the CONMEBOL Disciplinary Unit on 26 November 2018, No. O-213-18, which dealt with the incidents occurring “*inside the Stadium Antonio Vespucio Liberti and in the first security ring*”, because this possibility should have the effect to artificially split a matter in disregard of the doctrine of *lis pendens* and to unnecessarily duplicate CAS disciplinary proceedings, given their all-inclusive scope. Indeed, in principle, the Panel’s objective scope of review extends to all the incidents related to the Match. However, if despite the association’s error in opening *ex officio* a second proceeding, Decision No. A-23-18 has already become final and binding - for all incidents other than the Bus Attack -, the CAS panel shall deal only with the appealed decision’ matter(s) not covered by said decision – the Bus Attack -, in order to avoid a violation of the double jeopardy principle preventing the imposition of sanctions for the facts already judged and penalized in a final manner.

2. Is the present case inadmissible or, alternatively, must it be dismissed, for lack of a legal basis?

The First Respondent argues that the appeal is inadmissible or, alternatively, must be dismissed for lack of a legal basis, because the Appellant did not have a legitimate ground to request a specific sanction against the Second Respondent.

Article 33 CDR provides that those “*who promote or are directly affected by a disciplinary case, as well as all those who may be affected by the procedure if they have appeared and there has been no resolution, are considered interested parties*”.

Differently than the situation under the rules of other sports governing bodies, the CDR expressly allow parties who have filed a complaint and thus prompted the initiation of disciplinary proceedings – as is the case of Boca Juniors - to be considered as “*interested parties*” and, in that capacity, take part in disciplinary proceedings to try and obtain a sanction against the prosecuted party. The CONMEBOL rules permit the complainant to enjoy full procedural rights within the disciplinary proceedings and to appeal the last instance decision to the CAS. No provision of the CONMEBOL rules specifies or limits what sanction(s) a complainant may request. This, of course, does not mean that the adjudicating bodies of the CONMEBOL are obliged to impose the requested sanction; they are at liberty (as is the CAS) to impose that sanction, any other applicable sanction, or even no sanction at all, depending on their assessment of the facts and legal aspects of the case.

3. Does the Postponement Agreement have the effect of a waiver of the right to introduce a complaint against another club?

The Respondents argue that the Appellant, by submitting a complaint before CONMEBOL requesting the Second Respondent’s disqualification, has breached the principles of good faith, *pacta sunt servanda* and *venire contra factum proprium*, because the Parties had agreed to play the Match under the Postponement Agreement. The Respondents thus conclude that the appeal must be dismissed on these grounds.

Article 52 CDR grants a club participating in a CONMEBOL competition the right to introduce a complaint asking for sanctions against another club. The waiver of this right must be explicitly stipulated in writing.

The core and spirit of the agreement reached between the clubs and CONMEBOL was to postpone the Match to the following day and to play it under normal and equal conditions. The Postponement Agreement was a valid

and effective agreement between the Parties. However, the biding effects of the Postponement Agreement cannot be extended beyond its text. The Postponement Agreement did not exculpate the Second Respondent for the Bus Attack and/or preclude the Appellant from filing a complaint and requesting sanctions against the Second Respondent.

4. Is River Plate strictly liable for the Bus Attack?

According to Article 8 CDR, a club is strictly liable for the misconduct of its supporters regardless of whether or not the club is negligent or at fault. On the other hand, the degree of fault or negligence can and should have an impact on the measure of the sanction.

5. What is the application of spatial limitation to strict liability and what is the interpretation of the “surroundings” of a stadium?

Under Article 8 CDR, strict liability can be limited to the inside of the stadium and its “surroundings”, before, during or after a match. However, the Parties disagree as to the meaning of this term which is not defined.

The interpretation of the strict liability rules targeting supporters’ misconduct and of the related term “surroundings” must be defined using a functional approach.

With regard to the function of the rule, a rule that provides strict liability for the behaviour of supporters *“is a fundamental element of the current football regulatory framework. It is also one of the few legal tools available to football authorities to deter hooliganism and other improper conduct on the part of supporters”*.

A functional approach requires, in order to determine whether an incident falls within the stadium’s “surroundings” and thus triggers strict liability for the concerned club or association under Article 8 CDR, that the judging body assess the situation on a case-

by-case basis and cumulatively consider the following three criteria:

- (i) whether an incident occurred in reasonable geographic proximity to the stadium;
- (ii) whether it was directly linked to the match at stake; and
- (iii) whether it had a direct negative impact on the match.

Under said functional approach, the term “surroundings” should not, as the Respondents submit, be limited in a mechanical manner to topographical boundaries only, i.e. to a specific number of meters from, or a predefined security perimeter around, the stadium. Such a mechanical interpretation would undermine the function of Article 8 CDR, as hooligans would know at what exact distance from the stadium or in what specific areas their wrongdoings would escape the reach of the CDR. The only way to ensure the preventive and deterrent function of Article 8 CDR is to avoid any predetermination of the meaning of “surroundings” and of the triggering of strict liability, at the same time allowing some predictability to sanctions, by developing and applying some reasonable criteria to assess the circumstances of each case. Under those reasonable criteria, the supporters’ misconduct must occur reasonably close to the stadium and must also have some direct link to and impact on a given match.

Furthermore, a functional approach allows to interpret “surroundings” in a transnational way. A “transnational interpretation” of Article 8 CDR is opportune and even necessary, considering that CONMEBOL is a continental body that has ten members. The meaning of the term should not change depending on the local law of the relevant match as this would create confusion and inequities in the application of Article 8 CDR.

The Bus Attack occurred within the “surroundings” of the stadium under Article 8 CDR, given that:

(i) The Bus Attack occurred within reasonable geographic proximity to the stadium:

The River Plate supporters that attacked the bus transporting the Boca Juniors players were placed a distance of a little more than 700 meters. Furthermore, the Bus Attack occurred just a few meters from the entrance of the security rings delineated in the Security Meeting.

(ii) The Bus Attack had a direct link with the Match:

The host team supporters' attack occurred on the occasion of the Match and targeted the bus of the guest team while going to the stadium a few hours before kick-off.

(iii) The Bus Attack had a direct negative impact on the Match:

Due to the physical and psychological injuries suffered by the players as a result of the Bus Attack, the Match could not be played and was postponed for another day.

In light of the above, the Second Respondent is strictly liable for the Bus Attack.

6. Distinction between the purpose of sporting disciplinary regulations and local laws with respect to sporting events

River Plate point that CONMEBOL, as a private association under Paraguayan Law, has no authority to enact regulations which would contravene local laws. However, Boca Junior would not violate local law by applying its own disciplinary rules.

A distinction must be made between the purpose of sporting disciplinary regulations and local criminal, administrative or civil laws with respect to sporting events. The purpose of the former is *inter alia* to protect the integrity of football competitions and ensure the safety of athletes, clubs and other members by providing the channel to impose sanctions on all those, and only those, individuals or entities that fall under the relevant sport association's jurisdiction. The purpose of the criminal, administrative or

civil laws concerning safety at sporting events is to prevent and penalize crimes and administrative or civil wrongdoings. Both sets of rules and proceedings can coexist as they pursue different goals and are applied in different contexts. Notwithstanding the above, local law may be taken into account in assessing the proportionality of the sanction - in particular, one may consider whether and to what extent the club liable for its supporters had influence on setting and policing the security perimeter.

7. No violation of non reformatio in peius or ultra petita

The Panel also rejects the argument that imposing a sanction on River Plate for the Bus Attack would violate the principle of *non reformatio in peius*. That principle serves to protect an appellant from receiving a higher sanction on appeal than that which it received in the proceeding below. It does not prevent the adjudicating body from imposing a sanction on a respondent that was acquitted of liability by the previous adjudicative body. Furthermore, it is a principle that can be applied only if provided by the rules, and this is not the case here. Therefore, the Panel does have the power of holding River Plate liable and impose a sanction on it.

The fact that River Plate has received sanctions for other incidents related to the Match under Decision No. O-213-18 is irrelevant in assessing whether a violation of *non reformatio in peius* or *ultra petita* occurred.

8. What is the appropriate sanction, if any?

Article 18.1 CDR establishes the sanctions that may be imposed on a club for violating the CDR.

Two additional matches behind closed doors would accomplish the justifiable aim of preventing and deterring recurrence; given the importance of the matches of the Copa Libertadores, obligating the River Plate to play two matches behind closed doors would have a significant impact on the club's supporters.

Any lesser kind of sanction – such as a reprimand, warning, or fine – would not be sufficiently meaningful or impactful to achieve the envisaged goal of dissuading the supporters from repeating their misconduct in the future.

Any sanction more serious than playing two matches behind closed doors – in particular, a sanction that would affect the result obtained on the pitch, such as the cancellation of the Match result (Article 18.1(d) CDR), determination of the Match result (Article 18.1(g) CDR), the disqualification from the Copa Libertadores 2018 (Article 18.1(l) CDR) or withdrawal of a title or prize money (Article 18.1(m) CDR) – would be excessive and inappropriate because: the Second Respondent lacked any real control over the area in which the Bus Attack occurred, i.e. just outside of the security rings delineated at the Security Meeting.

Decision

1. The appeal filed by Club Atlético Boca Juniors on 7 December 2018 is partially upheld.
2. The CONMEBOL Appeals Chamber's Decision No. A-21-18 of 6 December 2018 is set aside and replaced by the present arbitral award as follows:
 - Club Atlético River Plate violated Articles 8 and 13.2 of the CONMEBOL Disciplinary Regulations.
 - Club Atlético River Plate is sanctioned pursuant to Article 18.1(h) of the CONMEBOL Disciplinary Regulations with two matches behind closed doors, to be applied on Club Atlético River Plate's next home matches of the Copa Libertadores in which it will participate.

CAS 2020/A/6713

Nilmar Honorato da Silva v. Fédération Internationale de Football Association (FIFA)

26 May 2021

Football; Disciplinary dispute; Standing of a creditor to appeal a disciplinary decision; Standing to be sued of a debtor

Panel

Prof. Luigi Fumagalli (Italy), President

Mr Efraim Barak (Israel)

Mr Andreu Camps (Spain)

Facts

Mr Nilmar Honorato da Silva is a Brazilian professional football (the “Appellant” or the “Player”).

The *Fédération Internationale de Football Association* (the “Respondent” or “FIFA”) is the governing body of football worldwide. FIFA is an association under the Swiss Civil Code with its headquarters in Zurich, Switzerland.

On 26 May 2016, the FIFA Dispute Resolution Chamber (the “DRC”) decided (the “DRC Decision”) to reject the Players’ claim regarding an employment-related dispute against El Jaish FC (“El Jaish”), a club then affiliated to the Qatar Football Association (“QFA”). On 11 October 2016, the Player lodged an appeal before the Court of Arbitration for Sport (the “CAS”) against the DRC Decision. CAS resolved to partially uphold the Player’s appeal against the DRC Decision (the “2017 CAS Award”). In particular, the DRC Decision was set aside and El Jaish was ordered:

“to pay to Mr Nilmar Honorato da Silva an amount of EUR 100,000 [...] net as outstanding bonus plus interest at 5% [...] per annum from 26 April 2014 until the date of payment.

to pay to Mr Nilmar Honorato da Silva an amount of EUR 300,000 [...] net as compensation for

breach of contract plus interest at 5% [...] per annum from 29 July 2014 until the date of payment”.

On 14 February, 8 March and 29 May 2019, the Player contacted the FIFA Players’ Status Department submitting that El Jaish and Lekhwiya SC (“Lekhwiya”) had merged into a new club, Al Duhail SC (“Al Duhail”), and requesting the opening of disciplinary proceedings against the latter for failing to comply with the 2017 CAS Award. On 15 August 2019, the FIFA DC issued the following decision (the “Appealed Decision”):

“The member of the FIFA Disciplinary Committee considered that the club Al Duhail SC is not liable for the debts incurred by the club El Jaish FC. All charges against the club Al Duhail SC are dismissed”.

On 13 January 2020, the Appellant filed an appeal with the CAS to challenge the Appealed Decision.

Reasons

The object of this arbitration is the Appealed Decision, issued by the Respondent (the FIFA DC), which found that Al Duhail committed no disciplinary infringement under the FIFA rules by not making a payment originally due to the Appellant by another club (El Jaish). The FIFA DC in fact held that *“Al Duhail SC is not liable for the debts incurred by the club El Jaish FC”*, as it could not be considered its successor. The Appellant requests this Panel to find that (i) Al Duhail was indeed a successor to El Jaish, (ii) it failed to satisfy the payment obligation due to the Appellant, and (iii) FIFA should sanction it for the disciplinary infringement committed.

The appeal filed by the Appellant raises complex issues. The Appellant was not a party to the proceedings before the FIFA DC, which, even though based on the Appellant’s complaint, were brought against Al Duhail and regarded the commission of a disciplinary infringement by that club. On the other hand, the current CAS arbitration has

been started against FIFA and does not involve Al Duhail, *i.e.* the club whose disciplinary responsibility was the object of the Appealed Decision.

Such issues require this Panel to conduct a careful analysis of the Appellant's power to challenge the Appealed Decision and to obtain the relief it seeks in this arbitration. Indeed, a first question arises as to the standing of the Appellant to bring an appeal against the Appealed Decision, and therefore as to whether there is any right for which the Appellant is entitled to seek protection in the arbitration. Should the existence of any such right be found, the second question to arise would be whether, and in which limits, such protection should be granted in light of Al Duhail's absence.

1. Standing of a creditor to appeal a disciplinary decision

The Respondent contends that the Appellant lacks standing to appeal since he was not a party to the proceedings before the FIFA DC, and does not have a direct and legal interest worthy of protection: the Appellant's only interest is the actual receipt of the monies resulting from the CAS Award, which is not at stake in the scope of the disciplinary proceedings.

The Appellant submits that it has standing to appeal in the current proceedings. In his capacity as creditor, the Appellant is affected by the Appealed Decision. Indeed, in the Appealed Decision, the FIFA DC did not limit its analysis to the issue of whether or not sporting sanctions should be imposed upon the debtor, but rather delved into the issue of whether or not Al Duhail is the legal and/or sporting successor of El Jaish. As a creditor, the Appellant clearly holds an interest in the result of this investigation. The Appellant has a right to initiate the disciplinary proceedings and, as such, has a right to have his case duly investigated by the FIFA DC. In addition, the FIFA DC assessed the evidence adduced by the Appellant in its request to initiate disciplinary proceedings against Al Duhail;

however, if the Appellant lacks standing to appeal it cannot make submissions and adduce evidence contrary to these documents in appeal, which is not acceptable. FIFA has a duty to investigate the situation properly and, as a creditor, the Appellant has at least an interest in having the FIFA DC undergo such a thorough examination of the situation.

The Panel notes that according to settled CAS jurisprudence a party has standing to appeal if it can show sufficient legal interest in the matter being appealed (CAS 2008/A/1674; CAS 2014/A/3744 & 3766). In this respect the appealing party must show that it is aggrieved by the appealed decision, *i.e.* that it has something at stake (CAS 2009/A/1880-1881). The issue of standing to appeal however shows specific features when it is raised in the framework of an appeal against a disciplinary decision rendered on the basis of Article 64 of the FIFA Disciplinary Code.

According to Article 64 of the FIFA Disciplinary Code, “[a]nyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision (financial decision)” may be sanctioned with a monetary fine and subsequently with additional sanctions until it complies with its monetary obligation vis-à-vis the creditor. The judgment creditor merely has to submit an appropriate request to the FIFA Disciplinary Committee and apply for enforcement of the decision.

There is abundant CAS case law on the fact that – in principle – disciplinary matters only concern and involve the disciplinary authority and the addressee of the disciplinary measure and that competitors or third parties are not affected in their legal rights by disciplinary measures that are not directed at them. For instance, in CAS 2014/A/3707, the panel stated “*No rule of law, either in the FIFA Regulations or elsewhere, is allowing the club victim of the breach of contract to*

request that a sanction be pronounced. Indeed, the system of sanctions lays down rules that apply to the FIFA, on the one side, and to the player or to the club that hired the player, on the other side. A third party like the club victim of the breach of contract has no legally protected interest in this matter and has therefore no standing to require that a sanction be imposed upon the player and/or the club that hired the player". Similarly, CAS panels (CAS 2012/A/2981; CAS 2006/A/1206; 2007/A/1329&1330; CAS 2007/A/1367; CAS 2008/A/1620) have consistently confirmed that "the proceedings before the DC (...) intended to protect primarily an essential interest of FIFA, i.e. the full compliance by the affiliates of the decisions rendered by its bodies. In other words, the core of the DC Decision, and of the appeal brought in these proceedings against it, regards only the existence of a disciplinary infringement by (...) and the power of FIFA to sanction it".

Despite the above, CAS panels have in the past also recognized that the fine imposed on the judgment debtor serves as an incentive to make the corresponding payments to the judgment creditor. The panel in CAS 2012/A/2817 explained that the "imposition of disciplinary measures (...) [serves] to "compel" the debtor to comply. Indeed, the Federal Tribunal, in its decision of 5 January 2007 [4P.240/2006, at consid. 4.2], acknowledged that the imposition of a sanction has the purpose to secure the observance of the rules of the association, deterring an associate from breaching them, and therefore constitutes an element of pressure on the associate to comply with its financial obligation towards the other affiliates (in the similar way, see the decision of the Federal Tribunal of 27 March 2012, 4A_558/2011): such effect, however, does not put the power of the association to sanction in conflict with the State monopoly on enforcement procedures, provided that sufficient grounds are offered by the rules of the association for the exercise of that power (and provided that the sanction imposed does not severely infringe the personality right of a player: decision of 27 March 2012)".

Evidence of the above, i.e. that Article 64 FIFA Disciplinary Code also serves the interests of the judgment creditor, is that the disciplinary proceedings are only initiated upon request of the judgment creditor and

not by FIFA *sua sponte*.

Similarly, CAS panels have recognized the creditor's right to institute meaningful disciplinary proceedings against the debtor:

"Whether in the case at stake the Appellant can request CAS to order the FIFA DC to institute or impose sanctions against the judgment debtor appears – at first glance – to be questionable for Article 64 of the FIFA Disciplinary Code primarily provides for a disciplinary measure. However, normally one member of the FIFA family does not have a claim against FIFA to have a sanction imposed on a fellow member (CAS 2012/A/3047). In the case of Article 64 of the FIFA Disciplinary Code the prevailing opinion appears to grant the creditor a right to 'assistance with enforcement', i.e. a right to institute disciplinary proceedings against the judgment debtor. This follows (directly) from a number of CAS awards, which deal with decisions by FIFA, in which enforcement proceedings were instituted belated or not at all and which were appealed by the creditor to the CAS. In all these cases the CAS accepted the creditor's standing to sue (cf. CAS 2011/A/2343; CAS 2012/A/2750; CAS 2012/A/2817). The Panel follows this jurisprudence. Even though disciplinary in nature (see below) the enforcement procedure according to Article 64 of the FIFA Disciplinary Code is a (natural) continuation of the procedure before the FIFA DRC. Thus, the right of access to justice does not only cover a party's right to bring a case for the determination of the parties' rights and obligation before the FIFA DRC, but also before the competent organs of enforcement of FIFA. In conclusion, the Panel holds that the creditor, in principle, has a right to request FIFA to initiate enforcement proceedings against the judgment debtor" (CAS 2015/A/4162).

The Panel agrees with the view expressed by the CAS panel in CAS 2015/A/4162. Any judgment creditor has a right to request the initiation of meaningful disciplinary proceedings against his debtor. In the Panel's view, in case such disciplinary proceedings are not initiated or are initiated belatedly or are not otherwise meaningful, the interests of the judgment creditor are clearly aggrieved. This is all the more evident when in the framework of the disciplinary proceedings, the FIFA DC analyses and takes a decision

on an issue that is essentially not disciplinary in nature, such as the issue of legal or sporting succession of a judgment debtor.

The Panel finds that the situation in the present case is not different. In the present matter, the FIFA DC did not merely consider whether or not sporting sanctions shall be imposed on the initial debtor, but rather took a decision on an issue that is not disciplinary in nature, *i.e.* whether Al Duhail is the legal or sporting successor of the debtor, Al Jaish. The Appellant, as judgment creditor, had the right to request the initiation of meaningful disciplinary proceedings against his debtor including the alleged successor of the debtor, and finds itself in a situation where it is aggrieved by the Appealed Decision which denied the point.

In light of the foregoing, the Appellant has a standing to bring an appeal in the present proceedings to enforce its right to request the initiation of meaningful disciplinary proceedings and this includes also the right to challenge in essence the finding of the FIFA DC that Al Duhail is not the legal or sporting successor of the debtor, Al Jaish.

2. Standing to be sued of a debtor

The core of the dispute concerns the existence of a sporting or legal succession of Al Duhail to El Jaish, and therefore whether Al Duhail was liable for the obligations of El Jaish towards the Appellant. Only in the event such succession is established, could a legal responsibility be found that might entail a disciplinary violation.

In its prayers for relief, the Appellant requests the Panel to order several measures. Some of those measures are directly sought against Al Duhail. This is the case where the Appellant requests *inter alia* the Panel to decide (i) that “*Al Duhail is found guilty of failing to comply in full with the [2017] CAS Award*”, (ii) that therefore it is ordered to make the payments due under it, and (iii) that FIFA shall take the appropriate steps to follow up on any payment received.

The Appellant also made specific requests, which – although not expressly and directly sought against Al Duhail – directly affect the latter in its legal position and interests. This is the case with respect to the prayers for relief entitled “*SECOND*”, “*TENTH*” and “*ELEVENTH*”. Indeed, in such prayers for relief, the Appellant requests that the Appealed Decision be set aside and that the case be referred back to the FIFA DC for imposition of disciplinary sanctions against Al Duhail as the successor of El Jaish. If the Panel were to uphold these prayers for relief, it appears clearly that Al Duhail would lose the benefit of the legal certainty on the fact that it is *not* liable for the debts of El Jaish as it is *not* the successor of the latter, which corresponds to the main conclusion that was drawn by the FIFA DC in the Appealed Decision.

In light of the above, the Panel concludes that all of the prayers for relief submitted to it by the Appellant are either sought directly against Al Duhail or directly affect Al Duhail in its legal interests. As a result, in the view of the majority of the Panel, Al Duhail should have been brought as necessary respondent in the present proceedings. The Appellant, however, did not call Al Duhail as a respondent in this arbitration. By failing to do so, the Appellant deprived Al Duhail of its right to be heard, namely its right to state its defence, adduce evidence and make submissions in a matter that undoubtedly affects the latter’s legal interests. In the absence of Al Duhail in the present proceedings, the Panel finds by majority that it has no power to grant any of the prayers for relief sought by the Appellant and that the appeal must be dismissed.

Decision

The appeal filed on 13 January 2020 by Nilmar Honorato da Silva against FIFA with respect to the Decision taken by the Disciplinary Committee of FIFA on 15 August 2020 is dismissed. The decision by the Disciplinary Committee of FIFA dated 15 August 2020 is confirmed.

CAS 2020/A/6986

Anna Knyazeva-Shirokova v. Russian Anti-Doping Agency (RUSADA)

6 April 2021

**Athletics (middle-distance running);
Doping (prohibited association);
Methods of interpretation of
legal/regulatory provisions;
Requirements of the prohibited
association rule; Burden and standard of
proof under the Russian Anti-Doping
Rules (ADR) in relation to an anti-doping
rule violation; Appeal arbitration dispute
decided *ex aequo et bono***

Panel

Mr Vladimir Novak (Slovakia), Sole Arbitrator

Facts

Mrs Anna Knyazeva-Shirokova (the “Appellant”) is a track athlete (middle distance runner) from Ekaterinburg Region in Russia. The Appellant is a member of the All-Russia Athletic Federation (“RusAF”), participating in competitions organized, convened, authorized or recognized by RusAF.

Russian Anti-Doping Agency (“RUSADA” or the “Respondent”) is a Russian anti-doping agency approved by the World Anti-Doping Agency (“WADA”) as a national anti-doping organization within the meaning of the WADA Code. RUSADA has its registered seat in Moscow, Russia.

In 2015, the Appellant was approached by Mr Vladimir Semenovich Kazarin (the “Coach”), and was offered to join his group of athletes in the Sputnik club. Due to an injury, the Appellant and the Coach did not work together until September 2017.

On 7 April 2017, the CAS rendered a decision imposing a life period of ineligibility

on the Coach due to his violation of anti-doping rules (CAS 2016/A/4480).

In September 2017, the Coach offered the Appellant to become employed by the Sputnik club. The Appellant accepted the offer. The Appellant learned about the Coach’s disqualification shortly after joining his group when one of the athletes mentioned the Coach’s status during a training event. The Appellant did not dispute that she was aware that the Coach had been banned from officially training athletes, though she alleged to believe that the Coach could train her unofficially.

In July 2018, the Appellant participated at the Russian Championships. On 21 July, while in the call room, a few minutes before the race, Mrs Goncharenko, a RusAF representative, informed the Appellant and other athletes that they were required to sign an acknowledgment form in order to compete. The Appellant signed the acknowledgment form. The form in question referred to the “Order 37” issued by RusAF on 25 June 2018. The relevant parts of the Order 37 provide as follows (although it is disputed whether the text of the Order 37 was provided to the Appellant):

“The following professionals have been currently disqualified: (...) V. Kazarin (...) (lifetime disqualification). The mere presence of a disqualified coach at the official training camp may be regarded as a violation by athletes of coaches of paragraph 2.10 (Illicit Cooperation) of the Russian National Anti-Doping Rules. This violation is punishable with the disqualification for 1 to 2 years”.

From 17 October 2018 until 26 November 2018, the Appellant attended a training camp in the Republic of Kyrgyzstan and was trained by the Coach. During the training camp, RUSADA’s personnel conducted an investigation. The RUSADA personnel had observed that the Coach was present at the training camp and was training athletes. However, RUSADA did not record this activity.

On 27 November 2018, the Appellant received a circular email from RUSADA containing questions regarding the Appellant's relationship with the Coach. On 29 November 2018, the Appellant responded to the questionnaire, reflecting instructions from the Coach. In January 2019, the Appellant and other athletes discussed with the Coach whether he was entitled to train them. The Appellant decided to continue training with the Coach until the end of 2019 (and did not dispute that she trained with the Coach in April 2019).

On 14 June 2019, the Appellant received a notice of charge from RUSADA alleging prohibited association with the Coach. According to the Appellant, this was the first official communication from RUSADA that explained the essence of the Prohibited Association Rule and the consequences thereof. The Prohibited Association Rule is an anti-doping rule violation that was introduced in the 2015 WADA Code. It prohibits athletes from associating with athlete's support personnel (e.g., coaches, trainers, physicians) that are, among other things, serving a period of ineligibility. The Prohibited Association Rule (the "Prohibited Association Rule") included in Article 2.10 of the Russian Anti-Doping Rules ("ADR") read as follows:

"Association by an Athlete or other Person subject to the authority of an Anti-Doping Organization in a professional or sport-related capacity with any Athlete Support Person who:

2.10.1 If subject to the authority of an Anti-Doping Organization, is serving a period of Ineligibility; (...).

In order for this provision to apply, it is necessary that the Athlete or other Person has previously been advised in writing by an Anti-Doping Organization with jurisdiction over the Athlete or other Person, or by WADA, of the Athlete Support Person's disqualifying status and the potential Consequence of prohibited association and that the Athlete or other Person can reasonably avoid the association. The Anti-Doping Organization shall also use reasonable efforts to advise the Athlete Support Person who is subject of the notice to the Athlete or other Person that

the Athlete Support Person may, within 15 days, come forward to the Anti-Doping Organization to explain that the criteria described in Articles 2.10.1 and 2.10.2 do not apply to him or her.

The burden shall be on the Athlete or other Person to establish that any association with Athlete Support Personnel described in Article 2.10.1 or 2.10.2 is not in a professional or sport-related capacity".

On 17 December 2019, the Disciplinary Anti-Doping Committee of RUSADA ("DADC") rendered a decision (the "Appealed Decision") finding that the Appellant violated Article 2.10 of the ADR by engaging in prohibited association with the Coach on 15 November 2018 in Russia and 22 April 2019 in the Republic of Kyrgyzstan. The Appealed Decision concluded as follows:

- The case file did not contain any evidence in relation to an appropriate written notification to the Appellant by an anti-doping organization regarding the Coach's disqualification status and possible consequences of prohibited association with the Coach.
- On 21 July 2018, before competing at the Russian Championships, the Appellant signed the acknowledgment form referencing the Order 37, a statement concerning the Coach's status. However, the Appellant was not aware, and did not understand the specific consequences of the Coach's disqualification and, in particular, her obligation to avoid any association with the Coach. This was due to lack of appropriate written notice provided to the Appellant.
- Given that the Appellant was not aware of her obligation to avoid any association with the Coach and the specific consequences for violation, the Appellant was sanctioned with a 1-year period of ineligibility (from 17 December 2019 until 16 December 2020) instead of the standard 2 years. Further, the Appellant's results were disqualified as from the date of the alleged ADR violation (i.e., 15 November 2018).

On 15 April 2020, the Appellant filed pursuant to the Code of Sports-related Arbitration (the “Code”) the Appeal (the “Appeal”) at the Court of Arbitration for Sport (the “CAS”) against the Appealed Decision.

Reasons

The Sole Arbitrator recalls that it is not disputed that (i) the Appellant was aware that the Coach had been banned from training athletes; (ii) the Appellant trained with the Coach after the Coach was banned by the CAS in 2017; and (iii) in July 2018 the Appellant signed the acknowledgment form that referred to the Order 37. However, the following principal issues are disputed between the Parties:

- Is it necessary that an athlete has been previously advised in writing by an anti-doping agency of the athlete support person’s disqualifying status and the potential consequences of prohibited association before an athlete could be sanctioned for a violation of Article 2.10 of the ADR?
- If so, was this requirement satisfied in this case?

1. Methods of interpretation of legal/regulatory provisions

The Sole Arbitrator notes that four conditions may be discerned in 2.10 of the ADR (which mirrors the wording in the 2015 WADA Code): the athlete “*has been previously advised in writing*”; Second, the notice must be given by “*an Anti-Doping Organisation with jurisdiction over the Athlete (...), or by WADA*”; Third, the notice must be “*of the Coach’s disqualifying status*” and “*of the potential Consequence of prohibited association*”; Fourth, the athlete “*can reasonably avoid the association*”.

The principal disagreement between the Parties is whether the first condition is an inherent substantive element of the Prohibited Association Rule, which therefore

must be established literally, or whether it could be satisfied by different means such as establishing an athlete’s knowledge.

At the outset, the Sole Arbitrator recalls that the Prohibited Association Rule included in the ADR mirrors Article 2.10 of the WADA Code. Given that WADA is itself a Swiss private law foundation, its rules should comply with Swiss law and the interpretation of the WADA Code (including the Prohibited Association Rule) must be consistent with Swiss law. Such an interpretation also ensures that the WADA Code is not subject to the vagaries of myriad systems of law throughout the world, but is capable of uniform and consistent construction wherever it is applied (CAS 2006/A/1025). Furthermore, the Sole Arbitrator emphasizes that the provisions of the ADR “*shall be interpreted in a manner that is consistent with applicable provision of the [WADA] Code*” (Article 20.6 of the ADR).

Under Swiss law, “*the starting point for interpreting a legal provision is its literal interpretation*” (CAS 2015/A/4345). As consistently held by the Swiss Federal Tribunal, there is no reason to depart from the plain text, unless there are objective reasons to think that it does not reflect the true meaning of the provision (137 IV 180, 184; CAS 2013/A/3365 & 3366). Only if a text is not clear and if several interpretations are possible, one must determine the true scope of the provision by analysing its relation with other provisions (systematic interpretation), its legislative history (historic interpretation) and the spirit and intent of provision (teleological interpretation) (CAS 2015/A/4345).

Moreover, it is not for the Sole Arbitrator, nor the CAS more generally, to question the policy or intent of anti-doping rule makers, in particular given that the WADA Code emphasises that “*when reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware of and respect the distinct nature of the anti-doping rules in the Code and the fact that those rules represent the*

consensus of a broad spectrum of stakeholders around the world with an interest in fair sport” (2015 WADA Code, “Doping Control, Introduction”, p. 16). The Sole Arbitrator therefore must exercise caution when engaging in interpretation of rules that, upon the face of the text, leave little doubt as to their meaning.

2. Requirements of the prohibited association rule

The Sole Arbitrator notes that the germane part of Article 2.10 of the ADR states: “*In order for this provision to apply, it is necessary that the Athlete or other Person has previously been advised in writing*”. The use of the wording “*in order for this provision to apply*” makes it abundantly clear that the application of the Prohibited Association Rule is subject to the requirements that follow in the text at issue. The use of the wording “*it is necessary that*” leaves little doubt that the satisfaction of the ensuing conditions is not discretionary but in fact *necessary*. Accordingly, the ensuing conditions are effectively “conditions precedent”. The use of the wording “*previously advised in writing*” unambiguously mandates a previous advice in writing. Further, the Sole Arbitrator notes that the wording “*in order for this provision to apply, it is necessary that*” is not used anywhere else in the WADA Code or the ADR. Therefore, the ensuing conditions are arguably inherent in the violation itself.

In light of the foregoing¹, the Sole Arbitrator concludes that, in order to establish a violation of Article 2.10 of the ADR applicable in this case, the Appellant ought to have first been advised in writing by an anti-doping organization with jurisdiction over the Appellant of the Coach’s disqualifying status and the potential consequence of prohibited association therewith. Failing to do so, a violation cannot properly be established.

¹ For completeness, the Sole Arbitrator also proceeded with scrutiny of the Prohibited Association Rule that went beyond its text. Seven considerations bore emphasis. Due to constraints inherent to the format of the CAS Bulletin and given the self-admitted

3. Burden and standard of proof under the Russian Anti-Doping Rules (ADR) in relation to an anti-doping rule violation

The Sole Arbitrator recalls that the Respondent has the burden of proof to establish that the Appellant has committed a violation of the Prohibited Association Rule, including that the Appellant has received a written notice. The relevant part of Article 3.1 of the ADR states “*The RUSADA shall have the burden of establishing an anti-doping rules violation has occurred. The Standard of proof shall be whether the RUSADA has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt*”.

First, the Sole Arbitrator notes that the Appellant’s signature was collected only a few minutes before her race. This appears suboptimal when compared to the process recommended by the WADA Guidelines. The Appellant testified that she was focused on the race and understood that she was obliged to sign the acknowledgment form if she wished to participate in the competition. The Sole Arbitrator has no reason not to accept the Appellant’s testimony on this point.

Second, the Appellant testified that, before signing the acknowledgment form, she was not handed the Order 37 nor explained its content. The Appellant’s testimony is further supported by oral testimony of three other athletes who testified that they similarly were not handed the Order 37 nor explained its content. When probed by the Sole Arbitrator whether the Appellant saw the Order 37 among the documents lying on the table in the call room, her testimony was evasive as

secondary nature of these seven additional considerations, they are not be reflected in this partial reproduction of the award. Readers are invited to consult those additional developments in the version of this award published on the CAS database.

she only explained that she flipped through documents but could not recall the details. While the Sole Arbitrator did not receive a straightforward answer, and there are therefore outstanding questions about the “documents” lying on the table in the call room, the evidence available in the file is insufficient to make the Sole Arbitrator “comfortably satisfied” that the Order 37 was provided to the Appellant.

Third, the Sole Arbitrator notes that the Respondent could have clarified this factual question to the comfortable satisfaction of the Sole Arbitrator, by simply providing the testimony of Mrs Goncharenko, the relevant RusAF representative collecting the signatures. While the Respondent reserved the right to call Mrs Goncharenko as a witness, it did not submit her written testimony nor did it call her to appear at the hearing, despite being repeatedly invited to do so.

Fourth, the acknowledgment form itself did not list the names of the coaches with whom the athletes were prohibited to associate with, nor explained any sanctions that may be imposed on the Appellant if she were to continue to associate with the Coach. The relevant part of the acknowledgment form read: “*Acknowledgment form for the order and paragraph 2.10 of the Russian National Anti-Doping Rules*”.

In light of the foregoing, the Sole Arbitrator also concludes that he is not comfortably satisfied that the advance written notification requirement inherent in Article 2.10 of the ADR was fulfilled in connection with the signing of the acknowledgment form at the Russian Championships.

The Sole Arbitrator in continuation notes that the Appellant received a questionnaire from RUSADA on 27 November 2018 inquiring about her association with the Coach. The Sole Arbitrator notes that the Respondent did not explicitly argue that the questionnaire satisfied the advance written notification requirement inherent in Article

2.10 of the ADR. The Sole Arbitrator nonetheless proceeded with the analysis and concludes that he is not comfortably satisfied that the questionnaire fulfilled the written notification requirement per Article 2.10 of the ADR.

First, the questionnaire clarified that the Respondent was merely collecting facts: “*RUSADA is carrying out the verification of the fact of potential anti-doping rules violation*”. Accordingly, the questionnaire did not appear to represent a written advance notification required by Article 2.10 of the ADR.

Second, the questionnaire did not include any explanation regarding the Prohibited Association Rule, nor referenced the relevant provisions of the ADR.

Third, the questionnaire did not explain that the Appellant was prohibited to associate with the Coach and what consequences could ensue for the breach thereof, as explicitly required by the wording of Article 2.10 of the ADR.

In view of all of the above, the Sole Arbitrator concludes that the Respondent did not establish to the comfortable satisfaction of the Sole Arbitrator that the Appellant was previously advised in writing by an anti-doping agency of the Coach’s disqualifying status and the potential consequences of prohibited association. Accordingly, the Respondent did not establish to the comfortable satisfaction of the Sole Arbitrator that the Appellant infringed Article 2.10 of the ADR.

4. Alleged procedural irregularities and request for compensation *ex aequo et bono*

The Appellant argued that the procedure before RUSADA leading up to the Appealed Decision, and the actions of RUSADA after the Appealed Decision, amounted to systematic violation of certain principles in the WADA Code and the WADA Guidelines aimed at protecting the athletes’ right to a fair

hearing. The Respondent disagreed and argued that these points had no bearing on the subject matter of the Appeal, *i.e.*, the alleged breach of the ADR, were not for the CAS to resolve in the present Appeal, and submitted that the Appellant should bring her claims before the Russian courts.

The Sole Arbitrator dismisses the Appellant's request for compensation. First, Article R57 of the Code grants CAS Panels full power to examine all facts and legal issue of a dispute and to hold a trial *de novo*. Similarly, Article 13.1.1 of the ADR, the primary applicable law to the Appeal at hand, provides that "*the scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker*". The full power of review has a dual meaning: (i) CAS admits new prayers for relief and new evidence and hears new legal arguments; and (ii) the full power of review means that procedural flaws, which occurred during the proceedings of the previous instances, can be cured by the CAS Panel (CAS 96/156 with reference to decisions BGE 116 Ia 94 and BGE 116 Ib 37; CAS 2001/A/435; CAS 2008/A/1574; CAS 2012/A/2702). In case CAS 2012/A/2913, the CAS Panel held: "*Therefore even if a violation of the principle of due process, or of the right to be heard, occurred in the proceedings in respect of which the appeal is brought, it is cured, at least to the extent such violation did not irreparably impair the First Appellant's rights, by full appeal to the CAS (CAS 94/129; CAS 98/211; CAS 2000/A/274; CAS 2000/A/281; CAS 2000/A/317; CAS 2002/A/378). In fact, the virtue of an appeal system which allows for a full rehearing before an appellate body is that issues relating to the fairness of the hearing before the tribunal of first instance 'fade*

to the periphery' (CAS 08/211. Citing Swiss doctrine and case law)".

The Swiss Federal Tribunal has also confirmed the legality of the curing effects of the CAS *de novo* review. Accordingly, infringements of the parties' right to be heard can generally be cured when the procedurally flawed decision is followed by a new decision, rendered by an appeal body which had the same power to review the facts and the law as the tribunal of first instance and in front of which the right to be heard had been properly exercised (ATF 124 II 132 of 20 March 1998, A., 138; See DTF 118 I b 111, p. 120; ATF 116 Ia 94 of 30 May 1990, J.).

Accordingly, the Sole Arbitrator considers that any procedural irregularities which may have occurred in the first instance proceedings were anyway cured by the present CAS arbitral proceedings.

Second, *ex aequo et bono* literally means ruling according to what is equitable and good. In principle, arbitration in equity is opposed to arbitration according to a specific law, and an arbitrator in equity has the mandate to issue a decision based exclusively on equity, without regard to legal rules, based on the circumstances of the particular case. In the CAS Code, other than in Article R45 (application law in the *ordinary* CAS procedures), there is no provision in Article R58 authorizing the arbitral tribunal to decide *ex aequo et bono* or in equity.

It is however accepted that the arbitral tribunal could decide *ex aequo et bono* also under the appeal procedure (pursuant to Article R58 of the Code), if the parties so agree.² The arbitral tribunal settles a case *ex*

² See Article 187 PILA ("*The parties may authorize the arbitral tribunal to decide ex aequo et bono*"); See also CAS 2005/A/983 & 984, para. 62; CAS 2009/A/1921, para. 10; CAS 2009/A/1952, para. 12; CAS 2010/A/2234, para. 8 (Article 17 of the FAR rules provides as follows: "*Awards of the FAT can only be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland (...). The CAS shall decide the appeal ex aequo et bono and in accordance with the Code of Sports-related Arbitration, in particular the Special Provisions*

Applicable to the Appeal Arbitration Procedure" (emphasis added)); See MAVROMATI/REEB, "*The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*", January 2015; this is also the general policy in other arbitration rules: in Article 33 of the Swiss Rules, it is possible to decide "*ex aequo et bono only if the parties have expressly authorised the arbitral tribunal to do so*"; A very similar provision is contained in Article 21 para. 3 of the ICC Rules, which provides that "*3 The Arbitral Tribunal shall assume the powers of an amiable compositeur or*

aequo et bono not because of the inherent virtue of resorting to such a process, but because the parties have agreed so. However, the Parties did not agree to do so in this case.

In any event, the Sole Arbitrator observes that the Appellant did not submit any evidence that she sustained damages due to alleged misconduct by the Respondent. The Appellant testified that she incurred financial loss because her wage was reduced to a minimum and she suffered moral damages. However, the Appellant did not substantiate in any manner the amount of damages, nor established a nexus between the Respondent's alleged misconduct and any alleged moral damages or financial loss incurred by the Appellant. For completeness, the Sole Arbitrator adds that, although the Appealed Decision was set aside, there is no indication in the case at hand that the adoption of that decision was manifestly arbitrary and, therefore, in and of itself cannot possibly form a basis of damages claims, and certainly not before the CAS.

Decision

The appeal filed by Mrs Anna Knyazeva-Shirokova on 15 April 2020 against the Russian Anti-Doping Agency with respect to the decision no. 20/2020 of 17 December 2019 of the Disciplinary Anti-Doping Committee of Russian Anti-Doping Agency is partially upheld. The decision no. 20/2020 of 17 December 2019 of the Disciplinary Anti-Doping Committee of Russian Anti-Doping Agency is set aside. All individual results earned by Mrs Anna Knyazeva-Shirokova from 15 November 2018 are reinstated. The request for compensation filed by Mrs Anna Knyazeva-Shirokova is dismissed.

decide ex aequo et bono only if the parties have agreed to give it such powers"; See RADKE H., "Sports arbitration *ex aequo et*

bono: basketball as a groundbreaker", CAS Bulletin, 2019/02, 2019, p. 28 and p. 36.

CAS 2020/A/7008

Sport Lisboa e Benfica SAD v. Fédération Internationale de Football Association (FIFA) (180009)

CAS 2020/A/7009

Sport Lisboa e Benfica SAD v. FIFA (180010)

10 May 2021

Football; Disciplinary sanction for violation of Art. 18bis RSTP; Reference to FIFA precedents as new evidence; Predictability of Art. 18bis RSTP; Binding nature of a rule and enforcement of such rule by adjudicating bodies; Principles of interpretation of statutes and regulations and application to Art. 18bis RSTP; Concept and context as well as specific targets of “influence” under Art. 18bis RSTP; Proportionality of the sanction

Panel

Prof. Massimo Coccia (Italy), President

Mr Bernhard Heusler (Switzerland)

Mr Mark Hovell (United Kingdom)

Facts

On 31 January 2014, Sport Lisboa e Benfica SAD (“Benfica” or the “Appellant” or the “Club”) entered into two Economic Rights Participation Agreements (singularly the “ERPA” and collectively the “ERPAs”) with the company Meriton Capital Limited (“Meriton”). Pursuant to the ERPAs, Meriton purchased from Benfica 100% of the economic rights (“Meriton’s Interest”) related to two players, André Tavares Gomes and Rodrigo Moreno Machado, through payment of an amount to the Club (“Meriton’s Grant Fee”).

The ERPAs are structured and worded in an essentially identical way save for, in particular, (a) the name of the player whose economic rights were secured by Meriton and (b) the amount of Meriton’s Grant Fee (EUR 15 mio for André Tavares Gomes and EUR

30 mio for Rodrigo Moreno Machado). In particular, clause 11 of both ERPAs, titled Meriton’s obligations, states: *“In compliance with the mandatory provisions of the Portuguese Football League and the FIFA Regulations on the Status and Transfer of Players Meriton recognises that the Club is an independent entity in so far as the Club’s employment and transfer-related matters are concerned and that Meriton shall not seek to exert influence over these matters on the Club’s policies or the performance of its teams”*.

In June 2015, Benfica accepted an offer made by the Spanish club Valencia FC and transferred both Players to the latter for, respectively, EUR 15 million (player André Filipe Tavares Gomes) and EUR 30 million (player Rodrigo Moreno Machado).

On 23 January 2018, FIFA initiated parallel disciplinary proceedings against the Appellant for a possible violation of Article 18bis of the FIFA Regulations on the Status and Transfer of Players (“RSTP”) prohibiting third-party influence on clubs, with reference to both ERPAs.

On 1 March 2018, the FIFA Disciplinary Committee issued two parallel decisions sanctioning Benfica in both cases with a fine of CHF 75,000 and a warning, for having breached Article 18bis RSTP.

On 17 February 2019, Benfica appealed before the FIFA Appeal Committee both decisions of the FIFA Disciplinary Committee.

On 12 April 2019, the FIFA Appeal Committee issued two parallel decisions confirming the findings of the FIFA Disciplinary Committee in their entirety. The FIFA Appeal Committee fully concurred with the FIFA Disciplinary Committee’s analysis of the cases and, *inter alia*, set out the following considerations:

- Article 2.1 of the ERPAs forces Benfica to guarantee that the Players’ employment contracts remain in force until a certain date, subject to, and thus influenced by, the obligation to pay compensation to

- Meriton pursuant to Article 2.3 of the ERPAs in case such contracts are terminated beforehand;
- Pursuant to Article 2.2 of the ERPAs, Benfica shall pay to Meriton the amount of Meriton's Grant Fee plus interest in case either or both of the Players, while on loan to a third club, terminated the employment contract with the third club for just cause and thus terminate the contract with Benfica; accordingly, Benfica is bound to prevent the Players from being in a position to terminate the contract with just cause;
 - Article 7.1 of the ERPAs provides Meriton with the power to decide whether to maintain its interest in the Players or receive Meriton's Grant Fee from Benfica, in case either or both of the Players' employment contracts are extended. Therefore, Benfica inevitably bears the economic consequences of Meriton's decision and it is influenced when determining whether or not to extend the Players' employment contracts;
 - Under Article 12.3 of the ERPAs, Benfica is forced to (a) file a claim against either of both of the Players in case they terminate the employment contracts without just cause and (b) transfer any amount awarded to Benfica to Meriton;
 - Under the ERPAs, Benfica has the obligation to disclose to Meriton information concerning (a) all the transfer and loan offers it receives with all details related thereto, and (b) all documents concerning the Players' transfers or loans;
 - Under Article 4.3 of the ERPAs, Meriton has the power to either accept or reject a transfer offer that Benfica received from a third club;
 - If, notwithstanding Meriton's rejection, Benfica accepts the transfer offer and transfers either or both of the Players, Articles 4.4 and 5.1 of the ERPAs are applicable and Benfica would have to pay to Meriton the higher amount between Meriton's Interest and Meriton's Grant Fee;

- If Meriton accepts a transfer offer, Article 4.5 of the ERPAs is applicable and Benfica is obliged to pay to Meriton the transfer fee contained in the transfer offer, regardless of whether or not the transfer actually takes place;
- Article 6.1 of the ERPAs stipulates that, in case either or both of the Players are loaned to a third club, Meriton is entitled to 100% of the loan fee;
- In light of the above clauses, although it is true that Meriton *per se* does not decide and/or instruct Benfica as to its transfer choices, it cannot be denied that the latter is influenced by the financial consequences that it would bear, under the ERPAs, depending on Meriton's decision.

On 27 April 2020, in accordance with Articles R47 and R48 of the 2019 edition of the Code of Sport-related Arbitration (the "CAS Code"), the Appellant filed two Statements of Appeal against the above-mentioned decisions of the FIFA Appeal Committee on cases 180009 and 180010 (the "Appealed Decisions").

On 24 July 2020, a hearing was held by video-conference. During the hearing, Benfica made reference to some FIFA decisions in order to support its arguments. FIFA objected and contended that those decisions could not be admitted into the file, since such references were not part of the materials mentioned in or annexed to the Appellant's Appeal Briefs. The Panel rejected the objection and communicated that the reasons for the Panel's decision would be provided in the final award.

Reasons

1. Reference to FIFA precedents as new evidence

Regarding FIFA's above-mentioned objection to the reference made by the Appellant to some FIFA decisions, the Panel recalled that in proceedings against FIFA,

making reference to previous FIFA decisions during the hearing did not constitute submission of new evidence in violation of Article R56 of the CAS Code, considering that such precedents (i) constituted FIFA's own jurisprudence, (ii) were published on FIFA's own website, and (iii) could be autonomously found by the CAS panel in doing its own research of relevant jurisprudence, based on the principle "*iura novit curia*" (or "*iura novit arbiter*").

2. Predictability of Art. 18bis RSTP

Benfica had argued that, notwithstanding the fact that Article 18bis RSTP had been in place for more than ten years, the rule was unclear and, in particular, the concept of providing a third party with the "*ability to influence*" was not straightforward and potentially included clauses that were widely used – and perfectly legal – in the worldwide football sector. According to Benfica, as per the so-called "predictability test", an unclear provision could not lead to the application of any sanction.

The Panel recalled that for a sanction to be imposed, sports disciplinary rules had to be sufficiently clear and precise in proscribing the misconduct with which someone was charged; in other words, *nulla poena sine lege clara* (principle of predictability). It held that Article 18bis RSTP was sufficiently clear and precise in prohibiting clubs from entering into contracts which enabled other parties to acquire the ability to influence, in employment and transfer-related matters, the independence, policies or teams' performances of those clubs. Article 18bis RSTP did not necessarily lack sufficient legal basis because it was broadly drawn. According to the Panel, disciplinary provisions were not vulnerable to the application of the rule *nulla poena sine lege clara* merely because they were broadly drawn. Generality and ambiguity were different concepts, and a sports governing body was certainly entitled to draft a disciplinary provision of a reach capable of embracing the multifarious forms of behaviour considered

unacceptable in the sport in question. Thus, the fact that Article 18bis RSTP was capable of catching an unspecified variety of contracts as providing a party with the ability to unlawfully influence clubs' conduct did not mean that it lacked sufficient legal basis and predictability.

3. Binding nature of a rule and enforcement of such rule by adjudicating bodies

Benfica was also contending that Article 18bis RSTP had scarcely, if at all, been applied by FIFA between its entry into force (2008) and the year in which Benfica had entered into the ERPA's (2014), thereby leaving clubs with no guidance whatsoever as to its actual scope of application.

Concurring with the findings of the panel in TAS 2017/A/5463, the Panel held that since its entry into force, Article 18bis RSTP had become mandatory on all football clubs that are subject to the FIFA RSTP regime. Consequently, and for obvious reasons of legal certainty, the mandatory nature of Article 18bis RSTP and its enforceability was not left to the knowledge or understanding that its addressees might have had of said rule. The consequences of the fact that, apparently, the FIFA disciplinary bodies had not investigated or sanctioned for several years those behaviors that could fit into the prohibition provided in Article 18bis RSTP had to be weighed in determining any possible sanction. However, this circumstance did not in any way affect the binding, enforceable and coercive nature of Article 18bis RSTP.

4. Principles of interpretation of statutes and regulations and application to Art. 18bis RSTP

The Appellant had criticized FIFA's interpretation of Article 18bis RSTP for having changed in recent times and for relying on a purely purposive interpretation, and had advocated the application of the *contra stipulatorem* principle.

The Panel started with reminding that various means of interpretation existed (literal, systematic, teleological and historical interpretation) and recalled that when called upon to interpret a rule, a pragmatic approach was to be adopted and a plurality of methods be followed, without any priority to the various means of interpretation being assigned.

In starting with the language of Article 18bis RSTP, the Panel held that it had to ascertain the meaning not only of the concept of “influence”, but also its relationship with the literal targets of such influence, i.e. the club’s “independence”, “policies” or “performance of its teams” in the context of “employment and transfer-related matters”. In addition, it had to consider the purpose of said provision, which was aimed at (i) protecting the sporting policies and operations of football clubs from being unduly influenced by other parties and (ii) avoiding conflicts of interests that might lead to practices affecting the integrity of the competition. In examining this rule in the context of Swiss law, the Panel further observed that, as Article 18bis RSTP was encompassing a prohibition related to the club’s conduct when entering into a contract, it was thus a provision that had the potential to significantly restrict the fundamental principle of the parties’ “freedom of contract”. Accordingly, such a restrictive provision had to be construed narrowly and applied on case-by-case basis bearing in mind that, in case of doubt, the adjudicating body had to favour the principle of freedom of contract (*in dubio pro libertate*).

5. Concept and context as well as specific targets of “influence” under Art. 18bis RSTP

Turning thus to the concept of “influence”, on the correct interpretation of which the parties were in disagreement, the Panel held that the prohibition enshrined in Article 18bis RSTP was not meant to be limited to instances of “direct” influence. Indeed, the wording of this rule did not distinguish between direct and indirect influence and, in accordance with the maxim “*ubi lex non distinguit, nec nos*

distinguere debemus” (i.e. “where the law does not distinguish, neither should we distinguish”), there was no need to devise a distinction not provided by the relevant rule. Moreover, if that distinction were to be made, it would be easier to circumvent the prohibition of Article 18bis RSTP; in particular, its pursued objective would be frustrated by simply drafting the relevant contractual clauses in order to avoid conferring any direct decision-making power to another party. Therefore, both the language and the purpose of Article 18bis RSTP pointed to a construal under which the influence exercised by another party on a club needed not be “direct” to fall within the scope of said rule. The basic element to look at was, rather, the effectiveness and impact of the influence, irrespective of its being direct or indirect. In other words, the influence had to be effective and have the potential to actually impact the club’s determinations to the degree required by the rule.

However, as recalled by the Panel, the proper interpretation of Article 18bis RSTP could not merely be limited to the concept and meaning of “influence”. Indeed, every contract, by definition, would restrict the freedom of action of the contracting parties and thus, inevitably, influence their behaviour. Therefore, a properly focussed interpretation of Article 18bis RSTP had to take into account the context in which such influence was exercised (“employment and transfer-related matters”) and its specific targets, namely the club’s “independence, its policies or the performance of its teams”. Therefore, Article 18bis RSTP could not be construed and enforced in an aprioristic manner but, rather, had to be applied following a case-by-case approach. Indeed, in players’ employment and transfer matters, the degree of influence that a given contract, or certain contractual clauses, could exert on the “independence”, “policies” and “teams’ performance” of a contracting club could significantly differ depending on (i) the sporting and financial situation and weight of such club as opposed to the sporting and financial situation and weight of the other contracting party or

parties, and (ii) the number and economic value of the players for which the club entered into a contractual relationship. In other words, in applying Article 18bis RSTP, there had to be a case-by-case appraisal of the relative standing, prominence and market power of the involved clubs and companies.

The Panel also had to take into account that Third Party Ownership (TPO) agreements were not specifically prohibited at the time when the ERPA's were signed (as opposed to now with Article 18ter RSTP). As a consequence, when assessing the clauses of the ERPA's and determine whether any of them provided Meriton with the ability to influence Benfica's "*independence*" or "*policies*" in violation of Article 18bis RSTP, the Panel had to consider that, on the one hand, in order for a TPO agreement to be effective and attract an investor, it needed to include some clauses that could secure the investor's venture in the player, and that, on the other hand, the guarantees for the investors could not be unfettered and needed to be weighed against the prohibition set forth by Article 18bis RSTP.

In order to analyse the ERPA's, the Panel followed the structure of the Appealed Decisions and divided the relevant clauses of the ERPA's into three groups: (a) Clauses related to the Players' employment contracts; (b) Clauses related to the Appellant's disclosure obligations towards Meriton; and (c) Clauses related to the potential transfer or loan of the Players.

(a) For the first group of clauses, and contrary to FIFA's interpretation in the Appealed Decisions, the Panel found that such provisions were inherent to a TPO agreement and merely aimed at securing the investment made by Meriton in the Players, but that through the aforementioned clauses, Meriton was not provided with any real ability to influence the Appellant's independence or policies. In particular, the Panel held that under Articles 2.2 and 2.3 of the ERPA's, Benfica accepted to indemnify Meriton if (1) Benfica does not obtain that

the employment contracts with the Players reach their natural expiry date, or (2) during a loan period, the loanee club breaches the employment contracts in force with a Player and such breach entails that Player's termination of his contract with Benfica. In this respect, the financial obligations towards Meriton had no bearing on the club's independence and policies, since they could not determine Benfica's decisions concerning the Players. Also, Article 7.1 of the ERPA's enabled Meriton to decide, in case the Players were not definitively transferred to a third club and thus agreed to extend their employment with Benfica, whether to (i) request payment of Meriton's Grant Fee within 7 calendar days or (ii) maintain Meriton's Interest; in the Panel's view, such contractual provision did not enable Meriton to have any influence as to Benfica's decisions, since it was unlikely that the option *sub* (i) became applicable, since it would have been reasonable for Meriton to request such payment only if either or both of the Players were not profitable enough to maintain the investment; for the Panel however, a team of Benfica's stature would hardly have considered extending its employment relationship with a non-profitable player, and thus the clause had no ability to influence its independence and policies.

(b) For the second group of clauses, and contrary to FIFA's interpretation in the Appealed Decisions, the Panel found that the obligation to disclose information to a commercial partner could not *per se* amount to undue influence under Article 18bis RSTP. The Panel held that, quite the contrary, it was often perceived as a legitimate obligation that is inherent in other types of contractual duties such as, for instance, the obligation to pay a sell-on fee or the transparency obligations towards a financing or guaranteeing bank. In particular, the Panel determined that this group of clauses of the ERPA's allowed Meriton to be informed of the details of possible transfers and/or loans of the Player(s) only after they had been accepted and executed and thus, notably, after the relevant fees related to the Player(s)

had been determined and paid. Therefore, these clauses did not, *per se*, determine Benfica's decisions in that respect.

(c) For the last group of clauses, regarding the financial consequences to be borne by Benfica in favour of Meriton in case the Players were temporarily or permanently transferred to a third club, the Panel found that in the case of the player André Filipe Tavares Gomes, it was fair to assume that Meriton, in order to profit from its investment or at least not to lose money, would have been inclined to accept a transfer offer for the Player that was greater than or equal to the amount of its Grant Fee (the same applying to the player Rodrigo Moreno Machado, although with a different Grant Fee). Accordingly, Benfica, having received an offer for such Player, would have had to consider the following scenarios: (i) if Benfica had accepted a transfer offer higher than or equal to EUR 15 million, 100% of the same amount would have been transferred to Meriton which, most likely, would have accepted the offer (Article 4.5 of the ERPA); therefore, Benfica would have paid the same amount it had received; (ii) if Benfica had accepted a transfer offer lower than EUR 15 million (which Meriton would most likely have rejected), Benfica would in any case have been liable to pay EUR 15 million to Meriton (since it would have been the "higher" amount between Meriton's Interest and Meriton's Grant Fee, under Article 5.1 of the ERPA); therefore, Benfica would have had to pay more than the amount received for the transfer; and (iii) if Benfica had rejected a transfer offer higher than or equal to EUR 15 million (which Meriton would most likely have accepted), 100% of the same amount would have been transferred to Meriton (Article 4.5 of the ERPA); therefore, Benfica would have had to pay within 7 days a considerable amount to Meriton – at least equal to EUR 15 million – while not receiving any (the "Third Scenario"). For the Panel the abovementioned situations and, in particular, the Third Scenario, may have been prejudicial to Benfica's financial stability and thus have

had a bearing and a real ability to influence its decision as to whether or not to accept the offer. Indeed, although Meriton did not *per se* have the power to decide whether or not to accept an offer on behalf of Benfica, it *de facto* forced the Club, having received an offer, to consider its economic solvency and whether it would be able to abide by its payment obligations towards Meriton based on its decision, especially in case it rejected an offer accepted by Meriton (Third Scenario). This third group of clauses secured Meriton's investment without any loss on its part, as in each possible scenario, Meriton could, through its acceptance or rejection, ensure that it would receive, at a minimum, the amount of Meriton's Grant Fee in a very short period of time; in this respect, such excessive guarantees provided to the investor most likely entailed that the latter was entitled to exert an undue influence over the club, in violation of Article 18bis RSTP.

6. Proportionality of the sanction

Lastly, the Appellant was contending that the sanction imposed by FIFA was not proportionate to the infringement and had to be reduced.

The Panel recalled that while it should not easily tamper with the sanctions imposed by an appealed decision, its *de novo* power of review allowed it to find that the sanctions were disproportionate and to determine more appropriate sanctions. It reminded that when determining the level of a pecuniary sanction, a decision making body had to take into account: (i) the nature of the offence; (ii) the seriousness of the loss or damage caused; (iii) the level of culpability; (iv) the offender's previous and subsequent conduct in terms of rectifying and/or preventing similar situations; (v) the applicable case law and (vi) other relevant circumstances.

In the cases at stake, the Panel found that, although the violation of Article 18bis RSTP for both ERPA had been confirmed, some considerations allowed it to determine that the sanctions at hand were disproportionate

and had to be reduced, *inter alia*, because the Panel had found that the Appellant had breached Article 18bis RSTP only in reference to one group of contractual clauses out of three groups.

Decision

In light of the foregoing, the Panel reduced both fines from CHF 75,000 to CHF 25,000. In addition, it confirmed the warning imposed on Benfica as to its future conduct under Articles 10 and 13 FDC.

Football; Training compensation; Conditions for the withdrawal of an appeal; Proposal as final and binding decision; Absence of complex factual or legal issues as precondition to issue a proposal; Failure to reject a proposal; Validity of communications via TMS; Duty to check the “Claims” tab in TMS

Panel

Mr Frans de Weger (The Netherlands),
President

Prof. Ulrich Haas (Germany)

Prof. Massimo Coccia (Italy)

Facts

On 9 March 2020, the Single Judge of the Fédération Internationale de Football Association’s (the “Second Respondent” or “FIFA”) Players’ Status Committee (the “FIFA PSC”) rendered a decision, authorising the Latvian Football Federation (the “LFF”), to provisionally register the Kazakhstani player R. (the “Player”) for BFC Daugavpils (the “Appellant” or “Daugavpils”).

On 10 March 2020, the Player was registered for Daugavpils with the LFF in FIFA’s Transfer Matching System (“TMS”).

On 11 March 2020, the Player and Daugavpils lodged a joint claim against the Kazakhstani club FC Kairat (the “First Respondent” or “Kairat”) with FIFA’s Dispute Resolution Chamber (the “FIFA DRC”), claiming that the Player terminated his employment contract with Kairat with just cause.

On 1 April 2020, the secretariat to the FIFA DRC (the “FIFA DRC Secretariat”) informed the Player and Daugavpils that, as the dispute opposed a Kazakhstani player to

a Kazakhstani club, FIFA was not competent due to the lack of international dimension of the dispute. In addition, it highlighted that Daugavpils did not appear to be an interested party in the sense of art. 22 lit. a of the FIFA Regulations on the Status and Transfer of Players (the “FIFA RSTP”).

On 25 May 2020, Kairat submitted a claim against Daugavpils with the FIFA Dispute Resolution Chamber (the “FIFA DRC”), claiming [...] as outstanding training compensation.

On 29 May 2020, the “FIFA DRC Secretariat”, issued the following proposal (the “Proposal”) to Kairat and Daugavpils:

“[...] the proposed amount due by [Daugavpils] to [Kairat] is as follows: [...] as training compensation, plus 5% interest p.a. as of the due date.

*In accordance with Article 13 of the Procedural Rules, it is informed that the parties have to either accept or reject the proposal **within the 15 days following this notification via TMS, i.e. until 18 June 2020.** In this regard, [Kairat] is limited only to accept or reject the proposal, excluding hereby any possibility to amend its original claim.*

In case a proposal is accepted by all parties or the parties fail to provide an answer to the FIFA Player Status’ Department within stipulated deadline, the proposal will become binding.

*In case of rejection by [Daugavpils], the latter will have **five additional days, i.e. until 23 June 2020** to provide its position to the claim. [...].*

Please also be informed that in case of rejection of the proposal by one of the parties, a formal decision on this matter will be taken by the Single Judge of the sub-committee of Dispute Resolution Chamber in due course.

Equally, we wish to point out that the relevant proposal will always be without prejudice to any formal decision which could be passed by the competent deciding body in the matter at a later stage in case the proposal is rejected by one of the parties” (emphasis in original).

On 16 June 2020, Kairat informed the FIFA DRC Secretariat that it accepted the Proposal

Daugavpils did not reply to the Proposal within the time limit granted.

On 25 June 2020, the FIFA Players' Status Department informed Kairat and Daugavpils as follows (the "Appealed Decision"):

"[...]"

As mentioned in our previous communication, in case a proposal is accepted by all parties or the parties fail to provide an answer to the FIFA Player Status' Department within the stipulated deadline, the proposal will become binding.

*Bearing the above in mind, we would like to inform the parties involved that the proposal has become binding. Consequently, [Daugavpils] has to pay to [Kairat], within 30 days as from the date of this notification, if not done yet, the amount of [...], **plus 5% interest p.a. as of 30 days of the due date of each instalment** until the date of effective payment.*

[...]" (emphasis in original).

On 26 June 2020, Kairat sent a letter to Daugavpils with reference to the Appealed Decision, requesting payment of an amount of [...].

According to Daugavpils, on 27 June 2020, Daugavpils' TMS Manager, Mr Aleksandrs Isakovs, accessed TMS, allegedly for the first time since 10 March 2020 due to the COVID-19 pandemic, and downloaded both the Proposal and the Appealed Decision simultaneously.

On 30 June 2020, Kairat filed a claim for breach of contract by the Player with the FIFA DRC, claiming compensation from the Player and Daugavpils.

On 3 July 2020, Daugavpils requested the grounds of the Appealed Decision.

On 6 July 2020, the FIFA DRC Secretariat informed Daugavpils as follows:

"[...] [W]e understand that you request the grounds of the alleged decision, allegedly communicated to the parties on 25 June 2020 in the dispute between the above-captioned parties.

In this regard, we must emphasize that in the matter at hand, no formal decision has been passed by the Dispute Resolution Chamber. In this respect, we refer to the proposal dated 29 May 2020, made by the FIFA secretariat in accordance with article 13 of the Procedural Rules and the FIFA Circular 1689, which was not contested by any of the parties involved before the deadline of 18 June 2020.

As a result, on 2 June 2020, the FIFA Administration communicated that the proposal dated 29 May 2020 had become binding. In this respect, we also refer to the contents of article 13 of the Procedural Rules and the FIFA Circular 169, which amongst other stipulates that the parties have 15 days 'to either accept or reject the proposal and provide the reasons which could justify the rejection' and they can, within 15 days as from receipt of the proposal, request for a formal decision, however that 'failure to do so will result in the proposal being regarded as accepted by and binding on all parties.'

Moreover, in our correspondence dated 29 May 2020, the parties were explicitly informed that 'the parties fail to provide an answer to the FIFA Player Status' Department within stipulated deadline, the proposal will become binding.'

In view of the above, we would like to emphasize that [Daugavpils] did not contest the [Proposal], before the deadline of 18 June 2020.

As a result, and considering all of the above, particularly that the proposal has become binding, we regret having to inform you that we are not in a position to provide you with the motivation of the decision, as no formal decision has been passed".

On 9 July 2020, Daugavpils lodged a Statement of Appeal with the CAS, challenging the Appealed Decision, naming Kairat as the sole respondent. On 16 July 2020, Daugavpils filed an amended Statement of Appeal with CAS, now also naming FIFA as respondent, lodging the following requests for relief:

"1. Order the Second Respondent (FIFA) to issue the grounds of the decision rendered by

the Head of the Players' Status on behalf of the FIFA Dispute Resolution Chamber in case Ref. No. TMS 6081 on 25 June 2020 (if the Sole Arbitrator deems it necessary).

2. *Set aside and annul the decision rendered by the Head of the Players' Status on behalf of the FIFA Dispute Resolution Chamber in case Ref. No. TMS 6081 on 25 June 2020.*
[...].”

On 10 November 2020, Daugavpils informed the CAS Court Office as follows:

“[...]

In light of the above, the Appellant, while reserving all rights and claims against FIFA, hereby withdraws (i) its request for relief directed at FIFA (Section VII point 1 of the rectified Statement of Appeal dated 16 July 2020) and (ii) its appeal directed at FIFA. Such withdrawal of the specific prayer and appeal against FIFA does not constitute and should not be interpreted as confession, acceptance, or acknowledgement of any of the allegations, claims, or requests made by FIFA.

For the sake of good order and clarity, the Appellant hereby maintains all of its other requests for relief against [Kairat]” (emphasis in original).

On 13 November 2020, FIFA informed the CAS Court Office, *inter alia*, as follows:

“[...]

As can be read from the Appellant's requests for relief, aside from the (procedural and legal) costs, the primary relief sought was only directed against FIFA and not against [Kairat]. The Appellant's sudden change by withdrawing the appeal against FIFA is even more relevant when taking into account that the FIFA letter of 25 June 2020 is not an appealable decision as the Appellant alleges. Under these circumstances, [Kairat] does not have any stake in the dispute and the Appellant cannot seek any relief against this club.

Therefore, by withdrawing the appeal against FIFA, the Panel must consider that the remedies are no longer sought by the Appellant, as there are no remaining substantive requests against [Kairat] to be resolved and, thus, the appeal must be considered as

being dismissed and FIFA is deemed to have prevailed. [...]

If, for any reason the Panel considers that there are (even eventual) substantive requests against [Kairat] (quod non), FIFA believes that it should still be allowed to intervene in the proceedings, whether remaining a party or through the filing of an amicus curiae brief [...].

[...] FIFA asks the following from the Panel:

- Should FIFA remain a party, to bifurcate these proceedings and allow the parties to file submissions on the admissibility of the appeal and CAS jurisdiction, and render a preliminary award on these issues in accordance with Articles R39 and R55 CAS Code.

- Should FIFA be excluded from the proceedings due to the Appellant's withdrawal of the appeal, to be granted the opportunity to file an amicus curiae brief after the Appellant and [Kairat] have exchanged written submissions in this matter”.

On 20 November 2020, the CAS Court Office informed the Parties that the Panel had decided to grant the request for bifurcation of the proceedings, adding that “*the Panel wishes that the Parties deal with every possible issue with the exception of the merits of the underlying horizontal dispute between [Daugavpils] and [Kairat], including the issues of CAS jurisdiction, admissibility of the appeal and 'preclusion', in order for the Panel to decide on all these issues in the preliminary award*”.

On 30 November 2020, the Respondents filed their written submissions with respect to the bifurcated issues.

Reasons

1. Conditions for the withdrawal of an appeal

The Panel had to address the Appellant's request to withdraw its appeal and requests for relief against FIFA, to exclude FIFA from the proceedings and FIFA's submission dated 30 November 2020 from the case file. Relying on Swiss legal literature, the Appellant considered that a unilateral withdrawal of a claim in arbitration was

possible until the claimant had filed its full statement of claim with the arbitral tribunal.

The Panel however found that while the Appellant had not filed its Appeal Brief at the time it withdrew its appeal against FIFA, FIFA had already indicated that it considered that the Proposal had become final and binding and that the Appealed Decision was purely of informative nature. For the Panel, FIFA had a legitimate interest to raise this issue and have this argument addressed. Besides, the Appellant had maintained its second request for relief, with the consequence that FIFA was and is entitled to defend the Appealed Decision.

The Panel also found that the Appellant's inconsistent procedural behaviour did not warrant protection. Daugavpils had initially only called Kairat as a respondent, but had later filed an amended Statement of Appeal with the sole purpose of including FIFA in the proceedings as a party, demonstrating that it had made a conscious choice to call FIFA as a respondent, only to subsequently try and exclude FIFA from the proceedings again.

The Panel, in addition, considered it problematic that Daugavpils had not unconditionally withdrawn its appeal against FIFA, but had only done so "*while reserving all rights and claims against FIFA*". Under such circumstances, the Appellant's request to exclude FIFA as a respondent was rejected and FIFA's submission of 30 November 2020 was admitted to the file.

2. Proposal as final and binding decision

The Respondents disputed the admissibility of Daugavpils' appeal. They maintained that, in the absence of any objection being raised by Daugavpils and/or Kairat by 18 June 2020, the Proposal had already entered into force and that the Appealed Decision of 25 June 2020 could therefore not be considered an appealable decision, but that it was merely a letter of informative nature.

Contrary to the position of the Respondents, the Panel found that the amount to be paid set forth in a proposal only became final and binding if such proposal was accepted by both parties or if no objection was raised against it within the stipulated time limit. However, the parties to which the proposal was issued did not necessarily know whether the opposing party accepted or rejected the proposal until this was confirmed by FIFA. Accordingly, the proposal itself could not be considered a final and binding decision; only the "confirmation letter" issued after the proposal was the decision that definitely affected the legal position of the parties involved.

3. Absence of complex factual or legal issues as precondition to issue a proposal

The Panel also held that notwithstanding its conclusions with respect to the jurisdiction of CAS and the admissibility of Daugavpils' appeal, it might nonetheless be precluded from addressing the merits of Daugavpils' appeal, because of the latter's failure to object against the content of the Proposal by 18 June 2020. In order to determine whether or not this was the case, it was required to address, *inter alia*, Daugavpils' argument that FIFA had not complied with the regulatory requirements for issuing a proposal.

Referring to Article 13(1) of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (the "FIFA Procedural Rules"), the Panel explained that this provision, in principle, was providing FIFA administration with a regulatory basis to issue a proposal regarding training compensation in disputes "*without complex factual or legal issues*", but that this latter phrasing was somewhat unfortunate, as this determination could actually only be made if and when all parties involved had communicated their views, a situation Article 13 in fact aimed to avoid for reasons of efficiency. Rather, the Panel derived from this provision that the assessment of whether or not there were complex factual or legal issues was to be

made on a *prima facie* basis and on the basis of the claim alone. The Panel also found that the FIFA administration had to be afforded ample discretion in determining whether or not it considered a case to be complex and, thus, whether or not to issue a proposal to the interested clubs, given that such discretionary power was wholly counterbalanced by the fact that each of those clubs had the right, at its sole discretion, to reject the FIFA proposal and ask for a reasoned decision (with a subsequent right of appeal to the CAS).

In the present case, the Panel found that FIFA had not arbitrarily or unreasonably exerted its ample margin of discretion in qualifying this matter as “*simple*” and considering that Kairat’s claim did not raise complex factual or legal issues. In any case, the issuance of the Proposal in no way prejudiced the position of Daugavpils, as it was by no means required to accept the Proposal. For these reasons, the Panel found that FIFA was entitled to notify the Proposal to the Parties on 29 May 2020.

4. Failure to reject a proposal

The Panel also considered Article 13(1) FIFA Procedural Rules providing that “*the parties [...] have 15 days from receipt of FIFA’s proposals to request, in writing, a formal decision from the relevant body, [...] failure to do so will result in the proposal being regarded as accepted by and binding on all parties*” and FIFA Circular no. 1689, determining that “[s]hould none of the parties reject the proposal of the PSD within the 15 days following its notification via TMS, the proposal will become binding on them” to be a sufficient regulatory basis to qualify a failure to respond as an acceptance of the Proposal.

5. Validity of communications via TMS

Daugavpils was maintaining that notification of a proposal via TMS had no regulatory basis and that FIFA should have notified it by way of the means of communication set forth in Article 9bis(1) FIFA Procedural Rules.

The Panel held that Article 13(1) FIFA Procedural Rules did not provide for the means of notification to be used by the FIFA administration. However, Article 13(2) FIFA Procedural Rules was specifying that the proceedings were to be conducted in accordance with the FIFA Procedural Rules if a party requested a formal decision, i.e. if no party did request for a formal decision, the (other) FIFA Procedural Rules did not apply. The Panel did not follow Daugavpils’ argument that Article 13(2) FIFA Procedural Rules applied only when a formal decision was requested, but not when a proposal was rejected. For the Panel, with the expression “*formal decision*” of Article 13(2), FIFA was clearly referring to the same concept found in Article 13(1), i.e. a “*formal decision from the relevant body*” or, said otherwise, a decision with grounds by an adjudicatory body of FIFA. A formal decision, thus, would only be issued if a proposal was rejected. Accordingly, a failure to reject a proposal amounted to a waiver of the right to request for a formal decision with grounds. In any event, Daugavpils had not requested for a formal decision, as a consequence of which the application of the FIFA Procedural Rules was not triggered.

In continuation, the Panel also found that Article 9bis of the FIFA Procedural Rules explicitly stated that the rules concerning communications with parties were set out “[a]s a general principle”, clearly leaving room for different rules for some specific situations. As it could be inferred from Article 1 of Annex 6 of the FIFA RSTP that Annex 6 of the FIFA RSTP prevails as a more specific rule over the default rules set forth by the FIFA Procedural Rules, in application of the principle *lex specialis derogat legi generali*, communication via TMS had to be deemed a legally permissible way of communication with regard to the procedure concerning disputes in training compensation and the solidarity mechanism. Indeed, Article 1(1) of Annex 6 FIFA RSTP provided that all claims related to training compensation and solidarity mechanism had

to be submitted and to be “*managed*” through TMS, with FIFA communications certainly being part of the claim management process.

6. Duty to check the “Claims” tab in TMS

Finally, the Panel found that even if, as it claimed, Daugavpils had only taken note of the Proposal and the Appealed Decision at the same time on 27 June 2020, this was wholly irrelevant. Indeed, Article 2(1) of Annex 6 of the FIFA RSTP was not only requiring clubs to regularly check the “Claims” tab in TMS, it was also indicating that a failure to do so was not a valid excuse for any procedural disadvantages that may arise. Besides, the duty to check the “Claims” tab at least every three days was not unreasonable.

In any case, Daugavpils had not explained in any detail why the Covid-19 pandemic would have prevented it from timely accessing TMS, given that its TMS manager had admitted that he had been prevented from accessing the office and the TMS platform only until 9 June 2020, with the consequence that as of 10 June 2020, Daugavpils had been able to check said “Claims” tab. Therefore, even if one were to believe that Daugavpils’ staff had truly not been able to access TMS from home (something that the Panel found implausible given that TMS was accessible from any device with an internet connection), this would not have prevented Daugavpils’ employees from eventually accessing TMS well before the deadline of 18 June 2020. Not doing it was a serious negligence, of which Daugavpils now had to bear all detrimental consequences.

The Panel concluded that since silence was deemed acceptance under the pertinent FIFA rules, Daugavpils was legally deemed to have accepted the content of the Proposal and, by the same token, to have waived its right to reject the Proposal by the elapsing of the deadline of 18 June 2020. Although the amount to be paid to Kairat had only been formally confirmed by means of the Appealed Decision issued on 25 June 2020,

Daugavpils had already been precluded from challenging the amount paid to Kairat by 19 June 2020. Consequently, Daugavpils was precluded from revisiting the Appealed Decision insofar as it concerned the amount due to Kairat.

Decision

In light of the foregoing, the Panel rejected the appeal filed by BFC Daugavpils and confirmed FIFA’s Appealed Decision.

CAS 2020/A/7266

Perak Football Association v. Jeon Hyoseok

7 May 2021

Football; Admissibility of the appeal; Condition to validly file a statement of appeal by email; Remedy of the default to validly file a statement of appeal by email; Excessive formalism

Panel

Mr Hendrik Willem Kesler (The Netherlands),
Sole Arbitrator

Facts

Perak Football Association (the “Appellant” or the “Club”) is a professional football club with its registered office in Perak, Malaysia. The Club is affiliated with the Football Association of Malaysia (the “FAM”), which in turn is affiliated with the Fédération Internationale de Football Association (“FIFA”).

Mr Jeon Hyoseok (the “Respondent” or the “Player”) is a professional football player of South Korean nationality.

On 17 February 2020, the Player lodged a claim against the Club before the FIFA Dispute Resolution Chamber (the “FIFA DRC”), submitting that the Club had terminated their employment contract without just cause. The Player claimed compensation for breach of contract in the amount of USD 172,500 net from the Club, an additional amount of USD 30,000 due to the alleged egregious nature of the breach, plus interest, and that sporting sanctions be imposed on the Club.

The Club rejected the Player’s claim in full.

On 4 June 2020, the FIFA DRC rendered its decision (the “Appealed Decision”), with the following operative part:

- “1. The claim of the [Player] is partially accepted.*
- 2. The [Club] has to pay to the [Player] outstanding remuneration in the amount of USD 20,000, plus 5% interest p.a. as from 14 January 2020 until the date of effective payment.*
- 3. The [Club] has to pay to the [Player] compensation for breach of contract in the amount of USD 106,900 and CHF 710, plus 5% interest p.a. on the amount of USD 106,900 as from 17 February 2020 until the date of effective payment.*

(...)

On 15 July 2020, the Club filed a Statement of Appeal with the Court of Arbitration for Sport (“CAS”) against the Appealed Decision by email, also providing the CAS Court Office with a CAS e-filing registration form.

On 16 July 2020, the CAS Court Office provided the Club with the login details to the CAS e-filing platform.

On the same date, 16 July 2020, the Player enquired whether the Club “*actually appealed in a timely manner*”.

On 22 July 2020, the Club informed the CAS Court Office that it had paid the CAS Court Office fee on 17 July 2020, i.e. within the deadline set by the CAS Court Office in its letter dated 16 July 2020. The Club also enquired as follows:

“Additionally, the Appellant would like to know whether the Brief of the Appeal should be sent through email or uploaded to the Documents Library in CAS E-filing dashboard?”

If all cause papers are required to be uploaded to the Documents Library, the Appellant requests to disregard the documents sent through email on 15th

July 2020 along with the E-filing form. The Appellant made some changes to the Statement of Appeal thus replacing the previous one.

Kindly instruct us on the deadline to upload/file the following papers:

- 1. Brief of Appeal*
- 2. Statement of Appeal and related documents”.*

On the same date, 22 July 2020, the CAS Court Office informed the Club as follows:

“I acknowledge receipt of your email of today, the content of which is duly noted.

I note that, up to date, you have not uploaded your Statement of Appeal on the CAS e-filing platform and the CAS Court Office has not received the original of the Statement of Appeal by courier within the prescribed deadline in accordance with Article R31 of the CAS Code. I further note that the time limit for appeal expired on 15 July 2020 and that you had therefore until 16 July 2020 to do so.

Consequently, I invite you to provide the CAS Court Office with a proof of sending / uploading your Statement of Appeal on the CAS e-filing platform within the relevant time limit by 27 July 2020. Please note that failing which, Article R31 of the CAS Code would apply”.

On 27 July 2020, the Club informed the CAS Court Office as follows:

“I am having trouble logging in despite entering the correct password. Multiple requests to reset the password were also unsuccessful. No email received even in the spam folder”.

On the same date, 27 July 2020, the CAS Court Office provided the Club with new login details.

On the same date, 27 July 2020, the Club uploaded an amended Statement of Appeal, its Appeal Brief and additional documents to the CAS e-filing platform.

On 12 November 2020, the Player filed his Answer, pursuant to Article R55 CAS Code.

On 18 November 2020, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to grant the Club an opportunity to complete its observations with respect to the exception of admissibility raised by the Player.

Reasons

1. Condition to validly file a statement of appeal by email

Article 58(1) FIFA Statutes provides that an appeal filed against final decisions passed by FIFA’s legal bodies “*shall be lodged with CAS within 21 days of receipt of the decision in question*”.

The Sole Arbitrator considers it uncontroversial that this is an admissibility requirement.

It is common ground between the Parties that the *dies a quo* of the 21-day time limit commenced with the issuance of the grounds of the Appealed Decision on 24 June 2020 and that this time limit expired on 15 July 2020.

What is in dispute between the Parties is whether the Statement of Appeal filed by the Club by email on 15 July 2020 complied with the mandatory requirements for such filing to be valid.

Whereas the Club considers that its Statement of Appeal filed by email on 15 July 2020 was validly submitted upon receipt of the email, the Player submits that the Club failed to provide evidence of a timely transmittance of the Statement of Appeal by courier delivery as prescribed by Article R31 CAS Code (edition 2020).

Article R31 of the CAS Code provides, *inter alia*, as follows:

“The request for arbitration, the statement of appeal and any other written submissions, printed or saved on digital medium, must be filed by courier delivery to the CAS Court Office by the parties in as many copies as there are other parties and arbitrators, together with one additional copy for the CAS itself, failing which the CAS shall not proceed. If they are transmitted in advance by facsimile or by electronic mail at the official CAS email address (procedures@tas-cas.org), the filing is valid upon receipt of the facsimile or of the electronic mail by the CAS Court Office provided that the written submission and its copies are also filed by courier or uploaded to the CAS e-filing platform within the first subsequent business day of the relevant time limit, as mentioned above.

Filing of the above-mentioned submissions by electronic mail is permitted under the conditions set out in the CAS guidelines on electronic filing”.

The Sole Arbitrator notes that Article R31 CAS Code provides for two methods to validly file a Statement of Appeal:

1. Filing by courier alone;
2. Filing by facsimile or electronic mail in advance.

It is not in dispute that the Club did not file its first Statement of Appeal by courier, so that the first method described in the first sentence of Article R31 CAS Code paraphrased *supra* is immaterial for present purposes.

It is also not in dispute that the Club filed its first Statement of Appeal by email on 15 July 2020, in accordance with the method described in the first part of the second sentence of Article R31 CAS Code paraphrased.

However, when reading the full sentence concerning the second method, it is apparent that the filing of the Statement of Appeal by email is only valid, **“provided that the written submission and its copies are also filed by courier or uploaded to the CAS e-filing platform within the first subsequent business day of the relevant time limit”**

(emphasis added by the Sole Arbitrator).

Accordingly, in the absence of the Statement of Appeal also being filed by courier or uploaded to the CAS e-filing platform within the first subsequent business day, the filing **by email alone** is not valid.

Furthermore, while any problems successfully logging in to the CAS e-filing platform cannot be held against the Club, the Sole Arbitrator finds that any such alleged issues should have been reported forthwith, i.e. at the latest on 17 July 2020, because that was the date that its deadline to do so certainly expired. A delay of 10 days in reporting alleged connection problems does not exculpate the Club from its failure to timely upload its Statement of Appeal to the CAS e-filing platform.

2. Remedy of the default to validly file a statement of appeal by email

Contrary to the Club’s submission, the Sole Arbitrator finds that the mere fact that the CAS Court Office, by letter dated 16 July 2020, acknowledged receipt of the Statement of Appeal filed by email on 15 July 2020, does not cure the Club’s default of failing to timely upload the Statement of Appeal to the CAS e-filing platform, as the CAS Court Office by no means confirmed that the Club’s Statement of Appeal had been validly filed in accordance with Article R31 CAS Code. Indeed, the CAS Court Office letter dated 22 July 2020 suggests that the Club did not comply with the requirements of Article R31 CAS Code: *“you have not uploaded your Statement of Appeal on the CAS e-filing platform and the CAS Court Office has not received the original of the Statement of Appeal by courier within the prescribed deadline in accordance with Article R31 of the CAS Code”*.

Likewise, the Sole Arbitrator also considers that the Club’s inexperience with CAS proceedings does not cure its default, nor does

the fact that it sought instructions from the CAS Court Office to ensure that the proceedings would go “smoothly”, as the Club’s fatal default already took place prior to seeking instructions from the CAS Court Office. In this respect, the Sole Arbitrator does not accept that the invalid filing of the Club’s Statement of Appeal was only a result of the Club’s inexperience with CAS proceedings, because the content of Article R31 CAS Code is unequivocal and clear, also to inexperienced users.

Moreover, by no means can the payment of the CAS Court Office fee or the advance of costs cure a procedural default since such payments are preconditions for the CAS to proceed with a case.

3. Excessive formalism

Finally, the Sole Arbitrator does not consider that declaring the Club’s appeal inadmissible is a result of excessive formalism and feels himself comforted in this respect by the jurisprudence of the Swiss Federal Tribunal, in turn referring to other decisions of CAS and the Swiss Federal Tribunal (see SFT 4A_556/2018, consid. 6.3-6.5).

“6.4. The Federal Tribunal has already had the opportunity to state that the CAS did not show excessive formalism in sanctioning with inadmissibility the formal defect constituted by the sending of a statement of appeal by simple fax (judgment 4A_690 / 2016, cited above, para. 4.2).

It reiterated this again recently, in a judgment rendered in 2018, stressing that, while art. R31 al. 3 of the Code allows a statement of appeal to be filed in advance by fax, the validity of this filing is, however, subject to the condition that the submission is also sent by mail on the first working day following the expiry of the applicable time limit. In other words, the requirement to file a statement of appeal by mail cannot be relegated to the rank of a mere

administrative formality (judgment 4A_238 / 2018, cited above, para. 5.6)”.

In this respect, the upload of the statement of appeal to the CAS e-filing platform is not a mere administrative formality, but indeed a condition for the validity of the filing of such submission. This principle makes it possible to rule out the reproach of excessive formalism.

Decision

In view of all the above, the Sole Arbitrator finds that the Club failed to file a valid Statement of Appeal within the time-limit of 21 days set forth by Article 58(1) FIFA Statutes and that the Statement of Appeal uploaded to the CAS e-filing platform on 27 July 2020 was filed late, rendering the appeal inadmissible.

CAS 2020/A/7276

Suphanburi FC v. Michael Seroshtan

9 June 2021

**Football; Contractual dispute;
Assessment of the validity of a clause of
termination of contract; Interpretation of
a contractual clause and of the intention
of the parties**

Panel

Mrs Anna Bordiugova (Ukraine), Sole Arbitrator

Facts

Suphanburi FC (the “Appellant” or the “Club”) is a professional football club with its registered office in Suphanburi, Thailand. It is registered with the Football Association of Thailand (the “FAT”), which is affiliated to the *Fédération Internationale de Football Association* (the “FIFA”).

Mr Michael Seroshtan (the “Respondent” or the “Player”) is a professional football player.

On 30 June 2019, the Player and the Club entered into an Employment Contract Agreement (“Employment Contract”) valid as of 1 July 2019 until 30 November 2019. The Employment Contract included the following clause (Art. 4) regarding its extension:

“The Club agreed that contract extension clause starting from 1st December 2019 and ending on 30th November 2020 will automatically extend should the Club remain competing in the Thai League 1 for the Season 2020”.

The Employment Contract contained the following clause (Art. 15) regarding relegation:

“This Contract will terminate without liability for either party if the Club’s senior men’s first team is relegated from the Thai League 1 for ordinary sporting reasons. On such relegation, this Contract will terminate with effect from the end of the month in which the Club’s senior men’s played its last match”.

The Employment Contract contained a clause applicable in case of a unilateral termination:

“14. Termination without Sporting Just Cause:

14.1. In the event that the club wants to unilaterally terminate the contract extension clause starting from 1st December 2019 and ending on 30th November 2020 with the Employee without just cause before the expiration, the Club shall pay 3 (Three) months worth of salary to the Player”.

On 28 October 2019, one day after the last match of the season, which left the Club in 14th position in the Thai League 1 (one of three positions to be relegated to the League 2, namely the clubs which remained in 14th – 16th place), the Club triggered the “relegation clause” and sent a letter (dated 27 October 2019) to the Player *via* email, informing him about the automatic termination of the Employment Contract pursuant to Art. 15 of the Employment Contract by virtue of the Club’s relegation for sporting reasons (“the Termination Letter”).

On 25 November 2019, the Thai League, organizer of football competitions in Thailand, issued an official statement explaining that the Thai club PTT Rayong had withdrawn from the Thai League 1 competition for the 2020 season and that therefore the Thai League had decided to allow the Appellant to participate in the Thai League 1 season 2020 competition.

On 2 December 2019, the Club started its preparation for the new football season. On 9 December 2019, the Player arrived back to Thailand. On 16 December 2019, the Player's representative sent a letter to the Club, requesting the Club to issue a statement to the Player that the Employment Contract is still in force until 30 November 2020 and that the Termination Letter of the Club dated 27 October 2019 was delivered by "*a bona fide mistake*".

On 6 January 2020, the Club replied that the employment relationship had been terminated pursuant to Art. 15 of the Employment Contract and that there was "*no reason to question the validity of this clear wording*". The Club further pointed out that "*any decision by the national football association concerning the relegation (...) is of **administrative** nature and does not impact the working of article 15 of the contract (which has a **sporting nature**)*". "[T]he official decision by the national football association only confirms the sportive relegation from the club as it once again states that Suphanburi finished 14th in the 2019 Thai League".

On 7 January 2020, the Player signed an employment contract with Hapoel Haifa FC, valid as of 7 January 2020 and until 31 May 2020, valued at USD 68,092.00. On 3 March 2020, the Player lodged a claim in front of the FIFA Dispute Resolution Chamber ("FIFA DRC") regarding compensation for breach of contract against the Club and *inter alia* claimed the amount of USD 325,000 plus interest. On 8 May 2020, the FIFA DRC rendered its decision (the "Appealed Decision"), with *inter alia* the following relevant operative part:

"1. The claim of the Claimant, Michael Seroshtan, is partially accepted.

2. The Respondent, Suphanburi FC, has to pay to the Claimant compensation for breach of contract in the amount of USD 256,908".

On 9 July 2020, the Club filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the Appealed Decision, in accordance with the CAS Code of Sports-related Arbitration (the "CAS Code").

Reasons

The Appellant insists that the Club was relegated based on the number of points accumulated. The fact that, almost one month after the valid termination of the Employment Contract, the Appellant was admitted to participate in the Thai League 1 by means of an administrative decision by the Thai League does not amount to constitute a legal basis for a backdated prolongation of the Employment Contract for the season 2020. The amount of points earned by the Club during the 2019 season had remained unchanged and the position of the Club in the standing table due to sporting reasons did not change. By the time of Club's reinstatement the Employment Contract was already validly terminated with just cause.

The Respondent insists that since the Club, *de facto*, was not relegated and remained in the Thai League 1, this served as legal basis for prolongation of the Employment Contract for the season 2020 as per its Article 4. His Employment Contract was terminated prematurely without just cause as the Club did not want to continue the relationship with him without substantiating its position. The FIFA DRC rightly awarded him compensation for breach of his Employment Contract by the Club because the "extension clause" prevails over the "relegation clause".

The dispute to be decided by the Sole Arbitrator therefore concerns the legality Club's termination of the Employment Contract as well as, if applicable, the satisfaction of the conditions established by the "relegation clause" for such termination.

Inherently, the issue to be resolved by the Sole Arbitrator would be whether the Employment Contract come to an end immediately after the last match of the 2019 season and based on the relegation clause due to sporting reasons? If such question is answered negatively, what are the consequences?

1. Assessment of the validity of a clause of termination of contract

In this respect, it shall be recalled that there are two different types of relegation clauses: 1) relegation clauses stating that the contractual relationship of the parties automatically ends in the case of relegation of the club, or otherwise provide both parties with the right to terminate the employment contract in case of relegation. Not only clubs, but also the players benefit from these kinds of relegation clauses. This view is supported by CAS 2008/A/1447, stating that “*relegations clauses are mainly a way protecting the players’ careers, as their employment opportunities and market values would be reduced by playing in lower divisions during their short-term careers*”; 2) Relegation clauses which do not automatically lead to the termination of the contractual relationship in case of relegation, but only provide one party with the opportunity to terminate the employment contract without any regulation of the compensation, if any, for the other party. This kind of clauses bears the risk of providing an unbalanced right to the discretion of one party only, without having any interest of any kind for the other party.

The Sole Arbitrator notes that the wording of Art. 15 is clear: as soon as the team is relegated at the end of the season for ordinary sporting reasons, the Employment Contract is terminated without any liability for either party. This is in line with Art. 154 of the Swiss Code of Obligations (“Swiss CO”), according to which: “*A contract whose termination is made dependent on the occurrence of*

an event that is not certain to happen lapses as soon as that condition is fulfilled. As a rule, there is no retroactive effect”.

Consequently, the Sole Arbitrator needs to analyze the balance of interest in the clause agreed upon between the Parties, taking into account the specific circumstances of the present case. *In casu*, the condition stipulated in Art. 15 of the Employment Contract is depending on other circumstances than the will of a party to the employment contract. In fact, it has to be presumed that the will of clubs and players is always to avoid relegation. The fulfillment of the condition of relegation is thus solely depending on sporting circumstances. In other words, the condition of relegation is a casual condition, not a potestative condition. Thus, this clause belongs to the type 1) as outlined above – it is reciprocal, and therefore, valid.

Additionally, both Parties confirmed that the relegation clause was inserted by default to the employment contracts of all foreign players and was triggered by the Club in other instances. Also, the Parties do not disagree in that the conclusion of the Employment Contract was performed freely and that the Employment Contract was not imposed by one party on the other. Finally, the Player did not claim any misunderstanding of the said provision at any the time. It is only on 16 December 2019 that the latter contacted the Club regarding the termination.

2. Interpretation of a contractual clause and of the intention of the parties

The Sole Arbitrator then turned her attention to Art. 18(1) of the Swiss CO, which states: “*When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement*”.

In the case at hand, the Employment Contract contains a provision reading that the contract will terminate if the team is relegated for ordinary sporting reasons. It is further clarified that the *“Contract will terminate with effect from the end of the month in which the Club’s senior men’s team played its last match”*. Accordingly, the Sole Arbitrator notes that the application of Art. 15 was very limited in time – it would only be triggered – after the last match of the season played by the team (*i.e.*, 26 October 2019) and before the end of the respective month, *i.e.*, October 2019. The effective termination date according to this provision is, therefore, 31 October 2019.

In terms of facts, it is undisputed between the Parties that, given the situation as it existed at the time of the last match of the season, the Club was relegated to the lower league for sporting reasons. Thus, the Employment Contract was validly and with just cause terminated as of 1 November 2019, and this was confirmed by the Club in its letter dated 27 October 2019. This was the Parties’ common intention when signing of the Employment Contract, and this is how things stood at the moment in time when the relegation clause could possibly be triggered. Absent any contrary evidence, this clause has the binding force of the Parties’ agreement.

Having so found, the Sole Arbitrator turns to the analysis of the “extension clause” of Art. 4 of the Employment Contract and notes that, in accordance with Art. 151 of the Swiss CO, *“A contract is conditional if its binding nature is made dependent on the occurrence of an event that is not certain to happen. The contract takes effect as soon as this condition precedent occurs, unless the parties clearly intended otherwise”*.

In the Sole Arbitrator’s opinion, Art. 4 is unambiguous – the extension of the Employment Contract is conditional upon

whether the Club remained or not in the competition of Thai League 1. It is not automatic. What was meant as “automatic” is that there was no necessity for the Parties to sign any additional document in order to prolong the Employment Contract for the second season in case the Club, immediately following the last match of the season, remained in the Thai League 1 based on its results. As a matter of fact, the Club did remain in the Thai League 1, but only as of 25 November 2019 and as a result of reinstatement, not for the sporting reasons. Furthermore, as not disputed by the Parties, it remained in the Thai League 1 after the Employment Contract had already been validly terminated, as of 31 October 2019, in accordance with Art. 15 of the Employment Contract. The application of the relegation clause, chronologically, came first, validly bringing an end to the Employment Contract. The extension clause, under these circumstances, could not be triggered anymore.

The Sole Arbitrator is of the opinion that by issuing, on 28 October 2019, its Termination Letter to the Player with the very clear wording regarding the basis for the Employment Contract termination, the Appellant, in due time and in good faith, confirmed its understanding regarding the applicability of Art. 15 of the Employment Contract.

The Sole Arbitrator finds it more likely than not that the Player had considered his Employment Contract as validly terminated because he was – at the relevant moment in time – of the understanding that this was indeed what was foreseen under Art. 15 of the Employment Contract. The Player did not provide any evidence to establish that the real, common understanding of both Parties, at the time of the negotiation regarding the relegation clause, was that it was not limited timewise with regard to its application, and

that “ordinary sporting reasons” did indeed mean any kind of circumstances *e.g.*, if the Club remained to play in the Thai League 1, for example, like in this case, because it replaced another club due to latter’s withdrawal at a later stage.

Besides, the Sole Arbitrator finds that also the subsequent behaviour of the Parties points in the direction of concluding that the Player, in good faith, had understood that his Employment Contract was lawfully terminated and indeed, by that time was already seeking for new employment. Therefore, any further claims of the Player, more than one month after the Employment Contract termination, are considered being made against the principle of good faith. The Sole Arbitrator feels necessary to outline, that as it appears from the evidence on the record - there was no written contact between the Club and the Player - until when on 25 November 2019, the Thai League announced its decision to replace PTT Rayong.

On account of the above, it is clear to the Sole Arbitrator that the relegation clause, with its clear wording, and a limited period of time of application, was lawfully triggered by the Club’s relegation for sporting reasons. The Employment Contract was terminated as agreed by the Parties, which the Player accepted at the relevant time. Therefore, the Sole Arbitrator concludes that the Club had validly relied on the relegation clause, having confirmed this to the Player after it became clear that it would be relegated, and based on the circumstances and facts as they stood at the relevant point in time. It was not possible for the Employment Contract, which had already validly terminated as of 31 October 2019, to be “renewed” after 25 November 2019.

The appeal filed on 9 July 2020 by Suphanburi FC against the Appealed Decision by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is upheld. The Appealed Decision is set aside. The Employment Contract between Suphanburi FC and Mr Michael Seroshtan is deemed validly terminated on 31 October 2019.

Decision

CAS 2020/A/7290

ARIS FC v. Oriol Lozano Farrán & FIFA

26 May 2021

Football; Termination of the employment contract; Determination of the event giving rise to the dispute; Sporting succession of clubs and fraudulent practices or bankruptcy proceedings as *sine qua non* elements of sporting succession; Due diligence; Effects of the sporting succession; Reduction of an excessive penalty clause

Panel

Mr Frans de Weger (The Netherlands), Sole Arbitrator

Facts

This appeal is brought by the Greek professional football club ARIS FC (the “Appellant” or the “Club”) against the decision rendered by the Dispute Resolution Chamber (the “FIFA DRC”) of the Fédération Internationale de Football Association (“FIFA” or the “Second Respondent”) on 4 June 2020 (the “Appealed Decision”), regarding an employment-related dispute between the Club and the Spanish professional football player Mr Oriol Lozano Farrán (the “Player” or the “First Respondent”).

On 9 July 2010, the Player and the Greek professional football club, ARIS FC Thessaloniki (the “Old Club” or the “Old Entity”) signed an employment contract valid as from the date of signature until 30 June 2013 (the “Employment Contract”). From Article 4.4 of the Employment Contract it follows that the Player was, *inter alia*, entitled to remuneration in the amount of NET EUR 1,050,000, payable in thirteen instalments.

On 5 July 2011, the Old Club and the Player signed a termination agreement, by means of which the Old Club undertook to pay the Player a total amount of NET EUR 300,000, corresponding to NET EUR 120,000 as outstanding payment and an amount of NET EUR 180,000 as compensation for the early termination of the Employment Contract.

On 29 March 2012, the Old Club and the Player signed a “Private Agreement”, stating, *inter alia*, that the Employment Contract was breached with mutual consent on 5 July 2011 and the Old Club and the Player agreed to the payment of a total amount of NET EUR 300,000 (“Private Agreement”). From Article 3 of the Private Agreement it follows that: “[...] after the payment of some of the above mentioned installments, the football player declares that he accepts the change of the date of the deposit as well as the change of the amount to 350.000€ NET (due to a delay of payment of the installment) and the new dates are settled as follows: 90.000€ (ninety thousand euros) NET on 30-04-2012; 95.000€ (ninety [sic] thousand euros) NET on 31-05-2012; 95.000€ (ninety five thousand euros) NET on 30-06-2012; 70.000€ (seventy thousand euros) NET on 31-08-2012”.

The next day, on 30 March 2012, the Old Club and the Player signed a Spanish version of the Private Agreement. From Clause 4 of the Spanish version of the Private Agreement it follows that, *inter alia*, in case any of the four instalments would be delayed for more than a month, the Player could request full performance of the Employment Contract.

On 30 April 2012, the Old Club duly paid the first instalment of the Private Agreement.

On 29 May 2014, the Player lodged a claim in front of FIFA against the Old Club, claiming a total amount of EUR 750,000, corresponding to the residual amount of the Employment Contract in accordance with Article 4 of the Spanish version of the Private Agreement.

On 1 October 2014, the HFF informed FIFA, *inter alia*, that the Old Club was no longer affiliated with the HFF due to their dissolution.

On 12 March 2015, FIFA informed the Player that the Old Club was no longer affiliated to the HFF and therefore considered that FIFA was no longer in the position to further proceed with the claim of the Player against the Old Club.

On 8 May 2018, the Player lodged a claim against the Appellant in front of the FIFA DRC, requesting the payment of the amount of EUR 750,000, corresponding to the residual amount of the Employment Contract, based on the non-compliance of the Private Agreement and in particular referring to Clause 4 of the Spanish version of the Private Agreement, and claiming that the Appellant was reaffiliated with the HFF.

The Appellant replied to the claim by means of a letter which letterhead read “Aris FC”, affirming that the Appellant is a different legal entity from the Old Club.

On 4 June 2020, the FIFA DRC rendered the Appealed Decision with, *inter alia*, the following operative part: “(...) 3. *The [Club] ARIS FC (ATHLITIKOS SYLLOGOS THESSALONIKIS O ARIS PODOSFERIKI ANONYMI ETERIA) has to pay to the [Player] (...), the amount of EUR 750,000, plus interest at the rate of 5% p.a. (...)*”. On 1 July 2020, the grounds of the Appealed Decision were communicated to the Parties.

On 22 July 2020, the Appellant filed a Statement of Appeal against the Appealed Decision with the CAS.

A hearing was held on 13 January 2021 by video-conference.

On 18 January 2021, the CAS Court Office invited the Parties to file a post hearing brief limited to their comments on the relevance of the recently published CAS Award CAS 2020/A/7092.

Reasons

1. Determination of the event giving rise to the dispute

The first issue the Sole Arbitrator had to deal with related to the Appellant’s position that the First Respondent’s claim filed on 8 May 2018 against the Appellant was time-barred.

As a starting point, the Sole Arbitrator referred to Article 25(5) of the FIFA Regulations on the Status and Transfer of Players (the “FIFA RSTP”), which reads as follows: “*The relevant FIFA decision-making body shall not bear any case subject to these regulations if more than two years have elapsed since the event giving rise to the dispute. (...)*”. As for what had to be considered as the “event giving rise to the dispute”, the Sole Arbitrator held that in a case involving a succession of clubs, the “event giving rise to the dispute” was not the contractual violation by the old club, but the new club’s date of affiliation to its national federation, as it was from that specific moment in time that the player was in the position to initiate proceedings against the new club, being considered a new different legal entity, before the FIFA DRC. Indeed, only as from that specific moment, when the new club had actively started participating in a competition organised under the auspices of the national federation, had the FIFA DRC, also in consideration of the party requirement according to the relevant applicable law, in particular under Article 6 of the Rules Governing the Procedures of the Players’ Status Committee and the Dispute Resolution Chamber, been able to deal with the case.

In this particular case therefore, the “event giving rise to the dispute” was the Appellant’s date of affiliation to the HFF, i.e. on 1 July 2016, as it had not been possible before that specific moment in time to initiate proceedings against the Appellant before FIFA DRC. In view of the fact that the First Respondent’s claim against the Appellant had been filed on 8 May 2018, the First Respondent’s claim against the Appellant was not time-barred.

2. Sporting succession of clubs and fraudulent practices or bankruptcy proceedings as *sine qua non* elements of sporting succession

The Sole Arbitrator then had to examine whether or not the Appellant was to be considered the sporting successor of the Old Club.

As a first important point, the Sole Arbitrator emphasized that the issue of the succession of two sporting clubs might be different than if one were to apply civil law regarding the succession of two separate legal entities. As such, the mere fact that two parties appeared as two separate legal entities was not a decisive factor to rule out sporting succession.

The Sole Arbitrator recalled that in the context of sporting succession, as opposed to legal succession, the picture the alleged sporting successor was presenting to the general public was of relevance, as the identity of a club was constituted by elements such as its name, colours, fans, history, sporting achievements, shield, trophies, stadium, roster of players, historic figures, etc. that allowed it to distinguish from all the other clubs. Hence, the prevalence of the continuity and permanence in time of the sporting institution in front of the entity that managed it had been recognised, even when dealing with the change of management companies completely different from themselves. The abovementioned elements were not exhaustive; in other words,

the existence of several elements could lead, in its combination, and so even if not all elements were met in a specific case, to the conclusion that a club had to be considered as a “sporting successor”. The overall package of elements was decisive.

The Sole Arbitrator also wished to point out that although the concept of “sporting succession” was mainly implemented in order to avoid abuse, and although it could certainly be an element to consider when analysing a concrete scenario, fraudulent practices by parties trying to avoid payments did not constitute a *conditio sine qua non* in order to conclude that sporting succession had occurred. In other words, sporting succession could exist even in the absence of such practices. The same applied to the absence of bankruptcy proceedings, that is, sporting succession could also exist in the absence of bankruptcy proceedings. By the same token, sporting succession was also not exclusively limited to entities which purchase clubs through public tender or auction.

In casu, the Sole Arbitrator found it of much importance that the names of the Appellant and the Old Club were practically identical. Both clubs had always been identified, and had competed, simply as “Aris” or “Aris Thessaloniki FC”. This also clearly followed from the Appellant’s own website, as well as the website of UEFA. Further to this, there was no doubt that the Appellant publicly portrayed itself as a sports entity founded on 25 March 1914 with a list of titles and achievements starting as from 1928. As such, the history of the Appellant was exactly the same as the Old Club and a great number of players who had played for the Original Debtor were in fact recognized in the Appellant’s history. Additionally, the Appellant had its premises at the same address, had the same stadium, used the same logo, colors and uniform as the Old Club. If the Appellant had

wanted to avoid any risk of being considered the sporting successor of the Old Club, it could have distinguished itself from the Old Club, but it had clearly opted not to do so. At the least, it could not be denied that the Appellant had had a serious hand in the creation of confusion towards the general public which could have been easily avoided.

For the Sole Arbitrator, the arguments as raised by the Appellant that ownership, license football teams and legal entities were different, could not prevail over the significant number of elements clearly pointing in the direction of the existence of sporting succession. In this regard, whether a club was operated through a different legal entity did not bear relevance on whether a sporting succession had taken place, i.e. *“a sporting entity identifiable by itself that, as a general rule, transcends the legal entities which operate it”* (CAS 2013/A/3425 at par. 139). The same applied to the fact that no players had been taken over by the Appellant from the Old Club. This was also of little relevance, considering that all players’ contract had automatically been terminated on relegation of the Old Club to the amateur division by virtue of the applicable regulations.

3. Due diligence

The Appellant further argued that, even if there was sporting succession, the First Respondent would still not be entitled to any amount from the Appellant as it had not shown the required degree of diligence as follows from the jurisprudence of CAS, in particular CAS 2011/A/2646.

The Sole Arbitrator concurred with the Appellant that the question of whether the creditor had showed the required degree of diligence had regularly been assessed in the jurisprudence of CAS, but recalled that it had been done in the context of decisions of the FIFA Disciplinary Committee related to the

imposition of disciplinary sanctions for a possible contribution to a breach of Article 64 of the FIFA Disciplinary Code (FDC) (edition 2011 or 2017) or Article 15 FDC (edition 2019). For the Sole Arbitrator, the present dispute significantly differed from the aforementioned CAS jurisprudence, as it did not concern an appeal of a decision of the FIFA DC, but an appeal of a decision of the FIFA DRC related to the consequences of a contractual breach. In this latter context the degree of diligence of the creditor did not need to be assessed. This could have been different in case the FIFA DRC would have rendered a decision in light of Article 24bis of the FIFA RSTP, but this was not the case here.

4. Effects of the sporting succession

As to the amount claimed by the First Respondent, the Appellant argued that it could not be condemned to pay compensation for an alleged breach that had been committed by the Old Club and not by the Appellant.

The Sole Arbitrator however noted that the provisions in relation to sporting succession did not leave any discretion for the adjudicatory body. In fact, it clearly followed from the CAS jurisprudence that if a club was considered to be a “sporting successor” of a non-compliant club, it also had to be considered a non-compliant party (see, *inter alia*, CAS 2020/A/7092). Therefore, being established that the Appellant was the sporting successor of the Old Club, the Appellant was considered the non-compliant party and, as such, was liable for outstanding payments under the Private Agreement to the First Respondent.

5. Reduction of an excessive penalty clause

Moreover, the Appellant argued that Clause 4 of the Spanish version of the Private Agreement was to be considered null and void

as it was against morality and imposed an excessive burden on the Old Club. The Appellant also argued that the First Respondent had failed to respect his obligation to mitigate his damages in accordance with Article 337c of the SCO.

As to the arguments of the Appellant that Clause 4 of the Spanish version of the Private Agreement was against morality and imposed an excessive burden on the Old Club, the Sole Arbitrator did not see why such provision had to be considered null and void for these reasons. As had rightfully been concluded by the FIFA DRC, Clause 4 of the Spanish version of the Private Agreement was equivalent to a financial disposition in a settlement agreement to which the parties involved had explicitly agreed. Therefore, in light of *pacta sunt servanda*, Clause 4 was considered to be valid.

There was also no need for the Sole Arbitrator to reduce the amount of EUR 750,000. In fact, as had also rightfully been decided by the FIFA DRC, the outstanding amount had to be considered outstanding payment and not compensation for breach of contract. Therefore, no mitigation was to be applied. Further to this, there was also no ground for any reduction for reason that the amount was “grossly disproportionate”, as had also been argued by the Appellant. The Sole Arbitrator recalled that in principle, parties were free to determine the amount of a contractual penalty and that contractual penalties had only to be reduced in case they were excessive. It was for the judge to establish, with regard to the merits of the case and all the relevant circumstances, whether the penalty was excessive and, if so, to what extent it had to be reduced. A penalty was deemed to be excessive when it was not reasonable and exceeded patently the amount that would seem just and equitable. However, the judge was not to reduce a penalty too easily and the principle of contractual liberty had

always to be privileged in case of doubt. Having weighted all criteria, the Sole Arbitrator found that Clause 4 of the Private Agreement was not unreasonable and excessive regarding the breach committed by Old Club and the First Respondent’s interest to secure performance of the breached obligation. Therefore, there was no reason to reduce the amount of EUR 750,000 plus interest at the rate of 5% *per annum* awarded to the First Respondent in the Appealed Decision.

Decision

In light of the foregoing, the Panel dismissed the appeal and confirmed the decision of the FIFA DRC.

CAS 2020/A/7417

Arsenal F.C. (Arsenal) v. Fédération Internationale de Football Association (FIFA)

18 June 2021

Football; disciplinary dispute; Regulatory framework governing the prohibition of third party influence on clubs; Contractual freedom under Swiss law and art. 18bis of the FIFA Regulations on the Status and Transfer of Players (Regulations); Interpretation of the concept of influence under art. 18bis of the Regulations; Criterion of the material influence in the assessment of a possible breach of the principle of prohibition of third party influence on clubs

Panel

Mr Lars Hilliger (Denmark), President

Prof. Ulrich Haas (Germany)

Mr Benoît Pasquier (Switzerland)

Facts

On 2 August 2018, Arsenal signed an Agreement for transfer of registration (the “First Contract”) with the Greek professional football club FC PAOK Thessaloniki (“PAOK”) regarding the permanent transfer of the professional football player [1] (“Player 1”) with immediate effect. Clause 3.6 (“*Future transfer of the Player*”) of the First Contract reads as follows:

3.6 If PAOK agrees to transfer, on a permanent basis, the registration of the Player to another football club (the “Future Transfer”), PAOK shall pay to Arsenal an amount in cash (the “Future Transfer Compensation”) equal to (a) in the event of a Future Transfer to a football club in the UK, 40% (forty per

cent.), or (b) in the event of a Future Transfer to a football club outside the UK, 30% (thirty per cent.)”.

On 15 August 2018, Arsenal signed an Agreement for transfer of registration (the “Second Contract”) with the Italian professional football club Frosinone Calcio S.R.L. (“Frosinone”) regarding the permanent transfer of the professional football player [2] (“Player 2”) with immediate effect. Clause 3.5 (“*Future transfer of the Player*”) of the Second Contract reads as follows:

3.5 If Frosinone agrees to transfer, on a permanent basis, the registration of the Player to another football club (the “Future Transfer”), Frosinone shall pay to Arsenal an amount in cash (the “Future Transfer Compensation”) equal to (a) in the event of a Future Transfer to a football club in the UK, 30% (thirty per cent.), or (b) in the event of a Future Transfer to a football club outside the UK, 25% (twenty-five per cent.)”.

When uploading the relevant transfer instructions in TMS, Arsenal “ticked the box” that it had “*not entered into an agreement which enables the counter club/ counter clubs and vice versa, or any third party to acquire the ability to influence its independence and policies in transfer-related matters*”.

By letter of 28 January 2020 (the “Charge Letter”), Arsenal was informed about the opening of disciplinary proceedings against it for a possible violation of art. 18bis (1) of the Regulations on the Status and Transfer of Players (2018 edition) (the “Regulations”) and art. 4 (3) of Annexe 3 of the same in connection with the transfers of Player 1 and Player 2 and specifically in relation to the sell-on fees payable under the relevant transfer agreements, given the circumstance that these provided for a higher percentage sell-on fee in the event that the Players were transferred

to clubs in the UK. The enclosed TMS Case Transfer Report averred that this higher percentage may have financial implications for the new clubs and thus “it appears that the Clubs would not enjoy full independence regarding transfer-related matters”. On 26 February 2020, the FIFA Disciplinary Committee issued its decision (the “DC Decision”), deciding *inter alia* as follows:

“1. The FIFA Disciplinary Committee found [Arsenal] responsible for the infringement of the relevant provisions of the Regulations related to third-party influence (art. 18bis par. 1) and the failure to declare mandatory information in TMS (art. 4 par. 3 of Annexe 3).

2. The FIFA Disciplinary Committee orders [Arsenal] to pay a fine to the amount of CHF 40,000.

3. In application of art. 6 par. 1 lit. a) of the FIFA Disciplinary Code, [Arsenal] is warned on its future conduct”.

On 24 June 2020, and following Arsenal’s appeal of the DC Decision, the Appeal Committee rendered the Appealed Decision and decided *inter alia* that:

“2. The appeal lodged by [Arsenal] is rejected and the decision of the FIFA Disciplinary Committee passed on 26 February 2020 is confirmed in its entirety”.

On 28 September 2020, Arsenal (the “Appellant”) filed its appeal with the Court of Arbitration for Sport (the “CAS”) and *inter alia* requested the CAS to decide that:

“II. the Appealed Decision is replaced in the sense that: Arsenal is not guilty of infringing Article 18bis (third-party influence on clubs) or Article 4 par. 3 of Annexe 3 (obligations of clubs with respect of the TMS) of the Regulations, and is therefore, released of any sanction;

III. alternatively to II., the Appealed Decision is replaced in the sense that: even if there is a finding that Arsenal is guilty of infringing Article 18bis (third-party influence on clubs), Arsenal is not guilty of infringing Article 4 par. 3 of Annexe 3 (obligations of clubs with respect of the TMS) of the Regulations and, therefore, the fine is reduced accordingly”.

In its Answer, FIFA (the “Respondent”) requested the CAS to *inter alia* reject the Appellant’s appeal in its entirety and to confirm the Appealed Decision of the Appeal Committee.

Reasons

1. Regulatory framework governing the prohibition of third party influence on clubs

Initially, the Panel notes that art. 18bis of the Regulations states as follows:

“Third-party influence on clubs

1. No club shall enter into a contract which enables the counter club/counter clubs and vice versa, or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams.

2. The FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article”.

Moreover, it is noted that one of FIFA’s objectives, according to art. 2 (g) of the FIFA Statutes, is “to promote integrity, ethics and fair play with a view to preventing all methods or practices, such as corruption, doping or match manipulation, which might jeopardise the integrity of matches competitions, players, officials and member associations or give rise to abuse of association football”.

Furthermore, it is worth noticing that art. 18bis of the Regulations was added to the Regulations in 2008 and amended in 2015 in order to achieve this objective.

With reference to this, the TPI/TPO Manual states, *inter alia*, that:

“Article 18bis prohibits all scenarios whereby any person or entity acquires the ability to influence in employment and transfer-related matters a club’s independence, its policies or the performance of its teams, including the club’s capacity to independently determine conditions and policies concerning purely sporting issues as the composition and performance of its team.

The prohibition is directed exclusively at clubs and, therefore clubs are responsible for ensuring that no party acquires the ability to influence them, and that they do not acquire such an ability in the areas stipulated”.

As such, it seems clear to the Panel that the main purpose of art. 18bis of the Regulations is to preserve the integrity of the competition as a whole by aiming at strengthening the autonomy of clubs in diverse aspects, including in relation to the transfer of players. Moreover, it seems clear to the Panel that the rule in question prohibits clubs from entering into a contract which enables any possible prohibited influence on another club, even if such prohibited influence never materialises.

2. Contractual freedom under Swiss law and art. 18bis of the Regulations

As explained by the Panel in CAS 2020/A/7158, freedom of contract is linked to the concept of *autonomy of will*, where the concept of *will* must be understood as “independence”, *i.e.* the absence of any subordination of the autonomy to an external matter. Contractual freedom as a legal principle is found, *inter alia*, in art. 19 of the

Swiss Code of Obligation, which states: “*The terms of a contract may be freely determined within the limits of the law*”. With regard to the limitation of the possibility of waiving contractual freedom, art. 27(2) of the Swiss Civil Code (“SCC”) has the wording: “*No person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals*”.

The CAS confirmed the application of the principle of contractual freedom to football contracts, including excessive self-commitment as being contrary to this principle (CAS 2015/A/4042).

As such, and in general, when negotiating, *e.g.* a transfer agreement governed by Swiss law, the two clubs are allowed to freely set the essential conditions, the nature and the non-essential elements of the contract they wish to enter into, without being subject to any limitations or conditions, except against entering into an unlawful contract (*i.e.* one that is against the law, good moral or customary practice).

However, it also follows, *inter alia*, from art. 60(2) SCC, that a private association legally established under Swiss law, like FIFA, has the power to self-govern and to lay down its own rules in articles, which must be done in writing and indicate the objects of the association, its resources and its organisation. As such, FIFA is entitled to lay down its own rules and regulations, but these are subject to and must observe Swiss law. The Panel notes that this case being of a disciplinary nature, it thus has to do with the obligation of a club by virtue of its affiliation with FIFA to observe the regulations put forward by FIFA to govern their relationship.

Art. 18bis of the Regulations aims, *inter alia*, at prohibiting clubs from entering into a contract which enables any possible prohibited influence on another club. Such prohibition must be understood and

interpreted as an exception to the principle of contractual freedom. The Panel supports the above-mentioned objective of protecting the integrity of the competition, however, and even if it is possible for FIFA to set limits on the contractual freedom of clubs that are subject to FIFA rules and regulations, thus prohibiting the conclusion of agreements that may jeopardise the integrity of the competition and/or the independence of clubs, such restrictions must be balanced with the principle of contractual freedom in accordance with Swiss law.

3. Interpretation of the concept of influence under art. 18bis of the Regulations

When interpreting an article like art. 18bis of the Regulations, the Panel must try to establish the true meaning of the provision pursuant to Swiss law, including the purpose sought and the intention of the legislator, *i.e.* FIFA. As already mentioned, the provision was included in the Regulations in order to try to safeguard the integrity of the competition as a whole, which is why the Panel will use that purpose and intention as the basis for its interpretation.

First of all, it is undisputed that the prohibited influence to be acquired, but not necessarily materialised, in order to constitute a breach of the said rule can both be direct and indirect. However, for the Panel the essential question to be answered is what is to be understood as “*influence*” in order to be in breach of art. 18bis of the Regulations, including whether such influence needs to potentially produce a limitation, and whether such possible limitation must threaten the integrity of the competition as a whole. In this regard, the Panel concurs with the panel in CAS 2020/A/7158 (para. 112) that “*a restrictive interpretation must be made of the rule, the nature of which is disciplinary or punitive*”. This follows from the fact that the provision is seeking to limit the contractual freedom

under Swiss law for football club subject to FIFA’s rules (see also CAS 2016/A/4518 para. 91).

In light of the above, and with reference to the purpose and intention behind art. 18bis of the Regulations, the Panel wishes to stress that any unsubstantial possible influence on another club must not be considered as a violation of the prohibition set out in the said rule. In the Panel’s view, in order for a potential influence to be covered by the prohibition set out in art. 18bis of the FIFA Regulations, first of all it has to concern an interest worth of protecting in order to safeguard the integrity of the competition as a whole. For example, and in line with the jurisprudence of FIFA’s deciding legal bodies, in general the Panel does not find that a standard sell-on clause imposes prohibited influence on a player’s new club, even if the said clause does in fact, to some extent, restrict the financial freedom of the new club.

Moreover, in the Panel’s opinion, there must be a threshold to pass for a potential influence to be in breach of the prohibition, in other words: the potential influence has to be material, which must be assessed on a case-to- case basis. As such, a mere financial provision in a transfer contract freely negotiated between two clubs does not, *per se*, constitute an influence prohibited under art. 18bis of the Regulations, even if the said contractual provision to some extent restricts the financial freedom of the new club, as long as the influence in question is below a certain threshold based on the circumstances of each particular case. In the Panel’s view, restrictions on the freedom of clubs, among others, to enter into fair and freely negotiated business transactions should not be limited by FIFA rules and regulations as long as such transactions are not in conflict with the principles set out in art. 2 (g) of the FIFA Statutes or in other FIFA rules or regulations worth of protecting.

4. Criterion of the material influence in the assessment of a possible breach of the principle of prohibition of third party influence on clubs

The Panel first of all note that pursuant to the Sell-on Clauses in this particular case, Arsenal would be entitled to receive 10 or 5 percent more, respectively, of the transfer fee paid for the possible transfer of Player 1 and/or Player 2, if such a transfer was made to a club in the UK.

During these proceedings, the true background for inserting these clauses in the First and Second Contracts could not finally be determined by the Panel, however, the Parties both agreed that transfer sums paid in connection with transfers to the UK are generally higher compared to other territories.

The Panel notes the submission made by FIFA that the Sell-on Clauses clearly are to be considered as “anti-rival” clauses, with the aim of reducing the risk of a future transfer to one of Arsenal’s rival clubs in the Premier League, thus limiting the independence of the Clubs and having an undue influence on the competition, as well as setting a limitation on the two players’ possible return to clubs in the UK.

However, the Panel does not find a sufficient basis for considering the Sell-on Clauses as “anti-rival” clauses causing the alleged influence. First of all, the Sell-on Clauses refer to the “UK” and not to the Premier League or English leagues, and, besides, FIFA did not substantiate its submission any further.

Furthermore, the Panel finds that the “additional” percentage to be paid to Arsenal in case of a transfer to a club within the UK is in fact very modest and of a very limited preventive strength, not least taking into

consideration that especially Premier League clubs in general are willing to pay higher transfer fees for the right to register a player.

Moreover, it should be recalled that, in any case, the players also have a say in deciding the destiny of a future transfer. In particular in cases where the percentages to be paid (according to the geographical regions) differ only little, the say of the player in the transfer bargain should not be underestimated.

All in all, and based on the wording of the Sell-on Clauses and the circumstances of these particular transfers, the Panel on a balance of probabilities is not convinced that Arsenal, when entering into Contract 1 and/or Contract 2, acquired the ability to materially influence the other Clubs in employment and transfer-related matters, their policies or the performance of their teams.

Moreover, and even if such influence was to be considered acquired when signing the respective contracts, *quod non*, the Panel finds, in these two transfers, that such influence did not reach the required threshold to potentially unduly limit the independence of the Clubs.

For the sake of good order, the Panel notes that, according to the information received during the hearing, the player 2 was in fact transferred to a club in the English Championship, which only supports the view of the Panel that no material limiting influence was ever acquired by Arsenal.

Based on the above, the Panel finds that the Sell-on Clauses in the First Contract and in the Second Contract do not violate the prohibition set out in art. 18bis of the Regulations. As such, the Appealed Decision should be set aside and the sanctions imposed on Arsenal lifted.

Decision

The appeal filed on 28 September 2020 by Arsenal F.C. against the decision rendered by the FIFA Appeal Committee on 24 June 2020 is upheld. The decision rendered by the FIFA Appeal Committee on 24 June 2020 is set aside.

CAS 2020/A/7503

N. v. Fédération Internationale de Football Association (FIFA)

25 March 2021

Football; International transfer of minor players; Rationale of Art. 19 RSTP; Interpretation of Art. 19 RSTP; Interpretation of the exception of Art. 19 para. 2 lit. a RSTP; Burden and standard of proof for the exception

Panel

Mr Rui Botica Santos (Portugal), Sole Arbitrator

Facts

N. (the “Appellant” or the “Player”) is a minor player with US and Hungarian nationalities. The Player was born on 29 September 2005 in Seattle, United States of America (“USA”) and is the son of P. (the “Mother”), Hungarian national, and of R. (the “Father”), US national. He lived all his life in the USA and has been training and playing football in the USA since his early age until July 2020, when he moved to Hungary, the home country of his Mother. In the past, during some holiday periods, the Player used to visit Hungary.

In July 2020, the Player and the Mother made the decision to move to Hungary invoking the difficulties caused by the Covid-19 outbreak in the USA. The main reason why they decided to move to Hungary is related to the advance age and delicate health conditions of the Player’s Hungarian grandparents (the “Mother’s Parents”) and their need of care and assistance in Hungary. The Mother has a father with 82 years old and a mother with 78 years old.

As a result, the Player had to move with the Mother to Hungary. The Player is a minor and cannot live away from his Mother, who is the most indicated person to take care of his education.

After arriving in Hungary, the Mother reached out the football club MOL Fehérvár FC (the “Club”) to see if there was an opportunity for the Player to train and play in friendly matches. The Club gave a positive answer and immediately initiated the application process for the Player’s transfer to Hungary.

On 3 September 2020, the Hungarian Football Federation (the “HFF”) submitted, on behalf of the Club, an application in the Transfer Matching System (the “TMS”), for the approval of the International Transfer Certificate (the “ITC”) of the Player from the U.S. Soccer Federation. The application was based on the exception foreseen in art. 19.2.a) of the Regulations on Status and Transfer of Players (the “RSTP”), i.e. *“Move of the player’s parents for reasons not linked to football”*.

The HFF indicated in the TMS that the *“Player lives in Hungary with his mother”* and provided the following supporting documents: (a) a copy of the Player’s birth certificate, which indicates that he was born in Seattle, USA; (b) a copy of the Player’s Hungarian passport and the Mother’s Hungarian identity card; (c) an employment letter signed on 17 August 2020 by the Father, in his capacity of President of the US company “I, Inc”, located in [...], Washington, confirming (i) the Mother’s employment with the said entity; and (ii) that the Mother *“(…) has been employed with the company in various roles beginning February 2, 2005 and continues her excellent work remotely. She is currently working out of the home in Siofok, Hungary”*; (d) a statement dated 17 August 2020 – duly signed by the Mother – in which she declared that she *“exercise(s) the right of custody of [the Player] in Hungary”*; and (e) a copy of the

Mother's Hungarian residence card issued on 16 July 2008, indicating the following address: [...] Siófok, [...] Hungary.

On 8 September 2020, upon the Fédération Internationale de Football Association's request (the "Respondent" or "FIFA"), the Appellant provided the following additional information: (a) a statement from the Hungarian club dated 7 September 2020, informing that the Player "(...) *is training with the team U18 of MOL Fehérvár FC (...)*" and that "*the family is living in Siófok, Hungary*". Moreover, the statement informs that the Parents "(...) *asked the club at first 3 years ago for training opportunities and [the Player] took some trainings and friendly matches*" and that "*this year they asked again for some training opportunities but this time with transfer request*"; (b) a statement from the Mother informing that the Player arrived in Hungary on 19 July 2020 and that he "(...) *was 5 years old when he started to play soccer. [The Parents] came home every summer for a few months since the kids were born. [They] lived in Siófok therefore at the beginning [the Player] trained with Siófok team as a guest player for the time being here. 3 years ago [they] took [the Player] to Vidi and he was given the opportunity for training (...). [The Player] always had a goal to be able to play soccer in Europe. Now [the Parents] would like to give him the opportunity to continue to improve his talent in soccer*"; and (c) a copy of a utility bill dated 24 August 2020 proving the abovementioned leaving address.

The Single Judge of the Players' Status Subcommittee (the "PSC") passed a decision on 9 September 2020 determining that the requirement set out in art. 19.2.a) of Regulations on the Status and Transfer of Players (the "RSTP") was not met and therefore rejected the request made by the Club for the approval of the ITC of the Player (the "Appealed Decision"). In the grounds of the Appealed Decision, the Single Judge held that the exception of Article 19.2 (a) RSTP is

not applicable in cases where the player's parents moved to the new country for reasons that are not entirely independent from the football activity of the minor. In light of the main facts and provided evidence (mainly the mother's and club's statements), and the strict application of the invoked exception for the registration of the Player before HFF, he concluded that the facts and circumstances of this case raised doubts about the main motivation of the Player's move to Hungary. The Single Judge added that "*[t]hese doubts were reinforced by the fact that the Player's father remained in the [USA] without providing any substantial explanation as to why he would not be moving along with his family*". Finally, "*the Single Judge (...) was unable to exclude that the Player's football career may have played a role in the Player's mother's decision to move to Hungary. As a matter of fact, the circumstances at hand rather suggest that the Player's mother moved to Hungary "to give him the opportunity to continue to improve his talent in soccer" as he "always had a goal to be able to play soccer in Europe"*".

On 9 November 2020, the Appellant filed a Statement of Appeal with the CAS, challenging the Appealed Decision. On 3 December 2020, the Appellant filed his Appeal Brief with the CAS.

On 10 February 2021, a hearing was held by videoconference.

Reasons

1. Rationale of Art. 19 RSTP

Before assessing the evidence and the factual circumstances of the present appeal, the Sole Arbitrator briefly commented the background of Article 19 RSTP and its purposes to ban the international transfers of minors. He recalled that Article 19.1 RSTP states that, in principle, international transfer of players is only permitted if the player is over the age of 18. This rule applies to

amateur and professional players. Exceptions to allow international transfers of players under the age of 18 are only permitted if within the exceptions allowed in Article 19.2 RSTP. The exceptions have been admitted to provide certain flexibility – to both clubs and players – but exclusively within the aim to protect minor players. Basically, the exceptions have been established to accommodate certain reasonable circumstances that would not affect the minors, among others, in socio-economic, educational, cultural, family and psychological terms.

2. Interpretation of Art. 19 RSTP

The Sole Arbitrator also found important to underline the principles stemming from the relevant CAS jurisprudence on the matter. In the Sole Arbitrator's view, the general prohibition contained in article 19.1 RSTP was based on the fact that, while international transfers might in very specific cases, be favourable to young players' sporting career, they were very likely to be contrary to their best interest as minors. The interest of protecting the adequate and healthy developments of a minor as a whole had to prevail over purely sporting interests. Therefore, Article 19 RSTP could only be interpreted restrictively in view of the protective purpose of the rule. The exceptions established in Article 19.2 RSTP, so the Sole Arbitrator found, had carefully been drafted, and corresponded to situations where the framers of the statutes had felt that minors would be adequately protected. There was no scope to narrow the application of Article 19.1 RSTP by allowing new exceptions, other than those already legislated and exhaustively listed in paragraph 2 of said provision.

3. Interpretation of the exception of Art. 19 para. 2 lit. a RSTP

In continuation, the Sole Arbitrator highlighted two different views in relation to the strict interpretation of the exception foreseen in Article 19.2(a) RSTP. While on the one hand, in the CAS case 2013/A/3140 (para. 8.25), the panel had considered that whenever the player's parents took football into consideration, even if this had only been part of the reasons for the move, the exception was not applicable, on the other hand, in the CAS case 2015/A/4312 (para. 81), the panel had expressed a more flexible position, as it had considered that in such cases where a CAS panel was convinced that the move of the family was motivated by a mixture of several reasons, and where each one of the other proven reasons was legitimate *per se*, the application of the exception envisaged in Article 19.2(a) RSTP had to be assessed and decided based on the weight of the "football factor" within the whole range of reasons and the overall circumstances of the matter, such as: What were the other reasons? Whether all the family moved? To what extent the specific location to which the family decided to move was chosen with due consideration of the football activity of the minor?, etc.

According to the Sole Arbitrator, this latter interpretation - according to which the player's registration had only to be refused if the "football factor" was the prevailing element in the decision to change countries - was the one to be adopted, as it was the most reasonable and balanced interpretation of the standards in question. Indeed, the change of country was never, or very rarely, based on a single cause and all cases had to be analysed according to the circumstances of the specific case. This flexibility in the interpretation and application of the rules in no way contradicted the strictness and care that the arbitrator had to have in applying the envisaged exceptions. This had also been the reasoning followed in CAS 2012/A/2839.

4. Burden and standard of proof for the exception

The Sole Arbitrator then proceeded with the assessment of the exception envisaged in Article 19.2(a) RSTP in the case at hand. He recalled that this was not an easy task because it implied and required the investigation of subjective intentions. He also underlined that the burden of proof lied with the player, who needed to prove that there had been no links to football underpinning the family's decision to move to the new country. The standard for proving the exception had to be "comfortable satisfaction" and not "beyond a reasonable doubt", as there was no justification in requiring a higher standard of proof than the one established for doping and corruption matters.

Based on the evidence provided, the Sole Arbitrator considered that the Mother's move to Hungary was significantly linked to the football activity of her son – the Player. Reviewing the Mother's statements on the reasons for her relocation to Hungary, in particular the part in which the Mother explained that the Parents wanted "(...) *to give [the Player] the opportunity to continue to improve his talent in soccer*", there was a clear feeling that the main reason for the Player's move to Hungary was not related to the Mother's Parent's health condition but to reasons linked to football. Even considering that the Mother had not understood what FIFA was asking, one could not ignore the emphasis given to the Player's interest in playing in Hungary.

For these reasons, the statements made by the Mother that the desire to integrate the Player into the Club was only a secondary element resulting from the natural process of the Mother's move to Hungary, had not convinced the Sole Arbitrator. The Player's submission that his move to Hungary had

been completely unrelated to football was not sustainable. The Sole Arbitrator thus held that he was firmly convinced that if football activity had not been the only reason for the Player's move to Hungary, it had certainly been the main reason that had presided over this intention. In conclusion, the Player could not benefit from the exception set forth in Article 19.2(a) RSTP and the application submitted before HFF for the registration of the Player with the Club had to be rejected.

Finally, the Sole Arbitrator added that the Player was not prevented from playing football, as he had been doing since he was 8 years old. The Player was only prevented to be registered at the Club and entering in the European football transfer market, a situation that, in any case, had the potential of distracting the Player from the essential focus of a minor, *i.e.* his studies and education. Moreover, the Player was not restricted to re-submit another registration application, either (i) based on a solid and convincing evidence proving the invoked main reasons related to the move to Hungary with his Mother; (ii) or based on other potentially applicable exceptions under Article 19.2 RSTP as soon as he is 16 years old.

Decision

In light of the foregoing, the Panel dismissed the appeal and confirmed the decision of the Single Judge of the Players' Status Subcommittee.

CAS 2020/A/7526

World Athletics (WA) v. Salwa Eid Naser & CAS 2020/A/7559 World Anti-Doping Agency (WADA) v. WA & Salwa Eid Naser
30 June 2021

Athletics (track and field); Doping (whereabouts failure); Reasonable attempt to locate an athlete for testing during the sixty minutes time slot; Assessment of the DCO recollection of events; Missed test presumed to have been caused by the athlete's negligence unless the presumption is rebutted; Personal responsibility of the athlete in case of delegation of Whereabouts Filings to a third party; CAS scope of review and recharacterization of the charge against the athlete; Second Anti-Doping Rule Violation for sanctioning purpose; Reduction of the ineligibility period; Starting date of the ineligibility period; Disqualification of the athlete's results

Panel

Prof. Massimo Coccia (Italy), President;
Mr Nicholas Stewart QC (United Kingdom);
The Hon. Michael Beloff QC (United Kingdom)

Facts

World Athletics ("WA", formerly known as the International Association of Athletics Federations or "IAAF") is the international governing body of athletics at world level, headquartered in the Principality of Monaco. WA is a signatory to the World-Anti Doping Code ("WADC") and has established the Athletics Integrity Unit ("AIU") to carry responsibility for anti-doping results management.

The World Anti-Doping Agency ("WADA") is the international agency governing anti-doping matters, with headquarters in Montreal, Canada.

Ms Salwa Eid Naser is a track and field international level athlete born on 23 May 1998 and mostly competing in 200m and 400m races (the "Athlete"). She is a Nigerian-born citizen of the Kingdom of Bahrain, where she lives and trains being registered with the Bahrain Athletics Association ("BAA"). She is the current 400m world champion, having won the title at the World Championships in Doha, Qatar, on 3 October 2019.

In compliance with the applicable WA Anti-Doping Rules ("ADR"), which the AIU is responsible for implementing, the Athlete has been included in the WA Registered Testing Pool ("RTP") since 2016.

The definition of RTP provided in the ADR requires the AIU to identify a group of "*highest priority*" athletes who, under the relevant Anti-Doping Regulations ("AD Regulations"), have in particular the following obligations as members of said pool of elite athletes (collectively the "Whereabouts Requirements"):

- (i) Provide accurate information as to their whereabouts on a quarterly basis, "*including identifying where [they] will be living, training and competing during that quarter*" so that they can be located for testing at those times and locations ("Whereabouts Information" or "Whereabouts Filing");
- (ii) Specify for each day of the forthcoming quarter a 60-minute timeslot in which they have to be available and accessible for testing at a specified location.

In order to implement the aforementioned rules, WADA has developed an online application, the Anti-Doping Administration and Management System ("ADAMS"), on

which athletes can upload and update their Whereabouts Information. Each International Federation is then provided access to the information entered into ADAMS by the athletes competing in their respective sport.

Accordingly, since 2016 the Athlete has been under the permanent obligation to regularly enter and update her Whereabouts Information into ADAMS – information to which the AIU has access on behalf of WA – and to be available and accessible for testing each day at the specified location and 60-minute timeslot.

A violation of the Whereabouts Requirements constitutes a “Whereabouts Failure” in the form of a Filing Failure or a Missed Test. A combination of three Whereabouts Failures within a 12-month period amounts to an Anti-Doping Rule Violation (“ADRV”).

By notice of charge dated 4 June 2020 (the “Notice of Charge”), the AIU, on behalf of World Athletics, charged the Athlete “*with committing the following Anti-Doping Rule Violations (the ‘Charge’)*”:

2.2.1 *A combination of three Missed Tests and/or Filing Failures, as defined in the International Standard for Testing and Investigations, within the twelve-month period beginning on 1 January 2019, specifically for (i) a Filing Failure effective 1 January 2019, (ii) a Missed Test dated 12 March 2019 and (iii) a Missed Test dated 12 April 2019 in accordance with Article 2.4 ADR; and*

2.2.2 *A combination of three Missed Tests and/or Filing Failures, as defined in the International Standard for Testing and Investigations, within a twelve-month period beginning on 12 March 2019, including (i) a Missed Test on 12 March 2019 (ii) a Missed Test on 12 April 2019 and (iii) a Missed Test on 24 January 2020 in accordance with Article 2.4 ADR”.*

The Notice of Charge accordingly indicted the athlete with two potential violations, which for the sake of convenience will be identified as “First Charge” and “Second Charge”. The Notice of Charge also informed the Athlete that the Head of the AIU had exercised its discretion to impose on her a provisional suspension (“Provisional Suspension”).

On 14 October 2020, the Disciplinary Tribunal (the “DT”) established by Sport Resolutions on behalf of World Athletics issued the Appealed Decision by which it dismissed both charges against the Athlete and lifted the Provisional Suspension.

In particular, the DT dismissed the Charge against the Athlete because, although “[*t]his was a case very much on the borderline*”, the unsuccessful attempt of DCO González of 12 April 2019 could not be treated as a Missed Test.

On 12 November and 30 November 2020, in accordance with Articles R47 and R48 of the 2020 edition of the Code of Sport-related Arbitration (the “CAS Code”), WA and WADA respectively filed their statements of appeal against the Appealed Decision. Accordingly, the CAS Court Office opened two proceedings, docketed as CAS 2020/A/7526 *World Athletics v. Salwa Eid Naser* and CAS 2020/A/7559 *World Anti-Doping Agency (WADA) v. World Athletics and Salwa Eid Naser*.

On 15 December 2020, the CAS Court Office informed the Parties, *inter alia*, that in view of their agreement, the procedures CAS 2020/A/7526 *World Athletics v. Salwa Eid Naser* and CAS 2020/A/7559 *World Anti-Doping Agency (WADA) v. World Athletics and Salwa Eid Naser* had been consolidated.

Reasons

Both WA and WADA request that the Panel set aside the Appealed Decision, arguing that the 12 April 2019 Missed Test should be confirmed and that thus the Athlete violated Article 2.4 ADR based either on the First Charge or on the Second Charge. As to the consequences for such violation, the Appellants contend that the Athlete shall be sanctioned with (i) the standard two-year period of ineligibility, which does not deserve reductions based on the Athlete's degree of fault and (ii) disqualification of her results since the date of the third Whereabouts Failure, 12 April 2019 (or, as requested by WADA, since 1 April 2019, based on a Filing Failure effective on that date).

The Athlete, on the other hand, seeks full confirmation of the Appealed Decision, contending that on 12 April 2019 there was no Whereabouts Failure. This alleged Whereabouts Failure is crucial to both the First Charge and the Second Charge as, without it, the Athlete would not incur three such failures within a twelve-month period and she could not be charged with any ADRV. Alternatively, should the Panel find that she did perpetrate an ADRV, the Athlete requests (i) that any imposed period of ineligibility be reduced, taking into account the circumstances of the case at hand, including the delays in the proceedings that led to the Notice of Charge, and (ii) that her results be disqualified only from 4 October 2019 (*i.e.* the day after she won the 400m at the World Championships in Doha).

Under Article 2.4 ADR, a "Whereabouts Failure" is defined as "[a]ny combination of three Missed Tests and/or Filing Failure Failures, as defined in the International Standard for Testing and Investigations, within a twelve-month period by an Athlete in a Registered Testing Pool".

1. Whether the Athlete has committed a Missed Test on 12 April 2019: the

reasonableness of the attempt made by DCO González on 12 April 2019

The Appellants contend that DCO González did what was reasonable in the circumstances and even went beyond its duties to locate the Athlete. The Athlete, on the other hand, backs the Appealed Decision's finding that DCO González did not act reasonably in the circumstances, and insists that she was present and available at the location and DCO González could not find her as he unreasonably selected the wrong door and did not even try to open the correct Door 12 although it was unlocked.

According to Article 9.2.1 of the WADA Guidelines, "[w]hat constitutes a reasonable attempt to locate an Athlete for Testing during the 60-minute timeslot cannot be fixed in advance, as it will necessarily depend on the **particular circumstances of the case in question, and in particular on the nature of the location chosen by the Athlete for that timeslot**" (emphasis added).

In the Panel's view, the whole system hinges on the premise that athletes have the duty to be diligent at filing Whereabouts Information that is accurate enough to allow DCOs to find them without any particular effort. In this respect, Article I.3.4 ISTI is unequivocal: "*It is the Athlete's responsibility to ensure that he/she provides all of the information required in a Whereabouts Filing **accurately and in sufficient detail to enable any Anti-Doping Organization wishing to do so to locate the Athlete for Testing on any given day in the quarter at the times and locations specified by the Athlete in his/her Whereabouts Filing for that day, including but not limited to during the 60-minute time slot specified for that day in the Whereabouts Filing. More specifically, the Athlete must provide **sufficient information to enable the DCO to find the location, to gain access to the location, and to find the Athlete at the location*****" (emphasis added).

With that in mind, the Panel is of the opinion that the evaluation of the reasonableness of a DCO's attempt must be made looking objectively at the steps taken by the DCO in the specific location chosen by the athlete, in light of the information provided by the athlete and in connection with said athlete's duty of diligence in foreseeing and reducing potential difficulties. In this respect, the personal situation of the concerned athlete and/or the actual presence and availability at the specified location is irrelevant (see CAS 2014/A/2 at para. 59: *"The reasonableness of the actions of the DCO were to be assessed objectively, without reference to the particular situation of Mr Gemmell. Any consideration of the particular situation of Mr Gemmell was only relevant to whether he can establish that he was not negligent in being unavailable for testing"* (emphasis added)).

In the Appealed Decision, the DT acknowledged that, considering the circumstances of the case and the overall situation at the specified location, DCO González acted conscientiously and went beyond what was expected of him. Nonetheless (and surprisingly, in the Panel's view), the DT found that DCO González made one mistake that by itself made his unsuccessful attempt to locate the Athlete unreasonable, namely that although he understood that Building 954 was the correct building (instead of the indicated Building 964), he did not at first select the correct entrance door (i.e. Door 12), he spent the timeslot knocking on the wrong door (i.e. Door 11) and he did not attempt to go through the unlocked Door 12. On that ground alone, the DT determined that it was not proven to its comfortable satisfaction that DCO González acted reasonably in the circumstances.

The Panel does not concur with the DT's determination in this regard; it is of the firm

opinion that DCO González actually did all that could be reasonably required of him to locate the Athlete at the specified location. The sequence of events is quite clear and essentially undisputed, with the only exception related to the attempt at opening Door 12. As to the disputed attempt to open Door 12, DCO González clearly testified, both before the DT and at the CAS Hearing, that he did try to open Door 12 during the 60-minute timeslot. However, he found that it was closed, specifying that he was prevented from opening it since it was locked or somehow stuck.

2. Assessment of the DCO recollection of events

There is no presumption that a DCO's recollection of events is correct unless proven otherwise. Rather, the hearing body must evaluate the probabilities in the particular circumstances of the case in hand (CAS 2020/A/7528, at para 141: *"it is a matter for the Panel to form a view on the evidence and to weigh it according to its context and circumstances"*).

It is noteworthy that the applicable rules provide no compulsory requirement as to the content of the DCO's contemporaneous report or the credibility of the events that are not mentioned therein. Conversely, it is acceptable for a DCO not to indicate each and every circumstance in his or her contemporaneous report and to expand his or her account at a later stage (see e.g. CAS 2018/A/5885-5936, para. 186).

3. Missed test presumed to have been caused by the athlete's negligence unless the presumption is rebutted

Pursuant to Article I.4.3.e) ISTI, where a missed test has been established, the athlete has the burden to rebut the presumption that his negligence caused his failure to be available for testing.

The Athlete contends that she was present and available at Building 954, flat 11, during the relevant timeslot and, accordingly, there was no negligence on her part. On the other hand, the Appellants contend that the assessment of her availability shall be made based on the location specified in her Whereabouts Information (i.e. building 964) and, that, in any case, she negligently failed to make herself available at Building 954.

The Panel notes that, under Article I.4.1 ISTI, the Athlete has an obligation to be “**present and available for Testing on any given day during the 60-minute time slot specified for that day in his/her Whereabouts Filing, at the location that the Athlete has specified for that time slot in such filing**”. Article I.3.2 ISTI further specifies in this respect that “*the Whereabouts Filing must also include, for each day during the following quarter, one specific 60-minute time slot between 5 a.m. and 11 p.m. each day where the Athlete will be available and accessible for Testing at a specific location*” (emphasis added).

In light of the clear wording of said rules, the Panel accepts WA and WADA’s argument that the Athlete’s availability – or failure thereof – is to be evaluated based on the location provided in her Whereabouts Information.

Accordingly, considering that the Athlete indicated a non-existent building (i.e. building 964 instead of 954), the Panel finds that the Athlete was not available and accessible (let alone present) at the “specified location”. For the same reason, it follows that the Athlete failed to update her Whereabouts Information to give notice of her actual location, namely Building 954. The Athlete’s failure to be available and accessible was patently caused by her negligent behaviour, considering that she is ultimately responsible for the Whereabouts Information being updated on ADAMS.

In light of the above, the Panel holds that the Athlete did not come close to rebutting, on a balance of probability standard, the presumption that her negligence caused her failure to be available and accessible at the specified location during the relevant timeslot on 12 April 2019. On the contrary, overall, the evidence reinforces that presumption. Consequently, the Panel is comfortably satisfied that the 12 April 2019 Whereabouts Failure meets all the requirements of a Missed Test under Article I.4.6 ISTI. The DT considered the case to be borderline but on the right side. The Panel considers the case to be significantly beyond the boundary but on the wrong side.

4. Personal responsibility of the athlete in case of delegation of Whereabouts Filings to a third party

The Panel accepts, in point of fact, that the Athlete had delegated the responsibility for the ADAMS entry to Mr Righi and had not acquainted herself with the mechanics of making the same. However, in point of law, Article I.6.4 ISTI is unambiguous in providing that athletes are personally responsible for any whereabouts data uploaded in ADAMS on their behalf; in fact, according to letter (b) of this ISTI provision, each “*Athlete remains personally responsible at all times for ensuring he/she is available for Testing at the whereabouts declared on his/her Whereabouts Filings. It shall not be a defence to an allegation of a Missed Test that the Athlete delegated responsibility for filing his/her whereabouts information for the relevant period to a third party and that third party failed to file the correct information or failed to update previously-filed information so as to ensure that the whereabouts information in the Whereabouts Filing for the day in question was current and accurate*”.

5. CAS scope of review and recharacterization of the charge against the athlete

While it was established, as indicated above, to the comfortable satisfaction of the Panel, that the Athlete had committed a Missed Test on 12 April 2019, the Panel wishes to consider, as it was invited to do by WADA, whether additionally the Charge could also have been upheld, and can now be upheld by this Panel, by treating the 12 April 2019 Whereabouts Failure as a Filing Failure.

The Panel accepts WADA's contention that the 12 April 2019 Whereabouts Failure indeed presents the features of a Filing Failure pursuant to Article I.3.6 ISTI notably given that the Athlete did not properly update her Whereabouts Information with reference to Quarter 2 of 2019 (which began on 1 April 2019) since, as she admitted, she inserted the address of a non-existent building; in this respect, the comment to Article I.3.6.b) ISTI specifies the following: "*An Athlete fails to comply with the requirement to make Whereabouts Filings...where he/she includes information in the original filing or the update that is inaccurate (e.g., **an address that does not exist**)*" (emphasis added).

The Panel must first determine whether to allow a recharacterization of the charge.

In fact, the Panel is aware that, while it has the power, under Article R57 of the CAS Code, to adjudicate the case *de novo*, reviewing "*the facts and the law*", such review shall be limited to the objective and subjective scope of the decision being appealed against and to the issues analysed therein (see e.g. CAS 2015/A/4059, CAS 2009/A/1879 and CAS 2007/A/1396 & 1402).

However, a recharacterization of the charge would not exceed the limits of its scope of review. Indeed, a recharacterization, if based on the same set of facts – in the case at hand, even on the same basic evidence – remains well

within the boundaries of the objective scope of the first instance decision.

Furthermore, the principle *jura novit curia* (undoubtedly applicable to arbitrations seated in Switzerland; see Swiss Federal Tribunal, Judgments nos. 4P 260/2000 of 2 March 2001; 4A_554/2014 of 15 April 2015, 4A 430/2020 of 10 February 2021) entails that the Panel can opt for a legal qualification of the conduct that is different from the one envisaged in the charge, as long as the interested parties are provided with the opportunity to provide comments and evidence on said new qualification.

In general, cases in which WADA is involved for the first time at the CAS stage, are fundamentally different from cases where a request to amend the charge at the appeal level has been dismissed because the new charge had not been previously raised by the prosecuting anti-doping organization before the first instance hearing body e.g. CAS 2007/A/1426 and TAS 2007/A/1433, and, considering WADA's role, the latter has the power to recharacterize on appeal before the CAS a charge that was brought by another anti-doping organization at first instance level.

WADA, as clearly enshrined in the WADC, has a crucial supervisory jurisdiction over the implementation of the WADC at worldwide level in order to (i) ensure harmonisation and consistent application of the World Anti-Doping Program across the various countries and the different sports and, crucially, (ii) correct mistakes that were made at first instance level.

Therefore, WADA has its first and only chance to present its case at the CAS appeal level. It must, therefore, to enable it to fulfil its vital functions, be allowed to fully exercise its appeal rights, which include a recharacterization of the charge(s), with the sole caveat that this

should be based on the same set of facts discussed during the first instance proceedings, thus not exceeding the scope of those proceedings below.

This is indeed essential to secure the integrity of the system and prevent that ADOs and first instance hearing bodies, especially those at national level, characterize charges in an incorrect way which could favour a given athlete. A worldwide uniform application of the anti-doping rules is the *raison d'être* of the establishment of WADA some twenty-plus years ago and of the ensuing adoption of the WADC.

The Panel is of the opinion that the only reason that could prevent WADA from recharacterizing a charge (and the Panel from entertaining the said argument) would be that such recharacterization could in some way prejudice the rights of the charged individual. Indeed, fairness demands that a person charged with a new ADRV be given a chance to properly mount a defence against it. Inevitably, such potential prejudice must be evaluated on a case-by-case basis, in order to ensure that such person's right to be heard and to present his or her case is fully respected.

The Panel holds that in the present dispute there would be no violation of the Athlete's rights, considering that the recharacterization of the 12 April 2019 Missed Test as a Filing Failure would be based on the same set of facts, on which the Athlete had a full chance to present her case. Moreover, the legal recharacterization of the charge would not even require an amendment of the ADRV for which the Athlete was indicted, which would remain a violation under Article 2.4 ADR.

6. Second Anti-Doping Rule Violation for sanctioning purpose

The present case is unusual since, although three Whereabouts Failures had already been established in August 2019, per se amounting to a first ADRV, the AIU waited to charge the Athlete with violating Article 2.4 ADR until 4 June 2020. At that point in time, she had committed a further Whereabouts Failure, i.e. the 24 January 2020 Missed Test, which fell outside the first 12-month period (beginning on 1 January 2019) and would complete a second ADRV under Article 2.4 ADR based on a different 12-month period (beginning on 12 March 2019).

In this respect, the Panel observes that the ADR do not provide any definition of a "second" ADRV. However, Article 10.7 ADR (*"Multiple Violations"*) allows to determine under which circumstances an ADRV can be treated for sanction purposes as a second ADRV, as follows:

Article 10.7.4(a): ***"For purposes of imposing sanctions under Article 10.7, an Anti-Doping Rule Violation will only be considered a second Anti-Doping Rule Violation if the Integrity Unit can establish that the Athlete or other Person committed the second Anti-Doping Rule Violation after the Athlete or other Person received notice, or after the Integrity Unit made a reasonable attempt to give notice, of the first alleged Anti-Doping Rule Violation. If the Integrity Unit cannot establish this, the Anti-Doping Rule Violations shall be considered together as one single Anti-Doping Rule Violation for sanctioning purposes, and the sanction imposed shall be based on the Anti-Doping Rule Violation that carries the more severe sanction"*** (emphasis added).

Article 10.7. 4(a) WADA ADR allows to determine under which circumstances an ADRV can be treated for sanction purposes as a second ADRV, i.e. the athlete must have received notice of a first alleged ADRV before a second violation can be established. Thus, even if there is two distinct ADRVs, for the purpose of sanction they must be treated as

one, if the condition precedent for treating them otherwise is not satisfied.

This, however, does not mean that the Second Charge is irrelevant, in the sense that the fact that the Athlete committed four Whereabouts Failures, which gave rise to two charges, must be taken into account in evaluating the Athlete's overall conduct and in evaluating the possibility to backdate the start of the ineligibility period.

7. Reduction of the ineligibility period

The Panel is of the view that the Athlete, in all three Whereabouts Failures, has shown an unacceptable degree of nonchalance and a worryingly lackadaisical approach to her whereabouts obligations under the ADR, thereby deserving no reduction of her ineligibility period. In fact, in essence: e.g. (a) as to the 12 March 2019 Missed Test: the athlete first stated that did not hear the DCO knocking at her door, which *per se* is not an acceptable explanation for her failure to be available for testing; however, even worse, it turned out that she actually had moved out of said address and failed to update her Whereabouts Information accordingly; the DCO tried to call her at the telephone number indicated on ADAMS, but it was “switched off”; (b) as to the Quarter 1 2019 Filing Failure: she was not at the specified address because she was on holiday in Dubai and her Whereabouts Information, once again, had not been updated accordingly; the DCO tried to contact the Athlete at both telephone numbers indicated on ADAMS, but the calls “did not go through”, since one was “currently switched off” and the other went directly to voicemail, as the number was incorrect;

The situation would not be any different vis-à-vis her degree of fault in discharge of her whereabouts duties if the Panel were to consider the Second Charge and, therefore, the

events concerning the 24 January 2020 Missed Test.

Such a reckless approach cannot be tolerated or in any way justified. Indeed, the whereabouts regime is a fundamental means to detect doping practices in sport, as it enables the location of athletes for unannounced out-of-competition testing, which are crucial in the fight against doping (cf. CAS 2014/A/2, para. 21).

WADA emphasised that the provision of accurate whereabouts information, coupled with presence at the location during the time therein indicated, benefits clean athletes who could rely upon their compliance with those requirements to defend themselves against any suspicion of substantive doping offences. Athletes who do not so comply inevitably expose themselves to such suspicion even if, as in the case of this Athlete, there is no evidence that they are – in the vernacular – “doping cheats”, which it is clearly in their own interests to avoid.

In light of the foregoing, the Panel determines that the Athlete shall be sanctioned with the standard two-year ineligibility period.

8. Starting date of the ineligibility period

Article 10.10.2, Proviso c, of the ADR states as follows:

“10.10.2 The period of Ineligibility shall start on the date that the decision is issued [...]

c. where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the period of Ineligibility may be deemed to have started at an earlier date, commencing as early as the date the Anti-Doping Rule Violation last occurred (e.g., under Rule 2.1, the date of Sample collection). All competitive results achieved during the period of Ineligibility,

including retroactive Ineligibility, shall be Disqualified”.

With regard to the construction of Proviso c of Article 10.10.2 WADA ADR providing for the possibility to backdate the starting date of the athlete’s suspension, it is a necessary, but not sufficient, condition precedent that there have been substantial delays in any aspects of doping control, including the hearing process, which are not attributable to the athlete. If the condition precedent is satisfied, backdating the period of ineligibility is an available but not a mandatory consequence. Whether and how such discretion is exercised by the adjudicating body depends axiomatically upon the circumstances of the particular case (see CAS 2015/A/4059 paras. 167-171; CAS 2018/A/5581 paras. 93-94 and DT Decision of 9 July 2020, para. 84).

A delay of 10 months between the notification by the Integrity Unit to the athlete regarding 3 whereabouts failures in a period of 12 months and a notice of charge is a substantial delay.

However, the only reason backdating has fallen for consideration as an issue on this appeal because the Athlete has not committed only three Whereabouts Failures, but has committed four. Moreover, the athlete’s reckless disregard of her duties as an international athlete does not make her a worthy candidate for the exercise of a favourable discretion.

Therefore, the Panel finds that the two-year period of ineligibility imposed on the Athlete shall start on the date on which this Award is released.

9. The disqualification of the Athlete’s results

Under Article 10.8 ADR, the finding that the Athlete has committed an ADRV under Article 2.4 ADR entails, as a rule, the disqualification

of all the results obtained from the date on which the ADRV occurred – therefore, based on the First Charge, as from 12 April 2019 (or from 1 April 2019 if based on the Filing Failure effective on that date) – until the start of any Provisional Suspension or the date on which the ineligibility period is set to begin, unless this Panel finds that “*fairness requires otherwise*”.

The fact that no doping practices affected the athlete’s competitive results obtained after her third whereabouts failure, can be taken into account in the athlete’s favour (see CAS 2011/A/2671 para. 84).

In the present case, the Athlete has presented before the DT and this Panel evidence of anti-doping controls that she underwent in the period between 28 January and 24 November 2019. This is sufficient evidence to enable the Panel to be comfortably satisfied that, in that period, the Athlete was clean and her competitive results were not won through doping practices. No contradictory evidence was presented by either WA or WADA.

In light of the foregoing, fairness requires that the Athlete’s competitive results between 1 April 2019 and 24 November 2019 be not disqualified. Accordingly, the relevant disqualification period shall be set to run from 25 November 2019 until the date of notification of this Award.

Decision

Ms Salwa Eid Naser is sanctioned with a period of ineligibility of two years, commencing on the date of notification of this award, with credit given for the period of provisional suspension already served between 4 June 2020 and 14 October 2020.

All competitive results obtained by Ms Salwa Eid Naser from 25 November 2019 through to the date of notification of this award shall be

disqualified, with all of the resulting consequences, including forfeiture of any medals, titles, ranking points and prize and appearance money.

Jugements du Tribunal fédéral*
Judgements of the Federal Tribunal
Sentencias del Tribunal federal



* Résumés de jugements du Tribunal Fédéral suisse relatifs à la jurisprudence du TAS
Summaries of some Judgements of the Swiss Federal Tribunal related to CAS jurisprudence
Resúmenes de algunas sentencias del Tribunal Federal Suizo relacionadas con la jurisprudencia del TAS

4A_600/2020

27 January 2021

A. SA v. Federation B. & C. SA¹

Appeal against the arbitral decision by the Court of Arbitration for Sport of 16 October 2020 (CAS 2019/A/6380)

Extract of the facts

A. SA and C. SA are two football clubs that are members of Federation B., which in turn is affiliated with the Union of European Football Associations (UEFA).

The two clubs are in a dispute about the right to use the name and colors of the historical and renowned club known as Football Club D. (hereafter: D.). The latter, founded in 1948, continued its activities until [...] 2011 under the management of an owner named Football Club E. (hereinafter: Football Club E.). From that date, A. SA joined Football Club E. in order to continue the activities of the club D.. When Football Club E. was dissolved on [...] 2014, A. SA claims to have become the exclusive owner of the right to play under the name and colors of D., which is contested by C. SA. The latter claims to be the holder of the said right, due to the partnership agreement it concluded on July 8, 2013 with F. regarding the combined trademark “Club Sportiv D.”. C. SA is also the owner of various trademarks, including

those registered as “E. Club Sportiv” and “D.”.

Several civil and criminal proceedings related to the use of the name, trademarks and identity of the D. club have been initiated before the [name of country omitted] authorities in recent years.

On June 13, 2019, C. SA filed a request before the Executive Committee of B. in order to be able to take part in competitions organized by B. under the name of the trademark “D.”, of which it is the owner.

A. SA opposed this request.

On July 2, 2019, the [name of country omitted] Professional Football League (PFL) indicated that the petition filed by C. SA met all regulatory requirements.

Ruling on July 3, 2019, the Executive Committee of B. granted the request. However, it decided that C. SA would no longer be able to take part in competitions

¹ Quote as A. SA v. 1. Federation B., 2. C. SA, 4A_600/2020. The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

For the full English translations & introductory notes on the Federal Tribunal judgments in both sports- and commercial arbitration cases, you can visit the website www.swissarbitrationdecisions.com (operated jointly by Dr. Charles Poncet and Dr. Despina Mavromati) as a service to the international arbitration community.

organized by B. under the name of the trademark “D.”, if a court decision was rendered deleting the registration of such trademark, suspending or limiting the right to use it, or cancelling the license agreement entered into by the Appellant.

On July 23, 2019, A. SA appealed this decision to the Court of Arbitration for Sport (CAS).

In its appeal brief, the appellant argued, primarily, that the judicial authorities of [name of country omitted] had exclusive jurisdiction to decide the dispute between the parties. Therefore, the appellant submitted that B. did not have the right to provide in its statutes for an appeal to CAS in the present case and the CAS had no jurisdiction. In the event that the CAS should declare itself competent, A. SA requested the annulment of the contested _____ decision.

A three-member Panel was constituted by the CAS.

By Award of October 16, 2020, the Panel, after declaring itself competent, dismissed the appeal. In short, it considered that the Appellant had approved the jurisdiction of the CAS by signing a declaration in which it undertook, *inter alia*, to respect the statutes and rules of B. and to recognize the authority of the CAS. On the merits, the arbitrators found that C. SA fulfilled all the regulatory requirements to be able to participate in competitions organized by B. under the brand name “D.”. Furthermore, the appellant had never argued or demonstrated that a judicial decision restricting the right to use the said mark had

been issued by the judicial authorities of [name of country omitted].

On November 16, 2020, A. SA (hereinafter: the Appellant) filed a civil law appeal with the Federal Tribunal. It mainly requested that the contested decision be annulled. In the alternative, the Appellant requested that the case be returned to the CAS for a new decision in the sense of the recitals of the federal judgment.

Extract of the legal considerations

Invoking Art. 190(2)(b) PILA, the Appellant maintains that the CAS wrongly declared itself competent to hear the appeal submitted to it. In its opinion, the arbitration clause in the articles of association of B. could not be invoked against it, since it had not given his consent.

The Federal Tribunal is free to examine questions of law, including preliminary questions, which determine the jurisdiction or lack of jurisdiction of the arbitral tribunal (BGE 133 III 139, at 5, p. 141, and the judgments cited). It does not, however, become a court of appeal, so that it does not have to investigate itself, in the contested award, which legal arguments could justify the admission of the complaint based on Art. 190(2)(b) PILA. Rather, it is up to the Appellant to draw its attention to them, in order to comply with Art. 77(3) LTF (BGE 142 III 239¹⁵⁷, at 3.1). This provision establishes the same requirements for the statement of reasons as Art. 106(2) LTF. The Appellant must therefore indicate which hypothesis of Art. 190(2) PILA is realized in its eyes and,

¹⁵⁷ The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/unsigned-arbitration-clause-upheld>

starting from the contested award, show in a detailed manner, according to it, what the violation of the principle invoked consists of (ATF 128 III 50 at 1c; judgments 4A_7/2019 of 21 March 2019 at 2; 4A_378/2015 of 22 September 2015 at 3.1).

According to the first of the two hypotheses envisaged by Art. R47 of the Code of Sports-related Arbitration, an appeal may be filed with CAS against a decision of a federation if the statutes or regulations of the said sports body so provide and also insofar as the Appellant has exhausted the legal remedies prior to the appeal available to him under the statutes or regulations of the said sports body.

Art. 48 para. 8 of B.'s statutes, in its 2018 version, provides, *inter alia*, as follows, according to the English translation in the contested award:

[...] any dispute arising in connection with a decision passed by the Executive Committee must be first referred to the Court of Arbitration for Sport in Lausanne.

In the contested award, the CAS notes that the Appellant signed a declaration dated July 31, 2018, by which it accepted, among others, the provisions contained in B.'s articles of association, undertook to observe them and recognized the authority of the CAS. By doing so, the Appellant has thus consented, in the opinion of the CAS, to the application of Art. 48 para. 8 of B.'s statutes, which is why the CAS has jurisdiction to hear the appeal filed before it.

In support of its appeal, the Appellant argues that it was forced to accept the arbitration clause in order to be able to take part in the competitions organized by B.. Referring to ATF 133 III 235 as well as to the judgment of the European Court of Human Rights (hereinafter: ECtHR) of October 2, 2018 in the case *Mutu and Pechstein v.*

Switzerland, the Appellant considers that the present case constitutes forced sports arbitration, insofar as it had no choice but to accept the arbitration clause by adhering to the statutes of B.. Stressing that it contested the jurisdiction of the CAS during the arbitration proceedings and refused, for this reason, to sign the order of procedure, the Appellant claims that the Panel should have declared itself incompetent due to the absence of a freely expressed consent to arbitration.

In the decision published in ATF 133 III 235, the Federal Tribunal considered that a waiver of appeal clause within the meaning of Art. 192(1) PILA is in principle not enforceable against an athlete, even if it meets the formal requirements of Art. 192(1) PILA. In this case, the athlete had signed a declaration in which he recognized, among other things, the jurisdiction of the CAS and acknowledged that the decision rendered by the latter could not be appealed. In this decision, the Federal Tribunal emphasized that competitive sport is characterized by a highly hierarchical structure, both at the international and national levels. The relationship between the athletes and the organizations involved in the various sports is vertical; it therefore differs from the horizontal relationship between parties to a contractual relationship. In principle, when two parties deal on an equal footing, each expresses its will without being subject to the goodwill of the other. This is generally the case in international commercial relations. The situation is quite different in the field of sport. Most of the time, an athlete does not have a free hand with respect to his or her federation and will have to bend to the federation's wishes, like it or not. Thus, an athlete who wishes to participate in a competition organized under the control of a sports federation whose regulations provide for recourse to arbitration will have no choice but to accept the arbitration clause, in particular by

adhering to the statutes of the sports federation in question in which the said clause has been inserted, all the more so if the athlete is a professional. The athlete will be faced with the following dilemma: to agree to arbitration or to practice sport as a pariah. Put in the alternative of submitting to an arbitration jurisdiction or practicing his sport “in his backyard”, watching the competitions “on television”, the athlete who wishes to face real competitors or who must do so because it is his only source of income will be forced, in fact, to opt, *no lens volens*, for the first term of this alternative (ATF 133 III 235 at 4.3.2.2 and the doctrine cited).

It is obvious that the waiver of recourse against a future award, when it emanates from an athlete, is generally not the result of a freely expressed will. The agreement that results from the concordance between the will thus expressed and that expressed by the interested sports organization is, therefore, affected *ab ovo* because of the obliged consent given by one of the parties. By agreeing in advance to submit to any award in the future, the athlete is deprived, from the outset, of the right to have the violation of fundamental principles and essential procedural guarantees that the arbitral tribunal called upon to rule on his case sanctioned at a later date. Moreover, as it concerns a disciplinary measure levelled against the athlete, such as a suspension, which does not require the implementation of an *exequatur* procedure, he does not have the possibility of formulating his grievances on this count before the judge of compulsory execution. Therefore, in view of its importance, the waiver of the appeal must not, in principle, be able to be set up against the athlete, even when it satisfies the formal requirements of Art. 192(1) PILA (ATF 133 III 235, at 4.3.2.2 and the authors cited).

In this decision, the Federal Tribunal emphasized that the case law treats differently the questions relating to the form of the arbitration agreement, the arbitration clause by reference and the consent to arbitration, on the one hand, and those relating to the contractual waiver of recourse within the meaning of Art. 192(1) PILA, on the other. This differentiated treatment follows a logic which consists, on the one hand, of favoring the rapid settlement of disputes, in particular in sports matters, by specialized arbitral tribunals offering sufficient guarantees of independence and impartiality, while ensuring, on the other hand, that the parties, and in particular professional sportsmen and women, do not lightly waive their right to challenge the awards of the final arbitral body before the supreme judicial authority of the State where the arbitral tribunal has its seat. Expressed in another way, this logic means that the maintenance of a possibility of appeal constitutes a counterweight to the “benevolence” with which the consensual nature of recourse to arbitration in sports matters should be examined (BGE 133 III 235, at 4.3.2.3 and the authors cited).

In the *Mutu and Pechstein v. Switzerland* case of October 2, 2018, the ECtHR recalled that the right of access to a court, guaranteed by Art. 6 of the European Convention on Human Rights (hereinafter; ECHR), does not necessarily imply the right to be able to bring a case before a court of the classical type, integrated into the judicial structures of a State. Art. 6(1) ECHR does not prevent the creation of arbitration tribunals for the purpose of adjudicating certain property disputes between individuals (§ 93 f.).

With regard to recourse to arbitration in the field of sport, the ECtHR has emphasized that there is a definite interest in ensuring that disputes arising in the context of professional sport can be submitted to a specialized court that is able to give a rapid

and economical decision. The use of a single, specialized international arbitral tribunal facilitates a certain procedural uniformity and increases legal certainty (*Mutu and Pechstein* judgment, §98; cf. also the *Ali Rıza and others v. Turkey* Judgment of 28 January 2020, § 179). This is all the more true when the awards of this arbitral tribunal can be appealed to the supreme court of a single country, in this case the Federal Tribunal, which gives the final decision. The ECtHR thus considered that a system providing for recourse to a specialized court, such as the CAS, in the first instance, coupled with the possibility of appeal, albeit limited, to a State court in the last instance, could represent an appropriate solution with regard to the requirements of Art. 6(1) ECHR (*Mutu and Pechstein*, § 98).

The ECtHR makes a distinction between voluntary and compulsory arbitration. In the case of the speed skater Claudia Pechstein, the ECtHR found that there was compulsory arbitration, in the sense that there was no possibility for the athlete to withdraw from the arbitration tribunal. The athlete concerned had no choice but to accept the arbitration clause, as she could either accept the arbitration clause and earn a living practicing her sport at the professional level, or refuse to do so and thus give up the practice of this sport at the highest level. The ECtHR emphasized that compulsory arbitration is not prohibited. In such a case, however, the arbitral tribunal must offer the guarantees provided for in Art. 6(1) ECHR, in particular those of independence and impartiality (*Mutu and Pechstein*, § 95 and 114 ff.).

In examining whether the CAS can be regarded as an “*independent and impartial tribunal established by law*” within the meaning of the above-mentioned provision, the ECtHR has held that it has the appearance of a tribunal established by law and that it is genuinely independent and impartial (*Mutu*

and Pechstein judgment, §149 and 159), a view which it confirmed again recently (*Michel Platini v. Switzerland* judgment of 11 February 2020, § 65).

In the light of the above, the appeal cannot be sustained. It is immediately questionable whether the case before the Federal Tribunal has all the characteristics of compulsory arbitration, since the dispute on the merits is not between an athlete and a sports federation, but between two football clubs, both of which claim the right to use the name D.. However, this question can be left undecided.

Contrary to what the Appellant suggests, the fact that it did not, by hypothesis, freely consent to the arbitration clause in favor of the CAS, inserted in the statutes of B., does not mean that such a clause would not be opposable to it. The ECtHR, like the Federal Tribunal, recognizes that recourse to arbitration is possible in sports matters notwithstanding the absence of freely expressed consent by a party. However, in the case of so-called compulsory arbitration (“*arbitrage force*”, according to the terminology of the ECtHR), the arbitral tribunal must offer the guarantees provided for by Article 6(1) ECHR, in particular those of independence and impartiality. In *Mutu and Pechstein v. Switzerland*, the ECtHR found that the German athlete Pechstein had been forced to accept the arbitration clause in favor of the CAS. However, it considered that the CAS was a truly independent and impartial tribunal. In view of the above, recourse to forced arbitration before the CAS is therefore admissible. It cannot be otherwise in this case. The Appellant can therefore not be followed when it merely argues that the arbitration clause by reference was not freely accepted in this case, for which reason the CAS should have declined jurisdiction. For the rest, the party concerned does not make any other criticism in support of its complaint based on the violation of Art. 190(2)(b) PILA.

This being the case, the plea that the CAS lacks jurisdiction can only be rejected.

Decision

In view of the above, the present appeal can only be rejected insofar as it is admissible.

4A_612/2020

18 juin 2021

A. c. International Biathlon Union (IBU)

Recours en matière civile contre la décision (“Arbitral Award”) rendue le 27 octobre 2020 par la Chambre Anti-dopage du Tribunal Arbitral du Sport (2019/ADD/6).

Extrait des faits

A. (ci-après: l’athlète) est un ancien biathlète xxx de niveau international. Il a remporté plusieurs médailles olympiques aux Jeux Olympiques de Vancouver 2010 et de Sotchi 2014. Il a mis un terme à sa carrière sportive en 2014.

L’International Biathlon Union (IBU) est l’instance dirigeante du biathlon au niveau mondial; son siège est à Salzbourg en Autriche.

Afin de lutter contre le dopage dans le sport de compétition, l’Agence Mondiale Antidopage a élaboré un programme, intitulé “Passeport biologique de l’athlète” (ci-après: le passeport biologique), qui constitue une méthode indirecte de détection du dopage sanguin.

Entre le 24 janvier 2010 et le 14 février 2014, divers échantillons de sang ont été prélevés en vue d’établir le passeport biologique de l’athlète.

Dans un rapport du 21 mars 2017, un groupe de trois experts, chargé d’examiner anonymement les profils sanguins de l’athlète, a conclu, à l’unanimité, à l’usage très probable d’une substance ou d’une méthode prohibée. Après avoir pris connaissance des explications fournies par l’athlète et du résultat des tests complémentaires subis par

ce dernier, il a rendu un nouveau rapport le 16 juin 2018 dans lequel il a revu ses conclusions initiales et a préconisé d’effectuer des analyses supplémentaires en vue d’expliquer les causes des anomalies repérées dans les échantillons de sang de l’athlète. Dans son rapport du 11 janvier 2020, le groupe d’experts a finalement confirmé sa première opinion.

Le 21 janvier 2020, l’IBU a accusé l’athlète d’avoir violé l’art. 2.2 des règles antidopage de l’IBU (édition 2009) entre 2010 et 2014 et l’a invité à admettre les faits qui lui étaient reprochés ou à solliciter la tenue d’une audience.

Le 7 février 2020, l’athlète a contesté les accusations de dopage proférées à son encontre.

Le 25 février 2020, l’IBU a saisi la Chambre Anti-dopage du Tribunal Arbitral du Sport (CAD TAS) d’une requête d’arbitrage au sens de l’art. 13 du Règlement d’arbitrage de la CAD TAS (ci-après: le Règlement). Le 6 mars 2020, l’athlète a excipé de l’incompétence de la CAD TAS.

Après avoir recueilli les observations des parties sur cette question, l’arbitre unique (ci-après: l’arbitre) désignée par le TAS a fait savoir aux parties qu’elle était à première vue compétente pour connaître de la présente affaire et que ce point serait examiné plus attentivement dans la sentence finale.

Par décision du 27 octobre 2020, intitulée “Arbitral Award”, l’arbitre s’est déclarée compétente et a admis la requête déposée

par l'IBU. Elle a constaté la violation par l'athlète de l'art. 2.2 des règles antidopage de l'IBU, prononcé sa suspension pour quatre ans à compter de la sentence et ordonné la disqualification de tous les résultats obtenus par ce dernier entre le 24 janvier 2010 et la fin de la saison 2013/2014, sanction impliquant notamment le retrait de l'ensemble des médailles, points et prix gagnés par l'athlète. Sous la rubrique "Appel" (décision, n. 225 s.), l'arbitre a précisé que la décision rendue pouvait faire l'objet d'un appel auprès de la Chambre arbitrale d'appel du TAS (CAA TAS) conformément aux art. 47 ss du Code de l'arbitrage en matière de sport (ci-après: le Code).

Le 23 novembre 2020, l'athlète (ci-après: le recourant) a formé un recours en matière civile au Tribunal fédéral aux fins d'obtenir l'annulation de la décision rendue le 27 octobre 2020.

Parallèlement, le recourant a attaqué la décision du 27 octobre 2020 devant la CAA TAS.

Extrait des considérants

Il est constant qu'en 2019, l'IBU a délégué son pouvoir disciplinaire en matière de dopage à la CAD TAS, créée en 2019, afin que cet organisme siège "as the Disciplinary Tribunal" (art. 8.1 du règlement antidopage de l'IBU [édition 2019] fondé sur l'art. 30.2.1 des statuts de l'IBU [dans leur version du 19 octobre 2019]). Ainsi, la CAD TAS a remplacé, en qualité d'autorité de répression de première instance, l'organe fédératif interne qui assumait cette mission auparavant, à savoir l'Anti-Doping Hearing Panel de l'IBU (ci-après: l'ADHP). Comme le prévoyait déjà le règlement antérieur au sujet des décisions rendues par cet organe, la nouvelle réglementation ouvre elle aussi la voie de l'appel à la CAA TAS à l'encontre des décisions rendues par la CAD TAS (art. 8.4 et 13 du règlement

antidopage de l'IBU). La situation juridique n'a ainsi pas changé s'agissant de la voie de recours dont dispose l'athlète reconnu coupable d'une violation des règles antidopage de l'IBU.

Le Tribunal fédéral contrôle d'office et librement la recevabilité des recours qui lui sont soumis (ATF 137 III 417 consid. 1 et les arrêts cités).

Dans le domaine de l'arbitrage international, le recours en matière civile est recevable contre les décisions de tribunaux arbitraux aux conditions prévues par les art. 190 à 192 LDIP (art. 77 al. 1 let. a LTF).

Le recours en matière civile visé par l'art. 77 al. 1 let. a LTF en liaison avec les art. 190 à 192 LDIP n'est recevable qu'à l'encontre d'une *sentence* (ATF 143 III 462 consid. 2.1).

Point n'est besoin de trancher ici la question de savoir si, comme le prétend l'intimée, la décision attaquée doit être assimilée aux décisions prises par l'organe d'une association sportive ou si, comme le suggère le recourant, elle doit être qualifiée de véritable sentence arbitrale, dès lors que l'on aboutit dans l'un et l'autre cas à la conclusion que le recours en matière civile est irrecevable en l'espèce.

A supposer que la décision rendue le 27 octobre 2020 par la CAD TAS ne soit pas une sentence arbitrale, mais une décision disciplinaire prise par une Chambre du TAS sur délégation de l'association sportive concernée (l'IBU), en lieu et place de cette dernière, semblable décision serait de même nature juridique que celles prises précédemment par la commission juridictionnelle *ad hoc* de l'intimée, à savoir l'ADHP. Or, la décision rendue par l'organe d'une association sportive ayant qualité de partie au procès, cet organe fût-il dénommé tribunal arbitral, ne constitue en principe 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 (ATF 119 II 271 consid. 3b; arrêts 4A_476/2020 du 5 janvier 2021 consid. 3.2; 4A_22212015 du 28 janvier 2016 consid. 3.2.3.1). Une décision de ce genre ne saurait ainsi être soumise directement au Tribunal fédéral. Elle peut être attaquée par l'athlète sanctionné au moyen d'une action en annulation fondée sur l'art. 75 CC lorsque le droit suisse est applicable. Une telle action doit être ouverte devant le tribunal étatique compétent mais peut l'être également devant un tribunal arbitral pour autant que celui-ci constitue une véritable autorité judiciaire et non pas le simple organe juridictionnel de l'association intéressée au sort du litige (ATF 144 III 120 consid. 1.2.2).

En l'occurrence, la décision incriminée pouvait être soumise à l'examen de la CAA TAS, laquelle constitue un véritable tribunal indépendant et impartial (arrêt 4A_600/2020 du 27 janvier 2021 consid. 5.6; arrêts de la Cour européenne des droits de l'homme *Mutu et Pechstein contre Suisse* du 2 octobre 2018, § 149 et 159; *Michel Platini contre Suisse* du 11 février 2020, § 65). Elle l'a du reste été. Ainsi, dans ce cas de figure, seule la sentence que rendra la CAA TAS pourra faire l'objet d'un recours en matière civile au Tribunal fédéral. Il s'ensuit l'irrecevabilité du présent recours en tant qu'il vise la décision litigieuse, si l'on dénie à celle-ci la qualité de sentence arbitrale.

Le recours en matière civile interjeté par l'athlète ne serait pas davantage recevable si la décision attaquée devait être considérée comme une véritable sentence arbitrale.

Dans son mémoire de recours, l'intéressé prétend que la décision attaquée serait une sentence incidente au sens de l'art. 190 al. 3 LDIP car elle réglerait plusieurs questions préalables de procédure - la compétence de la CAD TAS et le caractère régulier de la nomination de l'arbitre unique - alors que

la procédure arbitrale à deux échelons n'est pas terminée, la CAA TAS devant encore se prononcer sur le fond. Comme la CAD TAS ne serait pas compétente à son égard, la CAA TAS ne le serait pas davantage et ne pourrait donc pas constater cette incompétence, raison pour laquelle seul le Tribunal fédéral serait en mesure de se prononcer sur les griefs mentionnés à l'art. 190 al. 3 LDIP.

La sentence finale est celle qui met un terme à l'instance arbitrale pour un motif de fond ou de procédure (ATF 143 III 462 consid. 2.1). Tel est le cas de la décision entreprise, par laquelle l'arbitre unique a statué sur le fond en infligeant une sanction disciplinaire au recourant et, ce faisant, a mis un terme à l'instance pendante devant elle. Le recourant examine le caractère final ou incident de la décision attaquée en ayant égard au double degré de juridiction entrant en ligne de compte. En raisonnant de la sorte, il confond la question du caractère final de la sentence (par opposition à une sentence incidente ou à une sentence partielle) avec celle du caractère définitif ou attaquant de la sentence, qui consiste à déterminer si celle-ci peut ou non faire l'objet d'un recours. Le recourant qualifie ainsi en vain la sentence attaquée de décision incidente au sens de l'art. 190 al. 3 LDIP dans le but de pouvoir l'attaquer directement en invoquant les deux griefs prévus par cette disposition.

Le recourant met en doute l'applicabilité de la règle de l'épuisement des instances dès lors que l'art. 77 LTF ne prévoit pas que ladite règle s'applique lorsque le recours en matière civile formé devant le Tribunal fédéral vise une sentence rendue par un tribunal arbitral de première instance et que cette décision peut faire l'objet d'un appel à un tribunal arbitral de seconde instance. Un recours immédiat au Tribunal fédéral serait dès lors possible en l'espèce.

Le Tribunal fédéral a fait allusion à ce problème dans quelques arrêts.

Au consid. 1.3 de son arrêt du 6 octobre 2004 publié aux ATF 130 III 755, il relevait que l'application (par analogie) dans le domaine de l'arbitrage international de l'art. 86 al. 1 de la loi fédérale d'organisation judiciaire du 16 décembre 1943 (OJ) - disposition qui faisait dépendre la recevabilité du recours de droit public de l'épuisement des moyens de droit cantonal - n'allait certes pas de soi; il ajoutait toutefois ceci "(...), sous réserve peut-être de la question de l'épuisement des moyens de droit internes (nécessité du recours préalable à un Tribunal arbitral supérieur, si cette possibilité existe...)".

Dans un arrêt du 22 mars 2007 publié aux ATF 133 III 235, il est question du droit des parties "*d'attaquer les sentences de la dernière instance arbitrale devant l'autorité judiciaire suprême de l'Etat du siège du tribunal arbitral*" (passage mis en évidence par la Cour de céans; consid. 4.3.2.3).

Un autre arrêt, rendu le 28 août 2014, souligne que la procédure initiée devant une fédération sportive, puis poursuivie en appel devant le TAS "*s'apparente à une procédure étatique ordinaire, soumise à l'exigence de la double instance (cf. art. 75 al. 2, 80 al. 2 et 86 al. 2 LTF)*" (ATF 140 III 520 consid. 2.2.1).

Plus récemment, la Ire Cour de droit civil a appliqué la règle de l'épuisement des instances arbitrales en déniaut au recourant la possibilité de diriger ses griefs contre une décision prise par le juge unique du TAS au motif que cette décision pouvait faire l'objet d'un appel devant la Chambre d'appel du TAS. A cette occasion, elle a conclu en ces termes à l'applicabilité de ladite règle: "*Der Grundsatz der Letztinstanzlichkeit bzw. der Subsidiarität, der verlangt, dass vor der Beschwerde alle nützlichen Rechtsmittel ausgeschöpft werden müssen, gilt auch für die Schiedsbeschwerde (...)*" (arrêt

4A_490/2017 du 2 février 2018 consid. 2.5, lequel se réfère à l'ATF 130 III 755).

La règle de l'épuisement des instances préalables repose sur l'idée, maintes fois répétée, selon laquelle il convient de faire en sorte que le Tribunal fédéral ne doive s'occuper qu'une seule fois d'une affaire, sous réserve des exceptions admises par la jurisprudence en la matière (cf. parmi d'autres, ATF 143 III 462 consid. 3.2.2; 140 III 520 consid. 2.2.1). Le TAS lui-même l'a du reste adoptée en exigeant à l'art. R47 al. 1 du Code, que la partie appelante ait épuisé, avant de le saisir, les voies de droit préalables à l'appel dont elle dispose.

S'agissant de l'arbitrage interne, l'art. 391 du Code de procédure civile du 19 décembre 2008 (CPC; RS 272) formule expressément la règle en question, puisqu'il dispose que le recours au Tribunal fédéral n'est recevable qu'après épuisement des voies de recours arbitrales prévues dans la convention d'arbitrage. On ne voit pas pourquoi il se justifierait de renoncer à une telle exigence en matière d'arbitrage international. Telle est du reste l'opinion de la doctrine majoritaire pour qui la règle de l'épuisement des instances arbitrales préalables s'applique également en matière d'arbitrage international (Berger/Kellerhals, *International and Domestic Arbitration in Switzerland*, 3e éd. 2015, n. 1635; TARKAN GÖKSU, *Schiedsgerichtsbarkeit*, 2014, n. 2 013; CHRISTIAN OETIKER, in *Zürcher Kommentar zum IPRG*, 3e éd. 2018, no 2 ad art. 190 LDIP; KLETT/LEEMANN, in *Basler Kommentar, Bundesgerichtsgesetz*, 3e éd. 2018, no 3a ad art. 77 LTF; BERNARD CORBOZ, in *Commentaire de la LTF*, 2e éd. 2014, no 42 ad art. 77 LTF; STEFANIE PFISTERER, in *Basler Kommentar, Internationales Privatrecht*, 4e éd. 2020, nos 7 ad art. 190 LDIP et 6 ad art. 191 LDIP; PHILIPPE SCHWEIZER, in *Commentaire romand*,

Code de procédure civile, 2e éd. 2019, no 4 ad art. 391 CPC; JOLANTA KREN KOSTKIEWICZ, Bundesgesetz über das Internationale Privatrecht, Lugano-Übereinkommen und weiteren, 2e éd. 2019, no 4 ad art. 190 LDIP; MICHAEL LAZOPOULOS, in Schweizerische Zivilprozessordnung [ZPO], Alexandre Brunner et al. [éd.], vol. II, 2e éd. 2016, no 2 ad art. 391 CPC; DIETER GRÄNICH, in Kommentar zur Schweizerischen Zivilprozessordnung, Thomas Sutter-Somm et al. [éd.], 3e éd. 2016, no 3 ad art. 391 CPC; ISAAK MEIER, Schweizerisches Zivilprozessrecht, 2010, p. 626; MRAZ/PETER, in Basler Kommentar, Schweizerische Zivilprozessordnung, 3e éd. 2017, no 8 ad art. 391 CPC).

Que la nécessité d'épuiser les voies de recours arbitrales ne figure expressément ni à l'art. 77 LTF ni à l'art. 190 LDIP ne constitue pas un motif suffisant pour faire obstacle à l'application de ladite règle en cas de recours dirigé contre une sentence arbitrale internationale, quoi qu'en dise le recourant. Rien n'empêche en effet de voir dans l'art. 75 al. 1 LTF appliqué par analogie, disposition qui ne figure pas au nombre de celles dont l'art. 77 al. 2 LTF exclut l'application, une règle de droit susceptible de constituer la base légale de l'exigence de l'épuisement des instances arbitrales avant la saisine du Tribunal fédéral.

Au vu de ce qui précède, il y a lieu de confirmer la jurisprudence de l'arrêt 4A_490/2017 précité. Ainsi, le recours en matière civile au Tribunal fédéral dirigé contre une sentence rendue dans le cadre d'un arbitrage international n'est en principe recevable qu'après épuisement des voies de recours arbitrales à disposition de la partie qui entend le former.

Le recourant soutient que l'épuisement des voies de droit préalables ne serait pas

opportun en l'espèce. A cet égard, il cite une disposition légale (art. 390 CPC) ainsi qu'un arrêt (ATF 140 III 267 consid. 1.2.3) relatifs à l'arbitrage interne dont il croit pouvoir tirer par analogie la possibilité pour une partie de saisir directement le Tribunal fédéral lorsque l'instance arbitrale d'appel ne présente pas les garanties d'indépendance et d'impartialité suffisantes, ce qui serait le cas selon lui de la CAA TAS dans la présente cause.

Pour le recourant, un appel auprès de la CAA TAS serait une formalité dénuée de sens. L'intéressé relève que, quand bien même en matière civile l'art. 75 al. 1 LTF pose l'exigence de l'épuisement des instances cantonales avant la saisine du Tribunal fédéral, la jurisprudence a formulé certaines exceptions à cette exigence et a admis en particulier la possibilité de "sauter une étape" lorsque le passage devant l'autorité supérieure cantonale constituerait une formalité vide et inutile (ATF 143 III 290 consid. 1.2). De l'avis du recourant, il serait vain et inutile, conformément à la jurisprudence précitée, de contester la compétence de la CAD TAS devant une instance arbitrale d'appel ne disposant pas de l'indépendance nécessaire pour examiner cette question, ce qui justifierait un recours immédiat au Tribunal fédéral.

Eu égard aux liens organiques existant entre la CAD TAS et la CAA TAS et le fait que celle-ci ne présenterait pas les garanties d'indépendance et d'impartialité nécessaires, le Tribunal fédéral devrait créer "une voie de droit prétorienne", comme il l'a fait pour la décision du juge d'appui de refuser de nommer un arbitre, nonobstant le texte clair des art. 75 LTF et 356 al. 2 let. a CPC (ATF 141 III 444).

Les arguments avancés par le recourant pour réclamer une exception à la règle de l'épuisement des instances préalables sont dénués de tout fondement, comme l'intimée le démontre de manière

convaincante dans sa réponse au recours. Ainsi, il n'y a rien à tirer de l'ATF 140 III 267 consid. 1.2.3, relatif à l'art. 390 CPC, qui concerne une problématique différente. L'art. 390 al. 1 CPC permet en effet aux parties à un arbitrage interne de soustraire - au moyen d'une convention de délégation - le recours contre la sentence arbitrale à venir, à la connaissance du Tribunal fédéral au profit de l'autorité cantonale supérieure visée à l'art. 356 al. 1 let. a CPC. Dans l'arrêt précité, la Cour de céans a reconnu aux parties la possibilité de faire vérifier par le Tribunal fédéral la réalisation, dans un cas concret, des conditions d'application de l'art. 390 al. 1 CPC en leur ouvrant une voie de droit à l'encontre tant de la décision expresse d'irrecevabilité que de la décision implicite de recevabilité prise par le tribunal cantonal saisi d'un recours dirigé contre la sentence rendue dans un arbitrage interne. Il apparaît ainsi que le recourant ne peut rien tirer en sa faveur dudit arrêt.

On ne voit pas davantage en quoi la simple allégation du prétendu défaut d'impartialité de la CAA TAS permettrait au recourant de sauter une étape pour soumettre directement la décision du 27 octobre 2020 à l'examen du Tribunal fédéral. Force est à cet égard de relever que les conditions posées dans l'ATF 143 III 290 pour admettre un recours immédiat devant le Tribunal fédéral ne sont à l'évidence pas réalisées ici dès lors que l'on n'a pas affaire à un recours formé après renvoi de la cause à la première instance par l'instance d'appel. De même, la référence faite par le recourant à l'ATF 141 III 444 - qui concerne une question différente - pour justifier la création d'un moyen de droit par la voie prétorienne tombe à faux. Au demeurant, lorsque le recourant affirme qu'un appel à la CAA TAS ne serait qu'une formalité dénuée de sens, on peut se demander s'il maintiendrait cette affirmation dans l'hypothèse où la CAA TAS viendrait à annuler la décision de la CAD TAS et à le disculper. Quoi qu'il en

soit, l'intéressé perd de vue qu'il pourra faire valoir ses moyens concernant le manque d'impartialité et d'indépendance de la CAD TAS et l'incompétence des divisions du TAS pour connaître du présent litige, en formant, le cas échéant, un recours en matière civile contre la sentence de la CAA TAS à venir.

En l'espèce, le recourant a saisi le Tribunal fédéral avant que la CAA TAS n'ait statué sur l'appel qu'il avait interjeté devant elle contre la sentence de la CAD TAS, autrement dit avant que cette voie de recours n'ait été effectivement épuisée, et ce dans une situation où rien ne justifiait de faire exception à la règle de l'épuisement des voies de recours arbitrales. Le présent recours est dès lors irrecevable pour ce motif aussi.

Décision

Le recours est irrecevable.

4A_618/2020

2 juin 2021

A. c. World Athletics, (anciennement International Association of Athletics Federations)

Recours en matière civile contre la sentence rendue le 23 octobre 2020 par le Tribunal Arbitral du Sport (TAS 2020/A/6807)

Extrait des faits

A. (ci-après: l'athlète) est un athlète xxx spécialiste de la discipline du 400 mètres. Souffrant d'une malformation congénitale, il a subi une amputation des membres inférieurs au niveau des deux genoux à l'âge de quatre ans. Afin de pouvoir courir, l'athlète utilise des prothèses constituée de lames en fibres de carbone, dont le modèle est connu sous le nom de Ottobock 1E90 Sprinter de catégorie 3 (ci-après: les prothèses).

World Athletics (anciennement: International Association of Athletics Federations; ci-après: l'IAAF, selon son ancien acronyme anglais), association ayant son siège à Monaco, est la structure faitière de l'athlétisme au niveau international.

En sa qualité d'instance dirigeante de l'athlétisme au niveau mondial, l'IAAF a adopté divers règlements régissant les épreuves internationales d'athlétisme, parmi lesquels figurent notamment les " Règles techniques".

Sous la rubrique "Aide non autorisée ", les Règles techniques prévoient notamment ce qui suit:

"6.3 "For the purpose of this Rule, the following examples shall be considered assistance, and are therefore not allowed:

(...)

6.3.4 The use of any mechanical aid, unless the athlete can establish on the balance of probabilities that the use of an aid would not provide him with an overall competitive advantage over an athlete not using such aid. (...)"

En 2009, l'athlète a débuté sa carrière sportive en s'alignant dans les épreuves de course réservées aux athlètes en situation on de handicap. Il a remporté plusieurs médailles lors des Jeux paralympiques de Londres 2012 et des Championnats du monde de para-athlétisme 2013.

Dès juin 2017, l'athlète a commencé à s'aligner dans l'épreuve du 400 mètres aux côtés d'athlètes dits " valides" ("able bodied athletes"). Le 4 juin 2018, il a franchi la ligne d'arrivée de l'épreuve du 400 mètres en 44,42 secondes lors d'une compétition approuvée par l'IAAF, réalisant ainsi un temps qui lui permettait de se qualifier pour les Jeux olympiques de Tokyo 2020, repoussés en raison de la crise liée au coronavirus.

Le 19 juin 2018, l'athlète a été informé de l'annulation des résultats obtenus lors des courses qu'il avait disputées depuis avril 2018, au motif qu'il n'avait pas fourni d'éléments à l'IAAF démontrant qu'il ne tirait aucun avantage compétitif de l'usage de ses prothèses.

Le 3 juillet 2019, l'athlète a demandé à l'IAAF de rendre une décision confirmant que ses prothèses étaient réglementaires. Il a notamment fait valoir que celles-ci ne lui procuraient aucun avantage compétitif par rapport aux athlètes "valides " et que l'IAAF n'avait de toute manière pas rapporté la

preuve d'un tel avantage. A l'appui de sa requête, l'athlète a produit un rapport établi par les Drs B., C. et D. (ci-après: le rapport B.). Après avoir examiné les performances réalisées par l'athlète entre le 19 et le 24 août 2018 et procédé à toute une série de tests, les auteurs dudit rapport ont abouti à la conclusion que les prothèses utilisées par l'athlète ne lui conféraient aucun avantage compétitif par rapport aux athlètes "valides".

Le 18 février 2020, l'IAAF a refusé de faire droit à la requête de l'athlète, au motif que ce dernier avait failli à démontrer que l'usage de ses prothèses ne lui conférerait aucun avantage compétitif global par rapport aux athlètes "valides".

En date du 27 février 2020, l'athlète a appelé de cette décision auprès du Tribunal Arbitral du Sport (TAS).

L'athlète a, notamment, prié le TAS de prononcer que l'art. 6.3.4 des Règles techniques, en tant qu'il fait supporter à l'athlète le fardeau de la preuve de l'absence d'un avantage compétitif lié à l'utilisation de prothèses, consacre une discrimination inadmissible à l'égard des athlètes en situation de handicap. Il a aussi invité le TAS à constater qu'il pouvait prendre part à l'épreuve du 400 mètres lors de toutes les compétitions organisées par l'IAAF en utilisant ses prothèses actuelles.

Le 28 avril 2020, l'IAAF a demandé au TAS de donner l'ordre à l'appelant de fournir certaines informations relatives à la taille à laquelle il entendait prendre part aux compétitions d'athlétisme et à sa Taille Maximum Autorisée en Position Debout selon la règle MASH 2018 (Maximum Allowable Standing Height). A l'appui de cette requête, elle a relevé que l'utilisateur de prothèses peut moduler la hauteur de celles-ci et agir ainsi sur sa taille. De l'avis de l'IAAF, l'athlète court à une hauteur trop élevée, car la taille qu'il atteint avec ses prothèses est plus grande que celle qu'il

aurait eue si ses membres inférieurs n'avaient pas été amputés. La règle MASH, établie par le Comité International Paralympique (CIP) et World Para Athletics, repose sur une formule visant à déterminer la longueur des membres inférieurs d'un athlète amputé et sa taille si celui-ci n'avait pas subi d'amputation. L'athlète amputé est ainsi tenu de régler ses prothèses de manière à ce qu'il n'atteigne pas une taille supérieure à celle déterminée selon la règle MASH. Le CIP a modifié la règle MASH avec effet au 1er janvier 2018, ce qui s'est traduit, dans la plupart des cas, par une diminution de la hauteur des prothèses utilisées par les athlètes amputés des deux jambes. Selon l'IAAF, la réduction de la hauteur des prothèses affecte négativement la performance des athlètes concernés, raison pour laquelle il est nécessaire de connaître la taille de l'athlète selon la règle MASH 2018.

L'appelant s'est opposé à cette requête, en soulignant que la règle MASH n'est pas pertinente en l'espèce, puisqu'elle ne s'applique pas aux épreuves organisées par l'IAAF opposant des compétiteurs qui présentent un handicap à des athlètes "valides".

En date du 23 octobre 2020, la Formation a rendu sa sentence finale dont le dispositif énonce notamment ce qui suit:

"1. The appeal filed by Mr. A. against the International Association of Athletics Federations with the Court of Arbitration for Sport on 27 February 2020 is partially upheld.

2. Rule 6.3.4 of the World Athletics Technical Rules is unlawful and invalid insofar as it places the burden of proof upon an athlete desiring to use a mechanical aid to establish that the use of the mechanical aid will not provide the athlete with an overall competitive advantage over an athlete not using such an aid.

3. The International Association of Athletics Federations has established on a balance of probabilities that the particular running specific

prostheses used by Mr. A. give him an overall competitive advantage over an athlete not using such a mechanical aid. Accordingly, A. may not use his particular running specific prostheses in the Olympic Games or World Athletics Series competitions.

4. The costs of the arbitration shall be borne as to 30% by Mr. A. and as to 70% by the International Association of Athletics Federations.

5. Each party shall bear their own legal and other costs of these appeal proceedings.

6. (...)

Le 26 novembre 2020, l'athlète (ci-après: le recourant) a formé un recours en matière civile au Tribunal fédéral en vue d'obtenir l'annulation des chiffres 3, 4 et 5 du dispositif de la sentence du 23 octobre 2020.

Le TAS a déclaré se référer à la sentence attaquée, en précisant que les moyens de preuve offerts par les parties et leurs arguments pertinents soulevés au cours de la procédure arbitrale avaient été examinés et traités.

Dans sa réponse du 11 février 2021, l'IAAF (ci-après: l'intimée) a conclu au rejet du recours dans la mesure de sa recevabilité.

Le recourant et l'intimée, dans leurs écritures respectives des 8 et 24 mars 2021, ont maintenu leurs conclusions initiales.

Extraits des considérants

Dans un grief qu'il convient d'examiner en premier lieu, le recourant, dénonçant une atteinte à son droit d'être entendu et, subsidiairement, une violation de son droit à un procès équitable (art. 6 par. 1 CEDH), reproche au TAS de n'avoir pas satisfait à son devoir minimum d'examiner et de traiter les problèmes pertinents.

Il sied de rappeler, à titre liminaire, qu'une partie ne peut pas se plaindre directement,

dans le cadre d'un recours en matière civile au Tribunal fédéral formé contre une sentence arbitrale internationale, de ce que les arbitres auraient violé l'art. 6 par. 1 CEDH, même si les principes découlant de cette disposition peuvent servir, le cas échéant, à concrétiser les garanties invoquées sur la base de l'art. 190 al. 2 LDIP (ATF 146 III 358 consid. 4.1; 142 III 360 consid. 4.1.2; arrêt 4A_26812019 du 17 octobre 2019 consid. 3.4.3). C'est donc en vain que le recourant dénonce, à titre subsidiaire, la violation de l'art. 6 par. 1 CEDH.

La jurisprudence a déduit du droit d'être entendu, tel qu'il est garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, un devoir minimum pour le tribunal arbitral d'examiner et de traiter les problèmes pertinents. Ce devoir est violé lorsque, par inadvertance ou malentendu, le tribunal arbitral ne prend pas en considération des allégués, arguments, preuves et offres de preuve présentés par l'une des parties et importants pour la sentence à rendre. Il incombe à la partie soi-disant lésée de démontrer, dans son recours dirigé contre la sentence, en quoi une inadvertance des arbitres l'a empêchée de se faire entendre sur un point important. C'est à elle d'établir, d'une part, que le tribunal arbitral n'a pas examiné certains des éléments de fait, de preuve ou de droit qu'elle avait régulièrement avancés à l'appui de ses conclusions et, d'autre part, que ces éléments étaient de nature à influencer sur le sort du litige (ATF 142 III 360 consid. 4.1.1 et 4.1.3; arrêt 4A_478/2017 du 2 mai 2018 consid. 3.2.1). Si la sentence passe totalement sous silence des éléments apparemment importants pour la solution du litige, c'est aux arbitres ou à la partie intimée qu'il appartiendra de justifier cette omission dans leurs observations sur le recours. Ils pourront le faire en démontrant que, contrairement aux affirmations du recourant, les éléments omis n'étaient pas pertinents pour résoudre le cas concret ou,

s'ils l'étaient, qu'ils ont été réfutés implicitement par le tribunal arbitral (ATF 133 III 235 consid. 5.2; arrêt 4A_478/2017, précité, consid. 3.2.1).

A suivre le recourant, la sentence attaquée violerait son droit d'être entendu du fait qu'elle n'examinerait pas son argument selon lequel la règle MASH serait discriminatoire et, partant, inapplicable en l'espèce, au motif qu'elle aurait été établie sur la base d'études scientifiques ayant recueilli uniquement des données relatives à des personnes espagnoles, asiatiques et australiennes, faisant ainsi fi des mesures anthropométriques d'individus d'origine africaine ou afro-américaine. Les arbitres auraient ainsi appliqué directement ou indirectement la règle MASH au recourant, athlète afro-américain, sans nullement prendre en considération cet argument décisif. Pour étayer son grief, le recourant fait valoir que cette problématique a été abordée au cours de l'audience. Il en veut pour preuve divers extraits des déclarations faites par certains experts de l'intimée et des plaidoiries finales de son propre conseil (cf. recours, n. 101 et notes de bas de page 202 s.).

Tel qu'il est présenté, le grief ne saurait prospérer.

En l'occurrence, la Formation a en effet clairement indiqué, dans la sentence attaquée, que la règle MASH reflétait une corrélation générale entre la longueur des membres inférieurs d'un individu et celle d'autres parties de son corps, tout en précisant que cette corrélation n'était pas exacte, puisqu'il existe une variété de proportions du corps au sein de la population globale (sentence, n. 382). Nonobstant cette disparité entre les dimensions corporelles, elle n'en a pas moins conclu que cette corrélation était suffisamment forte et établie pour permettre aux scientifiques de déterminer la taille maximale possible d'une personne en

se basant sur la taille de certaines parties de son corps. Ainsi, selon la sentence attaquée, en mesurant le torse et les membres supérieurs de *tous* les athlètes "valides" et en utilisant les résultats de ces mesures pour calculer la taille MASH théorique de ces athlètes au moyen de la formule MASH établie, on constaterait qu'*aucun* de ces athlètes "valides" ne serait plus grand, ou nettement plus grand, que sa taille MASH théorique (sentence, n. 384). Ce faisant, la Formation a rejeté, à tout le moins de manière implicite, l'argument selon lequel la règle MASH ne pouvait pas constituer un indicateur fiable permettant d'estimer la taille de tous les athlètes, y compris celle d'un athlète afro-américain. Qu'elle l'ait fait à bon droit ou non importe peu sous l'angle d'une éventuelle atteinte au droit d'être entendu. Indépendamment de ce qui précède, il sied de relever que la question que la Formation était tenue de résoudre était celle de savoir si le recourant jouissait ou non d'un avantage compétitif global du fait de l'utilisation de ses prothèses. Pour ce faire, la Formation a estimé qu'il y avait lieu d'opérer une comparaison entre les performances de l'athlète réalisées au moyen de ses prothèses et celles qu'il aurait pu accomplir s'il avait eu des jambes biologiques intactes, tout en soulignant que cette appréciation impliquait inévitablement un élément d'incertitude. A cette fin, elle a jugé nécessaire de déterminer si les prothèses utilisées par l'athlète lui permettaient de courir à une hauteur anormalement élevée. Sur ce point, elle a abouti à la conclusion que le recourant courait à une hauteur sensiblement plus élevée que celle correspondant à sa taille MASH et - circonstance encore plus importante selon elle - supérieure à la taille qu'il aurait atteinte s'il avait eu des jambes biologiques intactes, conclusion prenant en compte une généreuse marge d'appréciation pour les diverses formes et tailles du corps humain (sentence, n. 378). Sur la base d'une appréciation des preuves disponibles, la Formation a ainsi constaté, en fait, que

l'athlète courait non seulement à une hauteur sensiblement plus élevée que sa taille MASH (près de 15 centimètres) mais, surtout, à une hauteur supérieure à la taille qu'il aurait eue s'il avait eu des jambes biologiques intactes. Or, dans son mémoire de recours, l'intéressé ne démontre pas en quoi l'argument que les arbitres auraient soi-disant omis d'examiner (le caractère prétendument discriminatoire de la règle MASH lié à son processus d'élaboration) était de nature à influencer sur le sort du litige. Il se contente en effet de faire valoir que la Formation ne pouvait pas asseoir son raisonnement, directement ou indirectement, sur la règle MASH. Ce faisant, il s'en prend en réalité uniquement au raisonnement tenu par les arbitres. Il perd toutefois de vue que les arbitres ont constaté que l'athlète, non seulement dépassait sensiblement sa taille MASH, mais surtout courait à une taille supérieure à celle qui eût été la sienne s'il avait eu des jambes biologiques intactes, même avec une généreuse marge d'appréciation pour les diverses formes et tailles du corps humain. Or, le recourant laisse cette seconde constatation intacte. Il n'établit en effet pas en quoi le fait que les études à l'origine de la règle MASH n'aient pas pris en compte les proportions corporelles d'individus d'origine africaine ou afro-américaine aurait pu modifier l'appréciation des arbitres selon laquelle le recourant courait, avec ses prothèses, à une taille plus élevée que celle qu'il aurait atteinte s'il était né avec des jambes intactes, et ce, même avec une généreuse marge d'appréciation.

Il s'ensuit le rejet du grief tiré de la violation du droit d'être entendu.

Dans un second grief, divisé en trois branches, le recourant soutient que la sentence attaquée est contraire à l'ordre public matériel, au sens de l'art. 190 al. 2 let. e LDIP. Il dénonce, à titre subsidiaire, une violation de l'art. 14 CEDH.

Pour étayer son grief, le recourant se plaint, en premier lieu, de ce que la sentence attaquée consacre une violation du principe de l'interdiction de la discrimination. En deuxième lieu, il prétend que les arbitres ont contrevenu au principe de la fidélité contractuelle. En troisième et dernier lieu, il fait valoir que la sentence entreprise porte atteinte à sa dignité humaine.

Une sentence est incompatible avec l'ordre public si elle méconnaît les valeurs essentielles et largement reconnues qui, selon les conceptions prévalant en Suisse, devraient constituer le fondement de tout ordre juridique (ATF 144 III 120 consid. 5.1; 132 Ill 389 consid. 2.2.3). Tel est le cas lorsqu'elle viole des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l'ordre juridique et le système de valeurs déterminants (ATF 144 III 120 consid. 5.1). Qu'un motif retenu par un tribunal arbitral heurte l'ordre public n'est pas suffisant; c'est le résultat auquel la sentence aboutit qui doit être incompatible avec l'ordre public (ATF 144 III 120 consid. 5.1). L'incompatibilité de la sentence avec l'ordre public, visée à l'art. 190 al. 2 let. e LDIP, est une notion plus restrictive que celle d'arbitraire (ATF 144 III 120 consid. 5.1; arrêts 4A318/2018 du 4 mars 2019 consid. 4.3.1; 4A 600/2016 du 29 juin 2017 consid. 1.174). Selon la jurisprudence, une décision est arbitraire lorsqu'elle est manifestement insoutenable, méconnaît gravement une norme ou un principe juridique clair et indiscuté, ou heurte de manière choquante le sentiment de la justice et de l'équité; il ne suffit pas qu'une autre solution paraisse concevable, voire préférable (ATF 137 I 1 consid. 2.4; 136 I 316 consid. 2.2.2 et les références citées). Pour qu'il y ait incompatibilité avec l'ordre public, il ne suffit pas que les preuves aient été mal appréciées, qu'une constatation de fait soit manifestement fautive ou encore qu'une règle de droit ait été clairement violée (arrêts 4A_116/2016 du 13

décembre 2016 consid. 4.1; 4A_304/2013 du 3 mars 2014 consid. 5.1.1; 4A_458/2009 du 10 juin 2010 consid. 4.1). L'anulation d'une sentence arbitrale internationale pour ce motif de recours est chose rarissime (ATF 132 III 389 consid. 2.1).

Pour juger si la sentence est compatible avec l'ordre public matériel, le Tribunal fédéral ne revoit pas à sa guise l'appréciation juridique à laquelle le tribunal arbitral s'est livré sur la base des faits constatés dans sa sentence. Seul importe, en effet, pour la décision à rendre sous l'angle de l'art. 190 al. 2 let. e LDIP, le point de savoir si le résultat de cette appréciation juridique faite souverainement par les arbitres est compatible ou non avec la définition jurisprudentielle de l'ordre public matériel (arrêt 4A_157/2017 du 14 décembre 2017 consid. 3.3.3).

Le moyen pris d'une violation de l'ordre public n'est ainsi pas recevable dans la mesure où il tend simplement à établir que la sentence incriminée serait contraire à l'art. 14 CEDH (cf. consid. 4.1, ci-dessus, et les arrêts cités).

En premier lieu, le recourant soutient que la sentence entreprise est contraire au principe de l'interdiction de la discrimination.

Dans un arrêt récent, le Tribunal fédéral a exprimé des doutes quant au point de savoir si la prohibition des mesures discriminatoires entre dans le champ d'application de la notion restrictive d'ordre public lorsque la discrimination est le fait d'une personne privée et survient dans des relations entre particuliers. Il n'a toutefois pas poussé plus avant l'examen de cette question dès lors que, dans le cas d'espèce, la sentence attaquée ne consacrait nullement une discrimination contraire à l'ordre public matériel (ATF 147 III 49 consid. 9.4).

La même conclusion s'impose ici, pour les motifs exposés ci-après.

A suivre le recourant, la règle MASH créerait en l'espèce une discrimination à son égard, fondée sur la race ou l'origine ethnique, car elle aurait été établie sur la base de données concernant exclusivement des individus espagnols, australiens et asiatiques. Or, fait-il valoir, les athlètes d'origine africaine ou afro-américaine ont des jambes proportionnellement plus longues que les individus de type caucasien ou autre. L'application directe ou indirecte de la règle MASH à des personnes d'origine africaine ou afro-américaine, comme le recourant, serait dès lors discriminatoire.

A l'appui de son grief, le recourant se réfère à diverses études scientifiques, dont il cite parfois certains extraits, censées démontrer les différences anthropométriques existant entre les individus d'origine africaine et les personnes de type caucasien. Il s'attache également à retracer, sur plusieurs pages, l'historique et l'évolution de la règle MASH.

Force est d'observer d'emblée que nombre d'éléments factuels avancés par le recourant au soutien de sa thèse ne ressortent pas de la sentence entreprise, et cela sans que l'intéressé ne démontre où, quand et comment il les aurait valablement soumis à la Formation qui aurait omis d'en constater l'existence. Le recourant ne prétend en particulier pas ni a fortiori n'établit qu'il aurait produit devant le TAS les études scientifiques auxquelles il fait référence dans son recours et sa réplique. Au demeurant, l'intéressé argumente, devant le Tribunal fédéral, comme s'il plaiderait devant une Formation du TAS autorisée à revoir les faits et le droit avec plein pouvoir d'examen. C'est oublier qu'il n'est plus temps, à ce stade de la procédure, d'ouvrir le débat sur les conditions dans lesquelles la règle MASH a été élaborée ou sur d'autres questions factuelles, telles les différences

anthropométriques existant entre les athlètes d'origines ethniques diverses.

La démonstration effectuée dans le recours et la réplique, en plus de reposer sur des faits non constatés dans la sentence attaquée, revêt ainsi un caractère appellatoire marqué, de sorte que le grief considéré n'apparaît pas recevable.

Quoi qu'il en soit, l'argumentation développée par le recourant n'est pas convaincante et ne permet pas d'établir l'existence d'une contrariété à l'ordre public matériel. Il sied d'insister ici sur le fait que la procédure conduite par le TAS ne visait pas à déterminer si la règle MASH, laquelle a été créée dans le domaine du para-athlétisme, est juridiquement admissible ni si elle est applicable, une fois pour toutes et de manière générale, à l'ensemble des athlètes, quelle que soit leur origine ethnique. Tel n'était pas l'objet de la présente procédure arbitrale. Contrairement à ce que tente de faire accroire le recourant, la sentence attaquée ne force ainsi pas "*les athlètes africains, des Antilles ou afro-américains à entrer dans le moule de mesures faites par ou pour les blancs*" (ou "*caucasiens*") et sur la base de critères anthropométriques propres aux "*blancs*" (recours, p. 7).

La question que la Formation était tenue de résoudre en l'espèce était celle de savoir si le recourant jouit ou non d'un avantage compétitif global du fait de l'utilisation de ses prothèses. Les arbitres y ont répondu par l'affirmative, au motif que celles-ci lui permettent d'atteindre une taille supérieure à celle qui eût été la sienne s'il avait eu des jambes biologiques intactes. Toute l'argumentation présentée par le recourant repose sur la prémisse erronée selon laquelle la Formation aurait appliqué directement ou indirectement la règle MASH, qui, selon lui, serait discriminatoire. La Formation n'a cependant pas fait application de la règle précitée. Si tel avait été le cas, elle serait immédiatement parvenue à la conclusion

que le recourant courait à une hauteur trop élevée en raison de ses prothèses, sans émettre d'autres considérations. Or, à la lecture de la sentence attaquée, force est de relever que les arbitres se sont contentés de mentionner que la règle MASH constitue un indicateur fiable de la taille probable qu'aurait eue le recourant s'il avait eu des jambes biologiques intactes. S'ils ont certes souligné que les prothèses utilisées par le recourant lui permettent de courir à une hauteur significativement plus élevée que sa taille MASH (différence de 14,8 centimètres), ils ont surtout constaté que l'athlète atteint une taille sensiblement plus élevée que celle qui eût été la sienne s'il avait eu des jambes biologiques intactes. En tant qu'il critique le fait que les arbitres se sont inspirés de la règle MASH pour estimer la taille qui eût été la sienne s'il avait eu des jambes biologiques intactes, le recourant s'en prend donc en réalité à la manière dont les arbitres ont apprécié les preuves figurant au dossier de la cause. Une telle critique est irrecevable dans un recours visant une sentence arbitrale internationale (arrêts 4A_50/2017 du 11 juillet 2017 consid. 4.3.2; 4A_34/2015 du 6 octobre 2015 consid. 4.3.2 non publié in ATF 141 III 495; 4A_606/013 du 2 septembre 2014 consid. 5.3).

Au demeurant, le recourant ne démontre pas que la conclusion selon laquelle ses prothèses lui permettent d'atteindre une taille sensiblement plus élevée que celle qui eût été la sienne s'il avait eu des jambes biologiques intactes et lui procurent de ce fait un avantage compétitif global, serait contraire à l'ordre public, ce qui seul importe ici. Le grief considéré, s'il était recevable, ne pourrait qu'être rejeté.

En deuxième lieu, le recourant reproche aux arbitres d'avoir violé le principe de la fidélité contractuelle.

Le principe en question, rendu par l'adage *pacte sunt servanda*, au sens restrictif que lui

donne la jurisprudence relative à l'art. 190 al. 2 let. e LDIP, n'est violé que si l'arbitre refuse d'appliquer une clause contractuelle tout en admettant qu'elle lie les parties ou, à l'inverse, s'il leur impose le respect d'une clause dont il considère qu'elle ne les lie pas. En d'autres termes, l'arbitre doit avoir appliqué ou refusé d'appliquer une disposition contractuelle en se mettant en contradiction avec le résultat de son interprétation à propos de l'existence ou du contenu de l'acte juridique litigieux. En revanche, le processus d'interprétation lui-même et les conséquences juridiques qui en sont logiquement tirées ne sont pas régis par le principe de la fidélité contractuelle, de sorte qu'ils ne sauraient prêter le flanc au grief de violation de l'ordre public (arrêts 4A660/2020 du 15 février 2021, consid. 3.2.2; 4A_70/2020 du 18 juin 2020 consid. 7.371; 4A 318/2017 du 28 août 2017 consid. 4.2).

A en croire le recourant - pour peu qu'on le comprenne -, la Formation, après avoir souligné que les Statuts de l'intimée interdisent, à leur art. 4.1 (j), toute forme de discrimination, aurait *“créé de toutes pièces, sur la base de la Règle MASH 2018 qui repose sur des données raciales et ethniques incomplètes, une norme indirectement discriminatoire et illicite”* (recours, p. 39). Les arbitres auraient ainsi refusé d'appliquer une clause contractuelle, soit l'art. 4.1 (j) des Statuts tout en admettant que celle-ci lie les parties, violant ainsi le principe de la fidélité contractuelle.

Cette argumentation, outre le fait qu'elle est difficilement intelligible en raison de la manière dont elle est formulée, apparaît dénuée de toute pertinence.

Il sied d'emblée de souligner que le principe de la fidélité contractuelle ne trouve pas à s'appliquer en l'espèce. Selon la jurisprudence du Tribunal fédéral, il convient en effet d'interpréter les règles édictées par une association sportive majeure selon les règles d'interprétation de la loi (arrêt 4A_462/2019

du 29 juillet 2020 consid. 7.2 et les arrêts cités). Il ne saurait en être autrement pour les Statuts d'une association régissant l'athlétisme au niveau mondial. Cela suffit à priver le grief considéré de toute assise.

En tout état de cause, on relèvera que la Formation n'a pas refusé d'appliquer l'art. 4.1 (j) des Statuts de l'intimée. Les arbitres ont en effet retenu que l'art. 144.3 des Règles de compétition créait une discrimination indirecte, au sens de l'art. 4.1 (j) précité, à l'égard des athlètes en situation de handicap. Ceci les a du reste conduits à partiellement admettre l'appel interjeté devant eux, au motif que la règle prévoyant qu'il incombe à l'athlète de démontrer qu'il ne tire pas un avantage compétitif global de l'utilisation d'une aide mécanique, ne constitue pas une mesure nécessaire, raisonnable et appropriée pour atteindre l'objectif poursuivi. Contrairement à ce que semble soutenir le recourant, la Formation n'a en revanche pas *“créé de toutes pièces”* une norme indirectement discriminatoire basée sur la règle MASH. Elle a uniquement examiné si l'intimée avait établi que le recourant jouissait d'un avantage compétitif global en raison d'une aide mécanique au sens de l'art. 144.3 des Règles de compétition, ce qu'elle a fini par admettre sur la base des éléments en sa possession.

Le grief considéré ne peut dès lors qu'être rejeté, dans la mesure où il est recevable.

En troisième et dernier lieu, le recourant dénonce une atteinte à sa dignité humaine.

Selon lui, il est contraire à la dignité humaine de forcer des athlètes d'origine africaine ou afro-américaine d'être mesurés selon la règle MASH. L'application *“choquante et inique”* de ladite règle, laquelle n'a pas vocation à s'appliquer à de tels athlètes, serait dès lors contraire à l'ordre public matériel, puisqu'elle empêcherait le recourant

d'utiliser ses prothèses et de gagner sa vie en exerçant sa profession.

En raisonnant de la sorte, le recourant perd une nouvelle fois de vue que la Formation n'a pas fait application de la règle MASH. Il méconnaît aussi le fait que la Formation n'avait pas à trancher le point de savoir si ladite règle est applicable à tous les athlètes sans distinction. La seule question à résoudre ici est dès lors celle de savoir si le fait de priver le recourant de la possibilité de pouvoir utiliser ses prothèses actuelles, dans un souci d'équité sportive, est contraire ou non à la dignité humaine. Celle-ci doit assurément être résolue par la négative, étant précisé que la Formation a constaté en fait, d'une manière qui lie le Tribunal fédéral, que les prothèses utilisées par l'athlète lui permettent de courir à une hauteur sensiblement plus importante que la taille qui eût été la sienne s'il avait eu des jambes biologiques intactes et lui confèrent, de ce fait, un avantage compétitif.

Le grief tiré d'une atteinte à la dignité humaine se révèle ainsi infondé.

Décision

Au vu de ce qui précède, le recours doit être rejeté dans la mesure de sa recevabilité.

*Appeal against the arbitral decision by the Court of Arbitration for Sport of 30 October 2020 (CAS 2020/A/7283)*¹

Extract of the facts

On June 18, 2020, the Dispute Resolution Chamber of the Fédération Internationale de Football Association (FIFA) rendered a decision in a contractual dispute between Claimant C., a football club and Player A. (hereinafter: the Player), and Club B. (the defendants). The DRC ordered the defendants, jointly and severally, to pay the plaintiff the sum of USD 11 294 99, plus interest.

C. filed a statement of appeal with the Court of Arbitration for Sport (CAS) against the FIFA decision (CAS 2020/N7283). The other two parties to the proceedings as well as D., the club for which the Player currently plays, have also filed an appeal with CAS.

The CAS joined the four arbitration proceedings. However, the appeal submitted to the Swiss Federal Supreme Court concerns only CAS 2020/A/7283.

On August 14, 2020, CAS notified the parties that the deadline for filing their respective appeal briefs was extended to August 24, 2020.

On August 21, 2020, both Appellants requested a twenty-day extension of time to file their appeal briefs with CAS.

On the same day, CAS indicated that the deadline for the Player, D. and B. to file their appeal briefs was provisionally suspended.

On August 25, 2020, CAS clarified that the deadline for C. to submit its appeal brief was also suspended until further notice.

On August 31, 2020, CAS wrote to the parties, *inter alia*, as follows:
In view of the Parties' agreement, the Appellants' requests of extension of 20 days of their deadline to file the Appeal Brief are granted. In view of the above, the suspension of the Appellant's deadline is hereby lifted with immediate effect.

On September 14, 2020, the Player, D. and B. submitted their appeal briefs to CAS.

On September 18, 2020, C. requested a further extension of time of five days to file its appeal brief.

On the same day, CAS invited the parties to comment on the said request, but stated that the deadline for filing the appeal brief was suspended until further notice.

The Player, D. and B. objected to said motion as, according to them, the deadline for filing the appeal brief had expired on September 14, 2020.

¹ The decision 4A_626/2020 was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch. For the full English translations & introductory notes on the Federal Tribunal judgments in both sports- and commercial arbitration cases, you can visit the

website www.swissarbitrationdecisions.com (operated jointly by Dr. Charles Poncet and Dr. Despina Mavromati) as a service to the international arbitration community.

On September 23, 2020, CAS indicated to the parties, *inter alia*, the following:

With respect to the admissibility and timeliness of the request of extension filed by C., the Parties are advised as follows:

- On 21 August 2020, C. requested an extension of its deadline to file the Appeal Brief which was to expire on 24 August 2020;
- Such request was filed before the expiration of the deadline to file the Appeal Brief;
- On 25 August 2020, the CAS Court Office acknowledged receipt of such request of extension and suspended the deadline;
- On 31 August 2020, the CAS Court Office granted a 20-day extension of the Appellants' deadline to file the Appeal Brief.
- The deadline of C. was suspended between the 25 and 31 August 2020.
- Accordingly, the deadline of C. to file its Appeal Brief did not expire on 14 September 2020, but on 21 September 2020.
- On 18 September 2020, C. requested an extension of five days of its deadline to file the Appeal Brief.
- In view of the above, the request of extension of C. is admissible.

In view of the fact that Mr A., B. and D. disagree with the requested extension, it is for the President of the CAS Appeals Arbitration Division, or her Deputy, to decide the issue in accordance with Article R32 of the Code.

The Parties are hereby informed that the Deputy of the President of the CAS Appeals Arbitration Division has decided to grant the requested extension in accordance with Article R32 of the Code. Accordingly, the suspension of the deadline of C. to file its Appeal Brief is lifted with immediate effect.

C. filed its appeal brief on September 28, 2020.

Once the Panel was constituted, the Player and B. requested that the Panel decide whether C. had filed his appeal brief in a timely manner.

On October 30, 2020, CAS informed the parties that the Panel had decided the following with respect to the admissibility of C.'s appeal brief:

The Panel notes that this issue has been submitted to the Deputy President of the CAS Appeals Division, who decided to grant the Appellant's extension request making the Appeal Brief eventually filed, admissible.

The Panel considers that the Deputy President of the CAS Appeals Division's decision is final and that the Panel cannot subsequently review and reconsider the decision taken.

Accordingly, the Appeal Brief submitted by C. is admissible.

On November 30, 2020, the Player and B. (hereinafter: the Appellants) filed an appeal in civil law in which they request, in substance, that the Federal Tribunal annul the decision rendered on October 30, 2020, declare the Appeal Brief submitted by C. inadmissible and close the CAS 2020/A/7283 proceedings in accordance with Art. R51 of the Code of Sports-Related Arbitration. As a preliminary matter, they request the Federal Tribunal suspend the examination of the present appeal until the Panel makes its final award in the case CAS 2020/A17283.

Extract of the legal considerations

The Appellants request, as a preliminary matter, that the present proceedings be suspended until the final award has been made. They indicate that they intend to ask the Panel to

reconsider its decision with regard to the admissibility of the Respondent’s appeal brief. The present appeal is therefore filed, in their words, “as a procedural precaution”, in the event that the Panel were to confirm that the decision of October 30, 2020, was final.

In this case, the Panel considered that the decision of the Deputy President of the CAS Appeals Division regarding the extension of time requested by the Respondent and the admissibility of the appeal brief filed by the Respondent was final and could not be reconsidered. Based on this assessment, it confirmed that the appeal brief was admissible. In view of the foregoing, the Panel cannot be expected to reconsider the issue of the admissibility of the appeal brief in the final award. Therefore, it cannot have any influence on the decision to be made regarding the admissibility of the present appeal to the Federal Tribunal.

Therefore, the request for a stay is rejected.

In the field of international arbitration, appeals in civil matters are admissible against decisions of arbitral tribunals under the conditions of Art. 190-192 PILA² (Art. 77(1)(a) LTF³).

The seat of the CAS is in Lausanne. None of the parties had their domicile or seat in Switzerland at the relevant time. Therefore,

the provisions of Chapter 12 PILA are applicable (Art. 176(1) PILA).

The Swiss Federal Supreme Court examines *ex officio* the admissibility of appeals submitted to it (ATF 138 III 542, para. 1.1).

The appeal in civil law referred to in Art. 77(1)(a) LTF in conjunction with Art. 190-192 PILA is only admissible against an award. The challengeable act can be a final award, which puts an end to the arbitration proceedings for a substantive or procedural reason, a partial award, which deals with a quantitatively limited part of a disputed claim, or with one of the various claims at issue, or which puts an end to the proceedings with regard to part of the parties (ATF 143 III 462⁴, para. 2.1; judgment 4A_222/2015⁵ of January 28, 2016, para. 3.1.1), or even a preliminary or interim award, which settles one or more preliminary questions of substance or procedure (on these concepts, see ATF 130 III 755, para. 1.2.1, p. 757). On the other hand, a simple procedural order that can be modified or revoked in the course of the proceedings is not subject to appeal (ATF 143 III 462, para. 2.1; 136 III 200⁶, para. 2.3.1, p. 203; 136 III 597⁷, para. 4.2; judgment 4A_596/2012⁸ of April 15, 2013, para. 3.3).

² PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.

³ LTF is the most commonly used French abbreviation for the Federal Law of June 6, 2005, organizing the Federal Tribunal (RS 173.110).

⁴ The English translation of this decision is available here: <https://www.swissarbitrationdecisions.com/atf-4a-98-2017>

⁵ The English translation of this decision is available here: <https://www.swissarbitrationdecisions.com/provisional-determination-jurisdiction-not-capable-appeal>

⁶ The English translation of this decision is available here:

<https://mw.swissarbitrationdecisions.com/decision-on-provisional-measures-characterized-as-interlocutory->

⁷ The English translation of this decision is available here: [https://www](https://www.swissarbitrationdecisions.com/procedural-order-of-the-arbitral-tribunal-directing-payment-of-)
[.swissarbitrationdecisions.com/procedural-order-of-the-arbitral-tribunal-directing-payment-of-](https://www.swissarbitrationdecisions.com/procedural-order-of-the-arbitral-tribunal-directing-payment-of-)

⁸ The English translation of this decision is available here: <https://www.swissarbitrationdecisions.com/order-produce-document-not-appealable-award>

In order to determine the admissibility of the appeal, what is decisive is not the name of the decision, but the content of the decision (BGE 143 III 462, para. 2.1; 142 III 284, para. 1.1.1; judgment 4A_222/2015, cited above, para. 3.1.1).

It follows from Art. 190(2) and (3) PILA that a final or partial award can be challenged on all the grounds listed in Art. 190(2) PILA. According to Art. 190(3) PILA, however, an interim award may only be challenged before the Federal Tribunal on the grounds of irregular composition (Art. 190(2)(a) PILA) or lack of jurisdiction (Art. 190(2)(b) PILA) of the arbitral tribunal.

In a recent decision, the Federal Court, referring in particular to two doctrinal contributions (Stefanie Pfisterer, *Die Befristung der Schiedsvereinbarung und die Zuständigkeit eines Schiedsgerichts ratione temporis - eine Illusion?*, in *Mélanges en l'honneur de Anton K. Schnyder*, 2018, p. 275 if; Antonio Rigozzi, *Le délai d'appel devant le Tribunal arbitral du sport: quelques considérations à la lumière de la pratique récente*, in *Le temps et le droit*, 2008, p. 255 ff), considered that the observance of the time limit for appealing to the CAS is a condition for the admissibility of the appeal, which does not relate to the jurisdiction of the arbitral tribunal (Judgment 4A_413/2019⁹ of October 28, 2019, at 3.3.2). Failure to comply with the time limit within which an appeal must be filed with the CAS does not in fact mean the arbitral tribunal lacks jurisdiction, it only impacts the (in)admissibility of the appeal. Consequently, the complaint based on the failure to comply with the time limit for filing an appeal to the CAS does not fall within the scope of Art. 190(2)(b) PILA.

⁹ The English translation of this decision is available here: <https://www.swissarbitrationdecisions.com/atf-4a-413-2019>

The Appellant cannot therefore immediately challenge the interim award by which the CAS found that the appeal was filed in due time, insofar as it does not challenge either the composition of the arbitral tribunal or its jurisdiction (Art. 190(3) PILA).

The Federal Court has confirmed its case law on several occasions since then (see judgments 4A_198/2020 of December 1, 2020, at 3.2; 4A_290/2020 of August 26, 2020; 4A_287/2019¹⁰ of January 6, 2020, at 4.2).

In their submissions, the Appellants challenge the solution adopted in Judgment 4A_413/2019 and consider that compliance with the time limit for appeal to the CAS is a question of jurisdiction in the broad sense of Art. 190(2)(b) PILA. According to them, the fact that the non-compliance with the time limits does not lead to the lack of jurisdiction does not prevent the Federal Tribunal from reviewing this decision from the point of view of Art. 190(2)(b) PILA. The Appellants further argue that the contribution by Stefanie Pfisterer, cited in Judgment 4A_413/2019, only examines the question of the jurisdiction *ratione temporis* of the arbitral tribunal in commercial arbitration and not in the field of sport. As for the other academic opinion cited, which is none other than that of their own counsel, the Appellants point out that the latter also argued, in a subsequent contribution, that the Federal Tribunal could examine the question of the time limit for appealing to the CAS from the point of view of Art. 190(2)(b) PILA (Rigozzi/Hasler, in *Arbitration in Switzerland, The Practitioner's Guide*, vol. II, 2nd ed. 2018, no 26 ad Art. R49 of the Code and footnote 65). Finally, they note that recent doctrine has been

¹⁰ The English translation of this decision is available here: <https://www.swissarbitrationdecisions.com/atf-4a-287-2019>

critical of the solution adopted in 4A_413/2019.

The elements put forward by the Appellants, as they stand, do not justify calling into question the solution recently adopted by the Federal Tribunal. Although the Judgment 4A_413/2019 has given rise to some criticism in the doctrine (cf. in particular Sébastien Besson, note on the above-mentioned judgment, in *Revue de l'Arbitrage* 2020/3 p. 916), it should be noted that several authors have welcomed this new case law (cf. Marco Stacher, *Jurisdiction and Admissibility under Swiss Arbitration Law - the Relevance of the Distinction and a New Hope*, in *Bulletin ASA* 2020/1 p. 67 f. and 73; Stacher/Püschel-Arnold, *BGer 4A_413/2019: Schiedsgerichtsbarkeit: Fristgerechte Klage und Postulationsfähigkeit - (beschwerdefähige) Zuständigkeitsfragen?*, in *PJA* 2020/2 p. 250 f.; Mladen Stojiljkovic, *Swiss Federal Court Addresses Jurisdiction and Admissibility in CAS Arbitration*, in *dRSK*, December 17, 2019).

For the rest, the decision in ATF 142 III 296¹¹ cited by the Appellants, in which the Federal Tribunal examined the complaint of non-compliance with a contractual mechanism constituting a mandatory prerequisite for the implementation of a commercial arbitration from the point of

view of Art. 190(2)(b) PILA, is of no help to them, as it concerns a different situation. The Appellants can therefore draw nothing from it in the present case. It should be noted, in passing, that some authors invite the Federal Tribunal to extend the scope of Judgment 4A_413/2019 to other situations in which the Federal Tribunal has, in the past, ruled on various appeals by broadly interpreting Art. 190(2)(b) PILA, in particular in the case that was the subject of ATF 142 III 296 (Stacher, *op. cit.*, p. 64 and 73; Stojiljkovic, *op. cit.*, n. 16 f.; Stacher/Püschel-Arnold, *op. cit.*) However, there is no need to examine here whether the solution adopted in Judgment 4A_413/2019 should be transposed to other cases.

In view of the foregoing, it is appropriate to adhere to the recent case law of the Federal Tribunal, according to which the plea of failure to comply with the time limit for appeal to the CAS does not fall within the scope of Art. 190(2)(b) PILA. Therefore, the present appeal must be declared inadmissible.

Decision

The request for suspension is rejected. The appeal is inadmissible.

¹¹ The English translation of this decision is available here:

<https://www.swissarbitrationdecisions.com/mandatory-pre-arbitration-procedure-not-complied>

4A_644/2020

23 août 2021

A. c. Comité International Olympique

Recours en matière civile contre la sentence rendue le 24 septembre 2020 par le Tribunal Arbitral du Sport (CAS 2017/A/5444)

Extrait des faits

Le Comité International Olympique (CIO) est une organisation internationale non gouvernementale, à but non lucratif, constituée sous la forme d'une association de droit suisse, dont le siège est à Lausanne. Les Jeux Olympiques (JO) constituent le point culminant de son activité.

Du 7 au 23 février 2014, la ville russe de Sotchi a accueilli les JO d'hiver (ci-après: les Jeux de Sotchi). Les athlètes du pays organisateur y ont obtenu 33 médailles, ce qui a permis à la Russie de finir en tête du tableau des médailles.

A. (ci-après: la biathlète) est une ancienne biathlète de nationalité russe, domiciliée en Russie. Elle a participé aux Jeux de Sotchi et y a glané une médaille... lors de l'épreuve féminine du... aux côtés notamment de ses deux compatriotes B. et C..

Les 31 janvier, 12 et 19 février 2014, la biathlète a fait l'objet de trois contrôles antidopage qui se sont tous révélés négatifs.

A la suite de la diffusion sur une chaîne de télévision d'un documentaire concernant l'existence alléguée d'un programme de dopage étendu, secret et institutionnel au sein de la Fédération russe d'athlétisme, l'Agence Mondiale Antidopage (AMA) a nommé, en date du 16 décembre 2014, une commission indépendante de trois membres pour enquêter sur cette allégation. Dans son

rapport du 9 novembre 2015, la commission indépendante a notamment identifié des manquements systémiques imputables aux autorités russes ayant eu pour effet d'entraver la lutte antidopage.

En 2015, le Dr D., ancien directeur du Laboratoire antidopage de Moscou et de celui qui avait été mis en place à Sotchi pendant la durée des JO, a quitté la Russie et a fait une série de révélations largement publiées quant à l'existence d'un plan de dopage sophistiqué avant, pendant et après les Jeux de Sotchi. Le 19 mai 2016, l'AMA a chargé le Professeur Richard H. McLaren de mener une enquête indépendante sur les allégations du Dr D.. Dans un premier rapport, daté du 16 juillet 2016, le Prof. McLaren est arrivé à la conclusion que le Laboratoire de Moscou opérait, pour la protection des athlètes russes dopés, dans le cadre d'un système très fiable, dicté par l'État, désigné dans le rapport sous l'appellation de Méthodologie de Dissimulation Positive (*Disappearing Positive Methodology*); que le Laboratoire de Sotchi avait usé d'un système d'échange d'échantillons unique pour permettre aux athlètes russes dopés de participer aux Jeux de Sotchi; enfin, que la manipulation des résultats des analyses antidopage et l'échange des échantillons avaient été dirigés, contrôlés et supervisés par le Ministère du Sport avec la participation active des Services secrets fédéraux (FSB), du Centre de préparation sportive des équipes nationales de Russie (CSP) et des deux laboratoires susnommés.

Le second rapport du Prof. McLaren, daté du 9 décembre 2016, contenait des

explications détaillées sur la mise en oeuvre d'un programme de dopage sans précédent à l'occasion des Jeux de Sotchi. A en croire son auteur, il y avait eu une conspiration méticuleusement orchestrée, incluant la complicité des officiels au sein du Ministère du Sport, du CSP, du personnel du Laboratoire de Sotchi basé à Moscou, de l'Agence antidopage russe (RUSADA), du Comité d'organisation olympique russe, des athlètes et du FSB. Selon le Prof. McLaren, le Ministère du Sport russe avait établi une liste d'athlètes protégés (la "Liste Duchesse") auxquels serait administré un "cocktail" contenant trois substances interdites (oxandrolone, méténolone, et trenbolone) en vue d'améliorer leurs performances lors des Jeux de Sotchi. Les échantillons d'urine fournis par les trente-sept athlètes figurant sur la Liste Duchesse seraient automatiquement échangés lors des Jeux de Sotchi.

En juillet 2016, le CIO a institué une Commission disciplinaire, avec à sa tête le Prof. Denis Oswald (ci-après: la Commission disciplinaire), qui a été chargée d'enquêter sur de potentielles violations des règles antidopage commises par des athlètes individuels russes aux Jeux de Sotchi. Ladite Commission a formellement ouvert des enquêtes disciplinaires à l'encontre d'un certain nombre d'athlètes russes auxquels elle reprochait de s'être engagés sciemment et activement, lors des Jeux de Sotchi, dans un système de dopage et de camouflage sophistiqué, orchestré par l'État. L'une des personnes visées était la biathlète. Après une étude réalisée sur la teneur en sel de tous les échantillons A prélevés sur les athlètes russes durant les Jeux de Sotchi, les résultats obtenus s'agissant de la biathlète indiquaient, selon le CIO, une falsification des échantillons. Un flacon contenant l'un des échantillons fournis par la biathlète présentait non seulement des marques mais contenait aussi de l'urine affichant une teneur en sel anormalement élevée.

En date du 26 octobre 2017, la biathlète a été informée de l'ouverture d'une procédure disciplinaire à son encontre.

Le 1er décembre 2017, la Commission disciplinaire a prononcé le dispositif de sa décision. Reconnaisant la biathlète coupable d'avoir enfreint les règles antidopage du CIO applicables aux Jeux de Sotchi, elle a annulé tous les résultats obtenus par l'intéressée lors des épreuves auxquelles elle avait pris part durant ces Jeux-là, ordonné le retrait de la médaille qu'elle y avait glanée, a disqualifié l'équipe féminine du..., exigé la restitution de toutes les récompenses obtenues par ses membres et déclaré la biathlète inéligible à l'accréditation en quelque qualité que ce soit pour toute édition des Jeux de l'Olympiade et des JO d'hiver postérieure aux Jeux de Sotchi. La décision complète a été rendue le 22 décembre 2017.

Sur l'examen des éléments de preuve concrets, la Commission disciplinaire arrive à la conclusion qu'un programme d'échange d'échantillons a effectivement été mis en place aux Jeux de Sotchi. Selon elle, la biathlète était impliquée dans ce programme, et ce pour diverses raisons. L'intéressée figurait notamment sur la Liste Duchesse, deux flacons d'échantillons présentaient des marques et un échantillon d'urine prélevé sur la biathlète lors des Jeux de Sotchi affichait une teneur en sel élevée. Le Dr D. avait en outre fourni des éléments supplémentaires concernant l'implication de la biathlète. Dans ces conditions, la biathlète devait être reconnue coupable d'avoir enfreint diverses règles antidopage et se voir infliger les sanctions susmentionnées.

Le 6 décembre 2017, la biathlète a saisi le Tribunal Arbitral du Sport (TAS) d'un appel dirigé contre la décision rendue par la Commission disciplinaire (CAS 2017/A/5444).

Au cours de l'audience, l'appelante a renouvelé les objections qu'elle avait déjà fait valoir dans le cadre de sa demande de récusation visant le président de la Formation, tout en confirmant, pour le reste, que son droit d'être entendu avait été pleinement respecté.

Par sentence du 24 septembre 2020, la Formation a partiellement admis l'appel interjeté par la biathlète. Elle l'a reconnue coupable d'avoir enfreint les règles antidopage applicables aux Jeux de Sotchi et l'a déclarée inéligible à l'accréditation en quelque qualité que ce soit pour l'édition des JO d'hiver postérieure ces Jeux-là. Pour le reste, elle a confirmé la décision attaquée à savoir que les infractions commises par l'appelante doivent entraîner la disqualification des résultats obtenus par celle-ci lors des Jeux de Sotchi, y compris dans le cadre des épreuves de relai.

Le 9 décembre 2020, la biathlète (ci-après: la recourante) a formé un recours en matière civile au Tribunal fédéral aux fins d'obtenir l'annulation de la sentence précitée.

Extrait des considérants

Invoquant l'art. 190 al. 2 let. a LDIP, la recourante fait valoir, dans un premier moyen, que la sentence attaquée a été rendue par un tribunal arbitral irrégulièrement composé.

Selon elle, le TAS est en effet structurellement dépendant des organisations sportives internationales, lesquelles ont une influence considérable sur son fonctionnement. Faisant siennes les critiques émises par deux Juges de la Cour européenne des droits de l'homme (ci-après: la CourEDH) dans leur opinion dissidente formulée dans le cadre de l'affaire Mutu et Pechstein contre Suisse (arrêt du 2 octobre 2018), elle estime que l'intimé exerce, au sein du Conseil

International de l'Arbitrage en matière de Sport (CIAS), une influence sur la procédure de sélection et de nomination des arbitres, ce qui a un impact réel sur l'indépendance et l'impartialité de ceux-ci. Vu la composition du CIAS, le système de la liste fermée d'arbitres appliqué par le TAS et l'influence du CIAS sur le choix et la révocation de ceux-ci, l'intéressée est d'avis que le Tribunal fédéral devrait réexaminer la question de l'indépendance structurelle du TAS. Elle insiste notamment sur le fait qu'un membre du CIAS, soit en l'occurrence la présidente de la Chambre arbitrale d'appel, est compétent pour désigner le président de la Formation arbitrale dans les procédures d'appel. Elle relève en outre que le TAS ne mentionne pas, sur la liste fermée des arbitres, le nom des organisations sportives les ayant proposés au CIAS. Elle soutient en outre que les membres du CIAS n'hésitent pas à se prononcer sur certaines affaires traitées par le TAS et à révoquer "les arbitres qui les dérangent". Enfin, elle estime qu'il est pour le moins troublant que la présidente de la Chambre arbitrale d'appel, laquelle aurait approuvé publiquement les sanctions infligées aux athlètes russes, ait choisi de désigner, en qualité de président de la Formation appelée à trancher la présente cause, une personne ayant déjà condamné un certain nombre de sportifs russes.

Lorsqu'un tribunal arbitral présente un défaut d'indépendance ou d'impartialité, il s'agit d'un cas de composition irrégulière au sens de l'art. 190 al. 2 let. a LDIP. En vertu du principe de la bonne foi, le droit d'invoquer le moyen se périmé cependant si la partie ne le fait pas valoir immédiatement; elle ne saurait garder à ce sujet ses arguments en réserve pour ne les soulever qu'en cas d'issue défavorable de la procédure arbitrale (ATF 129 III 445 consid. 3.1; arrêt 4A_428/2011 du 13 février 2012 consid. 2.1).

En l'occurrence, force est de relever d'emblée que la recourante a non seulement choisi elle-même de s'adresser au TAS mais n'a en outre jamais soutenu ni a fortiori démontré, au cours de la procédure arbitrale, que l'institution d'arbitrage en question ne présentait pas les garanties d'indépendance nécessaires. Comme le relève à bon droit l'intimé, la recourante tente, en vain, de parer au fait qu'elle n'a pas soulevé à temps ses arguments relatifs au prétendu manque d'indépendance structurelle du TAS en faisant valoir qu'elle ne connaissait pas, au moment où elle a saisi ce dernier, le contenu de l'arrêt Mutu et Pechstein, dès lors que celui-ci a été rendu en octobre 2018. Ce faisant, elle ne démontre nullement ce qui l'aurait empêchée de remettre en question d'entrée de cause l'indépendance structurelle du TAS. Par ailleurs, comme le souligne l'intimé, elle n'explique pas pourquoi elle n'aurait pas pu faire valoir ces mêmes arguments au cours de la procédure arbitrale, notamment lorsqu'elle a présenté sa demande de récusation visant le président de la Formation arbitrale en septembre 2019, soit bien après la publication de l'arrêt précité.

Dans ces conditions, le premier moyen soulevé par la recourante est frappé de forclusion.

Cette question de forclusion mise à part, le moyen pris de la violation de l'art. 190 al. 2 let. a LDIP n'apparaît de toute manière pas fondé.

Dans l'arrêt de principe Lazutina du 27 mai 2003, le Tribunal fédéral, après avoir examiné la question par le menu, est arrivé à la conclusion que le TAS est suffisamment indépendant pour que les décisions qu'il rend dans les causes intéressant l'intimé puissent être considérées comme de véritables sentences, assimilables aux jugements d'un tribunal étatique (ATF 129 III 445 consid. 3.3.4). Depuis lors, cette jurisprudence a été

confirmée à maintes reprises (cf. parmi d'autres: ATF 144 III 120 consid. 3.4.2; 133 III 235 consid. 4.3.2.3; arrêt 4A_248/2019 du 25 août 2020 consid. 5.1.2 non publié in ATF 147 III 49 et les arrêts cités).

Dans l'arrêt rendu le 2 octobre 2018 dans l'affaire Mutu et Pechstein contre Suisse, la CourEDH a été amenée elle aussi à se prononcer sur la question de l'indépendance et de l'impartialité du TAS. Devant la CourEDH, la requérante Pechstein a notamment fait valoir que le TAS n'était ni indépendant ni impartial car les parties n'ont aucune influence sur la nomination du troisième arbitre chargé de présider la formation arbitrale. Elle a aussi souligné que le TAS est financé par les fédérations sportives et que ce système de nomination implique que les arbitres désignés sont enclins à favoriser celles-ci. L'intéressée a en outre soutenu que l'obligation faite aux parties de choisir leur arbitre respectif sur une liste fermée élaborée par le CIAS, dont la majorité des membres serait nommée par les fédérations internationales, ne garantit pas une représentation équilibrée des intérêts des athlètes par rapport à ceux des fédérations (§ 124-126). Si la CourEDH a certes relevé que les organisations susceptibles de s'opposer aux athlètes dans le cadre de litiges portés devant le TAS exerçaient, par le truchement du CIAS, une réelle influence dans le mécanisme de nomination des arbitres en vigueur à l'époque des faits et que le CIAS a la possibilité de révoquer les arbitres, elle n'en a pas moins considéré que le TAS a les apparences d'un tribunal établi par la loi et qu'il est véritablement indépendant et impartial (§ 149 et 157-159), ce qu'elle a du reste confirmé encore récemment (arrêt Michel Platini contre Suisse du 11 février 2020, § 65). Elle a en outre précisé que le système de la liste d'arbitres du TAS satisfait aux exigences constitutionnelles d'indépendance et d'impartialité applicables aux tribunaux arbitraux (§ 157). Que deux Juges de la CourEDH aient

formulé une opinion dissidente n'y change rien. Aussi est-ce en vain que la recourante tente de rouvrir le débat sur la question de l'indépendance du TAS, laquelle a été définitivement tranchée par la CourEDH.

Par surabondance, on relèvera que le mécanisme de sélection des arbitres a évolué par rapport à celui ayant été examiné par la CourEDH. A la suite de la modification de l'art. S14 du Code, le CIAS n'est en effet plus tenu de faire appel à un quota d'arbitres sélectionnés parmi les personnes proposées par les organisations sportives (1/5e chacun pour l'intimé, les fédérations internationales et les Comités Nationaux Olympiques), ces dernières ne jouissant plus d'un statut privilégié puisque, à l'instar de leurs commissions d'athlètes, elles ne peuvent que porter à l'attention du CIAS les noms et qualifications d'arbitres susceptibles de figurer sur la liste ad hoc (ATF 144 III 120 consid. 3.4.3). Aussi les arbitres potentiels ne doivent-ils plus être parrainés par les fédérations internationales.

La recourante ne peut pas davantage être suivie lorsqu'elle remet en cause l'indépendance structurelle du TAS au seul motif que le président de la formation arbitrale est désigné par un membre du CIAS (la présidente de la Chambre arbitrale d'appel), sur lequel l'influence de l'intimé est indéniable. Comme le relève le TAS, sans être contredit par la recourante, la présidente de la Chambre arbitrale d'appel, si elle est certes membre du CIAS, n'entretient en effet aucun lien direct ou étroit avec le CIO, puisqu'il s'agit d'une ancienne athlète.

Pour le surplus, l'intéressée assoit sa critique sur des faits qui ne ressortent pas de la sentence attaquée et qui sont, partant irrecevables, notamment lorsqu'elle se réfère à certains propos prétendument tenus par divers membres du CIAS ou lorsqu'elle fait allusion à la révocation d'un arbitre dont elle

concède elle-même ne pas connaître les raisons ayant poussé le CIAS à adopter une telle mesure. Quoi qu'il en soit, les déclarations faites par certaines personnes ne sont pas susceptibles, à elles seules, de remettre en cause l'indépendance du TAS en tant qu'institution.

Enfin, la recourante, bien qu'elle reconnaisse ne plus vouloir contester à ce stade la désignation du président de la Formation, cherche néanmoins à instiller le doute quant à son impartialité au motif qu'il a siégé dans plusieurs Formations ayant sanctionné des athlètes russes. Semblable démarche est vouée à l'échec dès lors que la Commission de récusation du CIAS a déjà examiné et rejeté pareil grief et que la recourante concède elle-même ne plus chercher à obtenir la récusation de l'arbitre en question. On se contentera de relever, en passant, que la Formation qui a reconnu la recourante coupable d'avoir enfreint les règles antidopage n'a pas hésité, dans les procédures parallèles, à blanchir ses deux coéquipières.

Cela étant, le moyen pris de la composition irrégulière du tribunal arbitral se révèle infondé, si tant est que la recourante ne soit pas déjà forclosée à l'invoquer.

Dans un deuxième moyen, la recourante, invoquant les art. 6 par. 1 CEDH et 190 al. 2 let. e LDIP, dénonce une violation de son droit à une audience publique.

Contrairement à ce que retient la sentence attaquée (n. 51), les parties ne se seraient, selon elle, pas entendues pour limiter l'accès à la salle d'audience à un nombre restreint de personnes préalablement identifiées. A cet égard, l'intéressée relève que le TAS, par avis du 26 février 2020, a avisé les parties que si celles-ci désiraient, nonobstant l'apparition du coronavirus, obtenir une audience publique, celle-ci serait ajournée à leurs frais. Le lendemain, la recourante a

maintenu sa requête tendant à obtenir des débats publics, en précisant qu'un ajournement occasionnerait des frais très importants pour elle puisque les parties, leurs conseils et leurs experts avaient déjà réservé leurs vols et leurs hôtels. Le TAS a alors proposé l'alternative suivante aux parties: maintenir l'audience en présence d'un nombre déterminé de personnes ou ajourner l'audience fixée. Le 28 février 2021, il leur a imparti un délai échéant le jour même à 17h00 pour confirmer, par écrit, qu'elles acceptaient sans réserve de maintenir l'audience, faute de quoi celle-ci serait reportée. Bien qu'elle ait accepté le maintien de l'audience aux conditions fixées par la Formation, la recourante prétend qu'elle n'aurait pas consenti librement à la limitation de la publicité des débats. Elle reproche en outre aux arbitres de ne pas s'être prononcés sur la possibilité, évoquée par elle, de diffuser l'audience en direct sur le site internet du TAS.

Il sied de rappeler, à titre liminaire, qu'une partie ne peut pas se plaindre directement, dans le cadre d'un recours en matière civile au Tribunal fédéral formé contre une sentence arbitrale internationale, de ce que les arbitres auraient violé l'art. 6 par. 1 CEDH, même si les principes découlant de cette disposition peuvent servir, le cas échéant, à concrétiser les garanties invoquées sur la base de l'art. 190 al. 2 LDIP (ATF 146 III 358 consid. 4.1; 142 III 360 consid. 4.1.2). En effet, les motifs de recours sont énoncés de manière exhaustive à l'art. 190 al. 2 LDIP. Toute violation du droit conventionnel n'étant pas nécessairement *per se* assimilable à une contrariété à l'ordre public au sens de l'art. 190 al. 2 let. e LDIP, il incombe dès lors à la partie recourante de démontrer en quoi la prétendue violation de l'art. 6 par. 1 CEDH serait incompatible avec l'ordre public procédural (ATF 146 III 358 consid. 4.1).

Il y a violation de l'ordre public procédural lorsque des principes fondamentaux et généralement reconnus ont été violés, conduisant à une contradiction insupportable avec le sentiment de la justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un État de droit (ATF 141 III 229 consid. 3.2.1; 140 III 278 consid. 3.1; 136 III 345 consid. 2.1). Une application erronée ou même arbitraire des dispositions procédurales applicables ne constitue pas, à elle seule, une violation de l'ordre public procédural (ATF 126 III 249 consid. 3b; arrêt 4A_548/2019 du 29 avril 2020 consid. 7.3).

On relèvera d'emblée que la recourante ne prétend nullement avoir fait valoir, au cours de l'audience, qu'elle n'avait pas librement consenti au maintien de celle-ci aux conditions fixées par la Formation. Elle n'établit pas davantage s'être plainte, durant l'audience, de ce que celle-ci n'était pas retransmise en direct sur le site internet du TAS. Aussi est-elle malvenue d'invoquer *a posteriori*, au stade du recours contre la sentence arbitrale, une violation de son droit à une audience publique. Pareille tentative est en effet incompatible avec les règles de la bonne foi.

En tout état de cause, la recourante cherche à relativiser, après coup, la portée de l'accord qu'elle a exprimé sans réserve, et ce, à grand renfort d'éléments de fait ne ressortant pas de la sentence attaquée. Il va sans dire que semblable démarche n'est pas admissible. Force est du reste d'observer avec l'intimé que la recourante, dans sa dernière communication adressée au TAS précédant l'audience, a indiqué ce qui suit:

- I confirm that the Appellants accept without reservation that the hearing be held with the restricted list of attendees that is specified in your last letter.

I note that you did not address the proposal to organize a streaming. Please note that if there are technical issues, the team of the Appellants will be

happy to help and can find solutions for providing such streaming. I would appreciate to have a feedback from the Panel in that respect without any delay (...)”.

Les termes utilisés par la recourante démontrent que celle-ci a finalement décidé d'accepter sans la moindre réserve la proposition faite par la Formation. Elle n'a d'ailleurs pas fait la moindre allusion au fait que ce choix aurait été dicté par des impératifs financiers ou qu'il ne refléterait pas sa réelle volonté. Dans ces circonstances, rien ne permet de retenir que l'intéressée n'aurait pas librement consenti à une restriction de la publicité des débats. Il y a lieu en outre d'admettre que la recourante, après avoir exprimé son accord sans réserve à la tenue d'une audience en présence d'un nombre limité de personnes, n'a pas formulé sa proposition de diffuser l'audience sur le site internet du TAS comme une condition formelle à cet accord mais bel et bien comme une simple possibilité pour laquelle elle offrait son concours. Dans ces conditions, l'intéressée ne saurait prétendre que le refus implicite des arbitres de retransmettre en direct l'audience sur une plateforme en ligne aurait porté atteinte à son droit à une audience publique.

En tout état de cause, on soulignera que la limitation du nombre de personnes autorisées à prendre part à l'audience répondait en l'occurrence à un intérêt public prépondérant, puisqu'il visait à pallier le risque sanitaire lié à la crise du coronavirus. C'est le lieu de préciser que la jurisprudence admet la possibilité de déroger à la publicité des débats et d'ordonner un huis clos, total ou partiel, lorsque celui-ci est strictement commandé par les circonstances (cf. arrêt 6B_1295/2020 du 26 mai 2021 consid. 1.2.4.1 destiné à la publication et les arrêts cités). Quand bien même la crise n'avait pas encore frappé durement la Suisse à ce moment-là, on ne saurait faire grief à la

Formation d'avoir fait montre de prudence alors que la situation sanitaire était encore très incertaine et que les craintes d'une contagion à large échelle étaient bel et bien réelles. Chaque personne supplémentaire admise dans la salle d'audience aurait en effet occasionné un accroissement du risque de propagation du virus.

Il s'ensuit le rejet du grief examiné.

Dans un troisième et dernier moyen, la recourante soutient que la sentence attaquée est contraire à l'ordre public matériel.

Une sentence est incompatible avec l'ordre public si elle méconnaît les valeurs essentielles et largement reconnues qui, selon les conceptions prévalant en Suisse, devraient constituer le fondement de tout ordre juridique (ATF 144 III 120 consid. 5.1; 132 III 389 consid. 2.2.3). Tel est le cas lorsqu'elle viole des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l'ordre juridique et le système de valeurs déterminants (ATF 144 111 120 consid. 5.1). Qu'un motif retenu par un tribunal arbitral heurte l'ordre public n'est pas suffisant; c'est le résultat auquel la sentence aboutit qui doit être incompatible avec l'ordre public (ATF 144 III 120 consid. 5.1). L'incompatibilité de la sentence avec l'ordre public, visée à l'art. 190 al. 2 let. e LDIP, est une notion plus restrictive que celle d'arbitraire (ATF 144 III 120 consid. 5.1; arrêts 4A 318/2018 du 4 mars 2019 consid. 4.3.1; 4A_600/2016 du 29 juin 2017 consid. 1.1.4). Selon la jurisprudence, une décision est arbitraire lorsqu'elle est manifestement insoutenable, méconnaît gravement une norme ou un principe juridique clair et indiscuté, ou heurte de manière choquante le sentiment de la justice et de l'équité; il ne suffit pas qu'une autre solution paraisse concevable, voire préférable (ATF 137 II consid. 2.4; 136 I 316 consid. 2.2.2 et les références citées). Pour qu'il y ait incompatibilité avec

l'ordre public, il ne suffit pas que les preuves aient été mal appréciées, qu'une constatation de fait soit manifestement fautive ou encore qu'une règle de droit ait été clairement violée (arrêts 4A_116/2016 du 13 décembre 2016 consid. 4.1; 4A_304/2013 du 3 mars 2014 consid. 5.1.1; 4A_458/2009 du 10 juin 2010 consid. 4.1). L'annulation d'une sentence arbitrale internationale pour ce motif de recours est chose rarissime (ATF 132 III 389 consid. 2.1).

Pour juger si la sentence est compatible avec l'ordre public, le Tribunal fédéral ne revoit pas à sa guise l'appréciation juridique à laquelle le tribunal arbitral s'est livré sur la base des faits constatés dans sa sentence. Seul importe, en effet, pour la décision à rendre sous l'angle de l'art. 190 al. 2 let. e LDIP, le point de savoir si le résultat de cette appréciation juridique faite souverainement par les arbitres est compatible ou non avec la définition jurisprudentielle de l'ordre public matériel (arrêt 4A_157/2017 du 14 décembre 2017 consid. 3.3.3).

Pour étayer son grief, la recourante fait valoir qu'il est contraire au sentiment de justice de sanctionner une personne alors que les accusations portées contre elle n'ont pas été établies. A l'en croire, la sentence attaquée violerait le principe de la présomption d'innocence puisque la Formation l'aurait condamnée alors que chaque étape du scénario de dopage alléguée par l'intimé avait été écartée. Procédant ensuite à une discussion des différentes étapes du raisonnement tenu par les arbitres, elle estime qu'on ne saurait la reconnaître coupable d'avoir enfreint les règles antidopage alors que la Formation a retenu qu'elle n'avait pas ingéré le Cocktail Duchesse ni fourni d'échantillon d'urine propre avant les Jeux de Sotchi. Retenir l'existence d'une telle infraction en raison de la teneur élevée en sel - mais pas physiologiquement impossible - observée dans un échantillon d'urine alors qu'un tel

niveau de sodium peut s'expliquer par d'autres facteurs naturels serait contraire à la présomption d'innocence.

On relèvera d'emblée que l'application automatique de notions telles que la présomption d'innocence et le principe *in dubio pro reo*, ainsi que des garanties correspondantes figurant dans la CEDH, ne va pas de soi en matière de sanctions disciplinaires prononcées par des associations de droit privé, telles les fédérations sportives (arrêts 4A_462/2019 du 29 juillet 2020 consid. 7.1; 4A_178/2014 du 11 juin 2014 consid. 5.2 et les arrêts cités). Si la mise en oeuvre du principe *in dubio pro reo* ne prête pas à discussion dans une procédure disciplinaire ou pénale ordinaire, en raison des pouvoirs d'investigation et de coercition étendus dont dispose l'État, l'application stricte du même principe dans le cas de procédures disciplinaires conduites par des organismes privés ne pouvant pas s'appuyer sur un tel rapport de puissance vis-à-vis des sportifs soupçonnés de pratiques interdites pourrait en effet empêcher le système mis en place pour lutter contre le fléau que constitue le dopage sportif de fonctionner correctement (arrêt 4A_488/2011 du 18 juin 2012 consid. 6.2). Dans ces conditions, il n'apparaît pas possible de rattacher les critiques formulées par la recourante à la notion spécifique et strictement limitée de l'ordre public, telle qu'elle a été définie par le Tribunal fédéral.

Au demeurant, l'intéressée argumente, devant le Tribunal fédéral, comme si elle plaiderait devant une Formation du TAS autorisée à revoir les faits et le droit avec plein pouvoir d'examen. C'est oublier qu'il n'est plus temps, à ce stade de la procédure, d'ouvrir le débat sur diverses questions factuelles, tels les motifs pouvant expliquer la teneur élevée en sel d'un échantillon d'urine. En tout état de cause, il saute aux yeux, à la lecture de l'argumentation revêtant un caractère appellatoire marqué

mêlant les faits et le droit de manière inextricable, que la recourante se contente de remettre en question la manière dont la Formation a apprécié les preuves pour retenir l'existence d'une violation des règles antidopage. Pareille tentative est d'emblée vouée à l'échec.

La démonstration de la recourante visant à démontrer une contrariété à l'ordre public n'apparaît de toute manière pas convaincante. En argumentant comme elle le fait, l'intéressée fait en effet une relation par trop réductrice des motifs pour le moins nuancés ayant conduit la Formation à la sanctionner. Celle-ci a certes considéré qu'il n'existait pas de preuve *directe* lui permettant d'être confortablement satisfaite de divers actes imputés à la recourante. Elle a toutefois admis la possibilité de retenir l'existence d'une violation d'une règle antidopage, nonobstant l'impossibilité d'aboutir à pareille conclusion sur la seule base d'une preuve directe, à condition que la participation délibérée de la recourante à l'infraction alléguée soit démontrée. A cet égard, la Formation a retenu que deux flacons contenant des échantillons prélevés sur la recourante lors des Jeux de Sotchi avaient été manipulés. Après avoir examiné la question sous toutes ses coutures, elle a en outre considéré qu'aucune cause naturelle ne permettait d'expliquer la teneur élevée en sodium observée dans l'un des échantillons fournis par la recourante. Dans la mesure où un échange d'échantillons d'urine ne pouvait tendre qu'à dissimuler la présence de substances interdites dans l'échantillon remplacé, l'urine de substitution devait nécessairement être testée avant les Jeux de Sotchi. De telles analyses requéraient un certain temps et impliquaient la fourniture d'urine propre par la recourante ainsi que sa coopération active. Dans la mesure où l'urine de remplacement dans laquelle a été trouvée une teneur élevée en sel provenait indubitablement de la recourante, celle-ci avait forcément dû fournir de l'urine propre

avant lesdits Jeux, quand bien même il n'existait pas de preuve directe d'une telle remise. La recourante n'ayant jamais soutenu qu'on lui aurait administré des substances interdites à son insu, elle savait ou à tout le moins aurait dû savoir que l'urine ainsi fournie serait utilisée aux fins de contourner les règles antidopage. Dans ces conditions, force est ainsi de relever que la sentence attaquée ne souffre d'aucune contradiction interne. En définitive, le résultat auquel a abouti la Formation n'apparaît nullement contraire à l'ordre public matériel ni même critiquable.

Décision

Le recours est rejeté dans la mesure où il est recevable.

Informations diverses
Miscellaneous
Información miscelánea



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