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Editorial

This new issue of the CAS Bulletin includes an equal number of football and of doping-related cases which is not so usual. The number of football cases has indeed been predominant in CAS jurisprudence lately. The rebalancing is partly due to the increase of doping-related cases linked to the revelation of Russian doping ensuing the McLaren Report commissioned by WADA in 2016.

In the field of football, the case Hellas Verona FC v. FK Donji Srem illustrates interesting aspects of transfer agreement including interpretation of transfer agreement and essentialy negotii. For the first time in CAS jurisprudence, the case 4549 Aris Limassol FC v. Carl Malombé deals with the validity of the relegation clauses whereas in Espérance sportive de Tunis c. Moussa Marega and in Abdelkarim Elmorabet, the notion of applicable law is clarified following Professor Ulrich Haas' doctrine together with the notion of just cause. In the case Galatassaray v. UEFA, the compatibility of the Club Licensing and Financial Fair Play Regulations with certain prohibitions and with the EU fundamental freedoms is examined. Finally, in Pape Diakhaté v. Granada FC et al. & FIFA, a distinction is made between buyout and liquidated damages clauses. The decision rendered by the CAS in Diakhaté has been appealed before the Swiss Federal Tribunal (SFT) and dismissed by the latter. The SFT judgement is included in the relevant section of the Bulletin.

Turning to doping, the case Asli Cakir Alptekin v. WADA addresses the issue of substantial assistance provided by the athlete to the anti-doping authorities. The Russians cases IAAF v. ARAF & Tatyana Chernova and IAAF v. ARAF & Vladimir Mokhnev respectively deal with the different aspects of a Russian athlete's ABP and with the anti-doping violations committed by a coach. Both cases analyse the admissibility of the means of evidence. Importantly, in Arijan Adami v. UEFA, the Panel considers that under the WADC 2015, the establishment of the source of the prohibited substance in a player's sample is not mandated to prove an absence of intent. Finally the case Belarus Canoe Association v. ICF illustrates a Meldonium case under the WADC 2015.

We are pleased to publish an interesting article on good governance prepared by Namrata Chatterjee (India), Chiheb Kaibi (France), Ivan Kraljević (Croatia/Australia), and Adrienne Lerner (United States) entitled "ISGGO: A Proposal for Sports Governance Oversight". The article analyses the governance issues present today in major sport organisation and proposes the establishment of a comprehensive and focused independent organisation, based on public-private partnership to remedy the existing shortcomings related to governance.

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

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

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

Articles et commentaires
Articles and Commentaries

ISGGO: A Proposal for Sport Governance Oversight

Namrata Chatterjee, Chiheb Kaibi, Ivan Kraljević, and Adrienne Lerner*

I. Introduction

A. Importance of Sport in Society

The widespread appeal of sport has made it a pillar of society for centuries. From kids playing in the garden to athletes competing at the Olympic Games (OG), sport captivates, inspires, and unifies, reaching every layer of society. This widespread global reach is remarkable, and it is hard to imagine any other industry with such extensive appeal. Sport is also a relevant economic endeavour, with an estimated 150 billion USD annual revenue.[1] Sport's popularity and relevance gives it a key role in present-day society.

B. Current Context – Crisis in the Sport World

Unfortunately, however, sport organisations have recently garnered media attention for the wrong reasons. The extremely public scandal at Fédération Internationale de Football Association (FIFA), followed by the scandal at the International Association of Athletics Federations (IAAF), among others, have highlighted deep-seated problems.

Many broad explanations can help to explain how these scandals arose. One is that sport organisations transformed from non-profit entities created mostly for the unification of rules and organisation of international competitions to money-making entities through massive commercialisation, namely with lucrative sponsorship and broadcasting agreements for their extremely popular mega-events. Today, the sport itself is a

* Authors Namrata Chatterjee (India), Chiheb Kaibi (France), Ivan Kraljević (Croatia/Australia), and Adrienne Lerner (United States of America) originally submitted this paper as their final thesis for the FIFA Master: An International Master in Management, Law and Humanities of Sport from which they graduated in July 2016. It has been edited for publication, but the full version can be shared by request. Email:isggo.proposal@gmail.com

[1] Transparency International, Global Corruption Report: Sport, Oxon: Routledge, 2016.

means to the revenue end,[2] and the organisational structures were not created to support the profit-making endeavours the organisations now pursue.

Another consideration is that European sport organisations managed to avoid much regulation by gradually developing relationships with governments.[3] Sport, for the most part, has been able to operate in a mostly-private sphere despite its very public functions. For this reason, its governance structures lag behind generally accepted practices for the corporate world, which has manifested itself in detrimental scandals. This has resulted in, as Sir Martin Sorrell comments a "*breakdown in confidence in sports leadership*" that threatens sport organisations to their core.[4]

Furthermore, the massive revenue streams associated with sport organisations and their increasingly intertwined relationship with governments, especially in regards to hosting mega-events, has led to increased pressure from stakeholders to practice better governance.[5] Therefore, intense focus needs to be placed on promoting good governance in sport organisations and the resulting mechanisms must be adopted and implemented immediately.

C. Governance

Widely accepted definitions of governance mostly focus on the decision-making and implementation processes an organisation has in place. Much research exists examining good governance both outside the sporting world and within it.

General principles that arise in consideration of good governance include, but are not limited to: transparency, accountability, stakeholder representation, responsiveness, effectiveness, adherence to principles of democracy, checks and balances, and addressing conflicts of interest.

With the autonomy of sport currently threatened, methods of good governance must be adopted, however, a lack of cohesion and enforcement currently inhibits effectiveness and a stronger impetus is necessary.

Though numerous stakeholders of sport have proposed various methods to address the sport governance issues present today, a comprehensive and focused independent organisation, based on a public-private partnership with equal representation from the sport and public worlds, focused on promoting good governance in sport has not been fully developed.

Considering the magnitude of the problem and various other factors addressed, the authors wanted to examine the feasibility of this idea. The below paper begins with a case study of the International Olympic Committee (IOC), FIFA and IAAF to get a full understanding of the problems at hand and attempts to fix them. By also considering the World Anti-Doping Agency (WADA), the authors then attempt to answer the question: Can a hybrid public-private model of an international oversight body be applied to sport governance? The authors introduce the concept of the International Sport Good Governance Organisation (ISGGO) and examine its potential structure, functions, and feasibility to successfully emphasise and

[2] Forster, J., Global Sports Organisations and their Governance, Corporate Governance: The International Journal Of Business in Society, 6(1), 2006.

[3] Mavroidis, P., European Union Regulation on Sport Lecture, FIFA Master Programme, University of Neuchâtel. Neuchâtel, 2016.

[4] Burson-Marsteller / Tse Consulting, Implementing good governance principles in Sports Organisations, Lausanne, 2016.

[5] Scandals can threaten the revenue streams of sport organisations as evidenced by ARD's refusal to broadcast the Tour de France since 2012.
The massive public interest, as well as taxpayers' money used in connection with sport, particularly in regards to hosting mega-events, shows that sport and politics are inherently intertwined and warrants government interest in good governance of sport.

improve good governance in sport organisations.

II. Case Studies of International Sport Organisations

A. International Olympic Committee

1. The IOC and the Salt Lake City Scandal

The IOC, the supreme authority of the Olympic Movement responsible for staging the Olympic Games (OG), faced a very public and reputation-damaging scandal that catalysed widespread organisational reforms in the late 1990s/early 2000s.

The Salt Lake City scandal was the revelation of unethical behaviour in regards to bidding for the 2002 Winter Olympic Games. In late 1998, it came to light that members of the Salt Lake Organising Committee had bribed IOC Members, with money and other forms of gifts, to vote for Utah city to host the 2002 Winter Olympic Games. Unfortunately for the IOC, there had been prior accusations of wrongdoing by members associated with voting for other recent Olympic host cities, exacerbating the magnitude of the problem.

In 1998, IOC President Juan Antonio Samaranch created an Ad Hoc Commission, led by Richard Pound who was the IOC Vice President at the time, to investigate the issue. Ultimately, the investigation resulted in the 108th IOC Session approving extensive reform recommendations, disciplinary action against the members involved – including the expulsion of six[6] and the creation of an Ethics Commission.[7]

2. Reforms

a. The IOC 2000 Commission

The IOC 2000 Commission was a set of 50 reforms that were presented to and approved by the Session in December 1999 in the wake of the Salt Lake City scandal. Some of the most significant reforms approved included restructuring of IOC membership aspiring to become more inclusive of the greater sport world and transparent in selection, increasing financial transparency, and adjusting host city candidature, including a revamped bidding process.

b. The IOC Ethics Commission

Defined in Rule 22 of the Olympic Charter and subsequently further structured in its statutes, the Ethics Commission was created as one of the permanent commissions of the IOC in response to the Salt Lake City scandal.

- The Code of Ethics

The IOC Code of Ethics, adopted in the 109th Session in June 1999, applied to the IOC, its members, Candidate Cities, Organising Committees for the Olympic Games (OCOG) and National Olympic Committees (NOCs). The Code was written with close respect to the Olympic Charter and its principles[8] and has been regularly updated through the years.

c. Subsequent Developments

Since the reforms directly resulting from the Salt Lake City scandal, there have been other moments within the last 15 years where issues of good governance in the IOC have been reviewed, not necessarily in response to a scandal. As good governance and the autonomy of sport organisations have remained important discussion points for the IOC and other International Sport Governing Bodies (ISGBs), various summits, seminars, and documents have arisen since

[6] Longman, J, Olympics; Head of Olympics expels 6 members in payoff scandal, *New York Times*, 1999.

[7] Longman, J, Olympics; Leaders of Salt Lake Olympic bid are indicted in bribery scandal, *New York Times*, 2000.

[8] The International Olympic Committee (IOC) Code of Ethics, 1999.

the Salt Lake City scandal. Some notable developments include the creation of conflict of interest rules[9] and the creation and adoption of the *"Basic Universal Principles of Good Governance of the Olympic and Sports Movement"* (PGG) that sport organisations were encouraged to use as a reference point[10] and were later mandated by the 2010 IOC Ethics Code.[11]

d. Ethics and Good Governance in Agenda 2020

In December 2014, Olympic Agenda 2020 was approved. This included 40 reform recommendations that took into consideration the current state of the IOC, OG and sport movement and were designed to guide the Olympic Movement (OM) into the future. Several specific recommendations related to ethics and good governance were also identified, including Recommendation 32 which calls for the IOC Ethics Commission to review the Code of Ethics and its procedures to ensure alignment with the Agenda 2020 goals of more transparency, good governance and accountability.[12]

3. Analysis

The creation of the IOC 2000 Commission and implementation of its recommendations, the establishment of the Ethics Commission, and the creation of the Code of Ethics were major steps not only towards improving the organisation's tarnished image but also in working towards better processes. Richard Pound was asked about how the IOC can promote good governance and avoid corruption in an interview by Transparency International, and he said, although Agenda 2020 has received a lot of publicity, the main effort in this direction occurred in 1999 as a result of the Salt Lake City bid, wherein the IOC undertook a tremendous series of reforms."[13]

While it took a scandal of significant magnitude to motivate the IOC to act, they took strong actions. Although another scandal of such magnitude has not befallen the IOC, it did adopt Agenda 2020 as a response to rising pressures regarding some of its activities, and used the opportunity to implement other changes to continue to work towards best governance practices. As explained by Pâquerette Girard Zappelli, the first Chief Ethics and Compliance Officer, *"The Olympic Agenda 2020 process was basically a review of the [post-Salt Lake City] strategy. Were the reforms in 1999 sufficient and is the mechanism in place since 1999 still valid? Effectively, the answer was yes."*[14]

By numerous accounts it is clear that the IOC's extreme reforms following the Salt Lake City scandal were majorly successful and provided the organisation and its leadership an opportunity to critically assess the structure and membership of the IOC. Many of the steps taken made the IOC a sporting model of good governance, and the continued reform process, including Agenda 2020, reaffirms the organisation's commitment to creating and maintaining high ethical standards and promoting good governance. That said, it would be nearly impossible for even a well-intentioned

[9] IOC approves new conflict of interest Rules - Rules apply to all Olympic parties., IOC, 2002, Available at https://www.olympic.org/news/ioc-approves-new-conflict-of-interest-rules-rules-apply-to-all-olympic-parties

[10] Olympic and sports movement discuss 'Basic Universal Principles of Good Governance'., IOC, 2008, Available at https://www.olympic.org/news/olympic-and-sports-movement-discuss-basic-universal-principles-of-good-governance

[11] Chappelet, J.-L., & Mrkonjic, M., Basic Indicators for Better Governance in International Sport (BIBGIS): An assessment tool for international sport governing bodies, Institut de hautes études en administration publique, Lausanne, 2013

[12] Olympic Agenda 2020, IOC, 2014, Available at https://www.olympic.org/olympic-agenda-2020

[13] Unger, D., Richard Pound: The corruption risks in Sport, 2016, Available at http://blog.transparency.org/2016/01/15/richard-pound-the-corruption-risks-in-sport/

[14] Zapelli, P, Taking charge of Ethics at the International Olympic Committee, 2015, Available at http://blog.transparency.org/2015/07/31/taking-charge-of-ethics-at-the-international-olympic-committee/

organisation to independently rid itself of all methods of potential corruption, which is why an independent global governance body could be useful.

On one hand, the IOC was the first sport organisation to establish an Ethics Commission and now numerous other federations and organisations have followed suit; its creation, along with the Code of Ethics, demonstrate great leaps forward in regards to prioritising ethical behaviour. Publishing financial accounts, requiring audits, opening sessions to the media, and creating conflict of interest standards all highlight consciousness on important aspects of good governance. The IOC also made improvements to its membership rules and adjusted the Olympic Games bidding process to continue to move towards better methods of good governance, ethical behaviour and transparency.

On the other hand, there are still shortcomings that have either not been implemented from approved reforms or issues that existed or have arisen in regards to governance that have not been adequately addressed. IOC membership remains a controversial issue with exceptions to the age limit, term limits not implemented across all membership, some self-selecting processes, and members' conflicts of interest all still existing in varying degrees. While it is not in the scope of this paper to suggest changes to the rules of IOC membership, it is important to note that perhaps reforms are unable to, or reformers are unwilling to, address all potentially problematic issues.

Additionally, the Code of Ethics and its applicable provisions are, in their nature, binding to the whole OM. As evidenced by scandals in various federations, including some discussed in this paper, and NOCs, it is clear that the intended "trickle-down" effect has not been entirely successful. It is perhaps unfair to place blame with the IOC for other organisations' lack of dedication to adopting ethical principles, it is essential to note that this is one of the goals.

Finally, while the bidding and hosting process for the Olympic Games has been greatly improved, opportunities for corruption still exist, as evidenced by the corruption allegations directed towards Tokyo 2020, that have been denied by the IOC.[15]

B. Fédération Internationale de Football Association

1. FIFA Scandals

FIFA ranked second amongst all Olympic IFs in the Play the Game Sports Governance Observer Report 2015[16] and further reforms have since been approved at the Extraordinary FIFA Congress in February 2016[17] ; however, in the last two decades, FIFA has had many widely-publicised cases of corruption related to governance, most notably the scandals revolving around International Sport and Leisure (ISL), World Cup bidding, and Executive Committee (ExCo) members.

ISL was a major broadcasting contracts player in the 1980s and 1990s. Following its liquidation in 2001, Swiss authorities investigated allegations of fraud and embezzlement[18] and found that senior IF officials, including some at FIFA, received 'commissions' from ISL in exchange for the

[15] Ingle, S., Tokyo Olympic Games corruption claims bring scandal back to the IOC, 2016, Available at https://www.theguardian.com/sport/2016/may/11/tokyo-olympic-games-2020-ioc-international-olympic-committee-corruption-bid-scandal.

[16] Geeraert, A, Sports Governance Observer 2015: The legitimacy crisis in international sports governance, 2015.

[17] FIFA Congress approves landmark reforms, FIFA, 2016, Available at http://www.fifa.com/about-fifa/news/y=2016/m=2/news=fifa-congress-approves-landmark-reforms-2767108.html

[18] Staun, J, Play the Game: Timeline FIFA ISL., 2006, Available at http://www.playthegame.org/news/news-articles/2006/timeline-fifa-isl/

awarding of broadcasting contracts.[19] Despite this, most individuals were cleared; as Sparre explains, *"in the 1990s bribery of this kind was not illegal in Switzerland."* [20]

The FIFA World Cup bidding process was under the spotlight with the awarding of the Russia 2018 and Qatar 2022 tournaments[21]; and, since then criminal and Ethics Committee investigations are pending regarding the awarding of Germany 2006 and South Africa 2010, with further allegations related to Korea/Japan 2002.[22] FIFA commissioned a report into the allegations related to Russia 2018 and Qatar 2022 but cleared both bids of any wrongdoing due to any breaches being "*of very limited scope*". Within days, Michael Garcia, the head of FIFA's Ethics Committee investigatory chamber, said the published report was "*incomplete and erroneous*" and following FIFA's dismissal of his appeal against the report, he resigned in protest.[23]

FIFA's Ethics Committee suspended and the Court of Arbitration for Sport (CAS) confirmed the suspension of, former President Sepp Blatter and ExCo member and UEFA President Michel Platini from all football-related activities following an investigation into a "*disloyal payment*".[24] This scandal only came to light following the filing of an indictment by the United States Department of Justice and raids at the FIFA headquarters in 2015.[25]

Other prominent issues have included bribery related to FIFA World Cup bids and presidential elections, conflicts of interest, destruction of evidence, statute changes aimed at consolidating power and questions of human rights violations related to FIFA World Cup preparations. When the aforementioned instances have arisen, the organisation has distanced itself by claiming it was the conduct of certain individuals or that of its member associations.

2. Reforms

Following the ISL Scandal, FIFA enacted financial reporting and auditing reforms. These included applying International Financial Reporting Standards[26], annual audits of itself and its member associations by KPMG, and implementing an Internal Audit Committee and Internal Control System.[27] They also formed an Ethics Committee, adopted the FIFA Code of Ethics and began publishing Annual Activity Reports.[28]

A second round of reforms following the Russia 2018 and Qatar 2022 scandal, led to the appointment of an Independent Governance Committee (IGC) to assess

[19] Sparre, K, Play the Game: Only minor convictions in corruption case against ISL executives, 2008, Available at http://www.playthegame.org/news/news-articles/2008/only-minor-convictions-in-corruption-case-against-isl-executives/

[20] Idem

[21] Investigation into Russia and Qatar World Cup bids unearths more suspicious deals, World Soccer, 2015, Available at http://www.worldsoccer.com/news/investigation-into-russia-and-qatar-world-cup-bids-unearths-more-suspicious-deals-363428

[22] Sale, C, Daily Mail: FIFA hit by fresh corruption claims as Japan are accused of paying South American federation £950,000 for 2002 World Cup vote, 2015, Available at http://www.dailymail.co.uk/sport/football/article-3132045/FIFA-hit-fresh-corruption-claims-Japan-accused-paying-South-American-federation-950-000-2002-World-Cup-vote.html

[23] Robinson, J, FIFA investigator Michael Garcia resigns in protest, 2014, Available at https://www.wsj.com/articles/fifa-investigator-michael-garcia-resigns-in-protest-1418832459

[24] FIFA: Sepp Blatter and Michel Platini get eight-year bans, BBC, 2015, Available at http://www.bbc.com/sport/football/35144652

[25] United States of America v. Jeffrey Webb et al., 15 CR 0252 (RJD) (RML).

[26] International Financial Reporting Standards, IFRS, 2016, Available at http://www.ifrs.org/Pages/default.aspx

[27] Committee of Sponsoring Organizations of the Treadway Commission. COSO, 2016, Available at http://www.coso.org/

[28] Eckert, H.-J, Statement of the Chairman of the FIFA Adjudicatory Chamber, Hans-Joachim Eckert, on the examination of the ISL case, FIFA Ethics Committee, Zurich, 2013.

FIFA's responses to past allegations against it and to develop a framework of good governance. The Pieth Report of 2011 and the IGC Report of 2012[29] led to the implementation of an independent, two-chamber Ethics Committee, a confidential reporting mechanism, an independent chairperson on the Audit and Compliance Committee, creation of a compensation Sub-Committee and that the FIFA Congress will designate FIFA World Cup hosts and elect members of the judicial bodies.

Many other recommended reforms were not implemented, most notably centrally conducted integrity checks, FIFA Congress confirmation of elected ExCo members, that the Chairman of the Audit and Compliance Committee be an independent observer at ExCo meetings, term limits and compensation disclosure for senior officials.[30]

Following the U.S. indictment and allegations of an unethical payment between Blatter and Platini, the former resigned in 2015, and the media attention around this scandal forced FIFA's ExCo to establish a Reform Committee in August 2015. The Reform Committee considered much of the previous work by various stakeholders[31], and at the extraordinary FIFA Congress in February 2016, the Reform Committee proposals were unanimously approved.

This time reforms included *inter-alia* separation of the political and management functions, term limits, compensation disclosure for senior officials, centrally conducted integrity checks, supervision of election of council members, development of universal good governance principles for member associations, enhanced control of fund generation/allocation and a commitment to human rights in the statutes.

3. Analysis

From the above, it is clear that FIFA has made steps towards creating a good governance system; however, it has taken scandals to initiate change. The 2016 reforms bring FIFA closer to best practice governance standards, but as they have only recently been implemented, it remains to be seen whether they will be successful.

FIFA has made progress on transparency; the amendment of Article 36 of the FIFA Code of Ethics in October 2015 is a great example, whereby the Ethics Committee now has the power to inform the public of open or closed ethics and compliance proceedings *inter-alia.*[32] Previously, FIFA received much criticism for not revealing the full aforementioned Garcia Report, which was of high public interest.

The 2016 reforms mean that World Cup bids will now be voted on by the FIFA Congress, rather than the FIFA Council, in the hope that vote buying would be more difficult with more members. Although in theory this will alleviate the problem, it is yet to be tested.

From a financial perspective, FIFA's reforms have brought it closer to international standards but the 2016 reforms are yet to be judged in implementation. Chris Baird of Law in Sport argues that, *"The recent reform package is a welcome development in that it is, a step in the right direction. However, it is clear that the*

[29] Final report by the Independent Governance Committee to the Executive Committee of FIFA, FIFA Independent Governance Committee, Basel, 2014

[30] Pielke Jr., R, A Deeper Look at FIFA's Reform Scorecard, 2013, Available at http://www.playthegame.org/news/news-articles/2013/a-deeper-look-at-fifa%E2%80%99s-reform-scorecard/

[31] 2016 FIFA Reform Committee report, FIFA, Zurich, 2015.

[32] FIFA Code of Ethics, 2012, Amendment, Available at

http://resources.fifa.com/mm/document/affederation/administration/02/72/08/60/circularno.1507-amendmentofarticle36ofthefifacodeofethics_neutral.pdf

reforms fall far short of that expected of a UK listed company," i.e. corporate standards.[33]

FIFA revisions to its Code of Ethics have improved the situation regarding conflicts of interest with a great example being Mohammed Bin Hammam's life ban following conflicts of interest in his role as AFC President. However, FIFA's structure where Confederations elect members to the FIFA Council still creates an inherent conflict of interest whereby members are representing the interests of their Confederation and those of FIFA concurrently.[34]

A key success of the FIFA reforms has been giving the investigatory chamber of the independent Ethics Committee the power to initiate investigations *suomoto;* prior to 2012, investigations could only be opened upon the Secretary General's approval. In the last five years, the FIFA Ethics Committee has served bans of various durations to many prominent FIFA officials[35] whereas up until 2011, there were few high profile FIFA officials banned by the organisation. Despite positive changes, there have been questions raised as to the independence of the Ethics Committee, allegations of Blatter exerting influence over the Ethics Committee.[36]

FIFA implemented a confidential reporting mechanism for whistle-blowers as part of the 2012 reforms, which is a step forward in identifying unethical practices, but concerns have been raised as to how confidential it actually is with sources feeling they were not entirely protected.[37]

Despite previous reforms and the banning of many individuals, scandals continued to arise. The fact that many of the 2012 reforms were not immediately implemented, but only after the crisis reached a critical point in 2015, reveals an organisational culture that is opposed to change. An example is term limits for senior officials which are a norm in many organisations, but were deferred until the 2016 reforms.

Many of these issues are not exclusive to FIFA, but are connected to issues with the Confederations and Member Associations. The 2016 reforms have sought to deal with them by diversifying the organisation through the inclusion of women and football stakeholders in the governance system, and by pushing universal principles of good governance on its Confederations and Member Associations. Once again, these are in the process of being implemented, so their efficacy cannot yet be judged.

Following heavy criticism regarding human rights FIFA has introduced a commitment to human rights in its statutes[38] and is developing a human rights policy.[39]This policy is still in development, so how it will

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[33] Baird, C., A legal analysis of FIFA's governance reforms: Do they meet the standards of best global practice?, 2016, Available at http://www.lawinsport.com/articles/item/a-legal-analysis-of-fifa-s-governance-reforms-do-they-meet-the-standards-of-best-global-practice

[34] Cornu, P, Governance Lecture. FIFA Master Programme, University of Neuchâtel. Neuchâtel, 2016.

[35] FIFA corruption crisis: A complete list of high-ranked officials who were banned, fined or suspended., Reuters, 2016, Available at http://www.sportskeeda.com/football/fifa-corruption-crisis-complete-list-all-banned-fined-suspended-officials

[36] Bin Hammam makes new FIFA claims, Soccerex, 2011, Available at https://www.soccerex.com/insight/articles/2011/bin-hammam-makes-new-fifa-claims

[37]Phaedra Almajid and Bonita Mersiades: football's whistleblowers, World Soccer, 2015, Available at http://www.worldsoccer.com/features/phaedra-almajid-bonita-mersiades-footballs-whistleblowers-358740

[38]FIFA Statutes, 2016, Available at http://resources.fifa.com/mm/Document/AFFederation/Generic/02/78/29/07/FIFAStatutswebEN_Neutral.pdf?t=1461659845938

[39] Report by Harvard expert Professor Ruggie to support development of FIFA's human rights policies., FIFA, 2016, Available at http://www.fifa.com/governance/news/y=2016/m=4/news=report-by-harvard-expert-professor-ruggie-to-support-development-of-fi-2781111.html

affect the awarding of future tournaments remains to be seen.

C. International Association of Athletics Federations

1. IAAF Scandal and Investigation

The IAAF attracted a lot of attention in 2015 and 2016 after a documentary on German channel ARD revealed a doping scandal in Russia involving blackmail and bribery, and the ensuing McLaren report supported these findings. Athletes, top members of the Russian Athletics Federation (ARAF), the Russian anti-doping agency (RUSADA) and top members of the IAAF, including the previous president and treasurer, were found to be involved. The wrongdoings exposed even had an impact on London 2012 results and prevented many Russian athletes from competing at Rio 2016.

In light of the facts exposed, WADA initiated an investigation through an Independent Commission (IC). As the facts gathered had a criminal reach, the IC involved Interpol, and then French prosecutors who have greater investigatory powers. In November 2015, the IC delivered the first part of its report exposing the Russian doping system; the second part of the report published in February 2016 dealt with the criminal aspect of the investigation.

The IC exposed corruption within the IAAF that allowed doped athletes to participate in high-level competitions. The former IAAF president, Lamine Diack and his entourage allegedly accepted bribes from ARAF to allow athletes who should have been banned for doping to participate in high profile events such as the OG in London 2012 and the London Marathon. Athletes Biological Passports (ABP) were manipulated and money was laundered.

The IC identified a lack of checks and balances in the IAAF structure which gave the President too much power, allowed conflicts of interest and lacked a whistle-blower mechanism. It recommended reforms including term limits, amending the rules for hiring consultants and measures to avoid conflicts of interest.

The IC concluded that more people were aware of what was going on: *"At least some of the members of the IAAF council could not have been unaware of the extent of doping in Athletics and the non-enforcement of applicable anti-doping rules."*[40] Many of the people involved are still under investigation by French prosecutors and have been banned from the IAAF by the Ethics Committee with most also having been arrested.

As a consequence of this scandal, the ARAF was banned from competing at IAAF events and the involved anti-doping laboratory in Moscow was closed, preventing all Russian athletes, apart from Darya Klishina who could prove she was not involved in the doping system, from participating in the Rio de Janeiro 2016 Olympic Games. The sanctions were extended at the latest IAAF Special Congress in December 2016.

2. Reforms

Following the election of Sebastian Coe as President, the IAAF Congress voted for three significant changes to the leadership structure: forced gender balance, term limits for the president, and age limits for Council members.[41]

After the first part of the IC Report was published in January 2015, President Coe announced a road map[42] to restore trust in the IAAF. This program has two key pillars: re-establishing trust in the governing body

[40] The Independent Commission report #2, WADA, Montreal, 2016.

[41] New IAAF era includes gender and age requirements, term limits, USA Track & Field, 2015, Available at http://www.usatf.org/News/New-IAAF-era-includes-gender-and-age-requirements,.aspx

[42] Rebuilding Trust, IAAF, 2016, Available at http://www.iaaf.org/news/press-release/rebuilding-trust-road-map-2016

and rebuilding trust in the competition, which is more related to anti-doping than governance. At the IAAF Special Congress in December 2016, the new constitution was approved. It will be implemented in several steps with the first stage commencing in 2017 and the second in 2019. The most significant changes include better checks and balances on the President and CEO, eligibility checks on officials, a disciplinary chamber, revised council and executive board representation to improve gender equity, removal of age limits but with new term limits implemented.

3. Analysis

Similar to the IOC and FIFA, the IAAF enacted reforms in response to a scandal. The IC investigation into the ARD allegations commenced in December 2014, Diack announced that he was stepping down in March 2015 and the reforms were only implemented in August 2015. Nevertheless, these reforms were necessary to ensure improve IAAF governance.

Prior to November 2015, the IAAF Ethics Board statutes made all investigations completely confidential, however, transparency improvements were made with amendments to allow the *"IAAF Independent Ethics Board to acknowledge the existence of proceedings currently before it and to comment on their current status without divulging details of the case"*.[43]

The December 2016 reforms aimed to improve governance and avoid the serious failures of the past, especially relating to conflicts of interest (Diack hiring his sons as consultants), insufficient auditing (misappropriated funds) and an inadequate internal reporting mechanism (the IC claims people must have known but no one came forward). They also bring into question the integrity checks when so many individuals involved in corruption were in senior leadership positions. The allegations date back as far as 2010 yet *"the checks and balances of good governance were missing in the IAAF hierarchical structure"* and therefore were not sufficient to reveal a corrupt system.[44] Furthermore, it seems too much power was placed with the leadership team, particularly the President, allowing Diack to develop an inner circle. The IC noted all of these issues in its second report but although reforms were approved, it will be a while before their effectiveness can be measured.[45]

Even the new IAAF leadership was associated with scandal as the newly elected President, Sebastian Coe, was a member of the Council during Diack's reign. Coe's role as an ambassador for Nike was also questioned as being a potential conflict of interest when Eugene, where Nike was established, was chosen as the site for the 2021 IAAF World Championships.

D. Summary

After completing the above analysis of the scandals and reforms of the IOC, FIFA and IAAF[46], five clear categories of existing and potential governance issues became evident:

- Transparency deals with how much information is shared with the public and if the information shared is easily accessible.
- Checks and balances deals with how the organisation is structured to share power between bodies and people, and whether mechanisms are in place to ensure that no party within or outside the organisation retains too much power.
- Inadequate powers deal with the powers granted to the organisation itself and

[43] Amendment IAAF Code of Ethics – Governance review – World Athletics Gala, IAAF, 2015, Available at http://www.iaaf.org/news/press-release/amendment-code-ethics-world-athletics-gala

[44] The Independent Commission report #2, WADA, Montreal, 2016.

[45] Idem

[46] The analyses of the organisations exist in a more thorough form in the full version of the paper. Request if desired.

bodies within the organisation to carry out their necessary functions.

- Integrity deals with the individuals within the organisation.
- Culture, referring to an overarching approach to means of good governance and concern placed on important governance issues.

Upon completion of the sport organisation case studies, it is clear that a need exists for an independent, international body promoting good governance in sport. Considering the multitude of issues that exist, have existed or could exist at the IOC, FIFA and IAAF, there are many aspects to be addressed to improve governance in sport organisations, but no standard or set of best practices can be applied to all. In the three aforementioned case studies, it has been major scandals that prompted reform. Outside of these three organisations, smaller federations ranked even lower in the Sport Governance Observer[47], so the problems are not just limited to the organisations analysed. Therefore, there is a clear need for something to provide the impetus to the entire sport movement to raise the expected standards of

III. Case Study of the World Anti-Doping Agency

A. Coming into Existence

The creation of WADA stemmed from a growing need for a worldwide coordinated fight against doping in sport. Discovery of systemic doping, like in East Germany in 1993, and major scandals, like Ben Johnson being stripped of Olympic Gold after a failed doping test at the 1988 Olympics, confirmed doping as a major issue.

In addition to the IOC, which created the IOC Medical Commission in 1967, some governments were enacting tough laws against doping in sport[48] and in 1989 the Council of Europe adopted the Anti-Doping Convention to coordinate the fight against doping in Europe.[49] Nevertheless, between governments and the IOC's Medical Commission there was a lack of coordination in the fight against doping[50].

After the Festina Scandal in 1998 when French Police unveiled widespread doping at the Tour de France[51], the IOC's Medical Commission was criticised for not proactively exposing the scandal. In this context, the IOC initiated the creation of WADA to improve its reputation in its fight against doping and to bring uniformity to the fragmented efforts[52]. Subsequently the IOC organised two World Conferences on Doping in sport in 1999 and 2003.

In March 2003 at the Second World Conference on Doping in Sport, representatives of the sport world with the support of representatives of the governments adopted the World Anti-Doping Code (WADC). An undercurrent of mistrust towards the IOC, partially due to the IOC funding WADA entirely for the first two years of its existence, increased the demands of public authorities to join as equal representatives of WADA and ultimately resulted in the equal public-private representation that characterises WADA today.[53]

B. General Information

[47] Geeraert, A, Sports Governance Observer 2015: The legitimacy crisis in international sports governance, 2015.

[48] France and Belgium were amongst the first few countries to enact Anti-doping legislations in 1963 and 1965 respectively.

[49] Geeraert, A, Compliance systems: WADA, AGGIS reports, Play the Game, Leuven, 2013.

[50] Houlihan, B, Civil rights, doping control and the world anti-doping code. Sport in Society (7), 2004.

[51] Carter, N, Chapter 5, Medicine, Sport and the Body: A Historical Perspective, Bloomsbury Academic, London, 2012.

[52] Teetzel, S., The Road to WADA, Seventh International Symposium for Olympic Research, Lausanne, 2004.

[53] Houlihan, B, The World Anti-Doping Agency: Prospects for Success, Drugs and Doping in Sport, J.O'Leary (ed), Cavendish, London, 2000.

WADA is an international, independent organisation founded in November 1999 to *"promote and coordinate the fight against doping in sport internationally"*. [54] With its seat in Lausanne, WADA is a Swiss private law foundation with headquarters in Montreal, Canada and four regional offices located around the world. The WADC is the guiding document for doping-free sport, and some of WADA's responsibilities as laid out in the WADC are compliance monitoring of the Code, cooperation with law enforcement, anti-doping development and coordination *inter-alia*.

Organisationally, WADA has a Foundation Board, an Executive Committee, Standing Committees and Expert Groups. WADA also has its own Ethics Panel.

C. Funding

In accordance with the principle of equality, the OM and governments fund WADA equally. During the International Intergovernmental Consultative Group on Anti-Doping in Sport Meeting in 2001, governments agreed to a regional formula for their share of WADA funding whereby each region determines their own funding formula for their nations[55]. The Statutes lay out sanctions if either the Olympic Movement or public authorities fail to make their expected annual contribution including temporary loss of representation within WADA.[56]

D. Mandate / Jurisdiction

WADA derives its mandate, and subsequent jurisdiction to sanction relevant issues through the signatories to the WADC and through the governments' ratification of the UNESCO Convention.

The signatories as defined in the Code include WADA, IOC, IFs, IPC, NOCs, National Paralympic Committees (NPCs), major event organisations and National Anti-Doping Organisations (NADOs).[57] A signatory must be compliant with WADC. Therefore signatories must amend their rules and policies to be in line with the Code and ensure effective enforcement.[58] The sport organisations within the OM, NADOs and non-Olympic sport organisations are the three categories within the sporting world, which have accepted the WADC[59].

Since IFs are signatories, the national federations (NFs) by virtue of their membership to the IFs, or on signing specific rules accepting compliance with the Code, are required to follow the WADC. Further, due to multiple mechanisms, athletes or other individuals who are part of the pyramidal structure of sport are bound by the WADC.[60]

The WADC is not a political document as it is drafted by a non-governmental organisation and governments are not legally bound to abide by it. Therefore, governments first signalled their intention to recognise and implement the Code through an international treaty, the Copenhagen Declaration, and then followed through by ratifying and carrying out acceptance, implementation and enforcement of the UNESCO Convention.

WADA gets its jurisdiction over doping issues related to the OM through the Olympic Charter, which makes the WADC a mandatory document for the entire Olympic Movement[61] just as the UNESCO

[54] Who We Are, WADA, 2016, Available at https://www.wada-ama.org/en/who-we-are
[55] Governance, WADA, 2016, Available at https://www.wada-ama.org/en/governance
[56]WADC, 2015, Art. 23.6.
[57]WADC, 2015, Art. 23.1.
[58] Patel, S, Inclusion and Exclusion in Competitive Sport: Socio-Legal and Regulatory Perspectives. Routledge, 2016.
[59] The WADC 2015, WADA, Available at https://www.wada-ama.org/en/what-we-do/the-code
[60] Geeraert, A, Compliance systems: WADA, AGGIS reports, Play the Game, Leuven, 2013.
[61]The Olympic Charter, Art. 43.

Convention does for governments, albeit through a different mechanism. Sport organisations report their compliance to WADA, while governments do the same to UNESCO. For both parties, sanctions due to non-compliance can be removal of office at WADA. For more severe breaches, sport world members can have their sport removed from the Olympics whereas governments could be disqualified from hosting a major sporting event[62]. Furthermore, CAS has an overarching jurisdiction on cases of doping in sport and the same can be facilitated by WADA as the WADC gives WADA the right to appeal certain matters to CAS.[63] In addition to the WADC, WADA's creation of globally accepted standards creates what can be understood as a form of 'soft law'.[64]

E. Analysis

1. Success factors

Although WADA could be improved, it has mitigated the problems that forced its creation. While achieving entirely clean sport is an on-going and perhaps lofty goal, the situation today is much better than it was twenty years ago, and the existence of a widely accepted body aimed at achieving clean sport has focused and led the fight against doping.

Creating the WADC and the accompanying five International Standards, WADA has systemised the worldwide approach to anti-doping, and guidelines now exist for all stakeholders to apply.

WADA has been able to adapt and evolve successfully with scientific advancements. While some argue anti-doping mechanisms always lag behind those created by cheats, WADA has the ability to address the developments on a regular basis by the process of yearly updates to the Prohibited List.[65] Additionally, WADA is able to update the Code regularly to shift focus when necessary, like including more emphasis on investigations in the 2015 version.[66] By having its own Health, Research and Medicine Committee WADA is able, along with help from expert groups, adapt to the changing landscape of illegal drug use in sport.

WADA has done well to include important stakeholders in the organisation. WADA recognised the importance of athlete representation in both the Foundation Board and Executive Committee. Its structure also allows other individuals to be involved, as the organisation is able to appoint non-members to specific positions when necessary.

2. Criticisms

- Overly-centralised power

WADA is the supreme authority in anti-doping in sport and has the sole authority to issue declarations of non-compliance with its Code[67]. Even though this has been a beneficial move to counter doping in sport, it also poses the threat of assuming unbridled powers in that sphere without clear mechanisms of checks and balances on WADA.

- Fight for legitimacy

WADA has been criticised for its management of the McLaren report, the hacking of its Anti-Doping Administration

[62]WADC, 2015, Art. 23.6.
[63]WADC, 2015, especially, see, Art.13.6.
[64] Siekmann, R. C, The Hybrid Character of WADA and the Human Rights of Athletes in Doping Cases (Proportionality Principle). The International Sports Law Journal(1-2), 2011.
[65] Saugy, M., Laboratories in the Fight Against Doping Lecture. FIFA Master Programme, University of Neuchâtel, Neuchâtel, 2016.
[66] Rigozzi, A., Viret, M., & Wisnosky, Does the World Anti-Doping Code Revision Live up to its Promises. Jusletter, 2013.
[67] Dick Pound on the tools that WADA needs to tackle doping, the Sport Integrity Initiative, 2016, Available at http://www.sportsintegrityinitiative.com/dick-pound-on-the-tools-that-wada-needs-to-tackle-doping/

and Management System[68] and its handling of the Russian doping scandal. The IOC and WADA Athletes Commission sent a joint letter to the IOC and WADA presidents in June 2016 stating "…*at this time athlete confidence in the anti-doping system, in WADA and the IOC has been shattered…".*[69] Similarly, U.S. Senator John Thune sent a letter to WADA questioning the delay in investigating the Russian doping scandal, especially considering the significant U.S. contributions to WADA.[70] Such concerns from major stakeholders could threaten WADA's legitimacy.

- Conflict of interest due to IOC's role

WADA's complicated structure raises questions among critics, notably the fact that it was partially created by the IOC and that its constitution enables members of the OM, including senior IOC officials, to have dual roles. WADA is required to serve as an oversight body for IOC's activities in relation to anti-doping, but concerns remain regarding whether the IOC adequately sanctions popular sports and athletes.[71]

- Lack of government commitment

Despite the equal representation principle at WADA, there is still a significant lack of government commitment. The UNESCO Convention in itself creates a structure of weak obligations being a permissible document where most of the roles to be undertaken by the governments are closer to encouragement than mandates[72]. Furthermore, the hybrid nature is sometimes criticised as it is tasked with regulating the same stakeholders whose co-operation it functions with.[73] This raises questions of patronage and conflict of interests.

- Lack of funding

WADA argues that its budget is insufficient for its activities and that contributions need to be increased[74], especially with the addition of more investigatory powers as per 2015 WADC. .

- Lack of proper information sharing/Dependence on collaborative efforts

There is a lack of information sharing between government agencies and the sport movement which impedes effective implementation of the WADC. This has been highlighted each time a doping scandal has been uncovered by an organisation other than WADA, e.g. customs, police, Interpol etc.[75] The Russian doping scandal is a notable example.[76] Pressing governments to improve

[68] Brown, A, IOC criticism of WADA grows as Bubka speaks out, 2016, Available at http://www.sportsintegrityinitiative.com/ioc-criticism-of-wada-grows-as-bubka-speaks-out/

[69] Ingle, S., Tokyo Olympic Games corruption claims bring scandal back to the IOC, 2016, Available at https://www.theguardian.com/sport/2016/may/11/tokyo-olympic-games-2020-ioc-international-olympic-committee-corruption-bid-scandal

[70] Thune, J, Letter to WADA, United States Senate Committee on Commerce, Science and Transportation, 2016, Available at https://www.commerce.senate.gov/public/_cache/files/4bffa8b6-a87d-4b72-a17e-22511f34d3d8/1ECF41B6AB25AB09371463BEA1B5168B.jrt-letter-to-wada----final.pdf

[71] Gibson, O, A truly independent WADA should have the power to sanction sports and nations, 2015, Available at https://www.theguardian.com/sport/2015/nov/11/wada-anti-doping-agency-future-power-cheats

[72] Houlihan, B, Achieving compliance in international anti-doping policy: An analysis of the 2009 World Anti-Doping Code. Sport Management Review, 2013

[73] Bond, D, Drugs in sport: WADA weakened by funding and constitution, 2013, Available at. http://www.bbc.com/sport/24944641

[74] Dick Pound on the tools that WADA needs to tackle doping, the Sport Integrity Initiative, 2016, Available at http://www.sportsintegrityinitiative.com/dick-pound-on-the-tools-that-wada-needs-to-tackle-doping/

[75] Gibson, O, A truly independent WADA should have the power to sanction sports and nations, 2015, Available at https://www.theguardian.com/sport/2015/nov/11/wada-anti-doping-agency-future-power-cheats

[76] WADA dismayed by latest doping allegations in Russian athletics, WADA, 2016, Available at https://www.wada-ama.org/en/media/news/2016-03/wada-dismayed-by-latest-doping-allegations-in-russian-athletics

information sharing would be beneficial, because although the 2015 WADC grants more investigatory powers, more support from law enforcement agencies is required to effectively investigate cases. Furthermore, WADA relies on accredited laboratories across the globe; however, issues with these laboratories keep arising.[77]

- Multiple compliance mechanisms

WADA has several compliance documents, which makes the process of compliance tedious. The variety of legal and non-legal documents, in addition to mandatory and recommended guidelines, creates confusion as to what exactly must be complied with and by whom.[78] Furthermore, there are multiple bodies responsible for testing and results management, including NADOs and laboratories. Even though international standards exist, differences arise based on the facilities and resources available to these institutions.[79] Industry insiders also argue that there is an overwhelming amount of bureaucracy in WADA's procedures.

III. Can a public-private partnership model of an international regulatory body be applied to promote good governance in sport organisations?

A. International Sport Good Governance Organisation (ISGGO)

1. Introduction

Based on the justified need for a good governance oversight body for sport organisations and a belief in the overall successful structure of WADA, a similar public-private hybrid model could be applied to sport governance.

Following the analysis of the governance issues at the selected international sport organisations and WADA, the following is a proposal for ISGGO, the International Sport Good Governance Organisation. The proposal includes consideration of the scope, seat, legal status, structure, mandate/jurisdiction, funding, and activities of the organisation, while also considering feasibility and limitations.

2. Scope

ISGGO would have a limited scope covering the IOC, IPC, IFs which are part of the OM and non-Olympic IFs which voluntarily decide to be signatories to the ISGGO Charter, a document giving ISGGO its legality, containing regulations and inner-workings of the organisation. ISGGO would not include the NFs, regional associations and confederations in its direct ambit currently.

Further, the IFs who would be signatories to the ISGGO Charter would be bound to follow the regulations of the Charter. Subsequently, the NFs by virtue of their membership to the IFs would be required to abide by the ISGGO Charter similar to WADC compliance. Initially this is the mechanism that ISGGO would have in place to reach out to the NFs, however, if deemed necessary, in the future it could extend its reach directly to NFs and confederations as well.

Decisions regarding the purpose/aim, resources/assets, organisational structure, and constituents of the Charter would be left to the members of the Supreme Governing Body of ISGGO, however, certain options have been proposed below.

3. Seat

[77] WADA suspends Kazakhstan anti-doping lab, 4 days after Rio, Associated Press, 2016, Available at http://www.dailymail.co.uk/wires/ap/article-3664184/WADA-suspends-Kazakhstan-anti-doping-lab-4-days-Rio.html

[78] Henne, K, WADA, the Promises of Law and the Landscapes of Antidoping Regulation. PoLAR: Political and Legal Anthropology Review, 33(2), 2010.

[79] Oswald, D., Saugy, M., & Rigozzi, A, Doping Round Table Lecture, FIFA Master Programme, University of Neuchâtel. Neuchâtel, 2016.

It is proposed that ISGGO be domiciled in Switzerland. There are many advantages of locating ISGGO in Switzerland including, as mentioned by sport law specialists, "geographic location, highly qualified workforce, political stability, neutrality, security, quality of life, flexibility in the legal code"[80] and an attractive tax regime inter-alia.[81] It is also the first signatory of the Convention on the Manipulation of Sports Competitions.[82] Moreover, the presence of 65 international sport federations based in Switzerland[83] including 'La Maison du Sport International' (The International House of Sport) could be convenient for exchanging good practices.[84]

The flexibility of some laws in Switzerland has come under criticism lately; however, Switzerland has taken steps to amend its legal framework. The most recent is 'Lex FIFA' or the amendments to the Swiss Penal Code, which have removed the legal lacunae whereby private individuals could not be prosecuted for corruption and bribery unless it fell under unfair competition. In the past, sport organisations, being non-governmental in nature, would have been out of the ambit of public corruption and even unfair competition, however, the amendments make it an automatic criminal offence for anyone to give or accept bribes.[85] Switzerland has also tackled money laundering and is based on the Organisation for Economic Co-operation and Development's (OECD) Financial Action Task Force on Money-Laundering's recommendation. Switzerland has amended its laws to include senior politicians and officials of ISGBs based in Switzerland as politically exposed persons.[86]

Despite the above, other locations for ISGGO may also be suitable. Criticisms of Switzerland may include that interdependencies with Swiss based IFs could be more harmful than helpful. Furthermore, the flexibility of Swiss Association Law and even the limitations in the latest amendments towards 'Lex FIFA', like its territorial applicability being limited to crimes effected in Switzerland[87], and the fact that the new law does not propose *suomoto* action for lighter violations[88], leaves room for misconduct. Also, since ISGGO is a global body, locating it in Switzerland may make it Eurocentric.

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[80] Jaberg, S, How Switzerland champions champions, 2010, Available at http://www.swissinfo.ch/directdemocracy/how-switzerland-champions-champions/8149794

[81] Bradley, S, Swiss set to get tough over sports corruption, 2014, Available at http://www.swissinfo.ch/eng/newrules_swiss-set-to-get-tough-over-sports-corruption/40801520

[82] Valloni, L. W., & Neuenschwander, E, Switzerland: The Role Of Switzerland As Host: Moves To Hold Sports Organisations More Accountable, And Wider Implications, 2015, Available at http://www.mondaq.com/x/432160/The+Role+Of+Switzerland+As+Host+Moves+To+Hold+Sports+Organisations+More+Accountable+And+Wider+Implications

[83] Bradley, S, Swiss set to get tough over sports corruption, 2014, Available at http://www.swissinfo.ch/eng/newrules_swiss-set-to-get-tough-over-sports-corruption/40801520

[84] Mrkonjic, M, Sports federations are privileged in Switzerland. Play the Game, 2013.

[85] Länzlinger, A. D., & Huber, R, Reforms in the Criminal Law on Bribery, 2016, Available at http://www.lexology.com/library/detail.aspx?g=2f0f7747-674d-4263-9eda-89c547bb967d

[86] Valloni, L. W., & Neuenschwander, E, Switzerland: The Role Of Switzerland As Host: Moves To Hold Sports Organisations More Accountable, And Wider Implications, 2015, Available at http://www.mondaq.com/x/432160/The+Role+Of+Switzerland+As+Host+Moves+To+Hold+Sports+Organisations+More+Accountable+And+Wider+Implications

[87] Levy, R, Can Switzerland's new "Lex FIFA" combat corruption within International Sports Federations?, 2015, Available at http://www.lawinsport.com/articles/anti-corruption/item/can-switzerland-s-new-lex-fifa-combat-corruption-within-international-sports-federations?category_id=114

[88] Swiss MPs pass 'Lex Fifa' anti-corruption law, Swissinfo.ch, 2015, Available at http://www.swissinfo.ch/eng/clamping-down_swiss-mps-pass--u2018lex-fifa-u2019-anti-corruption-law/41652890

The advantages appear to outweigh the disadvantages associated with locating ISGGO in Switzerland. Furthermore, ISGGO could take a WADA-like approach of locating its headquarters outside of Europe or having seats outside of Europe for functional aspects.

4. Legal Status

ISGGO can be created as a foundation under the Swiss Law, similar to the legal structure of WADA.[89] Articles 80-89 of the Swiss Civil Code govern a Swiss foundation with requirements of registration, external audits and requirements to be mandatorily included in the foundation's charter. As per Articles 80 and 81 of the Swiss Civil Code, *"A foundation is established by the endowment of assets for a particular purpose"* and it must be created by public deed or by testamentary disposition.[90] A foundation comes into existence on its entry to the commercial register and is under the supervision of the State as opposed to an Association[91], therefore providing for better accountability and transparency of the organisation.

Government support is sought for ISGGO and governments would be more comfortable joining a structure which is a public entity[92], however, as this would infringe upon the autonomy of private sport organisations; a public-private regulatory body for promoting good governance in sport would be more conducive as a foundation than an association. The foundation model allows representation based-funding permitting differences in contributions.[93]

Finally, the Swiss Foundation Code 2015, which is voluntary in nature, is a guide for the self-regulation and functioning of foundations in Switzerland[94] and can be adopted by ISGGO.

Another option is an International Non-Governmental Organisation (INGO). A Non-Governmental Organisation (NGO) is a not-for-profit entity that is independent from states and governments. An NGO becomes an INGO when it consolidates with other NGOs and becomes international. For the past 50 years, the United Nations (UN) has collaborated with INGOs on matters where the UN has competence, using Article 71 of the UN Charter.[95]

Governance of sport bodies is reaching a level of public interest that could entice the UN to interact with an organisation tackling sport governance issues. The International Centre for Sport Security (ICSS) and other initiatives have taken this approach, and if these private entities collaborate, the UN could take note. This would legitimise the issue of sport governance with governments and confirm UN dedication to the cause giving the INGO greater authority.

At present, this is not the best solution, as becoming a UN-sanctioned INGO is time consuming and not guaranteed. There are also criticisms regarding the effectiveness and accountability of INGOs.[96] Furthermore, an

[89] Constitutive Instrument of Foundation of the World Anti-Doping Agency, WADA, 2014, Available at https://wada-main-prod.s3.amazonaws.com/resources/files/WADA-Revised-Statutes-4-July-2014-EN.pdf

[90] Swiss Civil Code. The Federal Assembly of the Swiss Confederation, 2014.

[91] Jakob, D., Huber, R., & Rauber, K, Nonprofit Law in Switzerland. Working Papers of the Johns Hopkins Comparative Nonprofit Sector Project(47), 2009.

[92] Siekmann, R. C, The Hybrid Character of WADA and the Human Rights of Athletes in Doping Cases (Proportionality Principle). The International Sports Law Journal(1-2), 2011.

[93] Zagklis, A, The relevance of Swiss law in sport corporate governance: a view from abroad. Zeitschrift fur Schweizerisches Recht, 2013.

[94] Specking, H, The Swiss Foundation Code 2015: A state of the art regulatory for grant-making foundations, 2015, Available at http://www.alliancemagazine.org/blog/the-swiss-foundation-code-2015-a-state-of-the-art-regulatory-for-grant-making-foundations/

[95] UN Charter, United Nations, Available at http://www.un.org/en/sections/un-charter/un-charter-full-text/index.html

[96] Barber, M., & Bowie, C, How International NGOs Could Do Less Harm and More Good. Development in Practice, 18(6), 2008.

INGO would compromise the autonomy of sport organisations, a key reason why ICSS has not been accepted by a majority of sport organisations. A solution with collaboration between the OM and governments would be easier to implement and more acceptable to the sport organisations.

5. Organisational Structure

a. Supreme Governing Body

ISGGO would be required to have a Supreme Decision Making Body or a Supreme Governing Body (SGB). As per Article 83 of the Swiss Civil Code, the foundation charter shall stipulate the foundation's governing bodies and therefore these decisions can be left to the members of ISGGO's SGB; however, similar to WADA, ISGGO may set a fixed number of members for the SGB and be equally represented by the sport world and governments.

The members of the SGB from the sport world could contain a number of representatives from the IOC, IPC, IFs under the OM and non-Olympic IFs, which have joined ISGGO voluntarily. The latter could have a fixed number of seats to be filled on a rotational basis from amongst the voluntary members. Similar to WADA, each continent can be responsible for the election process from their region and for notifying ISGGO of the selections. The number of government members from each continent may also be fixed based on their contributions or capacity to contribute, but representation from each region is essential.

The members of the SGB should have age and term limits. For government representatives from each of the continents, there should be a system of rotation of countries in place to ensure varied representation.

The President and Vice President of ISGGO can either be alternated between the OM and governments with term limits as is done by WADA or the members can elect the President and a Vice President, but guarantee that both do not belong to the same category, i.e. sport world or the public authorities, to reinforce a truly equal partnership.

b. Executive Committee

A smaller organ to carry out its strategic functions, make quick decisions and to act as an oversight body can be constituted in the form of an Executive Committee from amongst the members of the SGB, again with equal sport and government representation.

c. Administration

An administrative organ is proposed to carry out operational and support functions to the Executive Committee and other parts of the organisation.

d. Special Committees

Special committees should be created to carry out specific roles including, but not limited to, a Certification Committee to carry out the certification processes for the sport organisations under its ambit; an Integrity Checks Committee which would carry out integrity checks not only for individuals connected to the sport organisations under its ambit but also of people proposed as members of its own SGB; an Education/Training/Advisory Committee to carry out the advisory role and educational awareness of good governance and a Disciplinary Body for adjudicatory purposes. The members on these Special Committees should reflect the principle of equal representation and be a mix of people from within ISGGO as well as external experts. Each committee should be co-headed by a government and sport representative.

e. Potential alternative structure – sponsor involvement

As an alternative, ISGGO could have equal representation between the OM, government representatives and a third prominent stakeholder, sponsors. This way some of the

criticisms associated with WADA's present model could be tackled in ISGGO. It would lead to additional accountability mechanisms; ensuring that ISGGO is not run predominantly by the OM in practice, given that the government representatives often cannot dedicate as much time to sport issues. Sponsors, especially the ones associated with major sport events, would have an incentive to join ISGGO. This way, decision-making, funding and other prominent issues can be effectively tackled for ISGGO. Industry insiders are of the opinion that sponsors would be willing participants because a lack of good governance and associated issues in sport affects their reputation and investments.

- Feasibility

At the outset, there may be problems with the feasibility of giving sponsors a seat on the SGB as it is difficult to ascertain which sponsors would be chosen, how their representation would be constituted and their willingness to take on such responsibilities.

f. Checks and balances

In addition to the above, it is important to structure ISGGO in a way that it does not become too powerful for its own good and therefore the mechanism of checks and balances it proposes to various sport organisations, it should first apply to itself. As seen with WADA, it is essential that key stakeholders maintain trust in the organization and that varied membership helps to ensure accountability. This should be a lesson learnt for ISGGO while considering the members on its SGB. In that regard, it is also important that ISGGO is transparent in its functioning and keeps the public informed of its activities and outcomes regularly.

6. Mandate / Jurisdiction

Just like the Olympic Charter has made the WADC mandatory for the entire OM, a similar mechanism could be adopted for the ISGGO Charter, which would be binding on ISGGO's signatories and act as another pressure mechanism for compliance by the OM.

In order to get governments to partner with ISGGO, the route of a treaty or convention should be followed. Since most governments are not bound to follow non-governmental documents, UNESCO can be approached as it is already taking steps to promote good governance in sport with its recent regional meeting in Abidjan on sport governance and integrity[97] and partnership with ICSS.[98]

A UNESCO Convention dealing with governance in sport would need to be produced and ratified by the governments, and like in the case of WADA, they would follow the three steps of acceptance, implementation and enforcement; however, unlike WADA, public authorities involved in ISGGO would not have the same concrete responsibilities to create NADOs. The responsibilities of public authorities in ISGGO would include funding, information sharing, and contribution to initiatives, like providing adequate individuals for committees. Similar to the governments involved with WADA who enacted specific national laws about anti-doping to adherence to the Convention, ISGGO government authorities will be expected to enact, if it does not already exist, national legislations regarding issues of high public interest related to sport, most notably bribery,

[97] Regional meeting in Abidjan on sport governance and integrity, UNESCO, 2016, Available at http://www.unesco.org/new/en/media-services/single%20view/news/regional_meeting_in_abidjan_on_sport_governance_and_integrity/#.V32YHLh962

[98] UNESCO and ICSS join forces to protect sport integrity, UNESCO, 2013, Available at http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/sv15/news/unesco_and_icss_join_forces_to_protect_sport_integrity/#.V32Ygbh9601

money-laundering and corruption of officials.

Through the above-discussed mechanisms, ISGGO can derive its mandate and subsequently have jurisdiction to tackle relevant issues accordingly.

7. Funding

Money will be fundamental to the running of ISGGO. The activities of the organisation will need to be adapted to the funds it is able to raise.

The public-private model of WADA prevents one entity gaining unbridled power within the organisation and similarly, to ensure ISGGO's independence, having diversified monetary sources will be key. Therefore, the primary funding model would simply be applying the current WADA model where both governments and the sport world participate in its funding. WADA has proven the feasibility of this approach, and due to recent scandals in the sport world, there is a high public interest in governance as in anti-doping. Nevertheless, other sources of funds should also be considered. Because the IOC itself would be monitored by ISGGO, having major IOC funding could create a conflict of interest for which WADA too is criticised.

A simple solution could also be that the Olympic Movement contributes a portion of the revenues generated by the OG towards ISGGO's efforts to promote good governance. Another approach could be for each sport organisation to contribute a share of revenues from its main event (e.g. world championships). ISGGO would need to ensure that signatories have publicly available budgets to ensure it receives what was agreed. Some limitations of this approach include the difficulty of IFs agreeing to contribute and that not all sport federations run profitable premier events and thus it may not make sense for them to contribute.

Athletes may also be interested in ISGGO's functions to protect the integrity of their own sport and to prevent damaging scandals that could inhibit participation, which is especially relevant considering the case of the blackmailed Russian athletes affected by the IAAF scandal. ISGGO could potentially receive a voluntary or, if all athletes form an agreement, even a mandatory share of prize money from major competitions.

Sponsors could use ISGGO to ensure they interact with organisations that are well-governed and as such could provide partial funding to ISGGO, perhaps in a percentage of sponsorship contracts. If sponsors were included as members, they would be expected to contribute. Participating in initiatives of good governance could be pitched as a way to improve their brand image or as an insurance policy against scandal. Including sponsors could thus give ISGGO a further element of independent oversight and split the balance of interests between those running it.

Burson Marsteller TSE's research shows that 50% of sponsors would consider increasing their investments in sport if sport organisations implemented good governance principles[99] and Coca Cola, Visa and others issued a Joint Statement to FIFA in light of its scandals emphasizing their interest in independent oversight to reforms.

Therefore, there is clear interest from sponsors, but there are also issues of feasibility, including how to choose which sponsors to involve and whether this voiced support would translate into tangible action and financial support.

A major issue with funding ISGGO could be that any stakeholder that gives money will want to be represented. In order to be efficient, ISGGO must avoid conflicts of interest and being too political or

[99] Burson-Marsteller / Tse Consulting, Implementing good governance principles in Sports Organisations. Lausanne, 2016.

bureaucratic. For instance if ISGGO revealed a scandal in an IF that is sponsored by a brand represented in ISGGO, a conflict of interest could arise.

On the government side, the funding system in place for WADA can be reused with details to be determined by the government representatives themselves.

The public also has an interest in well-governed sport bodies but it is hard to imagine a feasible system reliant on funding from individuals. Individuals would already indirectly support ISGGO through the taxpayer money that their government pays to ISGGO. For particularly interested people or organisations, ISGGO could also create a mechanism of accepting donations.

8. Activities

a. Administration

One of ISGGO's major activities will be its administrative function. As will be discussed, some of the below activities will be affected by the amount of staff the organisation can support, which is based on funding.

aa. Ethics/Compliance Database

- Proposal

ISGGO will keep a centralised online database of IF Ethics Committee decisions. Creating a central location where ethics committee decisions are easily accessible, searchable, and posted in a timely fashion can help stakeholders remain informed of what kinds of cases and their decisions are occurring in sport.

- Feasibility

This will be a relatively easy and achievable endeavour consisting simply of an alert when ethics committee decisions are posted for any member organisations and subsequent, publishing on the ISGGO website. The database can be organized by federation and decisions within each organisation sub-section can be organised chronologically.

Currently, not all sport federations publish their ethics committee decisions so ISGGO would be limited to the ones that do, but this is the type of standard to be implemented in the certification section, discussed below.

ab. Integrity Checks

- Proposal

The people in positions of power are key in ensuring good governance. It is essential that executive board members, high-elected officers (e.g. presidents, general secretaries), and key committee heads are ethically and morally sound, with a proven track record of proper behaviour. FIFA, the IOC, IAAF do conduct integrity checks, but the Sports Governance Observer 2015 found that only four of the federations considered do these.[100] In addition to the necessity to complete the integrity checks, there is no accepted method of conducting them.

Ideally, ISGGO could have a specialised commission focused on conducting integrity checks in a specified manner. The independence of ISGGO would ensure absence of biases when considering candidates for positions in IFs and a systematic approach ensures fairness and consistency across the board. If the process of conducting the integrity checks is unachievable due to resource restrictions, ISGGO could at least commence by creating a standardised system or checklist denoting the kind of information to be gathered by member federations when conducting integrity checks.

- Feasibility

[100] Geeraert, A, Sports Governance Observer 2015: The legitimacy crisis in international sports governance, 2015.

At least at the outset, ISGGO conducting integrity checks for specific positions in all federations is likely unachievable. Of the 30-plus member federations who each have numerous positions that would need to be examined, the workload is extreme - especially considering that occasionally police cooperation is necessary.

It is entirely feasible, however, for ISGGO to create a mandatory, minimum standard for integrity checks to be completed by member federations. Additionally, perhaps ISGGO could begin this integrity check function on a request basis. Another solution is that ISGGO begins its integrity check function only with specific priority positions, for example they conduct integrity checks on all presidents, general secretaries and heads of ethics commissions.

ac. Independence of Commissions

- Proposal

One concern that arises when considering independent commissions, like ethics commissions, is whether they are truly independent. Depending on the organisation, these members are elected or appointed in different ways and have varying levels of connection to other branches of the organisation; however, in simple terms, connections still exist.

One potential function of ISGGO is to either maintain a pool of candidates from which organisations can select or nominate to the organisation individuals to serve on independent committees. These individuals would be well-vetted, capable and willing to work on the committees with the proper backgrounds and qualifications. Allowing ISGGO to have this function would ensure the individuals' independence.

- Feasibility

One prime concern here is organisations' willingness to implement this system. There will be a substantial loss of autonomy for the organisations by ISGGO having this function; though, in reality, it should not matter because independent members are independent anyway.

Consultation with member federations would be necessary to facilitate this system. Creating a database of candidates would likely be time-consuming, but once created, it would be relatively simple to delegate the candidates to members. The members could formally request to ISGGO the need to fill a specific position, in which case ISGGO could then either nominate a single candidate, who would then likely need to be approved by the organisation, or nominate a specific number of candidates who then the decision-making bodies of the organisation would chose. Another approach could be federations having full access to the candidate pool and individuals' background information and choosing for themselves. The pool of candidates would need to be maintained by ISGGO and updated regularly.

The benefit to this system is that these individuals would be filtered by ISGGO and would be ensured to be entirely independent, as they would be chosen and come from ISGGO representatives, not the federations themselves. Details of how these individuals would be found still need to be considered.

In implementing this function, it is necessary to consider the differences of sport organisations, specifically in regards to independent ethics commissions. Some IFs do not even have this; of the federations analysed by The Sports Governance Observer report, one-third were lacking that key function.[101] A certification standard, to be discussed below, will be to have an ethics commission, but it is difficult to expect small,

[101] Geeraert, A, Sports Governance Observer 2015: The legitimacy crisis in international sports governance, 2015.

resource-barren organisations to create a large and functioning commission. That being said, with the process of ensuring the independence of commissions, ISGGO will take the specificities of the organisation into account. An organisation that cannot have a fully-functioning ethics commission could potentially have an ISGGO-integrity checked individual serve as a single ethics officer for a single or multiple smaller organisation(s).

ad. Training and consultation

- Proposal

One of ISGGO's goals is to create an on-going forum about good governance in sport and to ensure it remains of the highest priority in organisations constantly, not just in response to a scandal. With that in mind, ISGGO would be responsible for good governance training. ISGGO could host annual seminars for members, and other seminars opened to a broader group, especially those with a stake or specialty in good governance. Collaboration with the corporate world, broadcasters, and sponsors could provide a healthy forum for idea sharing and provide a check on the sport world.

Additionally, ISGGO would be capable of providing consultation on a request basis for federations. If a federation or individuals within the federation want advice on best practices, help implementing reforms, or any other similar tasks, ISGGO would be available to facilitate.

- Feasibility

This function of ISGGO seems relatively straightforward. The Charter would require attendance by sport organisations to the annual seminars.

ISGGO could help consolidate the seminars run by other sport organisations. While the annual seminar would be exclusively for members, ISGGO could organize less regular larger-scale conferences that include more stakeholders. In fact, good governance is often addressed at seminars in the sport world; The Association of Summer Olympic International Federations (ASOIF)'s 2015 IF Forum focused on good governance and Transparency International had an anti-corruption summit in May 2016, of many. Collaboration with academics and stakeholders at these seminars will reaffirm the topic's importance and provide an opportunity for learning.

ae. Corruption reporting

- Proposal

ISGGO could provide an alternative method for reporting corruption. While the IOC and FIFA have entirely anonymous hotlines to report suspicions of unethical behaviour, not all federations do. Additionally, although they are entirely confidential, there might be individuals unaware of these functions or still feel the connection to the organisation is too strong to use them. To that effect, ISGGO could create a method of anonymous reporting as well. Because the vision is for ISGGO to be a very public, independent and well-known organisation, perhaps individuals would feel more comfortable using its reporting mechanism. Upon receiving a tip, ISGGO would note the complaint and report it to the authority with jurisdiction.

- Feasibility

It would be extremely easy for ISGGO to create an anonymous reporting mechanism that is entirely encrypted. It would be accessible via ISGGO's website but could also be included on federations' websites, especially relevant for those federations who do not already have a reporting system in place.

af. Other

Once ISGGO is created and its operation begins, there may arise other tasks for it to handle. The hope is that the organisation in

its structure will be flexible enough to adapt with the sport world's needs.

b. Certification

ba. Background

Many industries in the corporate world have specific standards they must adhere to and it is common practice to ensure minimum requirements are met. For the corporate world, some of the main standards are provided by the International Organisation for Standardization (ISO), of which ISO 26000 and ISO 37001[102] which refer to human rights, fair operating practices, due diligence, avoidance of complicity, anti-corruption and anti-bribery systems are particularly relevant for this endeavour. ISO 26000 is not a certification in itself but it creates a standard that guides best practices.

Different actors have also attempted to create a system of standards specifically for sport. The EU Council has collaborated with the Sport for Good Governance project, further emphasising the willingness of public authority involvement, which provides a self-assessment evaluation tool targeting sports operating at the national level[103] BIBGIS provides a set of 35 principles to evaluate good governance in ISGBs.[104] ASOIF, upon consultation with national authorities, used BIBGIS to develop their own assessment around five key principles (Transparency, Integrity, Democracy, Sport Development and Solidarity, Control Mechanisms) implemented with ten indicators[105].

bb. Proposal

Based on existing standards and taking into account the specificity of sport, ISGGO could, with the collaboration of various stakeholders, create its own comprehensive certification system by incorporating and adapting the principles of ISO 26000, BIBGIS and other relevant initiatives. Signatories of the ISGGO Charter would then be expected to adopt these standards.

The content of the certification system would need to be determined, but based on the aforementioned issues facing sport organisations, the certification system would attempt to standardise best practices and promote good governance proactively rather than in reaction to a scandal. Governance is an evolving topic, so it is important that the system is adaptive.

The differences amongst the signatories must be taken into account and so ISGGO would categorise the IFs by various criteria, e.g. revenues, and define the elements required to monitor each specific IF category, but always based on the same set of principles.

The ISGGO standards would determine the most important principles of good governance and include minimum mandatory requirements that all signatories must adopt. Failure to meet the minimum standards would result in sanctions. Furthermore, in addition to the minimum standards there would be further standards and after the ISGBs are evaluated on these, each would be given a rating based on their fulfilment of the criteria.

In addition to creating certification standards, ISGGO would be responsible for conducting audits to judge compliance and

[102] 26000 Guidance on social responsibility, International Organisation for Standardisation (ISO), Geneva, 2014.

[103] Breuer, C. (2012).Sport for Good Governance. Deutsche Sporthochschule Koln, 2012.; Transparency International, Global Corruption Report: Sport, Oxon: Routledge, 2016

[104] Chappelet, J.-L., & Mrkonjic, M., Basic Indicators for Better Governance in International Sport (BIBGIS): An assessment tool for international sport governing bodies, Institut de hautes études en administration publique, Lausanne, 2013

[105] ASOIF to Endorse Governance Measures, ASOIF, 2016, Available at http://www.asoif.com/news/asoif-endorse-governance-measures

provide a ranking. This will be the responsibility of one of ISGGO's committees. The results of the audit would be publicised yearly so that each signatory's ranking is known. It is understood that it is time-consuming for an organisation to make meaningful ranking improvements in a short period, but there will be an expectation of improvements on a set time basis, similar to UEFA's expectations for Financial Fair Play[106].

bc. Feasibility/Justification

The aforementioned good governance standards are only some examples that already exist, and ISGGO's endeavour would aim to consolidate all the standards into a unified system. This was one of the motivations for the creation of WADA, to have a singular body responsible for setting standards, like the Prohibited List, for anti-doping measures. As Geeraert identified, there exists a "…*lack of a generally accepted, homogenous set of core principles and benchmarking tools for good governance in [international sports organisations]*"[107] a problem that ISGGO would overcome.

It is essential to take into account the particularities of the sport environment when determining certification standards, which is why an ISO standard cannot directly be applied without modification. However, ISO would likely collaborate with ISGGO as can be seen with their contributions to sporting standards such as 97.220 regarding sport equipment and facilities, which FIFA adopted, and 20121 regarding event organisation used by the IOC for OCOGs[108].

Having an external body such as ISGGO conducting the audits would be more credible than existing methods based on publicly available data and self-assessment. The implementation of the standard would be the responsibility of the sport organisations. The certification and rating system is particularly relevant to sponsors, to whom it could be pitched as an insurance policy. Sponsors could rely on the credibility of the ISGGO system to help determine which sport organisations they associate their brands with, and if there is a problem, it will alleviate the reputational damage on the sponsor because ISGGO would be accountable. Additionally, fans and media would have a big interest in the ranking system and the pressure from these stakeholders will encourage adherence.

One of the main criticisms with the ASOIF proposal and with the IOC's PGG is that it is not completely binding and enforceable, so by the mechanisms of the ISGGO Charter and potential sanctions signatories could face, the certification system will assuage those concerns.

It is important to note, however, that it would be challenging to create the initial standards and to conduct the audits; however, once the system is in place, it would be much smoother. Another consideration is that if the audits were too costly or time-consuming, ISGGO could use an independent auditor.

c. Sanctioning

ISGGO needs sanctioning power in order to act as a deterrent and hold people and organisations accountable for their actions.

There are three separate approaches to sanctioning. The first is directly related to certification, whereby ISGGO would have the power to sanction signatories that are not compliant with minimum standards of the certification guidelines. The second would be to give ISGGO power to refer cases to CAS where the signatories have not acted or where ISGGO feels their actions are inadequate.

[106] Traverso, A, Financial Fair Play Lecture. FIFA Master Programme, University of Neuchâtel. Neuchâtel, 2016.

[107] Transparency International, Global Corruption Report: Sport, Oxon: Routledge, 2016.

[108] Event sustainability management systems - Requirements with guidance for us. ISO, 2012.

The third deals with the public authority members of ISGGO.

The ISGGO disciplinary committee would be responsible for determining the appropriate sanctions for signatories and the public authorities aligned through the Convention dependent on the type and severity of the misconduct.

ca. Certification Sanctioning

In relation to the certification, ISGGO will have the power to sanction organisations that fail to meet minimum standards and fail to improve their certification ratings over a set period of time. The potential of a sanction being imposed would drive sport organisations to adhere to the certification system, thus improving their governance. Failure to adhere, in addition to concrete sanctions, will result in a public "naming and shaming" that would harm the organisation's reputation.

In certain instances, a sanction will be immediate, but in other cases ISGGO could have a warning system that allows time for certification improvement. Like WADA, a key sanction would be the loss of representation within ISGGO. For an organisation like the IOC, this is likely the only sanction that could be imposed. For other sport bodies engaging in severe misconduct, a potential sanction could be, in cooperation with the IOC, a decrease in Olympic revenues or suspension from the OG.

With the current scope of ISGGO, it would be unable to sanction NFs or NOCs but if the scope increases to include those bodies, more sanctions could be applicable, such as prohibitions on hosting major sporting events. By adhering to ISGGO certification standards, the current signatories, namely the IOC and IFs, would be expected to be cautious in their dealings with their own poorly-governed members.

cb. Relationship with CAS

ISGGO would have a relationship with CAS similar to WADA pursuant to Article 13 in WADC, a mechanism recently added to the WADA Code[109]. Pursuant to the ISGGO Charter, adoption of standards would be required. ISGGO itself would be able to request arbitration proceedings at CAS for severe misconduct as would be defined in its Charter.

The methods of identifying cases would be firstly, if during the certification audit misdemeanours of a criminal threshold are discovered, ISGGO would be able to initiate proceedings. Secondly, if upon the publishing of an Ethics Committee decision ISGGO feels that internal disciplinary proceedings were not properly adhered to, it can refer a case to CAS.

The obvious drawback of relying on publicly published Ethics Committee decisions is that not all organisations have Ethics Committees nor publish their proceedings. ISGGO's certification process would attempt to address this issue, but it would be a complicated process.

cc. Sanctioning of public authorities

ISGGO has little authority to punish public authorities itself, but by means of signing the Convention, public authorities will have specific responsibilities towards ISGGO's functions and non-compliance would result in sanctions. Failure to fulfil their responsibilities, notably not providing their share of funding, will result in public authorities losing their representation. Additionally, non-compliant governments' details would be published and thus subject to disrepute. In collaboration with the IOC and IFs, non-compliance by the governments

[109] The WADC, 2015, Available at https://wada-main-prod.s3.amazonaws.com/resources/files/wada-2015-world-anti-doping-code.pdf

could also lead to a prohibition on bidding for major events and potentially participation.

cd. Feasibility

Sanctioning based on certification rules is feasible. Regardless of whether ISGGO or an external auditor completes the audit, a report will be submitted to ISGGO's disciplinary committee for review. Certification sanctions will be assessed case-by-case, as in UEFA's Financial Fair Play, to account for organisational differences and improvements over time.

d. Consideration of Investigatory Function

At first glance having investigatory functions in ISGGO would seem to be an effective mechanism in achieving its goals; however, ISGGO would initially not have an investigative unit.

There are several difficulties associated with having an investigative unit. Firstly, powers such as search and seizure reside with the law enforcement agencies of each nation. Assumption of such powers by an international organisation like ISGGO would create complications of jurisdiction and conflicts with law enforcement in individual countries. Secondly, such an investigative unit requires high maintenance costs, a problem WADA has faced as it had to spend over 1.3 million USD, approximately 6% of its budget, to produce two IC reports investigating the Russian doping scandal.[110]

Furthermore, in addition to the funding, investigations required for high profile cases like FIFA would also require investments of time, resources, and skilled staff along with high level of dependence on intelligence agencies.[111] Some authors have argued that not having investigatory powers actually benefits an anti-corruption agency as it allows them more freehold and less resistance to access information.[112]

Ultimately, cooperation, potentially in the form of a memorandum of understanding, with Interpol, which already has an integrity in sports initiative[113], and other intelligence agencies could be useful for ISGGO. Currently, however, such a mechanism would only increase bureaucratic hurdles. Furthermore, Interpol would likely only be interested in high-profile cases of sport corruption, thus excluding ones of smaller magnitude contrary to the all-inclusive intent of ISGGO. Therefore, the current recommendation is to not include an investigatory unit, but in the future, there is the potential to consider this function with the help of global governments.

V. Conclusion

Recurring issues of mal-governance and misconduct have put sport organisations under immense scrutiny of the public, media, sponsors and other stakeholders. This leads to a lack of trust in the integrity of sport and its leaders. The scandals of ISGBs, reform efforts, and their shortfalls puts into question sport's autonomy, justifying the need for the creation of a global and independent organisation to promote good governance in sport.

There are many recent initiatives created to tackle the governance issues plaguing sport; ideas from academics like the WSGA

[110] Dick Pound on the tools that WADA needs to tackle doping, the Sport Integrity Initiative, 2016, Available at http://www.sportsintegrityinitiative.com/dick-pound-on-the-tools-that-wada-needs-to-tackle-doping/

[111] Kuris, G, Watchdogs or guard dogs: Do anti-corruption agencies need strong teeth? Policy and Society, 34(2), 2015.

[112] Idem.

[113] Integrity in Sport., Interpol, 2016, Available at http://www.interpol.int/Crime-areas/Crimes-in-sport/Integrity-in-sport

proposed by Arcioni[114] and BIBGIS[115], government initiatives like the EU Council's Sport for Good Governance and private sector proposals like ICSS's SIGA further enforce the relevance of this topic.

ISGGO is a practical solution to provide leadership and coordination to the existing initiatives. With its tools to help sport, its certification system to standardise practices of good governance and its sanctioning power to punish those who are non-compliant, ISGGO would hopefully be able to act as a real catalyst for change, which is desperately needed. Its principle of equal representation from the sport world and public authorities ensures checks and balances and a diversity of opinions, and the potential for including sponsors could add another element to heighten its effectiveness. While there are parts of ISGGO that can be further developed in the future, namely investigatory powers and a broader scope of membership, the ISGGO proposal is an adequate starting point that those with the power to enact change should consider.

WADA can be seen as a largely successful endeavour, despite some shortcomings, in helping to regain the credibility of sport following the major public doping scandals of the late 1990s. The hope is that in twenty years, the same will be said of ISGGO in promotion of good governance in sport organisations.

[114] Arcioni, S & Vandewalle, P, Creation of an independent body for the control of the governance of sporting organisations worldwide, Paper presented at New trends in management and governance of sport, Session II, 2014.

[115] Chappelet, J.-L., & Mrkonjic, M., Basic Indicators for Better Governance in International Sport (BIBGIS): An assessment tool for international sport governing bodies, Institut de hautes études en administration publique, Lausanne, 2013

Jurisprudence majeure*
Leading Cases

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

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

CAS 2015/A/4262
Pape Malickou Diakhaté v. Granada CF, Bursaspor Kulübü, Kayseri Erciyesspor & FIFA
CAS 2015/A/4264
Granada CF v. Pape Malickou Diakhaté, Bursaspor Kulübü, Kayseri Erciyesspor & FIFA
4 October 2016

Football; Termination of employment contract without just cause by the player; Admissible method of filing of the statement of appeal; Interpretation of the term "mémoire"; Duty to look at the other linguistic version in case of doubts in reading one linguistic version of the CAS Code; Inadmissibility of counterclaims; Priority of the parties' autonomy in Article 17 RSTP; Buyout clause; Penalty/liquidation damages clause; Criteria to determine if a penalty/liquidation damages clause is excessive; Protected period; Definition of "new" club

Panel
Prof. Massimo Coccia (Italy), President
Mr Ricardo de Buen Rodríguez (Mexico)
Mr François Klein (France)

Facts

On 24 August 2011, Dynamo Kyiv, a professional club from Ukraine, transferred the Senegalese professional football player Pape Malickou Diakhaté (the "Player") to the professional Spanish football club Granada CF for EUR 4.5 million. On 25 August 2011, Granada signed an employment contract with the Player (the "Original Player Contract") valid for 5 seasons until 30 June 2016. Under the Original Player Contract, Granada undertook to pay the Player a total of EUR 445,000 per year.

On 30 August 2012, Granada and the Player signed another employment contract (the "Player Contract"), which reproduced in an identical manner all of the contractual terms of the Original Player Contract and added one new provision – Clause 5 of the *"Additional Clauses"* section ("Clause 5 of the Player Contract") – which reads: *"If the Player unilaterally terminates the present contract, in order to sign with another club or SAD, without cause imputable to Granada CF, in accordance with any labor or federative law in force, the Player, directly, and his new club, subsidiarily, shall be liable to pay an indemnity amounting to EUR 15,000,000 to Granada CF. In this regard, the Player undertakes to inform every club interested in signing a contract with him of said clause".*

On 3 February 2014, Granada loaned the Player to the professional Turkish football club Kayseri Erciyesspor for the remainder of the 2013-2014 season free of charge. Also on 3 February 2014, the Player and Granada entered into an agreement (the "Waiver Agreement") under which *"Mr. Malickou Diakhaté fully agrees on the cancellation of any and all financial obligations agreed with Granada Club de Futbol, SAD for the 2013-2014 season, as reflected in the player employment contract, and expressly declares that he has no outstanding amount to receive for the 2013-2014 season, granting therefore the broadest acquittance that is required under the law, and for any reason, in favour of Granada Club de Futbol, SAD and extinguishing the labor and economic relationships between the parties for the 2013-2014 season".*

On 4 July 2014, Granada extended the Player's summer holidays until 7 July 2014 without giving reasons. On this same day, the professional Turkish football club Bursaspor Kulübü made an offer for the definitive transfer of the Player, which Granada rejected.

On 7 July 2014, the Player sent a text message

to Granada's sporting director Mr. Cordero and an email to the club requesting to be paid outstanding amounts for a total of 361,5000 Euros.

On 8 and 16 July 2014, Granada further extended the Player's summer holidays until 16 and then 23 July 2014 without giving reasons. On 10 July 2014, Bursaspor made another offer for the definitive transfer of the Player, which Granada did not accept.

On 16 July 2014, the Player reiterated to the club by email his request to be paid outstanding amounts for a total of 361,5000 Euros.

On 31 July 2014, the Player, through his then counsel, terminated the Player Contract, citing the outstanding amounts as the reason for termination and on 5 August 2014, lodged a claim before the FIFA Dispute Resolution Chamber (DRC) against Granada for breach of contract.

On 8 August 2014, Bursaspor and the Player signed a preliminary contract, under which the parties agreed that, if three cumulative conditions were met, they would subsequently sign an employment contract with the terms stipulated in the preliminary contract (hereinafter the "Preliminary Contract"). The three conditions were: (i) that the Player pass his medical exam, (ii) that the Player certify his employment relationship with Granada had ended, and (iii) that the Board of Directors of Bursaspor agree to sign an employment contract. On 13 August 2014, Granada contacted Bursaspor and demanded that it avoid any negotiations with the Player without its consent. Granada also sent an email urging Bursaspor to contact it within 5 days in order to find an amicable solution, failing which it would have to take legal action and claim the amount of EUR 15 million. On 16 August 2014, Bursaspor responded to Granada, declaring that it never had any interest in the Player, that it did not sign any professional contract or other agreement with him, and that it had no connection with him.

On 10 September 2014, Granada replied to the Player's claim and also lodged a counterclaim against him for breach of the Player Contract and against Bursaspor for inducing that breach.

On 13 January 2015, the Player signed an employment contract with Kayseri valid until 31 May 2016 under which the Player would make EUR 76,000 per month.

On 10 April 2015, the DRC issued a decision in favor of Granada, ordering the Player and Kayseri – which had intervened in the DRC proceeding – to pay Granada EUR 3.1 million for the Player's early termination of the Player Contract without just cause.

On 2 October 2015, FIFA notified the Parties of the decision.

On 21 October 2015, Granada filed with the CAS a statement of appeal challenging the Appealed Decision of 10 April 2015. This initiated an appeals procedure referenced as CAS 2015/A/4264 Granada CF v. Pape Malickou Diakhaté, Bursaspor Külübu, Kayseri Erciyesspor & FIFA. Granada requested that the Player, Kayseri and Bursaspor be held jointly and severally liable to pay EUR 5 million. It arrived at this figure by taking the EUR 15 million amount from Clause 5, which in its view the DRC erroneously disregarded in calculating compensation under Article 17, para. 1 of the FIFA RSTP, and reducing it by two-thirds for its disproportionality. Granada also requested sporting sanctions be imposed on the Player and Kayseri.

On 22 October 2015 by fax and on 29 October 2015 by courier, the Player filed a statement of appeal also challenging the Appealed Decision.

This initiated a second appeals procedure referenced as CAS 2015/A/4262 Pape Malickou Diakhaté v. Granada CF, Bursaspor Külübu, Kayseri Erciyesspor & FIFA. The Player contended that he terminated the Player Contract with just cause and that, consequently, he could not be held liable to pay any compensation to Granada under Article 17, para. 1 of the FIFA RSTP and was not subject to any sporting sanctions under Article 17, para. 3 of the same regulations.

On 22 October 2015, Kayseri filed a statement of appeal also challenging the Appealed Decision. This initiated a third appeals procedure referenced as CAS 2015/A/4263 Kayseri Erciyesspor v. Granada CF. On 10 February 2016, in view of Kayseri's failure to pay its share of the advance of costs, pursuant to Article R64.2 of the CAS Code, the CAS deemed the appeal in the matter CAS 2015/A/4263 withdrawn.

Reasons

1. In appeal CAS 2015/A/4262, FIFA maintained that the appeal was inadmissible as the parties had until 23 October 2015 to file an appeal against the Appealed Decision, but that, while the Player had filed *by fax* a statement of appeal on 22 October 2015, it had not submitted the same *by courier* until 29 October 2015. The Player however contended that while the English version of Article R31 of the CAS Code was clear, the French version – which must, pursuant to Article R69, prevail where there is a discrepancy between the two versions – seemed to condition the validity of a statement of appeal faxed in advance on whether the appellant files the *"mémoire"* – that the Player understood to only mean the *"appeal brief"* – by courier within the deadline set in Article R51. The Player thus believed that because he filed his appeal brief within 10 days following the expiry of the time limit for appeal, the filing of the appeal was valid.

The Panel disagreed with the Player's interpretation of the term "mémoire" and of Article R31 of the CAS Code. First, it found that there was no discrepancy between the English and French texts of Article R31 of the CAS Code: Article R31 provides that the filing of the statement of appeal by courier is the general rule and that its filing by fax is only an exception that allows an appellant to file it *"in advance"* (*"par avance"*) by fax, but only accepts as *"valid"* (*"valable"*) the filing *"provided that"* (*"à condition que"*) it is also made by courier within the relevant time limit. Second, it held that in the French version of Article R31, *"mémoire"* could not be interpreted as a specific term for *"appeal brief"*, as the insertion of *"tout autre"* in the text *"…la déclaration d'appel et tout autre mémoire écrit…"* clearly indicated that the *"déclaration d'appel"* (*"statement of appeal"*) fell within the category of *"mémoire"* but did not distinguish the two. Moreover, Article R31 did not use *"mémoire d'appel"* which is the more narrow and precise French terms for appeal brief. Third, it deemed that although the French text certainly prevailed in case of discrepancy in the CAS Code (Article R69), ordinary diligence required all interested parties to look at the English version if they had doubts in reading the French version of the CAS Code, and vice versa. In other words, unless some true inconsistency between the two linguistic versions was detected, in case of interpretive doubts the CAS Code had to be construed in accordance with the meaning which best reconciled the French and English texts. Finally, the Panel emphasized that the final words of the second sentence of Article R31 "comme mentionné ci-dessus" or "as mentioned above" made obvious that the time limit for the courier to be sent when

the statement of appeal was also submitted by fax (second part of the rule) was exactly the same as the time limit to be respected when the appeal was only filed by courier (first part of the rule). As a result, the Panel held that, as the Player, after having submitted his statement of appeal by fax, had failed to send the same by courier within the 21-day deadline, the appeal CAS 2015/A/4262 was inadmissible.

2. For the Panel, this finding of inadmissibility had consequences on the Player's claims in CAS 2015/A/4264 where the Player was a respondent. Likewise, the finding that Kayseri's appeal (CAS 2015/A/4263) was withdrawn after the Turkish club had failed to timely pay the advance of costs had consequences on Kayseri's claim in that appeal.

   The Panel found that if the appeal of a party in a case has been held as inadmissible or withdrawn, irrespective of the principle of *de novo* established in Article R57 of the CAS Code, a CAS panel could not decide on this party's claims in a parallel case that had been consolidated with the first one and in which the party appeared as a respondent. Indeed, the acceptance of the party's claims would put the opposite party (the appellant in the second case) in a worse position than that determined by the decision appealed against by both parties. Ruling on said claims would be tantamount to accepting inadmissible counterclaims and would be, to some extent, contrary to the principle of *non ultra petita*. As a result, the Panel held that it could only decide in connection with Granada's appeal (CAS 2015/A/4264), and thus only rule on what were the financial and sporting consequences on the Player, Kayseri and Bursaspor for the Player's early termination of the Player Contract. On the other side, it could neither overturn FIFA's decision to hold the Player and Kayseri jointly and severally liable to Granada, nor award an amount lower that the EUR 3.1 million awarded in the Appealed Decision.

3. Starting with the financial consequences of the Player's early termination of the Player Contract to be assessed under Article 17 of the FIFA Regulations on the Status and Transfer of Players (RSTP), the Panel recalled that Article 17, para. 1 RSTP places priority on the parties' autonomy. Indeed, pursuant to that provision, the adjudicating body must first verify whether there is a provision in the relevant agreement that addresses the consequences of a unilateral breach of the agreement by the contracting parties, i.e. whether the parties have *"otherwise provided in the contract"*, and only if they have not, can it move on to calculate compensation using the other criteria. The Panel then noted that the parties had indeed agreed to such a provision in the Player Contract (Clause 5) and that, contrary to what the Player was submitting, it did not fall under the category of a buyout clause because its wording did not grant the Player the *"right"* to terminate that contract, but only set the financial consequences *"if"* (*"si"*) the Player terminated it. Furthermore, Clause 5 referred to an *"indemnity"* (*"indemnización"*) for the Player's unilateral termination of the contract, which was inconsistent with the concept of buyout clause as amounts agreed upon in a buyout clause are consideration for a contractual right, not for loss or damages. Nevertheless, Clause 5 of the Player Contract could not be disregarded in calculating compensation under Article 17 RSTP, as it qualified as a valid penalty/liquidation damages clause under Article 160 of the Swiss Code of Obligations (CO) as well as under the RSTP. The wording of the clause clearly reflected the intention of the parties to establish the financial consequences for the Player's unilateral, premature termination.

Contrary to FIFA's argumentation, it was irrelevant that the penalty/liquidation clause was not reciprocal, as there was no requirement in Swiss law or in the RSTP that such clauses be of that nature. Given the Panel's finding that Clause 5 of the Player Contract was a valid penalty/liquidation damages provision, the amount stipulated therein could not be disregarded – as the DRC had done – in calculating the compensation due under Article 17 RSTP. Furthermore, since the other criteria of that article are subsidiary to any agreed-upon penalty/liquidation damages, the Panel did not need to consider them.

4. The only question left for the Panel with respect to financial compensation under Article 17 RSTP was thus whether the amount stipulated in Clause 5 of the Player Contract was disproportionate under the applicable law. The Panel recalled that under Swiss law, parties were free to determine the amount of the contractual penalty (Article 163, para. 1 CO), but that the adjudicating body had the power to reduce the agreed-upon penalty at its discretion if it considered it to be *"excessive"* (Article 163, para. 3 CO). The nature of the agreement, the debtor's professional background and the aim of the penalty had to be taken into consideration in determining whether a penalty/liquidation clause was excessive. With this in mind, the Panel held, and noted it was undisputed - even by Granada -, that the amount of EUR 15 million stipulated in Clause 5 of the Player Contract was "excessive" under Article 163 CO. This was evident from the fact: (i) that only 2 football seasons remained in the Player Contract; (ii) that the aim of Clause 5 was to grant Granada compensation for loss or damage; and (iii) that the penalty of EUR 15 million was more than thirty times the EUR 445,000 salary stipulated under the Player Contract, more than three times the EUR 4.5 million Granada paid to acquire the Player from Dynamo, and more than eight times the EUR 1.8 million remaining of the transfer fee if amortized over the five years of the Player Contract. However, although in the Panel's view, these aforementioned circumstances would have required a much larger reduction than the two-thirds accepted by Granada, it was restricted from doing so as it would place Granada in a worse position than before its appeal. The Panel would have been empowered to reduce the amount awarded in the Appealed Decision only if the appeals brought by the Player or Kayseri had been found to be admissible, which was not the case. Accordingly, the Panel reduced the penalty/liquidated damages of Clause 5 to EUR 3.1 million, thus confirming the amount awarded by the DRC.

5. Continuing with the sporting consequences of the Player's early termination of the Player Contract, the Panel had first to determine whether this termination had occurred during the "protected period" or not. It recalled that the RSTP specified in Article 17, para. 3 that *"the protected period starts again when, while renewing the contract, the duration of the previous contract is extended"*. This meant that for the protected period to reset, there had to be an *extension* of the previous employment contract; it was actually irrelevant whether there was *"new"* agreement as opposed to *"amendment"*; the importance was on whether the employment relationship was *extended*. The Panel observed that the Player Contract of 2012 had not extended the duration of the Original Player Contract of 2011 at all. Therefore, the signing date of the Original Player Contract – 25 August 2011 – had to be considered as the starting point of the protected period. Taking into consideration

that the Player was 27-years old at the time of the signing of the Player Contract, the protected period had to be deemed to have lasted for three football seasons from 25 August 2011. Since the Player's termination of the Player Contract without just cause had occurred on 31 July 2014 after the end of the third season, it thus had fallen outside of the protected period and no sporting sanctions had to be imposed.

6. Granada had also requested that Bursaspor be held jointly liable to pay the awarded compensation for allegedly inducing the Player to terminate the Player Contract and had made reference to the Preliminary Contract signed between the Player and Bursaspor on 8 August 2014.

   The Panel recalled that Article 17 para. 2 RSTP defined *"new club"* as *"the club that the player is joining"* and that CAS jurisprudence had interpreted this definition to mean *"the first club to register the Player after his breach of the Employment Contract"*. For the Panel, it was undisputed that Kayseri had been the first club the Player had joined and registered to after he had terminated his contract with Granada and that the Player had never joined or registered with Bursaspor. In this regard, it was irrelevant that the Player had or nor negotiated with this club. As a result, Bursaspor, as a third club, did not face any financial consequences under the RSTP for the Player's breach.

Decision

In light of the foregoing, the Panel held that the appeal CAS 2015/A/4262 filed by Mr. Pape Malickou Diakhaté against the FIFA Dispute Resolution Chamber decision of 10 April 2015 was inadmissible and that the appeal CAS 2015/A/4264 filed by Granada CF SAD against the FIFA Dispute Resolution Chamber decision of 10 April 2015 was dismissed. Therefore, the appealed decision issued by the DRC on 10 April 2015 was confirmed.

CAS 2016/A/4416

Fédération Internationale de Football Association (FIFA) v. Confederación Sudamericana de Fútbol & Brian Fernández

7 November 2016 (operative part 8 July 2016)

Football; Doping (cocaine); Determination of the standard period of ineligibility for a non-intentional ADRV; Impossibility to eliminate the period of ineligibility based on No Fault or Negligence; Reduction of the standard sanction based on Non-Significant Fault ; Assessment of the appropriate period of ineligibility

Panel

Prof. Ulrich Haas (Germany), President
Prof. Luigi Fumagalli (Italy)
Mr José Juan Pintó (Spain)

Facts

The Fédération Internationale de Football Association ("FIFA" or the "Appellant") is the world governing body of Football.

The Confederación Sudamericana de Fútbol ("CONMEBOL" or the "First Respondent") is the continental football federation of South America, headquartered in Luque, Paraguay.

Mr Brian Fernández (the "Player" or "Second Respondent") is a professional football player currently affiliated with the Argentinian Football Association, member of CONMEBOL.

On 28 May 2015, the Player underwent an anti-doping control carried out during a competition held in Buenos Aires. The analysis of the "A-Sample" showed the presence of the prohibited substance *Cocaine* and its metabolites, *Methylecgonine* and *Benzoylecgonine*, classified under S6 a (Non-Specified Stimulants) on the WADA 2015 Prohibited List. The substance is prohibited in-competition only. On 26 June 2015 the Laboratory that carried out the analysis informed CONMEBOL of the adverse analytical finding ("AAF").

On 9 July 2015, the Chairman of CONMEBOL's Disciplinary Unit ("CDU") issued a provisional suspension of the Player.

On 28 July 2015, the "B-Sample" analysis of the sample confirmed the result of the "A-Sample".

On 4 August 2015, the CDU opened disciplinary proceedings against the Player.

On 21 October 2015, the CDU rendered its decision (the "Decision") and imposed on Mr BRIAN FERNÁNDEZ the sanction of a two-year (2) suspension and specified that *"after the first year of suspension has been served, the second year of the sanction shall be suspended and Mr BRIAN FERNÁNDEZ shall be eligible to play"*, under certain conditions.

On 17 November 2015, the Player filed an appeal against the Decision with the Appeal Chamber of the CDU (the "Appeal Chamber"), requesting the amendment of the Decision regarding the starting date of the sanction.

On 14 December 2015, the Appeal Chamber issued its decision (the "Appealed Decision"), dismissing the Appeal filed by the Player.

On 25 January 2016, FIFA filed its Statement of Appeal against the Appealed Decision with the Court of Arbitration for Sport ("CAS").

On 8 February 2016, FIFA filed its Appeal Brief and mainly requested that *"Mr Brian Fernández is sanctioned with a two-year period of ineligibility starting date on which the CAS award enters into force. Any period of ineligibility already served by the Player based on the doping control initiated by CONMEBOL shall be credited against the total period of ineligibility imposed"*.

In its Answer, dated 7 March 2016, the First Respondent requested the CAS to dismiss the appeal lodged by FIFA against Decision D/2/2014.

A hearing took place in Lausanne on 20 June 2016.

In his Answer, dated 8 March 2016, the Second Respondent – *inter alia* – mainly requested to reject the appeal against the CONMEBOL decision.

Reasons

1. It is undisputed that the Second Respondent committed an ADRV on 28 May 2015 according to Art. 6 and Art. 7 ADR (*"Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's biological sample"*). The provision corresponds to Art. 2 (1) WADC. As set out in the outline of the facts of the case, the sample was provided by the Player in the course of an anti-doping control carried out during a competition. The Player tested positive for the prohibited substance *Cocaine* and its metabolites *"Benzoylecgonine"* and *"Methylecgonine"*. Likewise, it is undisputed that *Cocaine* (and its metabolites) is a "non-specified substance" (S 6.a Prohibited List) and that the substance is prohibited in-competition only. Furthermore, the Parties were in agreement that the ADRV committed on 28 May 2015 constituted the Player's first violation.

2. With respect to the appropriate period of ineligibility the Parties agreed that the Player did not commit an intentional ADRV on 28 May 2015 and that, thus, Art. 19 (1) FIFA Anti-Doping Rules (ADR), which provides for a period of ineligibility of four years, was not applicable. As a result, the starting point for the determination of the applicable period of ineligibility was Art. 19 (2) ADR (Art. 10 (2) (2) WADC). The article provides for a (standard) period of ineligibility of two years in case an athlete has acted negligently.

   Even though the Parties were in agreement that the use of the prohibited substance was unrelated to sport performance, the Parties were in dispute whether or not – based on the facts submitted – further reductions applied to the period of ineligibility provided for in Art. 19 (2) ADR.

3. According to Art. 21 ADR ("No Fault or Negligence") the otherwise applicable sanction shall be eliminated, if the athlete bears "No Fault or Negligence". The provision corresponds to Art. 10 (4) WADC. The threshold for "No Fault or Negligence" is high. The term "No Fault or Negligence" is defined in the Appendix A to ADR as follows:

   "The Player or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule".

   This notion of "utmost caution" is incompatible with an athlete that deliberately ingested a substance that he knew was prohibited in-competition. This remains true when looking at the facts and circumstances of the present case. The

Player did not suggest an accidental or involuntary ingestion of the drug. Instead, the Player admitted having taken *Cocaine* voluntarily. According to his submission he did so on two occasions. Even if the Player encountered difficulties and hardships in his life, the Panel found that all these facts did neither justify the presence of the prohibited substance in competition nor did they eliminate the Player's personal duty to ensure that he did not compete with a prohibited substance present in his body. Consequently, the Panel found that the otherwise applicable period of ineligibility of two years couldn't be eliminated on the ground that the Player bore No Fault or Negligence.

4. The ADR provide for a reduction of the otherwise applicable sanction in case of No Significant Fault or Negligence ("NSF") where a non-specified substance is involved. Such reduction is based on the Player's degree of Fault, but the reduced period of Ineligibility may not be less than one half of the period of Ineligibility otherwise applicable (Art. 22 (2) ADR).

   In order to establish whether or not an athlete acted with NSF, the athlete's behaviour could be compared to the standard of care that could be expected from a "reasonable person" in the athlete's situation. As a rule of thumb, CAS jurisprudence has found that the threshold of NSF is met if it is established that the athlete has observed the *"clear and obvious precautions which any human being would take"* in the specific set of circumstances (CAS 2005/A/847, § 7.3.6). Obviously, a "reasonable person" would never have consumed drugs to begin with, in particular drugs like *Cocaine* the addictive character of which is well known. However, this is not the (decisive) issue when assessing whether or not an athlete acted with NSF, since the definition of said term specifically states that the athlete's level of fault must be assessed "in relationship to the anti-doping rule violation".

   The Panel noted that the consumption of Cocaine by itself is not an ADRV. Cocaine is banned – according to the Prohibited List – in competition only. From the standpoint of the fight against doping there is, in principle, no issue if these drugs are ingested in a "recreational" context unrelated to competition as long as the athlete does not return to competition with the drug still present in his system.

   The definition of NSF in the WADC includes a comment with regard to *Cannabinoids* which provides as follows:
   For Cannabinoids, an Athlete may establish No Significant Fault or Negligence by clearly demonstrating that the context of the Use was unrelated to sport performance.

   Based on the legislative history of the WADC, the Panel considered that the legal situation with respect to *Cannabinoids* applied also – by analogy – to the consumption of *Cocaine*. Ii is to be noted in this respect that both drugs (*Cannabinoids* and *Cocaine*) have been treated together as "Substances of Abuse" making it clear that recreational drug use merits "special treatment". (see also in this respect RIGOZZI/HAAS/WISNOSKY/VIRET, *Breaking Down the Process for Determining a Basic Sanction under the 2015 World Anti-Doping Code*, Int. Sports Law J (2015) 15:3, 27: *"… the panel might consider applying by analogy the special assessment for cannabinoids included in the Comment to the definition of No Significant Fault or Negligence in Appendix 1 of the 2015 Code, in situations that appear consistent with its underlying rationale".).*

   Second, according to the Panel, also a

systematic interpretation of the rules spoke in favour of treating both "substances of abuse" similarly when it came to assessing the athlete's level of fault in relation to their consumption. Finally, the application of the comment to NSF by analogy to *Cocaine* also helped to avoid inconsistencies with Art. 19 (3) ADR (Art. 10 (2) (3) WADC). The article provides that the recreational use of a drug (that is only prohibited in-competition) does not constitute "intentional doping" when being used in a context unrelated to sport performance. If however, the recreational use of a drug prohibited in competition only would constitute intentional doping in a context unrelated to sport, it would be contradictory to prevent the same athlete from recourse to the concept of NSF (enshrined in the ADR / WADC) by pointing to his alleged intentional consumption of the drug.

In casu, the Panel found that the evidence on file spoke in favour of a *Cocaine* use unrelated to sport performance. Based on the facts before it, the Panel concluded that the Player qualified for NSF.

5. In light of the jurisprudence in CAS 2013/A/3327 & 3335, CAS Panels distinguished between different categories of negligence, i.e. light, normal and significant negligence. Only the first two categories allow for a reduction of the otherwise applicable period of ineligibility according to Art. 22 (2) ADR. In case of NSF, the applicable sanction can be reduced down to one half of the otherwise applicable sanction. Accordingly the applicable scale of sanction in the case at hand extends from 12 – 24 months. Applying the above categories of negligence to this scale of sanction, the Panel concluded that in case of:

   a. light degree of negligence, the applicable period of ineligibility ranges from 12-18 months, and
   b. in the case of normal degree of negligence, the applicable range is from 18-24 months.

   In the given case the Panel found that the objective level of negligence was not negligible, since the prohibited substance had been ingested rather close to the sporting event. The Player, thus, did not take any particular precautions with respect to observing a "cooling-off" period. Considering the Player's reduced ability to exert control over and steer his private life, the Panel found that the Player's subjective level of negligence was lower. Balancing both aspects the Panel found that this was a case on the borderline between normal and light degree of negligence and, thus, deemed a period of ineligibility amounting to 18 months to be appropriate.

Decision

As a result, the Panel partially upheld the appeal, set aside the decision of the Appeal Chamber of CONMEBOL Disciplinary Unit and sanctioned Brian Fernandez with a period of ineligibility of 18 months, starting from the date of the present award, with credit given to any period of ineligibility already served.

CAS 2016/A/4462
Hellas Verona FC v. FK Donji Srem
11 October 2016

Football; Payment of transfer fee under transfer agreement in absence of effective transfer of player; Interpretation of contracts and intent of the parties; *Essentialia negotii* of transfer contracts; Precontract and letters of intent; Obligations of the club transferring the player; Sale of players; Obligations of parties involved in transfer under FIFA Transfer Matching System (FIFA TMS)

Panel
Mr José Juan Pintó (Spain), President
Prof. Petros Mavroidis (Greece)
Mr João Nogueira Da Rocha (Portugal)

Facts

Hellas Verona FC (hereinafter the "Appellant" or "Hellas Verona") is an Italian football club with registered seat in Verona, Italy. It is affiliated with the Federazione Italiana Giuoco Calcio, which in turn is a member of the Fédération Internationale de Football Association (hereinafter "FIFA").

Donji Srem (hereinafter the "Respondent" or "Donji Srem") is a Serbian football club with registered seat in Pećinci, Serbia. It is affiliated with the Football Association of Serbia, which is also a member of FIFA.

On 13 February 2013, Donji Srem and the Croatian-Palestinian player R. (hereinafter the "Player") entered into an employment agreement valid until 19 January 2015.

On 22 August 2014, Hellas Verona made an employment offer to the Player, conditional upon the conclusion of a further transfer agreement between Hellas Verona and Donji Srem (hereinafter the "Employment Offer"). The Employment Offer, also signed by the Player, laid out the payments due to the Player for the seasons 2014 - 2017. Also on 22 August 2014, Hellas Verona sent an offer to Donji Srem for the definitive transfer of the Player in exchange of EUR 300,000 and 15% of the profit of the future transfer of the Player.

On 3 October 2014, Hellas Verona and Donji Srem signed a document (hereinafter the "Agreement") which, essentially, foresaw the same financial conditions as stipulated in the transfer offer. The Agreement also contained the following clause:

> *"The football club Hellas Verona F.C. S.p.A., legally represented by its Sport Director Mr. Sean Sogliano, hereby promises to permanently buy the sporting services of the Player [R.] (07.10.1993), currently signed up with the Serbian club FK Donji Srem, at the following conditions: […].*

On 17 November 2014, the Player communicated to Hellas Verona that given the fact that he had only received an offer by Hellas Verona but not a professional contract he understood that Hellas Verona had cancelled the contract negotiations. That Player considered that given that he had only signed an offer but not a contract no further obligations resulted for him from the signed document.

On 6 December 2014, Hellas Verona communicated to Donji Srem that the incorporation of the Player was expected on 27 December 2014. The Player did not report to Hellas Verona on or after the date indicated by Hellas Verona; instead he finally joined the Serbian Club FK Borac Cacak.

On 18 December 2014, Donji Srem issued an invoice to Hellas Verona regarding the first payment of the Agreement, to be paid on 3

January 2015.

On 3 January 2015, Donji Srem released the Player from his employment contract through a letter of clearance. That letter, amongst others, stipulated that a) Donji Srem "seeks compensation", b) that no compensation fee had yet been paid to it and that c) a compensation agreement had been made with the club the Player joins. The letter of clearance further contained the following clause:

> *NOTE: The player may be registered with any club of his own choice without any impediments imposed by the Football Club: ONLY WITH FC HELLAS VERONA ON THE BASIS OF THE CONTRACT WITH THE PAYMENT OF INDEMNITY"* (underline added).

On 5 January 2015, Donji Srem - having been informed that the Player did not join Hellas Verona - communicated to the latter it had duly informed the Player of Hellas Verona's request to present himself on 27 December 2014.

On 30 January 2015, Donji Srem again requested payment of the first instalment of the Agreement; that in the absence of compliance by 3 February 2015 it would sue Hellas Verona through FIFA.

On 6 February 2015, Donji Srem lodged a claim before the FIFA Players' Status Committee (hereinafter "FIFA PSC") against Hellas Verona requesting the first instalment of the Agreement. By modified claim of 2 July 2015, Donji Srem also requested the second instalment of the Agreement.

On 10 February 2015, Hellas Verona communicated directly to Donji Srem regarding the Player's failure to show up on the requested date and to sign the employment contract with it. Hellas Verona further stated being *"determined to take action in order to protect its interests against this clear breach of contract"*.

On 24 November 2015, the Single Judge of the FIFA PSC rendered its decision, fully accepting the claim of Donji Srem and ordering Hellas Verona to pay the amount of EUR 300,000 plus interest until the date of effective payment. The grounds of the decision - notified to the parties on 28 January 2016 - may be summarized as follows: a) the Agreement is to be considered valid since it was signed by both parties, the financial conditions for the transfer of the Player were duly established and it did not contain any condition to trigger Hellas Verona's obligations; b) Hellas Verona clearly expected the incorporation of the Player which confirms the validity of the Agreement; c) the amount convened in the Agreement had to be paid pursuant to the basic legal principle *pacta sunt servanda*.

On 18 February 2016, Hellas Verona filed its statement of appeal with the Court of Arbitration for Sport (hereinafter the "CAS"), pursuant to Article R47 of the Code of Sports-related Arbitration (hereinafter the "CAS Code"), challenging the decision of the PSC.

A hearing took place on 6 July 2016 in Lausanne, Switzerland.

Reasons

1. The Panel, to start with, examined whether the Agreement was binding on the parties. In this context, in support of its claim that the Agreement was of provisional nature, the Appellant relied on the wording of the Agreement, in particular the section stipulating that Hellas Verona *"**promises to** permanently **buy** the sporting services of the player"*. To the Appellant this phrase expresses a future intention to buy the sporting services of the Player and not the immediate purchase of such services.

Conversely, the Respondent considered that the Agreement was a definitive transfer contract as it did not establish a condition to be fulfilled in order to become binding for both parties or to trigger Hellas Verona's payment. Donji Srem further underlined that it had not been asked by Hellas Verona to sign any definitive transfer agreement; that it was crystal clear that Hellas Verona considered to have a valid employment contract with the Player and a valid transfer agreement with Donji Srem.

To settle the discrepancies existing amongst the parties the Panel reverted to Article 18.1 of the Swiss Code of Obligations (SCO), reminding that Swiss law could be applied on a subsidiary basis; that Article 18.1 of the SCO foresees that in order to assess the form and the terms of a contract, the true and common intention of the parties should be ascertained without dwelling on any inexact expressions or denominations that the parties might have used, either in error or to conceal the true nature of the agreement. According to consistent CAS jurisprudence, the interpretation of a contractual provision in accordance with Article 18 SCO aims at assessing the intention of the parties at the time when they concluded the contract. On this basis, Swiss scholars and case law of the Swiss Federal Tribunal have indicated that the primary goal of interpretation is to ascertain the true common intentions (consensus) of the parties. Where a factual consensus cannot be proven, the declarations of the parties must be interpreted pursuant to the principle of good faith in the sense in which they could and should have been understood, taking into account the wording, the context, as well as all circumstances. The Panel noted that within the terms of the Employment Offer, signed by Hellas Verona and the Player on 22 August 2014, it was established that *"This proposal is conditional upon the transfer of the player from FK Donji Srem to Hellas Verona"*. That furthermore, also on 22 August 2014, Hellas Verona sent a transfer offer to Donji Srem with the same financial conditions as the ones established later on in the Agreement signed on 3 October 2014. The Panel - noting that the Agreement did not contain any clause providing for the signature of a further definitive contract or any other item that might lead to think that it should not be considered as a final and binding contract - concluded that by signing the Agreement the parties' intention was to conclude a definitive transfer agreement. This conclusion was also confirmed by the parties' behaviour after the execution of the Agreement: amongst others, at no time had Hellas Verona requested Donji Srem to conclude another transfer agreement; rather, Hellas Verona invited the Player to join it without any reference to a further transfer formalization; furthermore, in its correspondence sent to Donji Srem on 10 February 2015, Hellas Verona stated that *"… it was determined to take action in order to protect its interest against this clear breach of contract"*. The Panel held that given Hellas Verona's claim of the non-arrival of the Player, it clearly considered having a valid transfer agreement with Donji Srem and a valid employment contract with the Player. Lastly the Panel underlined that whereas it was common practice in the football world, confirmed by CAS jurisprudence, that transfer agreements require the full consent of the three parties involved, *i.e.* the two clubs and the footballer, at the time of the execution of the Agreement, the Player had not raised any objections about the Employment Offer; further his consent for his movement to Hellas Verona was in principle determinable by his signature in such document.

2. The Panel further addressed the Appellant's

argument that the *essentialia negotii* of a transfer agreement were not determined in the Agreement since it did not provide for a transfer date. In this respect the Panel shared the Respondent's view *i.e.* that the essential elements of a transfer contract - namely the parties (Hellas Verona and Donji Srem), the object (the transfer of the Player), the remuneration (EUR 300,000 in two instalments plus a sell-on fee), the date of the contract (3 October 2014) and the signatures of the clubs' representatives - were indeed determined in the Agreement. The Panel further held that it could be reasonably concluded from the Appellant's and the Respondent's behaviour - the former's by requesting appearance of the Player on 27 December 2014, the latter's by releasing the Player on 3 January 2015 - that the movement had to occur in the winter transfer window of the season 2014/2015.

3. With regards to the Respondent's argument that the title of the Agreement *i.e. "Agreement between Hellas Verona F.C. and FK Donji Srem* ***for the permanent transfer of the player*** *[R.]"* confirmed that the Agreement was not a mere precontract, the Panel developed that whereas the FIFA Regulations and Swiss law did not provide a specific, explicit definition of a "precontract", according to CAS jurisprudence this notion was well known in legal practice as a sort of "promise to contract", defined as the reciprocal commitment of at least two parties to later enter into a contract. Unlike when concluding a contract, the parties to the precontract have not agreed on the essential elements of the contract; or at least the precontract does not reflect the final agreement. In some cases, letters of intent can be considered as precontract as the parties agree on some important elements in view of the negotiation of the final contract and may provide for sanctions to be imposed in case of violation of specific commitments already taken at the level of the letter of intent. However, good practice requires from the parties to expressly mention if the document is not the final contract and does not represent the definitive agreement. CAS jurisprudence stressed that in contractual negotiations, the parties must consider the risk to be bound at an earlier stage than they sought and that this risk is covered by specific wordings found for instance in letters of intent. The Panel however underscored that, even assuming, *quod non*, that the sentence *"promises to permanently buy the sporting services of the Player …"* contained in the Agreement could be interpreted as the Agreement being a pre-contract, considering all the circumstances of the case, it maintained its conclusion that the Agreement was of definite and binding nature.

4. The Panel thereupon addressed the Appellant's argument that it was not obliged to pay the transfer fee insofar as the Respondent had failed to comply with its obligations under the Agreement, *i.e.* to transfer the sporting services of the Player. The Appellant essentially argued in this context that despite the fact that the Player, following expiry of his employment contract with Donji Srem, had been free to conclude an employment contract without any transfer compensation to Donji Srem, it had signed the Agreement in order to ensure the sporting services of the Player. That accordingly, Donji Srem's only obligation was to ensure the Player's transfer to Hellas Verona; that the Agreement has to be considered a synallagmatic contract in which Donji Srem undertook to provide the sporting services of the Player and Hellas Verona promised a payment for obtaining them. The Appellant further contended that the obligation assumed by Donji Srem was a *"guarantee of performance by a third party"* under Article 111

of the SCO. Alternatively, that Donji Srem was in breach because Hellas Verona never received the Player's services and should therefore repair the damage caused to the Appellant according to Article 97.1 of the SCO.

In response to the Appellant's argument that Donji Srem's obligation was to "deliver the player" or to "deliver the services of the Player", the Respondent underlined that it was not in a position to legally take over the Player's obligations as this would be impossible, unlawful and immoral. Furthermore, it had complied with all its obligations i) by releasing the Player from its employment contract so that he could join Hellas Verona, ii) by issuing the "Letter of Clearance" and iii) by insisting on several occasions that the Player had to comply with the Employment Offer and join Hellas Verona. However, in spite of Donji Srem's best efforts to convince the Player to join Hellas Verona, he refused to do so.

The Panel found that the FIFA Regulations do not contain any provision stipulating that by signing a transfer agreement, the club transferring a player is responsible for the further actions of the player. That rather, the obligation assumed by the former club is to release the player from his contractual obligation with it; it is not to force the player to sign a contract with a specific new club or to provide his sporting services to a specific club. In particular, in the absence of any contractual obligation specifically undertaken by Donji Srem to ensure or guarantee a particular action of the Player, Donji Srem's obligation cannot be considered a "guarantee of performance by a third party" in the meaning of Article 111 of the SCO. Accordingly, if ultimately the transferred player did not sign up with the new club as foreseen in the transfer agreement, the former club could not be held in breach of the transfer agreement and was not liable for damages under Article 97.1 SCO.

The Panel recalled the considerations made in the award of case CAS 2010/A/2098, according to which, in the world of professional football, the term "sale" is used inaccurately as in fact it is not possible to describe the transfer of a player from a club to another in terms of a sale (or the contract entered into by the old and the new club as a sale contract) in the same way as one could refer to the sale of goods or other property. That it was inconceivable for clubs to have property rights in, or equivalent title, to players, which could be transferred from one entity to another. That in order to make up for this lack of property or title and to establish a "right" which can be transferred, a category of so-called "federative rights" has been identified, *i.e.* rights stemming from the registration with a football association or league of a player with a club. The "sale" of a player, therefore, is not an agreement affecting a club's title to a player, transferred from one entity to another against the payment of a purchase price. The transfer consented by the seller, and the price paid in exchange, do not directly consider a property right, but are part of a transaction affecting the employment relation existing between a club and a player, which always require the consent of the "transferred" player and the clubs involved. Through the "sale", the parties express their consent to the transfer of the right to benefit from the player's performance, as defined in the employment agreement; which, in turn, is the pre-condition to obtain the administrative registration of the player with a federation in order to allow the new club to field him. In the context of a "sale" contract, a transfer, being object and purpose of the parties' consent, can be made in two ways:

(i) by way of assignment of the employment contract; and (ii) by way of termination of the employment agreement with the old club and signature of a different employment agreement with the new club. In both cases, the old club expresses its agreement (to the assignment or to the termination of the old employment contract, as the case may be) against receipt of a payment - which substitutes for the loss of the player's services; the new club accepts the assignment of the existing employment contract or consents to enter into a new contract with the player; and the player consents to move to the new club. The Panel concluded that also in the Agreement, the term "buy-sale" had been used inaccurately and that the parties were well aware that they were not "purchasing" the Player: Donji Srem's commitment as a "seller" was to consent to the termination of the employment contract with the Player, and Hellas Verona's commitment as the "buyer" was to pay EUR 300,000 for that consent.

5. Lastly the Appellant argued that the Respondent had failed to fulfil the obligations foreseen in par. 4 of Article 2 of Annexe 3 of the FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP") according to which *"where a transfer agreement exists,* ***both clubs*** *involved must,* ***independently of each other****, submit information and, where applicable, upload certain documents relating to the transfer into TMS as soon as the agreement has been formed"*; that in light of this failure the Respondent shall be prevented from receiving the transfer compensation. Conversely, the Respondent argued that transfer agreements are not regulated by the applicable articles for FIFA TMS and that therefore, the validity and legal consequences of the Agreement are independent from these provisions. The Respondent further contended that in accordance with FIFA jurisprudence, even if the new club did not make use of the player's services, because it did not upload the transfer agreement into the FIFA TMS, it was liable to pay the transfer compensation to the former club. That the transfer agreement *per se* constitutes sufficient legal basis to conclude that the new club must pay transfer compensation, irrespective of the questions whether the new club benefited from the services of the player, or whether the player was duly registered with the new club.

Citing various rules of Annexe 3 of the FIFA RSTP, the Panel concluded that under the FIFA TMS Regulations, the clubs involved in a transfer incur two obligations: to submit, and to confirm the information to the FIFA TMS; that the clubs shall submit the information in the system and the process is then moved to the associations for electronic handling of the International Transfer Certificate (ITC). The request of the ITC shall be "carried out by the new association" after confirmation of the new club; the response to the ITC request shall be only carried out by the former association after the confirmation of the former club. In other words, even if the clubs must submit the information, independently of each other, the confirmation of the new club has to come first, followed by the confirmation of the former club. The Panel concluded that whereas the Respondent did not submit the information included in the FIFA TMS, Hellas Verona did not either submit the relevant information into the system or confirmed it to the Italian association. That without these steps Donji Srem could not have confirmed the information even though it had submitted it; the Panel therefore considered that the Appellant could not blame the Respondent on this matter.

Decision

The Panel therefore dismissed the appeal by Hellas Verona and confirmed the decision by the PSC.

CAS 2016/O/4469
International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation (ARAF) & Tatyana Chernova
29 November 2016

Athletics (Middle distance); Doping (Athlete's Biological Passport, ABP); CAS Jurisdiction according to Article 38.3 IAAF Competition Rules; Version of the regulations applicable; ABP finding as single anti-doping rule violation; Provisions of the WADA Code to be incorporated without substantive change by each Anti-Doping Organization; Prerequisites to disregard sample from ABP profile; Prerequisites to add samples to ABP profile; Establishment of an anti-doping rule violation by means of an ABP; Disqualification of results in case of a violation found by reference to the ABP;

Panel
Prof. Michael Geistlinger (Austria), Sole Arbitrator

Facts

The International Association of Athletics Federations (the "Claimant" or the "IAAF") is the world governing body for the sport of Athletics; it has its registered seat in Monaco.

The All Russia Athletics Federations (the "First Respondent" or the "ARAF") is the national governing body for the sport of Athletics in the Russian Federation, with its registered seat in Moscow, Russian Federation; it is a member federation of the IAAF. However, at the time of the present CAS proceedings the IAAF had suspended ARAF's membership and had taken over the responsibility for coordinating disciplinary proceedings on behalf of the ARAF.

Ms Tatyana Chernova (the "Second Respondent" or "Athlete") is a Russian athlete specialising in heptathlon.

Prior to the launch of the present proceedings, a retest performed in 2013 of a urine sample initially provided by the Athlete on 15 August 2009 on the occasion of the 2009 IAAF World Championships in Berlin, Germany, turned out positive for the anabolic steroid oral turinabol. On 20 January 2015, the Disciplinary Anti-Doping Committee of the Russian Anti-Doping Authority ("RUSADA Disciplinary Committee") found the Athlete guilty of an anti-doping rule violation, imposed an ineligibility period of two years on her and disqualified her results from 15 August 2009 until 14 August 2011. On 24 April 2015, the IAAF filed an appeal against the decision of the RUSADA Disciplinary Committee with the Court of Arbitration for Sport (the "CAS"), seeking an increased sanction and disqualification of further results. Upon request of the IAAF the respective proceedings - reference number CAS 2015/A/4050 - were suspended pending the proceedings in the present case.

From 14 August 2009 to 13 November 2014, the IAAF collected 19 Athlete Biological Passport (the "ABP") blood samples from the Athlete. Each of the samples was analysed by a laboratory accredited by the World Anti-Doping Agency ("WADA") and logged in the Anti-Doping Administration & Management System ("ADAMS") using the Adaptive Model, a statistical model that calculates whether the reported values of the three blood markers HGB (haemoglobin) concentration, RET% (percentage of immature red blood cells - reticulocytes) and OFF-score (a combination of HGB and RET%) fall within an athlete's expected distribution.

On 7, 9 and 17 April 2015, three experts with knowledge in the field of clinical haematology, laboratory medicine and haematology, sports medicine and exercise physiology (the "Expert Panel") analysed the Athlete's ABP profile on an anonymous basis and concluded independently from each other that *"it is highly unlikely that the longitudinal profile is the result of a normal physiological or pathological condition and may be the result of the use of a prohibited substance or prohibited method"*.

On 17 August 2015, after the Athlete had been granted an opportunity to explain the alleged abnormalities of her ABP, but in the absence of any respective explanation, the Expert Panel issued a joint expert opinion (the "Joint Expert Opinion"); it concluded that *"it is highly likely that a prohibited substance or prohibited method has been used and that it is unlikely that the passport is the result of any other cause"*.

On 5 February 2016, the IAAF notified the ARAF of an alleged anti-doping rule violation of the Athlete under Rule 32.2(b) of the IAAF Competition Rules (the "IAAF Rules") (*Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method*) on the basis of a longitudinal analysis of the Athlete's ABP, alleged to involve prohibited blood doping in the period between August 2009 and November 2014. Accordingly the Athlete was immediately provisionally suspended and was granted a right to request a hearing. The IAAF further informed ARAF that given ARAF's suspension, the IAAF had taken over responsibility for coordinating the disciplinary proceedings in *inter alia* the case of the Athlete. Also by letter of 5 February 2016 the IAAF informed the Athlete of the suspension of ARAF's membership and that the IAAF had taken over the responsibility for coordinating the disciplinary proceedings. The letter to the Athlete further explained that if she requested a hearing her case would *"be referred to the Court of Arbitration for Sport (CAS) in Lausanne (Switzerland) for a hearing to be conducted, at her election, in accordance with one of the following two procedures.*

> *13.1 Before a Sole Arbitrator of the CAS sitting as a first instance hearing panel pursuant to IAAF Rule 38.3. The case will be prosecuted by the IAAF and the decision will be subject to an appeal to CAS in accordance with IAAF Rule 42; or*
>
> *13.2 Before a CAS Panel as a single hearing, with the agreement of WADA and any other anti-doping organisations with a right of appeal, in accordance with IAAF Rule 38.19. The decision rendered will not be subject to an appeal (save to the Swiss Federal Tribunal)".*

On 19 February 2016, the Athlete informed the IAAF that she denied the accusations; she requested *"a hearing, as per IAAF Rule 38.2, according to the requirements of the Code of Sports-related Arbitration (CAS)"*.

On 23 February 2016, the IAAF filed its statement of appeal with the Court of Arbitration for Sport (the "CAS"), pursuant to Rule 38.3 of the IAAF Rules. In a nutshell it requested that CAS confirmed its jurisdiction and that further a period of ineligibility of two to four years was imposed on the Athlete.

On 25 February 2016, the CAS Court Office initiated the present arbitration and specified that, as per the Athlete's request, it had been assigned to the CAS Ordinary Arbitration Division but would be dealt with according to the Appeals Arbitration Division rules, in accordance with Article 38.3 seventh sentence of the IAAF Rules.

A hearing took place on 30 May 2016 in Lausanne, Switzerland.

Reasons

1. To start with the Sole Arbitrator analysed whether CAS had jurisdiction for the case at hand. In this context the Athlete essentially argued that there was no decision of a federation, association or any other sports-related body that could be appealed; that she had neither entered into an arbitration agreement with the IAAF pursuant to which the matter could be taken to CAS. Lastly that she had not requested for a hearing in accordance with Rule 38.3 of the IAAF Rules, but had rather invoked Rule 38.2 of the IAAF Rules and consequently she did not request for a hearing before CAS.

   For the IAAF CAS jurisdiction derived from Rule 38.3 of the IAAF Rules insofar as the ARAF, as a consequence of its suspension, was not in a position to conduct the hearing process by way of delegated authority from the IAAF pursuant to Rule 38 of the IAAF Rules. The Athlete had also expressly consented to the application of Rule 38.3 of the IAAF Rules. Whereas the claim, once filed, should be subject to the procedural rules set out at Article R47 of the CAS Code this did not mean that the threshold criteria of the respective article had to be satisfied.

   The Sole Arbitrator, underlining that the Athlete had not questioned that ARAF was properly suspended, found that CAS jurisdiction followed from the statutory rule of Rule 38.3 of the IAAF Rules. Furthermore, the relevant part of Rule 38.3 of the IAAF Rules (stating that the IAAF may proceed before CAS in the first instance where *"the Member fails to complete a hearing within two months, or, if having completed a hearing, fails to render a decision within a reasonable time period thereafter"*) clearly foresees that if a member fails to complete a hearing, the IAAF may finally elect to have the case directly referred to a single arbitrator appointed by CAS, provided the athlete – as here - is an International-Level Athlete. The Sole Arbitrator found that the Athlete had understood and accepted the IAAF's intention to refer the matter to CAS. Neither was the IAAF's letter of 5 February 2016 misleading nor was the Athlete's answer invalid because of false information provided by the IAAF. The Athlete's answer of 19 February 2016 could only be understood as requesting for a hearing before CAS. As the Athlete did not explicitly agree to the option offered by the IAAF under para. 13.2 of its 5 February 2016 letter, the procedure should be that of a sole arbitrator according to para. 13.1 of the IAAF's letter. That this procedure does not require exhaustion of any available legal remedies before submitting the matter to CAS. Lastly the Sole Arbitrator held that the language of Rule 38.3 fifth sentence of the IAAF Rules covers the understanding of the parties: a suspended member also fails to complete a hearing, with the consequence that the IAAF may refer the matter directly to CAS.

2. The Sole Arbitrator next turned to the question of the applicable law, noting at the outset that it was not disputed and corresponded to Rules 42.23 and 42.24 of the 2016-2017 IAAF Rules that the proceedings were primarily governed by the IAAF Rules and subsidiarily by the Monegasque Law; further, pursuant to the legal principle of *tempus regit actum*, procedural matters were governed by the regulations in force at the time of the procedural act in question; accordingly any procedural matters were governed by the 2016-2017 version of the IAAF Rules. As regards the law applicable to the substantive aspects of the asserted anti-doping rule violation the Sole Arbitrator took note that the IAAF argued that subject to the possible application of the principle of *lex mitior*, the

2012-2013 IAAF Rules should be applicable in all material aspects; that the Athlete asked for the application of the 2016-2017 IAAF Rules.

In this context the Sole Arbitrator pointed at the transitional provision of Rule 49.1 of the 2016-2017 IAAF Rules, which foresees that IAAF Rules 40.8(e) (Multiple violations) and 47 (Statue of Limitations) shall be applied retroactively. That otherwise, with respect to any anti-doping rule violation case pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective Date, the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred, unless it was determined that the principle of *lex mitior* appropriately applied in the circumstances of the case. The Sole Arbitrator first underlined that it followed from the concept of the WADA ABP Operating Guidelines that an ABP finding of an anti-doping rule violation was not to be considered as a multiple violation under Rule 40.8(e) of the 2016-2017 IAAF Rules but as a single anti-doping rule violation, established on the basis of a set of different samples collected at different times, places and occasions. That the matter in question did neither relate to the statute of limitations. Therefore the case fell under the prohibition of retroactive application of the 2016-2017 IAAF Rules, unless it was found that that edition should be applied based on the principle of *lex mitior*. Having thereupon analysed in their totality the eventually applicable sanctions under both the 2012-2013 and the 2016-2017 IAAF Rules the Sole Arbitrator concluded that as concerns the period of ineligibility, in the circumstances of the present case the most favourable version of the IAAF Rules for the Athlete was clearly the 2012-2013 version. As to the IAAF's Rules regarding disqualification of results the Sole Arbitrator elaborated that on their face, the 2016-2017 IAAF Rules were the more favourable rules for the Athlete insofar as they include a fairness exception (*"unless fairness requires otherwise"*), whereas the latter - read literally - did not. However the Sole Arbitrator also noted that the provision on disqualification of the 2009 World Anti-Doping Code (the "WADC") in force at the relevant time (Article 10.8 WADC) did include the fairness exception and that Article 10.8 WADC was part of the obligatory commitment of the IAAF as signatory to the WADC *i.e.* the IAAF was obliged to incorporate this provision without substantial change. As a consequence - and in line with the Athlete's request - the Sole Arbitrator found that Rule 40.8 of the 2012-2013 IAAF Rules had to be understood harmoniously with Article 10.8 WADC; that therefore, despite the fact that the fairness exception was not explicitly mentioned in the 2012-2013 IAAF Rules, it had nevertheless to be applied. In conclusion the Sole Arbitrator found that in the given circumstances the most favourable version of the IAAF Rules was clearly the 2012-2013 version of the IAAF Rules.

3. Thereupon the Sole Arbitrator examined whether the Athlete had violated Rule 32.2(b) of the IAAF Rules. He noted that in order to establish the anti-doping rule violation, the IAAF had focussed on an abnormal sequence in the HGB and OFF-score values in the Athlete's ABP with a probability in excess of 99,9%, individual "outliers" for all three blood markers in the Athlete's ABP, individual analyses of the Athlete's ABP by the Expert Panel, their Joint Expert Opinion, and further expert reports. That further the respective

irregularities always occurred in proximity to an important competition. In turn, the Athlete - relying on her expert - mainly advocated that certain samples of her ABP should be disregarded; that other samples could be additionally taken into account and that no indications existed that the respective data were not reliable; by doing so, the *"cleaned and updated"* ABP did not show any irregularities justifying ABP violations.

Starting with the Athlete's request to exclude some of the samples from her ABP, the Sole Arbitrator first addressed the Athlete's claim that one of the samples, showing higher levels of HGB, had been caused by dehydration. The Sole Arbitrator found that the Athlete had failed to establish that she suffered from dehydration at the relevant time; therefore he did not have to conclude whether dehydration might cause higher levels of HGB. Second, the Sole Arbitrator dismissed the Athlete's argument that the variation in the blood values of two other samples could be explained by storage at room temperature; in the opinion of the Sole Arbitrator the Athlete had not succeeded to rebut the establishment by the IAAF's experts of the use of a prohibited substance or prohibited method with regards to those two samples.

Third, the Sole Arbitrator addressed the Athlete's argument that sample 1 of her ABP (taken on 14 August 2009, on the eve of the 2009 IAAF World Championships in Berlin and displaying a high HGB concentration (15.80) paired with low reticulocytes (RET value 0.28%) resulting in a high OFF score (126.8)) and the ABP sample taken from her on 15 August 2009 only constituted one anti-doping rule violation, for which she had already been sanctioned; that therefore sample 1 should not be taken into account for her ABP. More specifically the Athlete argued that both sample 1 of her ABP and the positive test of 15 August 2009 had been caused by the anabolic steroid oral turinabol. Sample 1 had not been caused - as suggested by the IAAF and its experts - by the use and recent discontinuation of an erythropoietic stimulating substance *"to avoid detection in direct doping tests"*. The IAAF, supported by its experts, argued that sample 1 was really characteristic of blood manipulation: that its high OFF value was mainly due to the low RET% value (0.28%), and that in turn, such low RET% value was the sign of a suppression of erythropoiesis due to a recent and non-physiologic increase of the red cell mass. Furthermore, whereas anabolic steroids (such as turinabol) indeed impacted the red blood cell system - an increase in red cell mass being one of the main side effects - their effect on the red cell system was relatively slow, compared to human erythropoietin - the latter being the physiological regulator of red cell mass. That whereas the use and discontinuation of erythropoietin (EPO) caused relatively rapid changes in red blood cell markers, the action of anabolic steroids was delayed. The IAAF further highlighted that in light of the extremely low concentration of the long term metabolite discovered in the urine of 15 August 2009, the Athlete had likely ceased using oral turinabol at least three weeks before the doping control of 15 August 2009. That given the timing of the end of turinabol administration, sample 1 was likely not caused by the use of oral turinabol but highly likely by the use and discontinuation of an erythropoietic stimulant such as EPO.

To the Sole Arbitrator the IAAF experts had convincingly explained that the abnormal blood values of sample 1 could not have been caused by the Athlete's use of oral turinabol; that therefore sample 1

was not to be excluded from her ABP. The Sole Arbitrator further noted in this respect that even if sample 1 had been excluded, it would not have led to the consequence that no abnormal values would have been flagged in the Athlete's ABP insofar as also the HGB values of sample 2 and 17 were above the expected normal range (specificity 99.9%). Therefore if sample 1 was to be excluded, sample 2 would have been flagged as an individual outlier as the reference range of the Athlete's ABP would have been different due to exclusion of sample 1.

4. The Sole Arbitrator thereupon considered whether three samples voluntarily provided by the Athlete and not originally part of the Athlete's ABP should be added to her ABP.

   The Sole Arbitrator decided that the three samples could not be added to the Athlete's ABP as - in line with the IAAF's view - the circumstances under which these samples were obtained were unknown, they were taken outside the scope of the applicable ABP operating guidelines and no corresponding documentation package existed.

5. Prior to concluding on the question as to whether the Athlete had committed an anti-doping rule violation, the Sole Arbitrator examined the reliability of the ABP as means of evidence, underlining that the ABP had been generally acknowledged as a reliable and accepted means of evidence to assist in establishing anti-doping rule violations; that it was nevertheless possible, in a specific case, to reproach the reliability of the evidence contained it the ABP, provided that convincing arguments were made - corroborated by opinions of renowned experts in the field - that a specific element of the system did not operate satisfactorily; that in the absence of that, the ABP system was to be presumed valid. The Sole Arbitrator further emphasized that abnormal values in an ABP for which the athlete could not provide a credible explanation (*i.e.* "quantitative" assessment of the ABP evidence) did not, on their own, allow the conclusion that an anti-doping rule violation had been committed; that rather any deviations in the ABP were to be interpreted by experts, examining various hypotheses that could potentially explain the abnormality in the profile values; *i.e.* a "qualitative" assessment of the ABP evidence had to be performed. That the inference to be drawn from abnormal blood values was enhanced where the ascertainment of such values occured at a time when the athlete could benefit from blood manipulation, *i.e.* if the levels coincidence with the athlete's racing schedule. In conclusion, to find that an anti-doping rule violation had been committed a panel needed to be convinced that the abnormal values were caused by a "doping scenario", requiring both the quantitative information provided by the ABP as well as a qualitative interpretation of the experts and possible further evidence.

Applying the above to the case at hand, the Sole Arbitrator noted that when analysing the date of the respective sample as well as at the dates of the most recent competition before and after the respective sample, it was note-worthy that the samples that showed relatively elevated levels of HGB were all taken closely before or during an important competition, whereas the HGB levels of the samples taken in the off-season were relatively low, however all within the "normality" threshold of the ABP. That according to the IAAF experts this was a clearly non-physiological feature as HGB levels were usually lower during summer (competition period) due to physiological plasma volume expansion. That further, the

IAAF's experts, following a qualitative analysis of the ABP, had unanimously concluded that the abnormal results were highly likely caused by blood manipulation, namely the artificial increase of red cell mass using for example erythropoiesis stimulating substances. In the absence of any respective argument or explanation by the Athlete the Sole Arbitrator found that the IAAF had convincingly established that generally the Athlete had abnormally high HGB levels on the eve of competitions, whereas her HGB base levels, as shown by off-season samples, appeared to be much lower. That accordingly, the IAAF had succeeded to establish a "doping scenario" and that he was satisfied, to his comfortable satisfaction, that the values in the Athlete's ABP were caused by her use of a prohibited substance or a prohibited method; in conclusion the Sole Arbitrator considered the combination of circumstances constituted convincing evidence that the Athlete had engaged in blood doping practices throughout the period between August 2009 to at least July 2013, and had thereby violated Rule 32.2(b) of the 2012-2013 IAAF Rules.

6. Proceeding with the determination of the adequate period of ineligibility the Sole Arbitrator noted that whereas the IAAF requested a period of ineligibility of four years, the Athlete argued that she had already entirely served the period of ineligibility.

   To start with the Sole Arbitrator held that Rule 40.7(d)(ii) of the 2012-2013 IAAF Rules, headlined *"Additional Rules for Certain Potential Multiple Violations"*, was applicable as the Athlete's ABP violation had occurred before she was notified of the steroid charge. That insofar as the Athlete had not appealed the judgment by which she was suspended for the steroid violation, that violation was established as having been committed. That however, different from what was assumed in Rule 40.7 (d)(ii) of the IAAF Rules, the period of ineligibility deriving from such previous violation was not yet definite - as it depended on the outcome of the pending (but suspended) CAS proceedings in the case CAS 2015/A/4050. That therefore the relevant question was not whether an additional period of ineligibility should be imposed on the Athlete (the word "additional" implying that such sanction is already known), but rather what period of ineligibility should be imposed, taking into account that the Athlete had committed another anti-doping rule violation in the same period for which it was however not possible to take into account the specific circumstances and severity.

   The Sole Arbitrator further observed that the present case did not involve a Specified Substance and that the Athlete - whilst negating to have committed an anti-doping rule violation - had not put forward any arguments that could lead to the elimination or reduction of the otherwise - under Rule 40.2 of the 2012-2013 IAAF Rules - applicable standard sanction of a two years period of ineligibility. Therefore it only had to be examined whether there were aggravating circumstances pursuant to Rule 40.6 of the 2012-2013 IAAF Rules, triggering an increased sanction up to a maximum of a four years period of ineligibility. The Sole Arbitrator considered highly important that it had been established that the Athlete was guilty of using steroids as well as for the present ABP charge, both violations having been committed during more or less the same period. That further the IAAF had succeeded in establishing that both offences had been committed independently from each other as the Athlete's use of oral

turinabol had caused the 15 August 2009 positive but could not have caused the abnormal blood values in sample 1. As such, the Athlete had used multiple prohibited substances or prohibited methods, *i.e.* oral turinabol and blood doping, in parallel and at the same time. The Sole Arbitrator further highlighted that the Athlete had not admitted any of these two violations and therefore she was not entitled to avoid a finding of aggravating circumstances under Rule 40.7 (d)(ii) of the IAAF Rules. That further, based on the evidence presented by the IAAF, he was convinced to his comfortable satisfaction that the Athlete - over a period of at least four years - was subjected to a sophisticated doping scheme; and the fact that an anti-doping rule violation was committed as part of a doping scheme was specifically foreseen in the IAAF Rules as example for aggravating circumstances and has further been recognised by CAS jurisprudence.

The Sole Arbitrator further explained that according to CAS jurisprudence, not every ABP violation automatically leads to the increase of the period of ineligibility to the maximum of four years (CAS 2013/A/3080: a two years and nine months period of ineligibility was imposed on an athlete for an ABP violation, based on the fact that the established culpability of the athlete related to only one year and to the targeting of two competitions). That however in the case CAS 2012/A/2773, a period of four years ineligibility was imposed for an ABP violation because it was established that the whole career of the respective athlete was built on doping. Considering that the Athlete committed two separate anti-doping rule violations and that moreover the established ABP violation of the Athlete lasted considerably longer than in the case CAS 2013/A/3080, but that the IAAF had not maintained that her whole career was built on doping, the Sole Arbitrator found a period of ineligibility of three years and eight months to be appropriate to the severity of the violations. Taking into account that the Athlete had already served a period of ineligibility of two years between 22 July 2013 and 21 July 2015 in respect of her steroid violation, the Sole Arbitrator decided to credit this period. He further held that the remaining period of ineligibility (*i.e.* one year and eight months) should not commence on the date of his award, but on the start date of the provisional suspension, *i.e.* 5 February 2016.

7. As regards disqualification of results, the Sole Arbitrator took note that the IAAF - relying on IAAF Rules and arguing that they provide for the automatic disqualification of all results from the date of an anti-doping rule violation through the beginning of any period of provisional suspension - sought disqualification of all the Athlete's results from 14 August 2009 until 5 February 2016. Conversely, the Athlete considered the IAAF's request unreasonable and disregarding the "fairness principle" of Rule 40.9 of the 2016-2017 IAAF Rules, arguing that there was only one anti-doping rule violation in 2009.

   The Sole Arbitrator observed that the present case was not a case of a specific "positive sample" in the meaning of Rule 40.8 of the 2012-2013 IAAF Rules, but that it nevertheless fell under Rule 40 of the IAAF Rules, *i.e.* the Athlete's results were subject to disqualification. That a complicating factor in this respect was that insofar as the anti-doping rule violation had been established on the basis of an ABP it had not been exactly determined when exactly the violation was committed, but rather that based on all the evidence available it had to be concluded that a

violation was committed during a certain period. The Sole Arbitrator further noted that there had been delays in the case management process on the IAAF level that had not been caused by the Athlete. That on the other hand, the period of disqualification requested by the IAAF - covering six and a half years - was considerably longer than the maximum period of ineligibility of 4 years that can be imposed according the 2012-2013 IAAF Rules, causing a potential issue of proportionality and fairness of the sanction. In this context the Sole Arbitrator returned to his finding that a fairness exception had to be read into Rule 40.8 of the 2012-2013 IAAF Rules, read together with Articles 10.8 and 23.2.2 WADC (see also 2. above) as only when interpreting these provisions in this manner and applying them fairly to the athlete concerned they could be understood as being in compliance with the proportionality requirement deriving from general principles of law applicable both in Switzerland and Monaco. That the principle of proportionality requires to assess whether a sanction is appropriate to the violation committed and that excessive sanctions are prohibited; that according to CAS jurisprudence, in order to determine whether a sanction is excessive, the type and scope of the rule-violation, the individual circumstances of the case and the overall effect of the sanction on the offender have to be taken into account. The Sole Arbitrator declared being satisfied that sample 1 was evidence of doping, systematically used by the Athlete at least over the course of three years and eleven months following the taking of sample 1. Bearing further in mind that the results from 15 August 2009 until 14 August 2011 had already been disqualified by the RUSADA Disciplinary Committee and that during the period of ineligibility (22 July 2013 to 21 July 2015) the Athlete could not achieve any competition results, the remaining question was whether - considering the overall effect of the sanction on the Athlete - the results between 15 August 2011 and 22 July 2013 had to be disqualified. The Sole Arbitrator recalled at this stage that insofar as the sanction of disqualification of results embraces the forfeiture of any titles, awards, medals, points and prize and appearance money - *i.e.* the athlete loses all income from sport and also has to return income achieved - it had to be held equal to a retroactive imposition of a period of ineligibility and, thus, was a severe measure. That on the other hand, the Athlete's ABP had established continued doping for the entire period until 8 July 2013 - a period of time roughly equal to the overall length of the ineligibility period imposed by the Sole Arbitrator. The Sole Arbitrator - relying on previous CAS decisions in which results going back to the first sample collected in the context of an ABP had been disqualified - considered it justified to disqualify the Athlete's results from 15 August 2011 until 22 July 2013; that he was aware that such period of disqualification of results - covering the whole period during which the Athlete was found to have used doping, as established on the basis of her ABP - seen only from the perspective of the sanction of disqualification of the results, had to be deemed excessive in terms of proportionality. That however, when taking into account the main purpose of disqualification of results - not to punish the transgressor, but rather to correct any unfair advantage and remove any tainted performances from the record - to not disqualify results achieved by using a prohibited substance or prohibited method could not be considered as fair with regard to other athletes that had competed against the Athlete during the relevant period.

Decision

The Sole Arbitrator therefore partially upheld the appeal by the IAAF and imposed a period of ineligibility of three years and eight months on the Athlete, starting from 5 February 2016. He further held that the period of ineligibility served by the Athlete between 22 July 2013 and 21 July 2015 shall be credited against the period of ineligibility imposed and ordered disqualification of all of the Athlete's results between 15 August 2011 and 22 July 2013, including forfeiture of any titles, awards, medals, points and prize and appearance money obtained during this period.

CAS 2016/A/4484
OKK Spars Sarajevo v. Fédération Internationale de Basketball (FIBA)
10 November 2016

Basketball; International transfer of minor players; *Lex specialis* for the transfer of minors; Authorisation of transfer and Letter of Clearance; Protection of young players; No discrimination if compensation for national transfers is not determined on the basis of the same criteria

Panel
Mr Jacques Radoux (Luxembourg), President
Prof. Peter Grilc (Slovenia)
Mr Alasdair Bell (United Kingdom)

Facts

Darko Bajo (the "Player") is a basketball player of Croatian nationality, born on 14 March 1999. In 2012, the Player was transferred from the Bosnian basketball club HOOK Vitez to the Bosnian professional basketball club OKK Spars Sarajevo ("OKK Spars" or the "Appellant"). In connection, OKK Spars agreed to pay to HOOK Vitez a certain amount of money and 20 % of the Player's future transfer fees. On 29 October 2012, OKK Spars and the Player signed a scholarship agreement (the "Scholarship Agreement"). According to Article 6 of the Scholarship Agreement in *"case the Player wishes to leave the club, the Player or the Player's new club, shall pay compensation to the Club, the amount of compensation being determined by the Club. After the previously stated the Player becomes a free player and he is entitled to transfer to another club"*. During the following years, the Player developed into a very talented basketball player, playing for, inter alia, the Croatian U-16 national team in 2014 and 2015.

On 16 September 2015, the Croatian professional basketball club BC Cedevita announced the Player's transfer to BC Cedevita. Prior to this announcement, the Player's father and OKK Spars entered into discussions regarding the Player's possible transfer to BC Cedevita, but without reaching an agreement.

On 23 September 2015, the Player requested FIBA to determine, in application of Article 3-55 of the FIBA Internal Regulations (the "FIBA IR"), the amount of compensation he owed to OKK Spars, arguing, *inter alia*, that the Scholarship Agreement was not valid.

On 2 October 2015, OKK Spars contended, *inter alia*, that Article 3-55 was not applicable to the present case because the Player had a valid Scholarship Agreement. Thus, the Player's compensation should be determined by the market value, which was alleged to be EUR 250.000 plus 25 % of the future transfer fees.

On 23 October 2015, the Secretary General of FIBA took the decision (the "Decision") that the Player was allowed to register with the Croatian Basketball Federation, subject to payment of three thousand Swiss francs (CHF 3.000) to the Solidarity Fund of FIBA and that the Croatian club BC Cedevita had to pay compensation in the amount of thirty-five thousand euros (EUR 35.000) to OKK Spars. In substance, the Secretary General of FIBA considered that: (i) it was undisputed that the transfer of the Player is linked to basketball for the purposes of the FIBA IR; (ii) the question of whether or not the Player was under a valid contract with OKK Spars was not one of the six criteria provided in article 3-52 of the FIBA IR for FIBA's decision on the transfer of a young player; (iii) as, pursuant to article 3-55 of the FIBA IR, the compensation, when fixed by the Secretary General, is determined by primarily looking at the investments made by

the club of origin, the compensation was not supposed to reflect the "value" of the player in future transfers or take into account a percentage of future transfers; (iv) taking into account that the Player, who is considered to be a talented athlete for his age, was registered with OKK Spars for a period of approx. 33 months, and taking into account the circumstances of the case, together with the fact that the investments made by clubs in youth programmes normally result in a very low number of players who reach the playing skills required for top level play, it was found that the total investment in the Player by OKK Spars during this period were substantially lower than the amount of EUR 103.110 requested by OKK Spars.

On 5 November 2015, the Appellant submitted an appeal against the Decision before the FIBA Appeal's Panel. On 4 February 2016, the Single Judge appointed to hear the case issued a decision (the "Appealed Decision") which dismissed the appeal as unfounded. In the relevant parts on the merits, the Appealed Decision held that the FIBA IR made a distinction regarding transfers of players based on age, since FIBA in the FIBA IR had created *lex specialis* for the transfer of players under or at the age of 18, which were covered by articles 3-50 through 3-65 and could only be permitted by the FIBA Secretary General as Special Cases, and after the examination of each particular case. The question of whether a player was bound by a contract with another club beyond the scheduled transfer date was not included in the *lex specialis* provisions, whereas it was explicitly stated that an amount of compensation to the paid to the club of origin for the development of the player needed to be agreed or determined. Therefore, the FIBA Secretary General had been right in fixing the compensation to the Appellant not based on the 'market value' of the Player, but based primarily, but not solely, on the investments made by the club(s) that had contributed to the development of the player. However, no conclusion has been reached - neither in the Decision nor in the Appealed Decision - as to whether the Appellant was entitled to receive compensation for the (alleged) breach of the Scholarship Agreement by the Player, nor had the validity of the said Agreement been finally determined. Accordingly, the authorisation issued by the FIBA Secretary General, allowing the Player to transfer as a Special Case, was not, in content terms, comparable to a Letter of Clearance according to which the Player would have been cleared of any claims regarding, for example, breach of contract. Furthermore, there were no grounds for disregarding or amending the calculation of compensation to the Appellant as set out in the Decision.

On 6 March 2016, the Appellant, relying on Article 1-178 of the FIBA IR, filed a statement of appeal with the CAS against the FIBA with respect to the Appealed Decision.

Reasons

1. The Appellant was submitting that Article 3-55 was not applicable to the present case because the Player had a valid Scholarship Agreement and that, thus, the Player's compensation was to be determined by his market value.

   The Panel fully adhered to the reasoning developed in the Appealed Decision. For the Panel, the general provisions describing the transfer process in international basketball were found in articles 3-39 through 3-49 of the FIBA Internal Regulations (IR), stating *inter alia*, that a transfer can only be refused if a player is bound by a contract with another club beyond the scheduled transfer date. It was however correct to state that the FIBA IR had made a distinction regarding transfers of players based on age, and that the FIBA

IR had created *lex specialis* for the transfer of players under or at the age of 18. Such transfers were covered by articles 3-50 through 3-65 of the FIBA IR and were based on the general principle that international transfers of players under or at the age of 18 are not permitted and can only be permitted by the FIBA Secretary General after the examination of each particular case. Thus, even if the Scholarship Agreement signed between the Player and the Appellant was valid, Articles 3-50 to 3-65 of the FIBA IR would still apply to the transfer of the Player. The Panel considered that, would the interpretation submitted by the Appellant be retained, the provisions of this *lex specialis* in general and of Article 3-55 of the FIBA IR in particular would be deprived of their effectiveness as it would be sufficient to bind a young player by any agreement, i.e. a scholarship agreement, to circumvent the transfer regulations for young player set out in the FIBA IR.

Regarding the Appellant's submission that, in the presence of a valid contract binding a young player and a club, the words *"primarily, but not solely"* had to be interpreted broadly so as to put the FIBA Secretary General under the obligation to take into account the *"market value"* of the player when fixing the compensation to be paid to the club of origin, the Panel considered that such interpretation had to be rejected. First, it followed from Articles 3-52 and 3-56 of the FIBA IR that FIBA had explicitly specified whenever it considered a written declaration or a contract to be relevant. Thus, it was not conceivable that a reference to a valid agreement between a young player and his club of origin would simply have been forgotten in Articles 3-52 and 3-55 of the FIBA IR. Second, a grammatical approach did not imply that in presence of a valid agreement between a young player and his club of origin the words *"primarily, but not solely"* could only be understood as referring to the *"market value"* of the player. In any event, given the fact that the FIBA Secretary General had, according to Article 3-55 of the FIBA IR to fix a *"reasonable compensation"* and given the circumstance that neither Article 3-55 nor any other provision of the FIBA IR governing the transfer of a young player contained an explicit reference to the *"market value"* of a young player, the FIBA Secretary General did not have the obligation to take this value into consideration when fixing the said compensation.

2. The Appellant's second claim was based on an alleged violation of the general principle of *pacta sunt servanda*.

   For the Panel, the absence, in the *lex specialis* governing the transfer of a young player, of any reference to a valid agreement or contract between a young player and his club of origin, did not imply that this *lex specialis* was inapplicable whenever such an agreement or contract existed. In addition, neither the Decision nor the Appealed Decision affected the Appellant's right to receive compensation for alleged breach of contract. Further, no decision on the validity of the Scholarship Agreement had been taken by the FIBA Secretary General nor the FIBA Appeals' Panel so the rights deriving from the Scholarship Agreement were still intact/complete and any dispute relating to their enforcement could still be submitted to the FIBA Arbitration Tribunal, as foreseen in Article 7 of that agreement. Therefore, the authorisation of the transfer by the FIBA Secretary General could not be compared to a Letter of Clearance, which would have cleared the Player of all claims related, for example, to the Scholarship Agreement.

The Panel further observed that the fact that an existing agreement could not affect the transfer of a young player and did not oblige the FIBA Secretary General to take into account the *"market value"* of the player when fixing the compensation served the protection of a young player because it discouraged the clubs from taking speculative risks and fostered the young player's freedom to opt for the club that he considered would contribute best to his development as a player.

3. Finally, the Appellant was also raising the argument that the Appealed Decision violated the FIBA Code of Ethics.

   In this regard, the Panel found, first, that for the reasons already developed about the argument of the violation of the principle of *pacta sunt servanda*, the Appealed Decision could by no means be read or understood as inciting young players to infringe Article 1-27 of the FIBA IR, according to which basketball parties shall *"[h]onour all contracts related to basketball and not encourage others to break such contracts"*. Second, the fact that the compensation due for national transfers and the compensation due for international transfers were not determined on the basis of the same criteria could not be considered as a discrimination as the different set of rules governing these two different kind of transfers were adopted by two different entities, i.e. FIBA for the international transfers and the national member federations for the national transfers. In that regard, Article 1-41 of the FIBA IR invited the national federations to prepare similar regulations to the ones of FIBA for their national transfer systems. The fact that a national basketball association chose to base the payable compensation on the *"market value"* of the player instead of the investment made by the club of formation could certainly not be held against the FIBA. Instead, if a club felt it was discriminated by the deliberate deviation, by its national federation, from the FIBA IR provisions on the transfer of young players, it was for that club to exercise its statutory rights as member of this national federation and to request a change of the national regulations at hand.

Decision

As a result, the Panel dismissed the appeal filed by OKK Spars Sarajevo and confirmed the decision rendered by the FIBA Appeals' Panel.

CAS 2016/A/4492

Galatasaray v. Union des Associations Européennes de Football (UEFA)

3 October 2016 (operative part 23 June 2016)

Football; Exclusion of club from participating in UEFA competition for breach of Club Licensing and Financial Fair Play Regulations (CL&FFP Regulations); Applicability of EU law as foreign mandatory rules; Compatibility of the CL&FFP Regulations with the prohibition of restricting competition "by object"; Compatibility of the "break-even" rule with the prohibition of restricting competition "by object"; Compatibility of the CL&FFP Regulations with the prohibition of restricting competition "by effect"; Compatibility of the CL&FFP Regulations with the EU fundamental freedoms

Panel

Prof. Luigi Fumagalli (Italy), President
Prof. Bernard Hanotiau (Belgium)
Mr Olivier Carrard (Switzerland)

Facts

In 2012, UEFA adopted new regulations, modifying the existing "Club Licensing System", intended to promote a "Financial Fair Play" (the UEFA Club Licensing and Financial Fair Play Regulations: the "CL&FFP Regulations") on the basis, *inter alia*, of a "break-even requirement": under such requirement a club must break-even over a period of three years or, put differently, the football related expenses of a club must not exceed its football related income, subject to an acceptable deviation. In March 2012, UEFA created the UEFA Club Financial Control Body (the "CFCB"), comprising an Investigatory Chamber and an Adjudicatory Chamber, in order to oversee and enforce the application of the CL&FFP Regulations. On 1 July 2015, a new edition of the CL&FFP Regulations entered into force.

On 16 May 2014, the Turkish professional football club Galatasaray (the "Appellant", "Galatasaray" or the "Club"), is a entered into a settlement agreement (the "Settlement Agreement") with the Chief Investigator of the CFCB in accordance with Articles 14(1) and 15 of the 2014 edition of the Procedural rules governing the UEFA Club Financial Control Body (the "Procedural Rules"). The Settlement Agreement was concluded after the acting Chief Investigator had determined that Galatasaray had breached the CL&FFP Regulations. Specifically, the Chief Investigator considered that the Club had failed to fulfil the break-even requirement set out in Articles 58 to 63 of the 2012 edition of the CL&FFP Regulations.

The Settlement Agreement provided, *inter alia*, that (i) Galatasaray *"be break-even compliant in the meaning of* [CL&FFP Regulations] *at the latest in the monitoring period 2015/16, i.e. the aggregate Break-even result for the monitoring periods 2013, 2014 and 2015 must be a surplus or a deficit within the acceptable deviation in accordance with Article 63* [CL&FPP Regulations]*"* (Article 1.2 of the Settlement Agreement); and (ii) *"*[…] *for the reporting period ending in 2015, the total amount of the aggregate cost of employee benefit expenses cannot exceed the total amount of the aggregate cost of employee benefit expenses reported in the future financial information for the reporting period ending in 2014, i.e. EUR 90 Mio"* (Article 3 of the Settlement Agreement).

In October 2015, the Appellant submitted to UEFA its completed monitoring documentation, comprising the Club's break-even information for the reporting periods ending in 2013, 2014 and 2015, in accordance

with the CL&FFP Regulations. Such documentation showed that, for the reporting periods, the Appellant had a break-even deficit which exceeded the relevant acceptable deviation by EUR 134,200,000 and that its aggregate cost of employee benefits expenses was EUR 95,500,000, *i.e.* exceeding by EUR 5,500,000 the maximum employee benefits expenses set forth by Article 3 of the Settlement Agreement.

Between 26 and 28 of October 2015, an independent compliance audit was carried out by PricewaterhouseCoopers, which verified the accuracy and completeness of the Appellant's financial information and its aggregate break-even deficit. In light of these findings, the CFCB Chief Investigator concluded that the Appellant had not complied with the Settlement Agreement and decided to refer the case to the CFCB Adjudicatory Chamber.

On 2 March 2016, the CFCB Adjudicatory Chamber issued a decision (the "CFCB Decision"), in which it decided (i) that Galatasaray had failed to comply with the terms of the Settlement Agreement; (ii) to impose on Galatasaray an exclusion from participating in the next UEFA club competition for which it would otherwise qualify in the next two (2) seasons (i.e. the 2016/2017 and 2017/2018 seasons), and (iii) to order Galatasaray to limit the overall aggregate cost of the employee benefits of all of its players in each of the next two reporting periods (i.e. the reporting period ending in 2016 and the reporting period ending in 2017) to a maximum of sixty-five millions Euros (€65,000,000).

On 11 March 2016, the Appellant filed a Statement of Appeal with the CAS to challenge the CFCB Decision. On 6 April 2016, the Appellant filed its Appeal Brief, submitting the following requests for relief: *"The Appellant requests that the Arbitration Panel: Primarily, rules that the sanctions imposed by the disputed Decision are illegal, due to the illegality of the regulatory provisions on which it is based, (…); Alternatively, rules that the sanctions imposed by the disputed Decision are grossly disproportionate and substitutes accordingly a disciplinary measure that satisfies the proportionality requirement (…)".*

Reasons

1. The Appellant was submitting that EU competition law and EU law regarding freedoms guaranteed by the Treaty on the Functioning of the European Union ("TFEU") were applicable insofar as they constitute mandatory rules in EU territory. The Appellant was essentially invoking EU law to challenge the legality of the CL&FFP Regulations.

   With regard to EU law, the Panel noted that compliance with EU competition law and EU provisions on fundamental freedoms guaranteed by TFEU had to be taken into account, insofar as they constituted foreign mandatory rules, pursuant to Article 19 of the Swiss private international law statute ("LDIP"). The three conditions in this regard were met: (i) EU competition law and EU provisions on fundamental freedoms were largely regarded as pertaining to the category of mandatory rules by courts and scholars within the EU; (ii) there was a close connection between (a) the territory on which EU competition law and the EU provisions on fundamental freedoms are in force and (b) the subject matter of the dispute resulting from the fact that the challenged UEFA regulations and CFCB Decision have an obvious impact on the EU territory; and (iii) the Swiss legal system shared the interests and values protected by the EU competition law and the EU provisions on fundamental freedoms.

2. The Club was submitting that the break-even rule established by the CL&FFP Regulations was illegal under European Union law, as it was in breach of Article 101 TFEU, Article 102 TFEU, Article 63 of the TFEU on the free movement of capital, Article 56 TFEU on the free movement of services, and Article 45 TFEU on the free movement of workers. It could not be justified by the objectives advanced by UEFA, such as the long-term financial stability of football clubs or the integrity of UEFA competitions. And even if those objectives were legitimate, the break-even rule would not be proportionate, when compared to alternative instruments achieving the same objectives. Therefore, the disciplinary sanctions imposed on Galatasaray by the CFCB Decision on the basis of the break-even rule were also illegal.

   With regard to Article 101 TFEU, prohibiting *"agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market"*, the Panel came to the conclusion that the CL&FFP Regulations did not have *as their object* the restriction or distortion of competition, *i.e.* to favour or disfavour certain clubs rather than to prevent clubs from trading at levels above their resources: their object was the financial conduct of clubs wishing to participate in the UEFA competitions. The fact that the CL&FFP Regulations somehow governed the conduct of a club did not mean *per se* that they restricted competition: otherwise, all regulations (containing rules of conduct) would have been a restriction of competition. Assessing in particular the "break-even" rule pursuant to which clubs cannot spend over EUR 5 million in excess of their revenues per "assessment period" (three years), the Panel held that it did not impose a limit to, or control on, investments in the meaning of Article 101 TFEU. It was not a blunt restriction on clubs' spending, since the CL&FFP Regulations calculated compliance with the "break-even" requirement over a rolling three years' period and therefore allowed "overspending" in one or two years, provided the revenues generated in the subsequent(s) year(s) of the period covered it; and investment in infrastructures, for instance, was allowed without limits.

   Coming to the question of whether the CL&FFP Regulations had *the effect* of restricting competition, the Panel noted that the CL&FFP Regulations did not appear to prevent the clubs from competing among themselves on the pitch or in the acquisition of football players. On the contrary, they produced the effect that competition was not distorted by "overspending", *i.e.* by those clubs that, operating at a loss, allowed themselves operations that could not be conducted on a sound commercial basis, and gained an advantage over those clubs which respect the constraints of financial balance (*i.e.*, which take a behaviour that should be expected by any reasonable entity in normal market conditions). In other words, their effect was to prevent a distortion of competition. Further, they did not limit the amount of salaries for the players: clubs were free to pay as much as they wished, provided those salaries were covered by revenues. In addition, they did not "ossificate" the structure of market (large dominant clubs had always existed and would always exist) and did not exclude clubs from "essential facilities": the UEFA professional club competitions could not be compared to railway infrastructures or to grids in the electric market. Finally, the "break-even" calculations took place over

rolling periods of three years. Therefore, "overspending" was allowed during one or two football season, provided it was covered in the following one(s). In any case, as recalled by the Panel citing the European Court of Justice in the *Wouters* decision (19 February 2002, C-309/99), even if the Appellant had established that the CL&FFP Regulations have an anti-competitive effect, the analysis should have then referred to the overall context in which the CL&FFP Regulations operated, whether the objectives sought by them were legitimate and whether the restrictive effects they produce were necessary (inherent) and did not go beyond what is necessary to achieve the legitimate objectives. For the Panel, the declared objectives of the CL&FFP Regulations were legitimate and the restrictions imposed (in essence: limit spending beyond revenues) appeared to be inherent to the achievement of those results: if the CL&FFP Regulations intended to effectively control the levels of indebtedness reached in European football, the imposition of limits to spending beyond revenues was a natural element of financial discipline seeking that objective. The fact that the CL&FFP Regulations provided for exemption or mitigating factors to be taken into account by the CFCB in reaching a decision when one of the monitoring requirement was not fulfilled by a club, was also a guarantee that the restrictions did not turn out to be disproportionate in the given case. In any case, the existence of abstract alternatives did not make the CL&FFP Regulations disproportionate, if their content (decided on the basis of policy considerations by the competent "political" UEFA bodies) were in themselves proportionate.

In conclusion, the Panel considered that the Club had not established that the CL&FFP Regulations violated Article 101 TFEU and were therefore "illegal".

3. With regard to Article 102 TFEU, which prohibits the *"abuse of a dominant position"*, the Panel found that the Appellant had only provided arguments as to whether UEFA may be considered to be in a dominant position and had failed to provide specific explanations regarding how the CL&FFP Regulations and the "break-even rule" would constitute an abuse of such position. Since it was not necessary to enter into the issue of whether UEFA was in a dominant position on a given market, as in any case there is no evidence of any abuse, this argument was not conclusive.

4. As concerns the alleged infringements to the fundamental freedoms, the Panel held that the CL&FFP Regulations did not imply any discrimination based on nationality, since they applied to any and all clubs participating in the UEFA competitions. In addition, they applied also to "domestic operations" even absent an intra-EU element and did not restrict the fundamental freedoms: players could be transferred (or offer services) cross-border without limitations; capitals could move from an EU country to another without any limit. In other words, the CL&FFP Regulations did not appear to run against the provisions concerning the freedom of movement of capitals and of workers, as well as the freedom to provide services and Article 16 of the Charter of the Fundamental Rights of the European Union.

5. Finally, the Appellant was submitting that, in case the Panel decided that the CL&FFP Regulations were not "illegal", it was nevertheless to take into account the "mitigating factors" set out in Annex XI of the CL&FFP Regulations, in order to be

more flexible in the application of the break-even requirement and to render a less severe decision than the CFCB Decision. Specifically, the Panel was to pay particular attention to the set of external factors which had affected the finances of the Club, and thus its ability to meet the objectives set forth by the Settlement Agreement: namely, the Syrian refugee crisis, the terrorist attacks in Turkey, the Turkish major match-fixing scandal, the introduction of the so-called *"Passolig"* electronic ticketing system in Turkey, the exchange rate and interest rate fluctuations, the national economic downturn in Turkey, the fact of operating in a structurally inefficient market, and the management changes.

The Panel noted that the Club, while submitting general considerations regarding those factors, had largely failed to provide comprehensive and substantial data and evidence specific to its situation, the quantitative impact of such factors on its accounts and how they would have prevented it from complying with the Settlement Agreement. For the Panel, it was particularly telling that while the CFCB Decision had precisely underlined the lack of evidence (in particular, of accounting evidence) of how, and in which proportion, each these factors would have caused, the losses (and the break-even deficit) of the Club, no additional substantial club specific evidence and demonstration had been provided by the Appellant before this Panel. Given the scale of the aggregate break-even deficit, which exceeded the relevant acceptable deviation by EUR 134,200,000, this lack of substantial specific evidence and demonstration could not be overlooked. The Panel therefore considered that the Appellant had not established that its breach of the Settlement Agreement was justified, in totality or partially, by one of the factors listed in Annex XI of the CL&FFP Regulations.

The Panel also held that the sanction imposed on the Club by the CFCB Decision was not disproportionate, in view of the fact that it had been imposed as a sanction for a second violation. After its first breach of the CL&FFP Regulations, the Club had had the benefit of a second chance through the conclusion of the Settlement Agreement, the content of which had been defined with its participation. The Club had first avoided sanctions and had benefited from the Settlement Agreement, the purpose of which was precisely to provide an opportunity to allow compliance by clubs with UEFA's fair play regulations, in view of their indication that they could and were willing to do so if provided with the extra time, under the conditions mutually agreed. But still it had failed to comply with this second chance and now had to bear the consequences thereof.

Decision

In view of the above, the Panel dismissed the appeal filed by the Club against the CFCB Decision and confirmed the latter.

CAS 2016/O/4504
International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation (ARAF) & Vladimir Mokhnev
23 December 2016

Athletics; Doping offences committed by a coach; CAS jurisdiction according to Rule 38.3 IAAF Competition Rules; Law applicable to procedural and to substantive matters respectively; Admissibility of a witness statement and of a recording as means of evidence; Multiple violations by a coach: possession, trafficking, administration; Determination of the applicable sanction based on aggravating circumstances

Panel
Mr Hans Nater (Switzerland), Sole Arbitrator

Facts

The International Association of Athletics Federations (the "Claimant" or the "IAAF") is the world governing body for the sport of Athletics, established for an indefinite period with legal status as an association under the laws of Monaco. The IAAF has its registered seat in Monaco.

The All Russia Athletics Federations (the "First Respondent" or the "ARAF") is the national governing body for the sport of Athletics in the Russian Federation, with its registered seat in Moscow, Russian Federation. The ARAF is a member federation of the IAAF, currently suspended from membership.

Mr Vladimir Mokhnev (the "Second Respondent" or the "Coach") is a Russian athletics coach, who was in charge of a number of track athletes including Ms Yuliya Stepanova and Ms Yekaterina Kupina, both International-Level athletes for the purposes of the IAAF Competition Rules (the "IAAF Rules").

The Coach has been charged with violating:

- *Rule 32.2(e), "Tampering or Attempted Tampering with any part of Doping Control";*
- *Rule 32.2(f)(ii),* Possession by an Athlete support Personnel of any Prohibited Method or Prohibited Substance*;*
- *Rule 32.2(g), "Trafficking or Attempted Trafficking in any Prohibited Substance or Prohibited Method"; and*
- *Rule 32.2(h) of the IAAF Competition Rules,* Administration to any Athlete of any Prohibited Method or Prohibited Substance or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any Attempted anti-doping rule violation.

The evidence of the Coach's alleged anti-doping rule violations is based primarily on a witness statement of Ms Yuliya Stepanova, an elite Russian athlete who was sanctioned in February 2013 with a two year period of ineligibility in connection with abnormalities in her Athlete Biological Passport (the "ABP"). Ms Stepanova was trained by the Coach from 2003 to 2012.

In the period from 2013 to 2014, Ms Stepanova recorded a number of conversations she had with Russian athletes and athlete support personnel, including the Coach.

With a view to exposing the widespread doping practices within Russian athletics, Ms Stepanova made the recordings available to a German journalist, who used extracts from the recordings to produce a documentary alleging widespread doping in Russian athletics.

In the wake of a first documentary, the World Anti-Doping Agency ("WADA") announced the establishment of an independent commission (the "WADA IC").

On 8 August 2015, the IAAF asserted in a letter to the ARAF that there was sufficient evidence that the Coach had, over the course of years, been involved in procuring and providing prohibited substances to athletes training under him and lodged the above-mentioned charges against him.

On 24 August 2015, the IAAF informed the ARAF that the Coach was provisionally suspended with immediate effect pending resolution of the case in accordance with Rule 38.2 of the IAAF Rules.

On 11 September 2015, the Russian Anti-Doping Agency ("RUSADA") provided a summary of an explanatory note of the Coach, wherein the Coach denied the charges and requested for a hearing.

On 9 November 2015, the WADA IC issued its first report (the "WADA IC First Report") in which it concluded in general that *"*[t]*he investigation has confirmed the existence of widespread cheating through the use of doping substances and methods to ensure, or enhance the likelihood of, victory for athletes and teams"* and specifically in respect of the Coach that *"*[t]*hrough Stepanova's statements and secret recordings, the IC investigation uncovered evidence implicating coach Mokhnev in violations of the Code, specifically sections 2.8 and 2.9".*

On 26 November 2015, the ARAF's membership with the IAAF was suspended pursuant to a decision of the IAAF Council.

On 13 January 2016, the IAAF informed the Coach that it took over the responsibility for coordinating the disciplinary proceedings and that his case would be referred to the Court of Arbitration for Sport ("CAS").

On 17 March 2016, the IAAF lodged a Request for Arbitration with CAS in accordance with Article R38 of the CAS Code of Sports-related Arbitration (2016 edition) (the "CAS Code"). The IAAF informed CAS that its Request for Arbitration was to be considered as its Statement of Appeal and Appeal Brief and requested the matter to be submitted to a sole arbitrator. This document included the following requests for relief:

(iii) Vladimir Mokhnev is found guilty of an anti-doping rule violation in accordance with Rule 32.2(e), Rule (f)(ii), Rule 32.2(g) and/or Rule 32.2(h) of the IAAF Rules.

(iv) A period of ineligibility from four years to lifetime ineligibility is imposed upon Vladimir Mokhnev, commencing on the date of the (final) CAS Award.

Reasons

1. Regarding the jurisdiction of CAS, the Sole Arbitrator observed that Rule 38.3 of the IAAF Rules determines that the IAAF may elect to refer the matter to CAS if a Member fails to complete a hearing within two months and if the Athlete is an *"International-Level Athlete"*. The Sole Arbitrator had no doubt that the Coach fell under this definition, as, pursuant to Rule 37.2 of the IAAF Rules, *"athlete"* shall be understood as referring also to athlete support personnel. Coaches are listed in the definition of *"athlete support personnel"* in the IAAF Rules. The Coach clearly acted on an international level as he trained international-level athletes.

   Since the membership of ARAF from the IAAF had been suspended, the ARAF was prevented from conducting a hearing in the Coach's case within the deadline set by Rule 38.3 of the IAAF Rules. The Sole Arbitrator confirmed that the IAAF was therefore

permitted to refer the matter directly to a sole arbitrator appointed by CAS, subject to an appeal to CAS in accordance with Rule 42 of the IAAF Rules.

Therefore CAS had jurisdiction to adjudicate and decide on the present matter.

2. Regarding the law applicable, the Sole Arbitrator found that according to Article R58 of the CAS Code, the proceedings were primarily governed by the IAAF Rules. Pursuant to the legal principle of *tempus regit actum*, the Sole Arbitrator was satisfied that procedural matters were governed by the regulations in force at the time of the procedural act in question. Consequently, whereas the substantive issues were governed by the 2014-2015 edition of the IAAF Rules, procedural matters were governed by the 2016-2017 edition of the IAAF Rules.

3. The Sole Arbitrator observed that the IAAF based its case on the witness testimony of Ms Stepanova, corroborated partially by recordings of conversations she had with the Coach.

Notwithstanding the fact that the Coach did not dispute the admissibility of the recordings as such, in particular he did not submitted that the recordings had been obtained illegally, but yet maintained that the content of the recordings had been distorted, the Sole Arbitrator deemed it important to address this issue *ex officio* as the reliance on illegally obtained evidence in order to come to a conviction might constitute a violation of public policy (*ordre public*) if not properly assessed.

The admittance of means of evidence is subject to procedural laws, *i.e.* the *lex arbitri*. Since the seat of the present arbitration is Switzerland, Switzerland's Private International Law Act (the "PILS") is applicable.

According to Swiss scholars, Article 184(1) PILS provides arbitral tribunals in international arbitration proceedings seated in Switzerland with ample latitude in the taking of evidence. According to CAS case law, it follows from Article 184 (1) PILS (as well as the CAS Code) that a CAS panel disposes of a certain discretion to determine the admissibility or inadmissibility of evidence *(Kaufmann-Kohler/Rigozzi, op. cit., no 478)" &* TAS 2009/A/1879, para. 36). In general, the power of the arbitral tribunal related to the taking of evidence is only limited by *"procedural public policy"*, the procedural rights of the parties, and, where necessary, by the relevant sporting regulations.

Furthermore, the discretion to admit evidence under Rule 33(3) IAAF Rules is fairly wide as it determines that anti-doping rule violations may be established by "any reliable means". Whereas an athlete's witness statement is undoubtedly admissible, particularly because witness statements are explicitly listed as a means of evidence in Rule 33(3) of the IAAF Rules, the admissibility of recordings which objectively fall under the category "any reliable means" provided for in Rule 33(3), require a more detailed analysis as they have been made covertly by an athlete acting as a whistle blower to accuse widespread doping in a national sport. According to the Swiss Code of Civil procedure and to the Swiss Federal Tribunal, if a mean of evidence is illegally obtained, it is only admissible if the interest to find the truth prevails over the private interest – here the interest of the Coach in refraining from relying on the recordings - (balancing test) (Art. 152, 168 Swiss Code of Civil Procedure ("CCP"); HAFTER, Commentary to the Swiss Code of

Civil Procedure, 2nd ed., para. 8; see also BERGER / KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., p. 461 and SFT 4A_362/2013, 3.2.1-3.2.2).

Acknowledging the above general legal framework, the Sole Arbitrator found that in general, the fight against doping is not only of a private interest, but indeed also of a public interest. In a special situation where it is notorious that doping in a particular country is widespread and has been systematically supported by coaches, clubs and government-affiliated organisations, the interest in finding the truth must prevail over a possible reliance of a coach on the principle of good faith as a defence against gathering illegally obtained evidence.

Consequently, the Sole Arbitrator found that the recordings of Ms Stepanova's conversations with the Coach were admissible as evidence in the proceedings at hand.

4. The Coach maintained that Ms Stepanova knowingly adapted the content of the recordings and that the activities of Ms Stepanova were targeted solely against him out of revenge.

   Based on an athlete's witness statement, on recordings and on transcript of such recordings, the Sole Arbitrator was comfortably satisfied that IAAF satisfied its burden of proof pursuant to Rule 33.1 of the IAAF Rules and that the coach committed several violations i.e. possession of prohibited substances in breach of Rule 32.2 (f)(ii) of the IAAF Rules, trafficking in breach of Rule 32.2(g) for having provided prohibited substances to his athletes on multiple occasions and administration of prohibited substances to his athletes in breach of Rule 32.2(h).

   The Sole Arbitrator considered the statements made by the Coach in the recordings to be so abundantly clear that no further corroborating evidence was needed beyond the athlete's testimony, the recordings and the transcripts of the recordings. The IAAF Rules do not set forth that a conviction must be based on multiple pieces of evidence and, in any event, the evidence against the Coach did not consist only of the athlete's subjective opinion, but also on the recordings of the conversation between the athlete and the Coach, which is objective evidence.

   The Sole Arbitrator found that the recordings are in general reliable evidence.

5. The Sole Arbitrator agreed with the IAAF that, pursuant to Rule 40.7(d)(i) of the IAAF Rules, as it has not been established that the coach committed a second and a third doping violation after having been notified of the first anti-doping rule violation, all violations shall be considered together as one single first violation and the sanction imposed shall be based on the violation that carries the more severe sanction.

   "Trafficking" and "Administration" of prohibited substances carry the more severe sanction with an ineligibility period of four years up to lifetime. The Sole Arbitrator considered that as the coach acted intentionally, the period of ineligibility shall not be shorter than four years. According to the IAAF Rules the quantum of the sanction shall depend on the "seriousness of the violation". In this regard, although the regime of aggravating circumstances of Rule 40.6 of the IAAF Rules is not directly applicable in the context of Trafficking and Administration, the Sole Arbitrator found that they could and should be taken into

account in determining the sanction for these specific violations since the commentary to the equivalent article in the WADC provides that *"the sanctions for these violations* [*i.e.* Trafficking and Administration] *already build in sufficient discretion to allow consideration of any aggravating circumstances"*.

Furthermore, the fact that the violations have been severe and multiple was to be taken into account. Moreover, the Sole Arbitrator found that athlete support personnel in general bore an even higher responsibility than athletes themselves in respect of doping considering the influence they usually exert on their athletes. These factors together warranted a significant period of ineligibility to be imposed on the Coach.

As a matter of principle, a lifetime period of ineligibility could be considered both justifiable and proportionate in doping cases even if the ban is imposed for a first violation. However, according to CAS jurisprudence, the imposition of a lifetime ban is only justified where the seriousness of the offence is most extraordinary (CAS 2008/A/1513, para. 8.8.3).

The Sole Arbitrator found that the Coach's violations did not reach the level of seriousness required to justify imposing a lifetime period of ineligibility.

In view of the above considerations, the Sole Arbitrator, realising that imposing a specific period of ineligibility without any clear regulatory guidance as to the range of sanctions available and without guiding precedents is necessarily somewhat arbitrary, found that a period of ineligibility of 10 years shall be imposed on the Coach.The Sole Arbitrator also found that any violation of the provisional suspension should lead to the consequence that no credit should be given for the provisional suspension at all, even if the Coach complied with his provisional suspension for a certain period of time before violating it.

Decision

The Sole Arbitrator decided to uphold the claim filed on 17 March 2016 by the International Association of Athletics Federations against the All Russia Athletics Federation and Mr Vladimir Mokhnev and to impose a period of ineligibility of 10 years on Mr Vladimir Mokhnev.

TAS 2016/A/4509
Espérance sportive de Tunis c. Moussa Marega
22 novembre 2016

Football; Résiliation prématurée d'un contrat de travail; Droit applicable et hiérarchisation des normes juridiques; Compétence de la FIFA selon l'article 22 let b RSTJ; Juste motif de résiliation; Conséquences financières d'une rupture de contrat pour justes motifs; Interprétation du contrat relativement à la monnaie de paiement d'une créance

Formation
Juge Pierre Muller (Suisse), Président
Me François Klein (France)
Me João Nogueira da Rocha (Portugal)

Faits

Espérance Sportive de Tunis ("l'Appelante" ou "le Club") est un club de football affilié à la Fédération tunisienne de football ("FTF").

Moussa Marega ("l'Intimé" ou "le Joueur") est un joueur de football professionnel de nationalité malienne et française.

Le 19 juin 2014, le club et le joueur ont signé un contrat d'engagement de joueur professionnel pour trois saisons sportives commençant le 1er juillet 2014 et expirant le 30 juin 2017 ("le contrat") régi par les règlements de la Fédération Internationale de Football (FIFA) et de la Fédération Tunisienne de Football (FTF).

Ce contrat stipulait notamment les primes et salaires dus au Joueur durant chacune des trois (3) saisons sportives du présent Contrat et la compétence des instances compétentes de la FTF en cas de différend portant sur l'interprétation ou l'exécution du présent contrat, de ses suites ou annexes.

A cet égard, dans leur version antérieure au 6 novembre 2015, les Statuts de la FTF prévoyaient la compétence de la Commission Nationale des Litiges (CNL) pour statuer sur les litiges nationaux entre la FTF, les membres, les entraîneurs, les joueurs et les agents de joueurs ou de matchs et relatifs à leurs différentes obligations. Les décisions rendues par cette commission étaient susceptibles d'appel devant la Commission Nationale d'Appel (CNA), organe juridictionnel de deuxième instance. En troisième et dernière instance, les Statuts de la FTF prévoyaient, sur le plan national, que les décisions rendues par la CNA pouvaient faire l'objet d'un recours en arbitrage ad hoc auprès du Comité National de l'Arbitrage Sportif (CNAS). Sur le plan international, les statuts instituaient le TAS comme autorité de troisième instance.

Le 5 février 2015, le Joueur a déposé une "plainte" contre le Club auprès de la FIFA afin de faire constater la résiliation du contrat aux torts exclusifs du Club pour défaut d'enregistrement auprès de la FTF après écoulement de deux périodes d'enregistrement. Le Joueur réclamait également le paiement de 60 000 EUR correspondant à l'arriéré de "prime" pour la saison 2014-2015, 583 000 EUR à titre de compensation correspondant aux "primes" prévues pour les saisons 2015-2016 et 2016-2017 et aux salaires prévus pour les saisons 2014-2015, 2015-2016 et 2016-2017, 200 000 EUR à titre de dommages-intérêts pour préjudice moral et enfin 100 000 EUR à titre de dommages-intérêts pour préjudice sportif.

En cours de procédure, à la demande de la FIFA, le Joueur a confirmé avoir signé un contrat avec le club de football portugais CS Maritimo prenant effet du 1er février 2015 au 30 janvier 2018, sa rémunération annuelle fixe

s'élevant à 30'000 EUR pour la saison 2014-2015 et à 60'000 EUR pour chacune des saisons 2015-2016, 2016-2017 et 2017-2018.

Dans sa Décision du 25 septembre 2015, se référant à l'édition 2014 du Règlement de la Commission du Statut du Joueur, dès lors qu'elle avait été saisie le 5 février 2015, ainsi qu'aux articles 24 al. 1 et 22 let. b du Règlement du Statut et du Transfert des Joueurs ("RSTJ"), la Chambre de Résolution des Litiges (CRL) a constaté qu'elle était en présence d'un litige contractuel entre un joueur et un club comportant une dimension internationale et qu'elle était donc en principe compétente pour en connaître.

Sur le fond, la CRL a, en résumé, considéré que le Joueur avait eu une juste cause pour résilier le contrat en raison du défaut d'enregistrement du Joueur auprès de la FTF après écoulement de deux périodes d'enregistrement et en raison du défaut de paiement de la "prime" pour la saison 2014-2015, reconnu par le Club. S'agissant des conséquences pécuniaires de cette résiliation, la CRL a considéré que le Club devait verser au Joueur la somme de 60'000 EUR correspondant à la "prime" pour la saison 2014-2015, prime correspondant en réalité à un paiement forfaitaire, faisant partie de la rémunération fixe du demandeur. Pour déterminer l'indemnité due au Joueur par le Club pour rupture du contrat, la CRL s'est fondée sur l'art. 17 al. 1 RSTJ. Elle a fixé à 428'000 EUR la somme des "primes" et salaires du Joueur pour le reste de la saison 2014-2015 et pour les saisons 2015-2016 et 2016-2017, après déduction des montants dus au Joueur en vertu de son nouveau contrat de travails. Les prétentions du Joueur en indemnisation d'un préjudice moral et sportif ont en revanche été rejetées faute d'être suffisamment spécifiées et faute de base légale. Il en est allé de même de la demande de l'Intimé tendant au paiement des frais de procédure, rejetée conformément à l'art. 18 des Règles de procédure.

Le 21 mars 2016, Espérance Sportive de Tunis a adressé une déclaration d'appel au Greffe du TAS, conformément aux dispositions des articles R47 et R48 du Code de l'Arbitrage en matière de sport ("le Code"). L'Appelante a requis *"l'annulation de la décision attaquée pour avoir enfreint les règles de compétence et de fond applicables au litige.*

Une audience s'est tenue le 31 août 2016 au TAS, à Lausanne.

Considérants

1. A titre préalable, la formation s'est attachée à préciser la question du droit applicable.

   Les parties qui décident de soumettre leurs éventuels litiges à la compétence du TAS choisissent par là même également – implicitement, mais clairement - de se voir appliquer la réglementation instituée par ce tribunal arbitral (à cet égard, cf. ULRICH HAAS, Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law – in Bulletin TAS 2015/2, pp. 7ss, spéc. pp. 9-10). Elles admettent ainsi, notamment, que la Formation déterminera le droit applicable au fond en vertu de l'art. R58 du Code.

   Il résulte de cette disposition que les questions litigieuses doivent, en priorité, être résolues par la Formation en application de la règlementation applicable au cas d'espèce. Les dispositions règlementaires topiques ont ainsi la primauté sur le droit éventuellement choisi par les parties, par exemple dans le contrat litigieux. Ce droit ne peut entrer en ligne de compte dans la résolution du litige que

subsidiairement, comme le précise l'art. R58 du Code (à cet égard, ULRICH HAAS, *op. cit.*).

Une question supplémentaire doit être résolue dans l'hypothèse où la règlementation applicable (prioritairement) en vertu de l'art. R58 du Code contient elle-même une disposition destinée à déterminer le droit applicable. Tel est par exemple le cas de l'art. 66 al. 2 des Statuts de la FIFA qui prévoit (version 2015 notamment) que *"le TAS applique en premier lieu les divers règlements de la FIFA ainsi que le droit suisse à titre supplétif"*. La Formation partage l'appréciation selon laquelle, dans cette hypothèse, l'application correctement coordonnée des articles 187 al. 1 LDIP, R58 du Code et 66 al. 2 des Statuts de la FIFA entraîne l'application prioritaire de la règlementation de la FIFA et l'application complémentaire (soit subsidiaire ou supplétive) du droit suisse aux questions que cette réglementation ne résout pas expressément (cf. ULRICH HAAS, *op. cit.*). A titre d'exemple, le droit suisse serait ainsi applicable à la méthode d'interprétation de la réglementation de la FIFA ou à la légitimation active et passive dans les litiges régis par le RSTJ. Cette hiérarchisation des règles juridiques est en effet propre à assurer une mise en œuvre uniforme, sur le plan international, des principes et règles applicables en matière de football, but qui ne serait pas atteint par une application erratique d'une multitude de droits nationaux ayant pu, au gré des contrats passés dans le domaine du football international, faire l'objet d'une élection de droit par les parties. Cependant, selon certains auteurs, en vertu de l'art. R58 du Code, les règles de droit choisies par les parties doivent trouver une application résiduelle pour résoudre les questions qui ne sont pas traitées par la réglementation de la FIFA mais dont on pourrait considérer qu'il n'est pas impératif qu'elles soient tranchées de manière uniforme dans le cadre du football international par l'application supplétive du droit suisse. Ce peut être le cas par exemple pour trancher une question relative à la monnaie de paiement d'une créance.

2. L'Appelante a contesté la compétence de la CRL, motif pris de l'art. 14 du contrat qui prévoit expressément que le Joueur et le Club conviennent de recourir aux instances compétentes de la FTF, soit la CNL. Le Joueur a pour sa part soutenu que la composition de la CNL n'était pas conforme avec les exigences de l'article 22 let. b RSTJ.

   Selon l'art. 22 let. b RSTJ (2014), la compétence de la FIFA – soit de la CRL, s'étend notamment *"aux litiges de dimension internationale entre un club et un joueur relatifs au travail, à moins qu'au niveau national, un tribunal arbitral indépendant garantissant une procédure équitable et respectant le principe de la représentation paritaire des joueurs et des clubs ait été établi dans le cadre de l'association et/ou d'une convention collective"*.

   La Formation a rappelé que les contrats conclus entre un joueur professionnel et un club de football sont qualifiés de manière constante de contrat de travail (p. ex. TF 4A_510/2015, du 8 mars 2016; TF 4A_246/2014, du 15 juillet 2015; TF 4A_426/2014, du 6 mai 2015; ATF 140 III 520; TF 4A_304/2013, du 3 mars 2014), qualification qui s'impose manifestement en l'espèce. L'on est donc bien en présence d'un *litige relatif au travail* au sens de l'art. 22 let. b RSTJ.

   Ce litige oppose un joueur de nationalité française et malienne à un club de football tunisien. Il présente donc une *dimension internationale* au sens de l'art. 22 let. b RSTJ.

La CRL est donc – en principe – compétente pour statuer en première instance sur le présent litige sauf si, par exception et comme le prétend l'Appelante, l'art. 14 du contrat devrait être considéré comme excluant cette compétence.

La compétence de la CRL étant acquise sur le principe, c'est la partie qui soulève l'exception d'incompétence de cette commission – soit l'Appelante – qui supporte le fardeau de la preuve de la démonstration de la réalisation des conditions posées par l'art. 22 let. b RSTJ (JAN KLEINER, Der Spielvertrag im Berufsfussball, Thèse Zurich, 2013, p. 374, note infrapaginale 1267 et les références), soit en particulier du fait que le tribunal à saisir serait indépendant, et que la procédure à suivre serait équitable et que le principe de représentation paritaire des joueurs et des clubs serait respecté.

A cet égard, la Formation a considéré que si la compétence de la CNL couvre incontestablement les litiges de nature contractuelle entre un club et un joueur professionnel (art. 52 des Statuts de la FTF), cette compétence ne s'étend qu'aux litiges de dimension *nationale*. La CNL n'est donc pas compétente pour statuer sur des litiges de nature internationale, comme celui qui fait l'objet de la présente procédure. Il s'ensuit que le moyen tiré d'une prétendue incompétence de la CRL est infondé et que l'appel formé sur ce point devra être rejeté pour ce premier motif.

En outre, l'Appelante n'a pas démontré que les autorités instituées par les Statuts de la FTF respectaient les exigences de l'art. 22 let. b RSTJ- en particulier le principe de représentation paritaire des joueurs et des clubs.

3. Le Club conteste le bien-fondé de la résiliation anticipée du contrat par le Joueur pour défaut d'enregistrement sur la liste des joueurs qualifiés. Selon le Club, le Joueur savait lors de la signature du contrat que le Club comptait déjà dans ses rangs trois joueurs étrangers, ce qui constitue la totalité du quota autorisé par les règlements tunisiens, avec pour conséquence que l'enregistrement du Joueur était tributaire du départ de l'un de ces trois joueurs. Selon le Club, il ne fait donc aucun doute que le Joueur a consciemment et volontairement accepté sa situation, sans quoi il aurait réagi. Sa "réaction" après la clôture de la période d'enregistrement ne peut, en toute logique, qu'être assimilée à une manœuvre destinée à se départir de ses obligations. Pour sa part, le Joueur a soutenu s'être trouvé dans l'impossibilité d'exercer son métier à cause de sa mise à l'écart de la liste des joueurs qualifiés et n'avoir jamais accepté cette situation.

La Formation a rappelé que selon l'art. 14 RSTJ *"en présence d'un cas de juste cause, un contrat peut être résilié par l'une ou l'autre des parties sans entraîner de conséquences (ni paiement d'indemnités, ni sanctions sportives)"*.

Dans sa pratique, le TAS tend à interpréter la notion de "juste cause" de l'art. 14 RSTJ à l'aune de la notion de "justes motifs" de l'art. 337 CO (TAS 2013/A/3091; TAS 2008/A/1447; TAS 2006/A/1062). Selon l'art. 337 al. 2 CO, *"sont notamment considérées comme de justes motifs toutes les circonstances qui, selon les règles de la bonne foi, ne permettent pas d'exiger de celui qui a donné le congé la continuation des rapports de travail"*. Conformément au principe général de procédure consacré par l'art. 8 CC, le fardeau de la preuve de l'existence de justes motifs de résiliation incombe à la partie qui résilie le contrat. Une violation particulièrement grave permet à l'employeur ou à l'employé de résilier le

contrat avec effet immédiat. Si le manquement est moins grave, un avertissement préalable est nécessaire. Le fait pour un club de durablement ne pas mettre un joueur en situation d'effectuer la prestation de travail convenue et d'exercer ainsi son métier - obligations contractuelle fondamentale de l'employeur – constitue un juste motif de résiliation anticipée du contrat de travail sans qu'une mise en demeure préalable à la résiliation soit nécessaire. A cet égard, le Tribunal fédéral a jugé (ATF 137 III 303) que le travailleur peut avoir un intérêt légitime à fournir effectivement la prestation prévue contractuellement. Un employé qui ne travaille plus se déprécie sur le marché du travail et son avenir professionnel s'en trouve compromis. Dans le prolongement de cette jurisprudence voir CAS 2013/A/3091, 3092 & 3093, repris à son compte par le TAS dans la cause CAS 2014/A/3642.

Le Club n'a pas établi que le Joueur aurait accepté le prolongement de l'impossibilité d'exercer son métier en raison de l'échec des négociations visant au transfert de l'un au moins des joueurs étrangers du contingent. La Formation a considéré que l'Intimé n'avait pas à supporter plus longtemps cette situation d'inexécution par l'Appelante de l'une de ses obligations contractuelles fondamentales. L'Intimé disposait donc clairement d'un juste motif, au sens de l'art. 337 CO, ou d'une juste cause, au sens de l'art. 14 RSTJ, l'autorisant à mettre fin au contrat de manière anticipée. Par ailleurs, la violation des obligations contractuelles dont il est question est suffisamment grave, durable et connue de l'Appelante pour qu'une mise en demeure préalable à la résiliation du contrat ne fût pas nécessaire.

4. La Formation a rappelé que le RSTJ règle à son art. 17 les conséquences financières d'une rupture de contrat *sans juste cause*. Ce règlement ne prévoit en revanche pas de disposition traitant expressément de ces conséquences en cas de résiliation anticipée *justifiée* du contrat. Pour combler cette lacune, on trouve dans la pratique du TAS des sentences appliquant par analogie l'art. 17 RSTJ, des décisions se fondant sur l'art. 337b CO à titre de droit supplétif, voire examinant la situation sous l'angle de ces deux dispositions conjointement (p. ex. CAS 2013/A/3398). Il semble en général admis que le joueur qui résilie le contrat pour juste motif peut obtenir l'indemnisation de son intérêt positif ("dommages-intérêts positifs"), comme le prévoit en particulier l'art. 97 CO. A cet égard le créancier qui a droit à des dommages-intérêts positifs doit – sauf réduction de l'indemnité – être placé dans la situation qui serait la sienne si son débiteur avait exécuté l'intégralité du contrat conformément aux clauses du contrat et aux modalités stipulées dans le contrat ou prévues par la loi (LUC THEVENOZ, Commentaire romand du Codes des obligations I, 2ème éd., N 33 ad art. 97, p. 745).

Il résulte en l'espèce des principes prévus à l'article 337b al. 1 CO, que l'Intimé est en droit d'obtenir de l'Appelante l'intégralité de la rémunération qui lui aurait été versée en cas d'exécution régulière du contrat jusqu'au terme prévu à défaut de preuve de déduction justifiée rapportée par l'Intimé.

5. Le club conteste le fait que la CRL lui ait enjoint de payer des montants en euros alors que le contrat prévoyait expressément que le paiement de tous les montants en dinar tunisien. A l'inverse l'Intimé soutient qu'il lui serait impossible de se faire payer en dinars tunisiens dès lors qu'il ne réside plus en Tunisie et n'y dispose plus de compte

bancaire et que l'exportation de dinars tunisiens est interdite par décret.

Conformément aux principes issus de l'art. 18 al. 1 CO, pour apprécier la forme et les clauses d'un contrat, il y a lieu de rechercher la réelle et commune intention des parties (TF 4A_98/2016, du 22 août 2016). Si cela est impossible, le juge doit recourir à l'interprétation normative (ou objective), à savoir rechercher leur volonté objective, en déterminant le sens que, d'après les règles de la bonne foi, chacune d'elles pouvait et devait raisonnablement prêter aux déclarations de volonté de l'autre (application du principe de la confiance). A cet égard, si une interprétation objective du contrat conduit à retenir que la monnaie de paiement convenue entre les parties en relation avec l'exécution du contrat est la monnaie du débiteur/employeur – le dinar tunisien-, il heurte en particulier le principe de la confiance de considérer que cette clause autoriserait l'employeur à s'acquitter dans sa monnaie des montants libellés en euros après résiliation du contrat pour justes motifs par l'employé et ce alors que l'employé a quitté le pays de l'employeur. Par ailleurs, en vertu du droit national applicable à titre résiduel, le débiteur peut se libérer partout où il trouve le créancier, en particulier, s'agissant du versement d'une somme d'argent, là où le créancier dispose d'un domicile de paiement.

Décision

La Formation a rejeté l'appel formé par Espérance Sportive de Tunis contre la décision rendue par la Chambre de Résolution des Litiges de la FIFA le 25 septembre 2015 dans la cause l'opposant à Moussa Marega et confirmé ladite décision.

CAS 2016/A/4549
Aris Limassol FC v. Carl Lombé
4 November 2016

Football; Termination of contract of employment between a player and a club; Determination of the law applicable to the termination issue; Condition of validity of a relegation clause; Lack of evidence of mutual termination; Lack of evidence of a settlement agreement

Panel
Prof. Michael Geistlinger (Austria), Sole Arbitrator

Facts

Aris Limassol FC (the "Appellant" or the "Club") is a professional football club with its registered office in Limassol, Cyprus. It is a member of the Cyprus Football Association (CFA) and plays in the Cypriot First Division.

Mr Carl Lombé (the "Respondent" or the "Player") is a professional football player of Cameroons and Armenian nationalities, with a last assignment with the Appellant.

On 1 June 2010, the Parties concluded a contract of employment (the "First Contract"), valid from the date of signature until 30 May 2012, whereas the Respondent had signed his very first contract with the Appellant in 2008.

According to the First Contract, the Respondent was entitled to receive the amount of EUR 30,000 payable in ten equal monthly instalments amounting to EUR 3,000 (article 5) for the season 2011/2012. In addition, other advantages were provided for, such as an exceptional bonus in the amount of EUR 5,000 was due, if the Club *"climbs to a superior division"* (article 13 lit. e) under the First Contract. The Respondent was promoted to the Cypriot First Division at the end of season 2010/2011.

On 1 July 2011, the Parties concluded a second contract of employment for the period as from 1 June 2012 until 30 May 2015 (the "Second Contract") and on 2 July 2011 the Parties concluded a supplementary agreement for the period as from 2 July 2012 until 30 May 2015 (the "Supplementary Agreement"), both hereinafter also referred to together as the "Second Contract".

According to the Second Contract the Respondent was entitled to receive the amount of EUR 20,000 payable in ten equal monthly instalments amounting to EUR 2,000 for each season of the three-year-term. In addition, the Respondent was entitled to receive *"two return air tickets in order* (…) *to be able to go to France"* under to the Second Contract. According to the Supplementary Agreement, the Respondent was entitled to receive the amount of EUR 35,000 payable in ten equal monthly instalments amounting to EUR 3,500 for each season of the three-year-term. Also, the Appellant should provide the Respondent an accommodation *"for a rent of not more than EUR 400 per month"* (article 4) under the Supplementary Agreement.

The Second Contract stipulated in its article 8: *"In case of gradation of the Football Club to an inferior Category, the Football Club will have the right to release the Football Player and the latter will have no right to damages".*

Article 20.3.1. of the Statutes of the Cypriot Football Association ("CFA Transfer Regulations") stipulates: *"In case a club is relegated from A to the B Division, the employment contracts of all foreign professional players shall be automatically terminated and shall be free the latest by 1st of June following the end of the Championship. A relevant term must necessarily be included in all employment contracts of foreign professional players of the A Division".*

The Appellant did not pay the remuneration due for the months of March, April and May 2012 (in total EUR 9,000) and did not pay the exceptional bonus amounting to EUR 5,000 despite the Appellant was promoted to the Cypriot First Division at the end of the season of 2010/2011.

The Appellant was relegated to the Second Division at the end of season 2011/2012. As a consequence of such relegation, the Parties argue with respect to a termination of the Second Contract in summer 2012. Furthermore the Appellant gave the Respondent a one way ticket to Cameroon and three cheques amounting in a total of EUR 17,100. These cheques could not be cashed.

On 29 January 2013, by fax and via his counsel, the Respondent requested the Appellant to pay him, at the latest within 10 calendar days, a total amount of EUR 194,400 due to outstanding remuneration, outstanding bonus payment and compensation payments. The Appellant did not react to this, and on 8 February 2013, the Respondent brought his case before FIFA.

On 30 September 2013 the Appellant and Mr Giannakis Vasileiou signed a so called "Settlement Agreement" which stated that a payment of EUR 8,000 by the Appellant fully and finally settles the Payments and that the Respondent had no any other claim against the Appellant.

On 10 October 2013 the Appellant transferred EUR 8,000 to the Respondent's bank account.

On 8 February 2013 the Respondent lodged a claim in front of FIFA against the Appellant asking he be paid a total of EUR 204,000 plus 5% interest from the respective due dates as a consequence of the Appellant's allegedly outstanding remuneration, bonus and compensation payments.

On 5 November 2015, the FIFA Dispute Resolution Chamber partially accepted the Player's claim.

On 13 April 2016, the Appellant filed a Statement of Appeal to the Court of Arbitration for Sport (CAS).

A Hearing was held at the CAS Court Office, in Lausanne, on 29 July 2016.

Reasons

1. The Club argued that the Second Contract and the Supplementary Agreement were automatically terminated by virtue of article 20.1.3 of the CFA Transfer Regulations. On the other hand, the Player argued that the Club, on 1 July 2012, unilaterally terminated the Second Contract and the Supplementary Agreement on basis of a contractual clause which is potestative and contrary to the FIFA Regulations on the Status and Transfer of Players of 2012 (RSTP 2012) and Swiss (public) law. Therefore the Player considered that the Club terminated the Second Contract and the Supplementary Agreement without just cause.

   The Sole Arbitrator reminded that the reference to the *"applicable regulations"* in Article R58 constitutes an indirect choice of law (Rigozzi/Hasler in: Arroyo, Arbitration in Switzerland, Article R58 CAS Code, para 7). For this reason, a Panel or Sole Arbitrator needs to establish, what sets of rules or law might be applicable under the different conditions and circumstances mentioned explicitly in Article R58 (Rigozzi/Hasler, *op. cit.*, para. 8), which – in case of players and clubs – can be a tacit choice of law in the commitment to respect the rules of national or international federations (Mavromati/Reeb, para 103).

Usually, in employment contracts, licenses and registration documents, clauses can be found according to which the player undertakes to abide by the national or international (sporting) regulations. Such commitment of the player has not been demonstrated and substantiated by the Club in the present case, since neither does the contract of employment include such commitment, nor did the Club submit a national license, registration or similar document containing such commitment. Finally, the Sole Arbitrator noted that one cannot infer from the very first contract of employment signed with the Club that the Player was aware of the automatic termination that would result from a relegation and even less that the CFA regulations providing for the automatic termination of the employments contracts signed between Cyprus football clubs and foreign players in case of relegation to a lower division would be applicable to a subsequent contract. Without any circumstance leading to a tacit choice of law, the Panel found that the CFA regulations could not be considered the *applicable law*.

In conclusion, the Appellant cannot rely on an automatic termination of the Second Contract, since Article 20.1.3. of the CFA Transfer Regulations cannot be considered part of the applicable law, notwithstanding the fact that it was very questionable, whether such stipulation would actually have an effect on the Second Contract.

2. The Club argued that the Second Contract and the Supplementary Agreement were automatically terminated by virtues of article 8 of the Second contract which stipulates that: *"In case of gradation of the Football Club to an inferior Category, the Football Club will have the right to release the Football Player and the latter will have no right to damages"*.

The player considered that this contractual clause was potestative and contrary with the FIFA Regulations on the Status and Transfer of Players of 2012 (RSTP 2012) and Swiss (public) law.

The Sole Arbitrator reminded that there are two different types of relegation clauses:

There are relegation clauses stating that the contractual relationship of the parties automatically end in the case of relegation of the club, or give both parties the right to terminate the employment contract in case of relegation. These kinds of relegation clauses do not only benefit clubs but also the players. Therefore, these clauses can be deemed as a valid way to protect mutual interests of both parties of the contract. This view is supported by CAS award in case 2008/A/1447 para. 38 stating that *"relegations clauses are mainly a way of protecting the players' careers, as their employment opportunities and market values would be reduced by playing in lower divisions during their short-term careers"*.

On the other hand, relegation clauses implying that a club retains full discretion as to whether the employment relationship with the player will continue or will come to an end following the relegation of the club, without protecting any established or substantiated interest of the player, contain an unbalanced right to the discretion of one party only. These kind of clauses bear the risk that they contain an unbalanced right to the discretion of one party only without having any interest of any kind for the other party.

In the present case, Article 8 of the Second Contract only allowed the Club to terminate the employment contract in case of relegation. Moreover, neither in the Second Contract nor in the Supplementary

Agreement there was any compensation granted to the Player in the case of the termination of the contractual relation. That implied that the Club retained full discretion as to whether the employment relationship with the Respondent will continue or will come to an end following the relegation of the Club, without protecting any established or substantiated interest of the Player. In the light of the above the Sole Arbitrator considered that Article 8 of the Second Contract established unbalanced rights in the circumstances, and was, therefore, contrary to the freedom of workers under Art. 27 para. 2 of the Swiss Civil Code, as well as contrary to the parity of termination rights under Art. 335a of the Swiss Code of Obligations (SFT 102 II 211, p. 218 et alt., CAS 2005/A/983 & 984, para. 88). Therefore the Club could not rely on an act of termination under Article 8 of the Second Contract.

3. Since the Club would bear the burden of proof according to Article 8 of the Swiss Civil Code with respect to a mutual termination agreement but was not in possession of a respective document, it could only rely on the testimony of Mr Lysandrou. However, the Panel found that Mr Lysandrou's statement was not sufficient to support the conclusion of a mutual termination agreement since he had to be considered being close to one party, i.e. the Club. In addition, the Club's claim of a mutual termination agreement in July 2012 had been brought forward for the first time in the hearing before the CAS and was not part of its submitted witness statement. Such claim was neither supported by written evidence as could be expected in case of a written termination agreement. In conclusion, and given that the Player firmly denied having signed such agreement, the Sole Arbitrator, based on the submitted evidence, was not convinced that the Parties had signed mutual termination agreement in July 2012.

4. The Appellant argued that the Settlement Agreement or the acceptance of EUR 8,000 by the Player led to the conclusion that the Player legally effective waived all of his claims against the Club.

   However, absent any evidence that an authorization of representation was given by the Player to a third person, the Club could not rely on the effective conclusion of a settlement agreement entered into with that third person.

Decision

The Sole Arbitrator decided to dismiss the appeal filed by the Appellant on 13 April 2016 against the decision issued by the FIFA Dispute Resolution Chamber on 5 November 2015 and to confirm said decision.

TAS 2016/A/4569
Abdelkarim Elmorabet c. Olympic Club Safi & Fédération Royale Marocaine de Football (FRMF)
20 septembre 2016

Football; Contrat de travail de joueur professionnel; Détermination du droit applicable; Etendue du pouvoir de cognition du TAS; Définition de "justes motifs"; Base légale pour régler les conséquences financières d'une résiliation anticipée justifiée du contrat; Etendue du dommage

Formation
Juge Pierre Muller (Suisse), Arbitre unique

Faits

Le 2 septembre 2014, Abdelkarim Elmorabet ("le Joueur" ou "l'Appelant"), de nationalité franco-marocaine, et l'Olympic Club Safi ("le Club" ou "l'Intimé n° 1"), club enregistré auprès de la Fédération Royale Marocaine de Football (FRMF; "l'Intimée n° 2"), ont signé un contrat d'engagement de joueur professionnel pour les saisons 2014/2015 et 2015/2016. Ce contrat prévoit notamment que le club s'engage à octroyer au joueur un salaire net mensuel de 12.500 MAD pour les deux saisons et une prime de signature de 500.000 MAD pour la saison 2014/2015 et de 700.000 MAD pour la saison 2015/2016.

A dater du mois de juin 2015, le Club a cessé de verser au Joueur ses rémunérations. Par courrier du 24 juillet 2015, le Joueur a en outre été écarté du groupe professionnel et affecté à l'équipe des espoirs du Club.

Le 8 septembre 2015, le Joueur a adressé au Président du Club un courrier mettant ce dernier en demeure de lui payer un montant total de 337.500 MAD représentant pour 300.000 MAD les 2ème et 3ème tranches de sa prime de signature pour la saison 2014/2015 et pour 37.500 MAD les salaires impayés de juin, juillet et août 2015. Par courriers du même jour et du 12 septembre 2015, le Joueur a dénoncé sa situation à la FRMF.

Le 16 septembre 2015, le Joueur a adressé au Président du Club une deuxième mise en demeure pour un montant total de 312.500 MAD, constatant que le Club lui avait versé la somme de 25.000 MAD en lieu et place de la somme de 337.500 MAD normalement due.

Le 30 septembre 2015, le Joueur a saisi la Commission spéciale de résolution des litiges (CSRL) de la FRMF. Dans sa requête, il demandait à la CSRL de constater que le Club avait violé ses obligations contractuelles et d'ordonner le versement d'un montant total de 1.137.500 MAD représentant pour 300.000 MAD les 2ème et 3ème tranches de sa prime de signature pour la saison 2014/2015, pour 700.000 MAD la prime de signature pour la saison 2015/2016 et pour 137.500 MAD les salaires impayés d'août 2015 à juin 2016.

Dans un procès-verbal établi le 30 septembre 2015, vers 12h00, au stade de l'équipe Olympique de Safi, l'huissier de justice auprès du Tribunal d'instance de Safi a constaté que l'Appelant ne participait ni *"aux entraînements relatifs au football avec l'équipe Espoirs"*, ni *"aux entraînements relevant des techniques du football, l'intéressé se contenant (…) sans le moindre encadrement technique et de façon totalement isolée par rapport aux entraînements suivis par l'équipe sous encadrement technique (…) de faire le tour du stade le temps de sa séance d'entraînement sans toucher un ballon, ni participer aux entraînements suivis par les joueurs de l'équipe"*. Des constats semblables ont été établis par l'huissier de justice les 27 octobre 2015 vers 12h00 et le 5 février 2016 vers 12h00.

Le 1er février 2016, par décision référencée n° 55/2015-2016, la CSRL a ordonné au Joueur de *"rejoindre immédiatement son club et reprendre régulièrement les entraînements sous peine de mesures disciplinaires"*. Quant au Club, il lui a été ordonné de verser au Joueur *"la somme de 401.500,00 dhs représentant les frais d'ouverture du dossier (1.500 dhs), la 2ème et la 3ème tranche de la prime de signature 2014-2015 (300.000 dhs) et 8 mois de salaire allant du mois de juillet 2015 jusqu'au mois de janvier 2016 (12.500 x 8=100.000)"*.

Le 8 février 2016, le Joueur a contesté cette décision devant la Commission Centrale d'Appel (CCA) de la FRMF. Par décision du 21 mars 2016, notifiée au Joueur le 28 mars 2016, la CCA a annulé *"la décision en appel dans son volet ordonnant à l'appelant de rejoindre son équipe intimée"* et a ordonné *"son désengagement avec lui à partir de la date de notification de la décision à ses soins"*. Pour le reste, elle a confirmé l'octroi au Joueur de *"ses dus financiers pour les saisons 2014/2015 et 2015/2016"* dans la quotité arrêtée par la CSRL.

Dans une déclaration d'appel adressée au TAS le 18 avril 2016 et par mémoire d'appel du 4 mai 2016, le Joueur a contesté la décision de la CCA en ce qu'elle limitait les montants qui lui étaient octroyés à titre d'arriérés de paiement aux 400.000 MAD arrêtés par la CSRL et a demandé au TAS d'enjoindre le Club à lui verser *"l'intégralité des sommes dues au titre de son contrat de travail daté du 3 septembre 2014 qui devait expirer au 30 juin 2016"*, montant qu'il a chiffré à un total de 1.137.500 MAD incluant notamment la prime de signature de 700.000 MAD pour la saison 2015/2016 non retenue par la CSRL. Il a en outre conclu au paiement solidairement par l'Intimé n° 1 et l'Intimée n° 2 d'une somme de 30'000 EUR *"au titre des préjudices personnels et professionnels subis"*.

Considérants

1. Statuant sur la question du droit applicable, l'Arbitre unique a considéré qu'en vertu de l'art. R58 du Code TAS, les questions litigieuses devaient, en priorité, être résolues en application de la règlementation applicable au cas d'espèce et que les dispositions règlementaires topiques avaient ainsi la primauté sur le droit éventuellement choisi par les parties, par exemple dans le contrat litigieux. Ce droit ne pouvait entrer en ligne de compte dans la résolution du litige que subsidiairement, comme le précise l'art. R58 du Code TAS. Dans l'hypothèse où la règlementation applicable (prioritairement) en vertu de l'art. R58 du Code TAS contenait elle-même une disposition destinée à déterminer le droit applicable, par exemple les Statuts de la FIFA, l'application correctement coordonnée des art. 187 al. 1 LDIP, R58 du Code TAS et 66 al. 2 des Statuts de la FIFA entraînait alors l'application prioritaire de la règlementation de la FIFA et l'application complémentaire (soit subsidiaire ou supplétive) du droit suisse aux questions que cette réglementation ne résolvait pas expressément. Pour l'Arbitre unique, cette hiérarchisation des règles juridiques était en effet propre à assurer une mise en œuvre uniforme, sur le plan international, des principes et règles applicables en matière de football, but qui ne pouvait pas être atteint par une application erratique d'une multitude de droits nationaux ayant pu, au gré des contrats passés dans le domaine du football international, faire l'objet d'une élection de droit par les parties. Restait à savoir si les autres questions – celles non traitées par la réglementation de la FIFA mais dont on pouvait considérer qu'il n'était pas impératif qu'elles soient tranchées de manière uniforme dans le cadre du football international – devaient aussi être résolues par l'application supplétive du droit suisse (en vertu de l'art. 66 al. 2 des Statuts de la FIFA) ou si (en vertu de l'art. R58 du Code

TAS) les règles de droit choisies par les parties devaient trouver ici une application résiduelle. En l'occurrence, tant le Joueur et le Club, dans leur contrat, que la décision attaquée, rendue par une instance de la FRMF, faisaient référence aux règlements de la FIFA. A cela s'ajoutait que, devant le TAS, aucune des parties n'avait invoqué ni soumis de dispositions des règlements de la FRMF ou d'un quelconque droit national. En conséquence, l'Arbitre unique a considéré que, sous réserve d'une éventuelle contradiction manifeste entre la règlementation de la FRMF et celle de la FIFA, cette dernière devait être appliquée à titre principal, le droit suisse étant dès lors applicable à titre supplétif.

2. Quant au pouvoir d'examen du TAS, l'Arbitre unique a rappelé que selon l'art. R57 du Code TAS, la formation arbitrale pouvait statuer *de novo* sur l'objet de la décision attaquée. Elle n'était pas limitée à un simple examen de la légalité de cette décision, mais pouvait rendre une nouvelle décision sur la base des dispositions réglementaires ou légales applicables. Ce libre pouvoir d'examen de la décision attaquée connaissait toutefois certaines limites, l'une d'entre elles étant que ce pouvoir ne pouvait être interprété comme étant plus large que celui de l'institution qui avait rendu la décision attaquée et était limité aux questions qui avaient été traitées dans la décision attaquée. En l'espèce, l'Appelant n'avait jamais émis de prétentions envers l'Intimée n° 2 devant la CSRL ou la CCA. L'Arbitre unique a donc considéré que les conclusions prises par l'Appelant pour la première fois devant le TAS contre l'Intimée n° 2, en constatation d'un prétendu manque de célérité dans le traitement du litige et en paiement d'une somme de EUR 30'000, devaient être rejetées, dans la mesure de leur recevabilité.

3. En ce qui concerne les justes motifs de résiliation, l'Arbitre unique a précisé que les articles 13 et 14 du Règlement du Statut et du Transfert des Joueurs (RSTJ) correspondaient aux règles du droit suisse: il résultait en effet de l'art. 334 al. 1 du Code des obligations (CO) que les contrats de travail conclus pour une durée déterminée prenaient fin sans qu'il soit nécessaire de donner congé. Préalablement à l'échéance convenue, il ne pouvait pas y être mis fin par une résiliation ordinaire, mais uniquement par accord entre les parties ou en présence d'une cause extraordinaire de résiliation, en particulier de justes motifs au sens de l'art. 337 CO. Ainsi, en présence d'un juste motif, l'art. 337 al. 1 CO autorisait l'employeur ou l'employé à mettre en tout temps un terme immédiat au contrat. Rappelant que dans sa pratique, le TAS tendait à interpréter la notion de "juste cause" de l'art. 14 RSTJ à l'aune de la notion de "justes motifs" de l'art. 337 CO, l'Arbitre unique a ensuite précisé que selon l'art. 337 al. 2 CO, un juste motif était un fait propre à détruire la confiance qu'impliquent dans leur essence les rapports de travail ou à les ébranler de telle façon que la poursuite des rapports contractuels ne pouvait plus être exigée de celui qui donne le congé, de sorte qu'il ne pouvait plus lui être demandé d'attendre l'expiration de l'échéance du contrat (s'agissant d'un contrat de durée déterminée); il appartenait à celui qui se prévaut de l'existence de justes motifs de prouver leur existence (art. 8 CC). Une violation particulièrement grave permettait à l'employeur ou à l'employé de résilier le contrat avec effet immédiat. Si le manquement était moins grave, un avertissement préalable était nécessaire. En ce qui concerne une résiliation par l'employé, cet avertissement avait pour but de permettre à l'employeur de prendre conscience du manquement et de l'enjoindre de respecter ses obligations. Il

avait ainsi été jugé qu'en cas de retard répété et prolongé dans le paiement du salaire échu, le travailleur pouvait, si ce retard persistait en dépit d'une sommation qu'il avait adressée à l'employeur, résilier immédiatement le contrat en se fondant sur l'art. 337. Des justes motifs de résiliation anticipée du contrat de travail par un joueur professionnel pouvaient également résulter du fait que le club ne le mettait pas en situation d'effectuer la prestation de travail convenue. A cet égard, le travailleur pouvait avoir un intérêt légitime à fournir effectivement la prestation prévue contractuellement, autrement dit à être effectivement occupé par l'employeur; un employé qui ne travaille plus se dépréciant sur le marché du travail et son avenir professionnel s'en trouvant compromis.

En l'espèce, l'Arbitre unique a estimé qu'il était indubitable que les retards répétés de l'Intimé n° 1 dans le versement du salaire contractuellement dû à l'Appelant, et les mises en demeure y relatives, permettaient à l'Appelant de se prévaloir d'un juste motif, au sens de l'art. 337 CO, ou d'une juste cause, au sens de l'art. 14 RSTJ, l'autorisant à mettre fin au contrat de manière anticipée, respectivement à solliciter de la CSRL qu'elle prononçât sa libération de ce contrat. Le fait que l'Appelant ait été déclassé sans raison, mis à l'écart et contraint de s'entraîner seul constituait également, compte tenu de l'ensemble des circonstances du cas d'espèce, notamment des mises en demeure et protestations écrites émises par l'Appelant, un juste motif de résiliation anticipée du contrat.

4. Appréciant ensuite les conséquences financières de ladite résiliation anticipée pour justes motifs, l'Arbitre unique a rappelé que le RSTJ réglait à son art. 17 les conséquences financières d'une rupture de contrat *sans juste cause*, mais ne prévoyait en revanche pas de disposition traitant expressément de ces conséquences en cas de résiliation anticipée *justifiée* du contrat. Constatant que pour combler cette lacune, on trouvait dans la pratique du TAS des sentences appliquant par analogie l'art. 17 RSTJ, des décisions se fondant sur l'art. 337b CO à titre de droit supplétif, voire examinant la situation sous l'angle de ces deux dispositions conjointement, l'Arbitre unique a jugé que pour apprécier les conséquences d'une résiliation anticipée *justifiée* du contrat, il y avait lieu de se fonder sur l'art. 337b CO, dès lors que cette disposition traitait expressément et spécifiquement le cas d'une résiliation anticipée justifiée, alors que l'art. 17 RSTJ traitait, à l'instar de l'art. 337c CO, l'hypothèse contraire (résiliation injustifiée).

5. En ce qui concerne le montant du dommage, l'Arbitre unique a dans un premier temps rappelé que selon le Tribunal fédéral suisse, le dommage couvert par l'art. 337b al. 1 CO correspondait à l'ensemble des préjudices financiers qui étaient dans un rapport de causalité adéquate avec la fin anticipée du contrat de travail. Le travailleur pouvait ainsi réclamer la perte de gain consécutive à la résiliation prématurée des rapports de travail, ce qui correspondait au montant auquel pouvait prétendre un salarié injustement licencié avec effet immédiat en application de l'art. 337c al. 1 et 2 CO. En revanche, le travailleur ne pouvait pas réclamer en sus le paiement d'une indemnité fondée sur l'art. 337c al. 3 CO.

   En l'espèce, l'Arbitre unique a ainsi jugé que c'était à juste titre que l'Appelant faisait valoir qu'il était en droit d'obtenir de la part de l'Intimé n° 1 l'intégralité de la rémunération qui aurait dû lui être versée en cas d'exécution régulière du contrat jusqu'au terme prévu, soit jusqu'au 30 juin 2016. Dans le détail, la prétention en

versement des montants convenus à titre de salaires s'élevait à MAD 137.500 correspondant aux salaires dus pour la période d'août 2015 à juin 2016. Quant aux montants convenus à titre de primes à la signature, il n'avait été ni allégué ni établi par l'Intimé n° 1 que le solde de la prime 2014/2015 (MAD 300.000) et la prime 2015/2016 (MAD 700.000) auraient été versées, ni que l'Appelant avait à un quelconque moment renoncé à ces prétentions; c'était donc à tort que la décision attaquée n'avait pas alloué à l'Appelant sa conclusion en paiement de la somme de MAD 1.000.000. En revanche, l'Appelant ayant pris, pour la première fois seulement devant le TAS, une conclusion en versement d'une indemnité au titre de préjudice personnel et professionnel d'un montant de EUR 30.000, cette conclusion était exorbitante du pouvoir d'examen conféré à l'Arbitre unique par l'art. R57 du Code, puisqu'elle n'avait pas été soumise aux instances précédentes; elle devait donc être rejetée pour ce motif.

Décision

Admettant partiellement l'appel formé par Abdelkarim Elmorabet contre la décision rendue par la CCA, l'Arbitre unique a confirmé cette décision en tant qu'elle prononçait la libération d'Abdelkarim Elmorabet du contrat de travail conclu le 2 septembre 2014 avec Olympic Club Safi et l'a modifiée en sens que Olympic Club Safi devait verser à Abdelkarim Elmorabet la somme de MAD 1.137.500 avec intérêt à 5 % l'an dès le 30 septembre 2015.

CAS 2016/O/4615
Asli Çakir Alptekin v. World Anti-Doping Agency (WADA)
4 November 2016 (operative part 5 July 2016)

Athletics (Middle distance); Further suspension of period of ineligibility based on Substantial Assistance Agreement with WADA; Admissibility and Article R32 CAS Code; Scope of CAS review of WADA refusal to further suspend the period of ineligibility of an athlete; Grounds for WADA denial of further suspension of period of ineligibility;

Panel
Ms Jennifer Kirby (United Kingdom), President
Mr Dirk Martens (Germany)
Mr Ken Lalo (Israel)

Facts

Ms Asli Çakir Alptekin (the "Appellant" or the "Athlete") is a middle distance runner, specializing in the 1'500m. She is also a *"whistle-blower"*.

The World Anti-Doping Agency (the "Respondent" or "WADA") is a Swiss private-law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada.

An eight-year ban, commencing on 10 January 2013 and memorialized in a consent award dated 17 August 2015 (the "Consent Award"), had been imposed on the Athlete by the International Association of Athletics Federations ("IAAF").

On or about 13 November 2015, WADA and the Athlete entered into a Substantial Assistance Agreement (the "Substantial Assistance Agreement") further to Article 10.6.1.2 of the WADA Code and Rule 40.7(a)(ii) of the IAAF Anti-Doping and Medical Rules in force as from 1 January 2015 ("IAAF ADR"). Pursuant to the Substantial Assistance Agreement, WADA suspended four years of the Athlete's period of ineligibility (*i.e.* 50% of her eight-year ban) rendering her eligible to compete again from 10 January 2017. The basis for this suspension was information provided by the Athlete to WADA, the IAAF Ethics Board (the "IAAF EB") and French prosecutors in November 2015, revealing unprecedented levels of corruption within the IAAF, including attempts to subvert the anti-doping regime. The Athlete's Substantial Assistance included evidence of an alleged scheme by Papa Massata Diack ("PMD") and Khalil Diack ("KD") – both sons of former IAAF President Lamine Diack – and others to extort money from athletes charged with anti-doping violations.

In January 2016, the IAAF EB found PMD guilty of breaches of the IAAF Ethics Code for extorting money from the Russian athlete Liliya Shobukhova and banned PMD for life from being involved in athletics. In its decision, the IAAF EB did not rely on any of the evidence provided by the Athlete.

In February 2016, upon appeal from the decision of the IAAF EB by PMD to the Court of Arbitration for Sport ("CAS"), the IAAF EB and the French financial crimes prosecutor asked the Athlete to procure further evidence from additional witnesses to bolster the case against PMD. In response, in April 2016, the Athlete procured three witness statements from members of her entourage (the "Additional Witness Statements") that provide direct evidence of PMD's attempt to extort money from her after she had been charged with the anti-doping violation that had ultimately led to the Consent Award.

By letter to the IAAF dated 20 April 2016, WADA stated that the IAAF EB was better placed to assess the additional value of the Additional Witness Statements in order to quantify the same in terms of a further suspension of sanction (if any). That insofar as the Athlete's sanction is final and binding, the IAAF proposal would require WADA approval in accordance with Rule 40.7(a)(i) of the IAAF Rules.

On 23 April 2016, the IAAF EB made a Reasoned Submission to WADA, explaining the value of the Additional Witness Statements. In this respect, the IAAF EB stated that the Additional Witness Statements - as direct evidence of PMD's involvement in extortion and not merely, evidence from which such involvement can be inferred - would be the strongest evidence of the IAAF.

Also on 23 April 2016, the Athlete filed an application with WADA for a further suspension of her ineligibility period of six months and ten days, pursuant to Clause 5 of the Substantial Assistance Agreement (the "Application").

On 25 April 2016, WADA disagreed to suspend a further portion of the Athlete's ineligibility period (the "Decision") both in light of the short deadline provided for the response *i.e.* 25 April 2016 and in light of the fact that WADA had not been involved in the generation of the Additional Witness Statements and had only learnt about these developments in the preceding week. In these circumstances it was not in a position to duly assess the value of the respective statements (if any) to the fight against doping. WADA underlined that it had made clear that it would urgently consider any proposal made by the IAAF to itself suspend a further portion of the Athlete's period of ineligibility in connection with the Additional Witness Statements.

Despite the Decision, on 29 April 2016, the Athlete provided the Additional Witness Statements to the IAAF EB which submitted them to the PMD appeal. The IAAF EB further transmitted a draft of the additional statements to WADA. However, after the Athlete had filed her appeal, the CAS Panel sitting in the PMD appeal ruled the Additional Witness Statements inadmissible in those proceedings further to an objection by PMD.

On 17 May 2016, the Athlete filed a Statement of Appeal and Appeal Brief ("Appeal Brief") with the CAS against WADA with respect to the Decision.

On 4 July 2016, a hearing took place at the CAS headquarters in Lausanne, Switzerland.

Reasons

In essence, the issues to be decided by the Panel are whether a) the Appeal is admissible and whether b) the Athlete had proven that WADA acted unreasonably or in bad faith in denying her the further suspension she requested under Clause 5 of the Substantial Assistance Agreement.

1. With regards to the admissibility of the appeal the parties disagree whether the CAS Code default 21-day time limit in Article R49 of the CAS Code means that the appeal should have been submitted on 16 May 2016, or whether 17 May 2016 was sufficient. The Athlete argued that the *"country where the notification is to be made"* under Article R32 of the CAS Code for purposes of the Athlete's appeal is Switzerland because notification had to be made to the CAS. As 16 May 2016 was a holiday in Switzerland the deadline for filing the appeal was the "first subsequent business day", which was 17 May 2016. To the extent there was any ambiguity in the language of Article R32 it should be

resolved against WADA further to the principle *of contra proferentem*. Conversely, WADA contended that the *"country where the notification is to be made"* was the United Kingdom because the Athlete's counsel was based there. As 16 May 2016 was not a holiday in the United Kingdom, the appeal should have been filed on that day, not on 17 May 2016 only. WADA also argued that the *contra proferentem* principle could not help the Athlete as WADA did not draft the CAS Code and that the parties could not agree to vary the time limit for appeal. WADA concluded that the appeal was untimely and inadmissible.

The Panel, having first noted that no CAS Panel had yet determined the holidays of which country are meant by the reference in Article R32 of the CAS Code to official holidays *"in the country where the notification is to be made"*, decided by majority that the appeal was admissible. The majority of the Panel noted that in the absence of a clear rule in Article R32 of the CAS Code or any other CAS Code provision specifying which country is the country where the notification is to be made for purposes of filing an appeal with the CAS, *i.e.* in a situation of legal uncertainty, to find the appeal admissible, the Panel did not need to find that the Athlete's reading of Article R32 of the CAS Code was *right*. It rather only had to find that her reading was *colorable*. In the latter case her right to appeal should not be cut off but her appeal should be admitted and determined on the merits. The Appellant understood in good faith that the country where the notification was to be made for purposes of filing an appeal with the CAS was Switzerland because the CAS was located in Lausanne. In the majority's view, Article R32 of the CAS Code as written admits of the Athlete's reading; accordingly the appeal was declared admissible.

2. The Athlete, in support of her request for a further suspension of her period of ineligibility under Clause 5 of the Substantial Assistance Agreement, argued that under the agreement in question she had no obligation to procure evidence from other people, such as the Additional Witness Statements. She contended that the statements provide new, compelling, direct evidence of PMD's attempts to extort money from her - evidence she herself could not provide because she never met with PMD. The Athlete further stated that despite the fact that the IAAF EB shared her view in this regard WADA - not acting reasonably and in good faith as required under Clause 5 of the Substantial Assistance Agreement - had refused any further suspension for no legitimate reason.

   In response WADA mainly submitted that neither (a) the seriousness of the anti-doping rule violation committed by the Athlete nor (b) the significance of the Substantial Assistance provided by the Athlete to the effort to eliminate doping in sport would weigh in favor of granting any further suspension of the ineligibility period. WADA also argued that insofar as under the Substantial Assistance Agreement, WADA retained *"its entire discretion"* to suspend more of the Athlete's period of ineligibility, CAS should give deference to WADA's opinion, as doing otherwise would render WADA's discretion meaningless.

   The Panel considered that in light of the language of Clause 5 - according to which WADA has the power to suspend more of the Athlete's period of ineligibility *"if it considers, in its entire discretion, that the extent and/or quality of the Substantial Assistance provided by her proves more valuable than is currently anticipated"* and which demands

further that in exercising its discretion, WADA is obligated to *"act reasonably and in good faith"*. - it only had to determine whether the Athlete had proven that WADA acted unreasonably or in bad faith in denying the further suspension requested. This was a high bar and the Athlete had failed to clear it.

As a preliminary matter, the Panel noted that the Athlete demanded that WADA responded to her application in a very short period of time. While acknowledging that WADA had learned of the Additional Witness Statements the week before, and that the Athlete's time constraints resulted from the procedural calendar in the PMD appeal proceedings, the Panel found that indeed WADA had precious little time to consider the Application, form a view and respond. Furthermore, the Panel considered that WADA - not being a party to the PMD appeal and given the short deadline to consider the value of the Additional Witness Statements to the PMD appeal - did not consider itself well placed to assess the value of the respective statements and had therefore suggested that the IAAF/the IAAF EB performed the necessary assessment and proposed a further suspension of the period of ineligibility - a suggestion the Athlete considered a sign of WADA's bad faith. The Panel, disagreeing with the position that WADA acted in bad faith, held that WADA's decision rather resulted from WADA's discomfort in having to decide upon a further suspension on short notice and limited information. Despite the circumstances, WADA had indeed considered the Application and decided that the value of the statements in question did not justify any further suspension of the period of ineligibility. In this regard, there was no evidence that WADA, in reaching this conclusion, had ignored the Reasoned Submission from the IAAF EB on the value of the Additional Witness Statements to the PMD appeal. Moreover WADA's concern that the Additional Witness Statements might not even be admissible in those proceedings turned out to be correct as indeed subsequently, they were not admitted in evidence in the PMD appeal. WADA also considered that, even if admissible, the Additional Witness Statements would only serve to make an already strong case even stronger - a marginal benefit considered of little value by WADA, particularly as in WADA's opinion it was nearly inconceivable that PMD would ever have any role in sport again even if his CAS appeal was successful. Accordingly WADA considered, *"in its entire discretion"*, that the Additional Witness Statements did not render the Athlete's Substantial Assistance more valuable than anticipated. There was therefore no basis to consider that WADA's decision was unreasonable or taken in bad faith.

3. Lastly the Panel addressed the Athlete's contention that, in denying a further suspension, WADA was motivated by political or reputational concerns linked to potential criticism it might face if she were allowed to compete in the Olympics. To the Athlete this was improper given that under the Substantial Assistance Agreement WADA was only permitted to take into account the value of her Substantial Assistance and the amount of any further suspension of her period of ineligibility. Referring to the definition of "Fault" in the WADA Code, the Athlete argued that when considering reducing a period of ineligibility under Articles 10.5.1 or 10.5.2 of the WADA Code it was not permitted to consider the timing of a particular competition.

The Panel noted that WADA - given the Athlete's two prior doping violations, both of which were serious (steroids and blood doping), and neither of which she had fully acknowledged - had acknowledged that it was disinclined to grant a further suspension that might result in the Athlete's participation at the Olympics. The Panel did not consider it improper for WADA to have taken this fact into account in reaching its Decision, given that not a reduction of a period of ineligibility under Articles 10.5.1 or 10.5.2 of the WADA Code, but rather pursuant to Clause 5 of the Substantial Assistance Agreement had to be determined. The Panel further stated that it did not read Clause 5 to so narrowly circumscribe what WADA might take into consideration when exercising *"its entire discretion"* to grant or deny a further suspension. Furthermore when negotiating the Substantial Assistance Agreement, the parties had specifically negotiated over the Athlete's possible participation at the Olympics, and WADA had expressly rejected this possibility. Lastly, insofar as the Substantial Assistance Agreement was entered into following the imposition of an eight-year period of ineligibility and the discussions culminating in the Decision were in the context of negotiations regarding a further suspension of the ineligibility period, the case at hand was not a case of an athlete stepping forward to reveal wrong-doing before any proceedings were initiated against her. In conclusion, the Panel, in all events, did not consider that such policy considerations provided a basis to consider that WADA acted unreasonably or in bad faith in denying the Athlete the further suspension requested.

Decision

The Panel therefore declared the appeal by Ms. Alptekin admissible but dismissed it as unfounded.

CAS 2016/A/4676
Arijan Ademi v. Union of European Football Associations (UEFA)
24 March 2017

Football; Doping (Stanozolol); Admissibility of exhibits filed lately not introducing meaningful new evidence; Exceptional admissibility of evidence submitted lately (request to analyze the product containing the prohibited substance); Regime applicable to an ADRV according to UEFA ADR; Proof of source of the prohibited substance for the purposes of lack of intent (Article 9.01 UEFA ADR); Proof of lack of intent; Absence of reduction of the sanction based on No Significant Fault or Negligence

Panel
Mr Ken Lalo (Israel), President
Mr Jeffrey Benz (USA)
Mr Hans Nater (Switzerland)

Facts

This appeal is brought by Mr Arijan Ademi (the "Player" or the "Appellant"), a Croatian-born Macedonian professional football player registered with GNK Dinamo Zagreb (the "Club"), a Croatian football club, against the decision of the Appeals Body of the Union of European Football Associations ("UEFA"), dated 12 May 2016, which found that the Player had committed an anti-doping rule violation ("ADRV") pursuant to Article 2.01 of the UEFA Anti-Doping Regulations 2015 Edition ("UEFA ADR") and thereby imposing a four-year ban on the Player in accordance with Article 9.01 UEFA ADR (the "Appealed Decision").

On 16 September 2015, following a match between the Club and Arsenal FC in Zagreb, the Player underwent a doping control test and provided a urine sample to UEFA.

On 7 October 2015, the Player was notified of an Adverse Analytical Finding for stanozolol metabolites in the sample provided by him on 16 September 2015. These results were provided by the WADA accredited "Laboratoire Suisse d´Analyse du Dopage" ("Lausanne laboratory"). Stanozolol is a substance prohibited at all times, both in and out of competition, and is not a specified substance.

On 21 October 2015, disciplinary proceedings were opened against the Player for alleged doping offences in accordance with Article 13 of the UEFA Disciplinary Regulations ("UEFA DR").

On 19 November 2015 a hearing was held and on the same date the Control, Ethics and Disciplinary Body of UEFA (CEDB) issued a Decision suspending the Player from participating in any football-related activity for a period of four (4) years.

On 7 December 2015, the Player appealed the CEDB decision to the UEFA Appeals Body which was dismissed on 12 May 2016 and notified on 17 June 2016.

On 27 June 2016, the Player filed his statement of appeal at the Court of Arbitration for Sport (the "CAS") against UEFA in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code") challenging the Appealed Decision.

On 30 September 2016, the Player addressed UEFA's answer (in which UEFA indicated, among its many other arguments, that the Player *"refused to analyse the original pot of Megamin used by him"*) and filed a request to analyse the pills contained in an unsealed container of Megamin pills received by a WADA accredited

laboratory, the "Cologne Laboratory" from the Club on 5 January 2016 (the "Pills"). In the same letter the Player also requested to apply Article 62(6) of the UEFA Statutes and to exclude UEFA's exhibits 5, 6, 12, 15, 16, 17, 18, 21 and 22, since these could have allegedly been available to UEFA in the prior proceedings before the UEFA bodies.

On 5 October 2016, UEFA objected to the Player's requests to analyse the pills citing Article R56 of the Code which states that: *"[U]nless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer".*

On 28 October 2016, a hearing was held at the CAS Court Office in Lausanne.

On 10 November 2016, in accordance with the instructions of the Panel at the conclusion of the hearing and the parties' agreement embodied in a letter from the Player's counsel of 8 November 2016, the Cologne Laboratory was requested to analyse the Pills.

Reasons

1. The Player sought, in its letter of 30 September 2016, to exclude UEFA's exhibits which could have allegedly been available to UEFA in the prior proceedings before the UEFA bodies. The Player relied on Article 62(6) of the UEFA Statutes which states that: *"[t]he CAS shall not take into account facts or evidence which the appellant could have submitted to an internal UEFA body by acting with the diligence required under the circumstances, but failed or chose not to do so".* This rule allows the Respondent (UEFA in our case) to utilize a procedural safeguard i.e. to request the CAS not to take into account facts or evidence which were not submitted by the Appellant earlier due to a lack of diligence. The Player argued that the same rule should apply to UEFA as well.

   The Panel considered that even if the language of Article 62(6) of the UEFA Statutes can be read to refer to only one of the parties, it would be unfair and unjust to allow only one party to the proceedings i.e. the respondent, to utilize a procedural safeguard which is there to encourage the parties to litigate efficiently and fairly and avoid hearings being decided based on a new set of evidence which was or could have been available earlier. This being said, the Panel found that where the admissibility of some exhibits submitted by a party merely simplifies the panel's work in understanding parts of a testimony, the exhibits cannot be considered as introducing meaningful new evidence such that the other party's right to be heard is limited. Therefore, the Panel considered that those exhibits should be allowed into evidence and their late introduction should be considered in assessing the costs to be assessed in the arbitral award.

2. The Player also requested to analyse the Pills. The Player supported its request by the fact that such testing had been requested even prior to the UEFA proceedings and also arguing that it could resolve matters addressed in UEFA's answer.

   The Panel found that UEFA's objection citing Article R56 of the Code was relevant to the late request filed by an athlete to have the product containing the prohibited substance analysed. However, it reminded that a CAS panel has the right to allow such additional evidence in exceptional circumstances. Thus, The Panel considered that such analysis might be relevant, especially where there was no good reason

to prevent such analysis from the player who was trying to support his position and minimize any sanction imposed on him.

3. It was common ground between the parties that the Player was guilty of an Anti-Doping Rule Violation (ADRV) under Article 2.01 UEFA ADR in that stanozolol was present in his sample. A finding of an ADRV results, *prima facie*, in a period of suspension of four (4) years under Article 9.01(a)(i) UEFA ADR. In order for the period of suspension to be reduced to two (2) years, it is for the Player to establish on the balance of probabilities that his ADRV was not intentional under Article 9.01(a)(i) UEFA ADR as defined in Article 9.01(c) UEFA ADR. The period of suspension may be reduced or eliminated under Articles 10.01 or 10.02 UEFA ADR, if the Player can establish on the balance of probabilities that he bears No Fault or Negligence or No Significant Fault or Negligence for the presence of stanozolol in his systems and can also establish on the balance of probabilities the source of such prohibited substance. Specifically, the Player can benefit from a reduction or elimination of the period of suspension if he can establish on the balance of probabilities that he bears No Significant Fault or Negligence for the presence of stanozolol in his systems which entered his body through a contaminated product, under Article 10.02(a)(ii) UEFA ADR.

4. A legal question which arises is whether a proof of source of the prohibited substance is mandated under Article 9.01 in order to allow a player to establish lack of intent, in the same way that it is mandated for the purposes of Articles 10.01 or 10.02 UEFA ADR under the definitions of No Fault or Negligence and No Significant Fault or Negligence which require that *"the player must also establish how the prohibited substance entered his system"*.

   The Panel found the factors supporting the proposition that establishment of the source of the prohibited substance in a Player's sample is not mandated in order to prove an absence of intent more compelling. In particular, the Panel was impressed by the fact that the UEFA ADR, based on WADC, represents a new version of an anti-doping Code whose own language should be strictly construed without reference to case law which considered earlier versions where the versions are inconsistent. - any ambiguous provisions of a disciplinary code must, in principle, be construed *contra proferentem*. See, CAS 94/129 *Quigley v. UIT*-. The relevant provisions (Article 9.01(a) and (c) UEFA ADR) do not refer to any need to establish source, in direct contrast to Articles 10.01 and 10.02 UEFA ADR combined with the definitions of No Fault or Negligence and No Significant Fault or Negligence, which expressly and specifically require to establish source. This view is expressed in an article by four well recognized experts including Antonio Rigozzi and Ulrich Haas "Breaking Down the Process for Determining a Basic Sanction Under the 2015 World Anti-Doping Code" *International Sports Law Journal, (2015) 15:3-48*.

   Furthermore, the Panel could envisage the theoretical possibility that it might be persuaded by a Player's simple assertion of his innocence of intent when considering not only his demeanour, but also his character and history, even if such a situation may inevitably be extremely rare.

5. Article 9.01(c) UEFA ADR requires, in order to meet the definition of *"intentional"* and *"identify those players who cheat"* to

determine *"that the player or other person engaged in conduct which he knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk"*.

Irrespective of any inability to identify the source of the stanozolol, the Panel found that the Player established, on a balance of probability that he did not engage in conduct which he knew constituted or might constitute or result in an ADRV, in that he did not knowingly ingest stanozolol or otherwise intended to cheat.

Based on the special circumstances of the case and on the totality of the evidence i.e. the possibility that the prohibited substance came from a product used by the athlete, combined with the credible testimony provided by the player, as further supported by the evidence of a witness and of the club doctors, it could be considered on the balance of probabilities that the player discharged his burden of proving lack of intent to cheat. Therefore, the Panel found that the provisions of Article 9.01(b) UEFA ADR, and a two year period of suspension (in lieu of a four year one) were applicable to the player.

6. In order for the Player to benefit from the provisions of UEFA ADR 10.01 or 10.02 and have the period of suspension reduced or even completely eliminated, the Player had to prove, on the balance of probabilities (UEFA ADR 3.1), both of the following elements:
   - That he beared No Fault or Negligence or No Significant Fault or Negligence for the presence of stanozolol in its systems; and
   - The source of the stanozolol (under the specific definitions of the terms No Fault or Negligence and No Significant Fault or Negligence).

To enjoy a reduction or elimination of the period of suspension (reprimand and no suspension and up to two years suspension based on the degree of fault) in a special case in which the detected prohibited substance came from a contaminated product, the Player should establish under UEFA ADR 10.02(a)(ii), which was specifically relied upon by the Player in this case, not only that he bore No Significant Fault or Negligence and the source of the substance but additionally *"that the detected prohibited substance came from a contaminated product"*.

In assessing the player's degree of fault, the Panel considered that the Player's actions and omissions were not in line with the responsibilities of a diligent Player and could not be considered as prudent actions. Such behaviour could not be considered as evidencing No Significant Fault or Negligence.

The definition of *"No significant fault or negligence"* requires a player to establish *"that his fault or negligence, when viewed in the totality of the circumstances and taking into account the no fault or negligence criteria, was not significant in relation to the antidoping rule violation"*. The *"totality of the circumstances"* include the level of a professional player purchasing a product from a non-secure source and using a suspicious package and pills. *"*[*T*]*he no fault or negligence criteria"* refers to the player not knowing or suspecting, and not being able to *"reasonably have known or suspected, even with the exercise of utmost caution"* that he may have used an unsafe product. Finally, the significance is *"in relation to the antidoping rule violation"*. In this respect, the use of stanozolol, a steroid notoriously used for doping and not allowed in and out of the

competition was relevant. Based on the totality of the circumstances, the player's actions and omissions could not be considered to be in line with the responsibilities of a diligent player and could not be considered as prudent actions. Such behaviour could not be considered as evidencing No Significant Fault or Negligence. Therefore, it was no longer relevant for the purposes of a possible reduction of the sanction under Article 10.02 UEFA ADR whether the player met his burden to establish the source of the substance.

Decision

For these reasons the Panel decided to partially uphold the appeal filed on 27 June 2016 by Mr Arijan Ademi against the decision of the UEFA Appeals Body of 12 May 2016 and to impose a sanction of two-year ban.

CAS 2016/A/4708
Belarus Canoe Association (BCA) & Belarusian Senior Men's Canoe and Kayak team members v. International Canoe Federation (ICF)
23 January 2017

Canoe; Doping (meldonium *et al.*); Definition of "suspension" and "exclusion" in ICF Statutes; Distribution of powers within the ICF with regard to decisions in anti-doping matters; Meldonium taken before 1 January 2016; Possession of Prohibited Substances by a coach and Therapeutic Use Exemption ("TUE"); Necessity of legal basis for sanctions

Panel
Prof. Michael Geistlinger (Austria), President
Mr Romano Subiotto QC (United Kingdom)
Prof. Martin Schimke (Germany)

Facts

The Belarus Canoe Association ("BCA") is the national governing body for the sport of Canoe and Kayak in the Republic of Belarus with its headquarters in Minsk. It is affiliated to the International Canoe Federation ("ICF" or "Respondent"). The BCA includes the 15 members of the Belarusian senior men's kayak team, the 10 members of the Belarusian senior men's canoe team, 4 coaches and the medical staff of these male teams (the BCA and all other persons: "the Appellants").

The ICF is the international governing body for the sport of Canoe and Kayak, recognized by the International Olympic Committee ("IOC"). Its seat and headquarters are in Lausanne, Switzerland.

On 1 January 2016, the WADA Prohibited List 2016 (the "2016 List") entered into force, including for the first time meldonium as a prohibited substance (Class S4 Hormone and Metabolite Modulators: 5.3).

On 12 April 2016, French Police and Customs raided the rooms and personal belongings of the male Belarusian canoe athletes at a training camp in Le Temple-sur-Lot (France). They confiscated various substances, medication, material and medical equipment, including meldonium (16 capsules of Mildronate, found in the room of the coach of the Belarusian women's kayak team), needles and other equipment for transfusions, Actovegin and iron supplements. Seventeen athletes of the Belarusian canoe team underwent a doping control, urine samples were taken from them. Meldonium was found in five of the samples; the concentration of meldonium in four of the samples was below 1000 ng/ml. The meldonium values of the remaining athlete, of the 24 March 2016 test, showed 1,252 μg/ml.

On 15 June 2016, the BCA informed the ICF about the cases of the five athletes found with meldonium.

On 30 June 2016, WADA released a Notice on meldonium (the "WADA Notice") concerning cases where athletes claim that the substance was taken before 1 January 2016. According to this Notice, for samples taken on or after 1 March 2016 and showing a urinary concentration of meldonium below 1000 ng/ml, in the absence of other evidence of meldonium use on or after 1 January 2016, a no fault finding could be made. Given the results of some studies it could not be excluded that, at very low dosages, the use of meldonium could have occurred before the Prohibited List was published on 29 September 2015. In these circumstances, and in the absence of any evidence that meldonium was used after 29 September 2015, it considered acceptable that the athlete's results not be disqualified or be

reinstated.

On 11 July 2016, the ICF wrote to the BCA, referring to the WADA Notice and informed the BCA that the ICF was holding an emergency Executive Board Meeting on 13 July 2016 regarding doping issues with Belarus.

On 12 July 2016, the BCA answered to the ICF that following analysis of the results of internal investigation, the BCA assumed that in violation of customs rules, certain medicines could have been unintentionally imported into the customs territory of France without corresponding registration. In this respect, the medication found and seized from two coaches had been prescribed by a doctor in the Republic of Belarus; that once the coaches had provided their explanations and their doctor's prescriptions for the respective medications - the French authorities had not presented any claims or accusations against the coaches. The BCA underlined that no court decisions had yet been rendered on any assumed violations of French law and that in the absence of any judicial confirmation by a court there was no basis to impose any additional sanctions.

On 13 July 2016, a hearing before the ICF took place and was attended by a Belarusian delegation.

On 15 July 2016, the ICF informed the BCA of the ICF Executive Committee (the "ICF EC") decision ("Appealed Decision"), which imposed a one year suspension on the senior men's canoe and kayak teams including coaches, medical staff and entourage for all international competitions. The ICF explained that amongst others, to the ICF EC the finding of meldonium in the samples from the BCA athletes was consistent with the use of the medication. Furthermore the possession of meldonium tablets by the Belarus contingent constituted possession of prohibited substances and therefore an anti-doping rule violation under Article 2.6.2 of the ICF ADR; the possession of transfusion equipment, needles and medical equipment of the same design that would be used for blood doping constituted possession of prohibited methods without TUE and also a violation of Article 2.6.2 of the ICF ADR. Based on these facts the ICF EC relied on Article 12.3.1 of the ICF ADR to *"take additional disciplinary action against National Federations with respect to recognition, the eligibility of its officials and athletes to participate in international events"* as four or more violations of the ICF ADR had been committed by Belarusian athletes within a 12 month period.

On 18 July 2016, the Appellants filed their statement of appeal with the Court of Arbitration for Sport (the "CAS") against the Appealed Decision. They requested that CAS annul the Appealed Decision.

A hearing took place on 7 November 2016 in Lausanne, Switzerland.

Reasons

Having briefly confirmed its jurisdiction as well as the admissibility of the appeal the Panel determined the applicable rules to be the ICF Statutes and the ICF ADR, with Swiss law applying on a subsidiary basis.

1. In the context of the question of entitlement to issue the Appealed Decision the Appellants argued that according to the wording of the Appealed Decision a "suspension" was imposed; that however suspensions are disciplinary measures that do not fall within the competence of the ICF EC as foreseen under Article 12.3 ICF ADR read together with Article 42 ICF Statutes. Conversely, the Respondent took the position that the fact that the ICF EC used the word *"suspension"* instead of *"exclusion"* was not decisive; that rather focus should be on the effect of the

Appealed Decision; that by its very effect, the Appealed Decision imposes an exclusion of some or all members of a National Federation from participation in international competitions and ICF Competitions, based on and in accordance with Article 42 (c) ICF Statutes.

The Panel, in order to settle the dispute which disciplinary sanction had been imposed by the ICF EC, held that absent any particular explanation in the ICF Statutes and Bylaws, "suspension" had to be understood to have the meaning generally used by many international sports federations. In such understanding "suspension" means that use of all membership rights by the respective National Federation or individual shall be prohibited for a certain period of time. That "exclusion", as follows directly from the text of Article 42 (c) ICF Statutes, is restricted to particular rights, the participation at international competitions and ICF Competitions. The Panel - following the Respondent's argument that the ICF EC had erred in the term chosen - and high-lightening that the Appealed Decision did not refer to any of the reasons foreseen by Article 42 paragraph 2 ICF Statutes for taking the measure of "suspension" - held that the ICF EC wanted to apply, and did indeed apply the measure of exclusion, thereby using - in principle - the competence assigned to it by Article 42 ICF Statutes.

2. The Panel however found that the Appealed Decision had to be set aside as premature insofar as no previous decisions had been rendered by the competent hearing body - here the ICF Doping Control Panel (the "ICF DCP") - regarding the alleged anti-doping rule violations of the BCA's athletes or other persons affiliated with the BCA.

   The Panel noted that Article 12.3 ICF ADR - referred to as legal basis for the decision - had to be read together with Sub-Article 12.3.1 ICF ADR. That the respective sub-article requires that four or more violations of the ICF ADR are committed by athletes or other persons affiliated with a National Federation within a 12-month period. In this context the Panel found that the mere presence of a prohibited substance in an athlete's body was not sufficient to constitute - as contended by the ICF - an anti-doping rule violation. Moreover, the Panel considered that to follow such argumentation would reverse one of the essential achievements of the WADA Code, namely the establishment of independent judicial bodies as replacement of political bodies to decide on anti-doping rule violations. Specifically, it would empty the competence of the ICF Doping Control Panel, circumventing the system of distribution of powers laid down by the ICF Statutes and the ICF ADR; put differently it would prejudge the decisions of the ICF Doping Control Panel and assign to this panel the role of merely executing decisions already taken by the ICF Executive Committee through own decisions; lastly it would deprive the individual person concerned of all procedural guarantees laid down by the WADA Code, implemented by the ICF in the ICF ADR. In conclusion the Panel found that - in the absence of a decision of the ICF DCP based on Articles 10 and/or 11 ICF ADR - the ICF EC was not entitled to apply sanctions based on Article 12.3 ICF ADR read together with Sub-Article 12.3.1 ICF ADR.

3. The Panel further noted that the ICF EC, in order to establish anti-doping rule violations by all five BCA athletes, had relied on the mere fact that the urine samples of the five athletes had been found

to contain meldonium. However the Panel underlined that insofar as meldonium only became prohibited on 1 January 2016 and in light of WADA's Notice, the ICF was obliged to demonstrate that the meldonium intake had occurred after 1 January 2016; that however the ICF had failed to establish this for either of the five athletes - including the one whose sample had shown a meldonium level above the WADA Notice threshold. The Panel therefore concluded that the ICF had not succeeded to establish any rule violation for the presence of prohibited substances; therefore no anti-doping rule violations had been committed by the athletes as regards meldonium, another reason why the conditions of the first sentence of Sub-Article 12.3.1 ICF ADR were not met.

4. The Panel further held that the ICF EC had erred in holding that the Belarus contingent - based on the possession of meldonium - committed a violation of Article 2.6.2 ICF ADR; to the Panel the coach of the BCA women's team had convincingly explained that the meldonium was in his possession for personal medical reasons. Furthermore, neither the WADA Code nor the ICF ADR contain an obligation for a Therapeutic Use Exemption for coaches. The Panel therefore concluded that the coach in question had not violated Article 2.6.2 ICF ADR. That therefore also in this context the ICF EC had not succeeded in establishing a rule violation as required under Article 12.3 ICF ADR read together with Sub-Article 12.3.1 ICF ADR.

5. The Panel also dismissed the argument brought forward by the Respondent during the hearing that in any event Article 42 paragraph 2 ICF Statutes allowed the imposition of a sanction because of violation of the interests of the ICF. The Panel underlined that the ICF EC, in the Appealed Decision, had not referred to this option and had not provided any argument to the Panel enabling it to consider whether the decision could be properly based on this alternative legal basis. That it was too late to only at a hearing in front of CAS introduce arguments related to a legal basis on which the imposition of sanctions are allowed if those arguments have not been referred to in the appealed decision.

Decision

The Panel therefore decided to set aside the Appealed Decision, clarifying that accordingly, the sanction imposed by the ICF EC is not only lifted, but fully cancelled.

Jugements du Tribunal Fédéral*
Judgements of the Federal Tribunal

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

Judgment of the Swiss Federal Tribunal 4A_620/2015
1 April 2016
X. (Appellant) v. Fédéderation Internationale de Football Associations (FIFA) (Respondent)*

Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 18 September 2015

Extract of the facts

X._____ (hereafter: the Football Player) is a [citizenship omitted] professional football player. The Fédération Internationale de Football Associations (FIFA) is the governing body of football at the global level. A provision of the Regulations on the Status and Transfer of Players (RSTP) adopted by FIFA – reproduced in a regulation of the French Professional Football League (PFL) – states that a player may be registered with a maximum of three clubs during one season (in the case at hand, during the period between July 1 of one year and June 30 of the following year) and that during this period, he may play on behalf of only two clubs in official games.

Pursuant to a contract signed in August 2010 with B._____, an English professional football club, the Football Player played one game with the club on August 25, 2014, on the under-21 team (U21 Professional Development League (PDL)). Loaned to another English professional club (C._____) from September 2, 2014, to January 1, 2015, he participated in several games of the Premier League championship on behalf of this second team. On January 2, 2015, the Football Player and B._____ mutually agreed to terminate their contract. The following day, the French professional club D._____ and the Football Player signed a contract expiring at the end of the 2014/2015 season. On January 6, 2015, D._____ submitted the contract to the PFL for approval. On January 15, 2015, the Legal Committee of the PFL decided, on the one hand, to ask the French Football Federation (FFF) to seize the FIFA Players' Status Committee (PSC) of FIFA officially with a view to having it rule as to the official nature of the U21 PDL game in which the Football Player participated within the meaning of the aforesaid provision of the RSTP; and, on the other hand, to stay the approval of the contract in the meantime. The FFF did so on January 20, 2015; furthermore, on January 26 of the same month, it sent a brief from counsel for the Football Player to the Single Judge of the PSC.

On January 28, 2015, the Single Judge issued a decision containing the following operative part:

> The game played in [*name of country omitted*] in the framework of the U21 Professional Development League must be considered as 'official games' within the meaning of the Regulations on the Status and Transfer of Players.

Whereupon the Legal Committee of the PFL issued a decision on January 30, 2015, by which it approved the contract concluded by D._____ and the Football Player on January 3, 2015, whilst pointing out that the latter, although qualified, was not authorized to play any official games on behalf of his new club before the end of the 2014/2015 season, namely until June 30, 2015.

The Football Player did not appeal this decision.

* The original decision is in French.

On February 19, 2015, the Football Player seized the Court of Arbitration for Sport (CAS) with an appeal against the decision of the Single Judge of the PSC of January 28, 2015. In substance, he sought a finding that the disputed provision of the RSTP could not be applied to him and consequently that the decision challenged1 be annulled.

After hearing the case, the Panel rejected the appeal on September 18, 2015. In short, it found that the Appellant had no standing or interest to challenge a decision that did not apply to his particular case but merely interpreted a regulation, particularly since the decision was issued at the end of a procedure to which he was not a party and which, in contrast to the decision of the legal committee of the PFL which he had not appealed, could not impact his interests, *i.e.*, deprive him temporarily of the opportunity to carry out his profession as a professional football player.

Extracts of the legal considerations

1. The Federal Tribunal reviews freely and *ex officio* the admissibility of the appeals it receives (ATF 140 IV 57 at 2, p. 59 and the cases quoted) which implies, in particular, a review of the standing to appeal.

According to Art. 76(1)(b) LTF,[117] the Appellant must have an interest worthy of protection to the annulment of the decision under appeal. The interest worthy of protection is the practical usefulness that the Appellant would derive from his appeal being admitted, preventing him from economic, moral, material or other injury which the decision under appeal would cause him (ATF 137 II 40 at 2.3, p. 43). The interest must be present, namely it has to exist not only at the time the appeal is filed but also when the judgment is issued (ATF 137 I 296 at 4.2, p. 299; 137 II 40 at 2.1, p. 41). The Federal Tribunal finds that the matter is not capable of appeal when the interests worthy of protection fails at the time the appeal is filed. However, if the interest disappears during the proceedings, the appeal becomes moot (ATF 137 I 23 at 1.3.1, p. 24 *f.* and the cases quoted).

Without being contradicted, the CAS points out at n. 5 of its answer that the Appellant was qualified to play with D._____ as of July 2015, and that he has been playing with his club regularly since then. Leaving that remark aside, the very application of the pertinent regulation to the circumstances of the case shows that the provision, no matter what its correct interpretation may be, ceased to have effect as of June 30, 2015, *in casu* because at that time, the Appellant was party to a contract with D._____ only and no longer played for his former clubs, namely B._____ and C._____. This being so, one does not see what practical specific and present interest the Appellant could claim today in obtaining the annulment of the award. Such interest is even less discernable because the decision under appeal in the award was of a general and abstract nature since it merely sought to determine whether the games played in the framework of the U21 PDL should be considered as official games within the meaning of the aforesaid regulation. The existence of such an interest may also be rejected here because it is not the decision of the Single Judge appealed to the CAS which temporarily prevented the Appellant from delivering his contractual service to his new employer, D._____, but rather the decision of the Legal Committee of the PFL of January 30, 2015, left intact by the Appellant, that deprived him of the right to participate in any official game on behalf of his new club until June 30, 2015.

Neither does the Appellant show which residual interest(s) he may have in the annulment of the CAS award. In this respect, his reference to the judgment 4A_604/20103 of April 11, 2011, is not relevant at all because the factual circumstances of the aforesaid

[117] LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal

case had nothing in common with the case at hand.

The foregoing shows that the Appellant no longer has a present interest to obtain the annulment of the award under appeal and that such an interest no longer existed even at the time when he filed his appeal.

Furthermore, the conditions to which federal case law submits the admissibility of an appeal against the decision concerning the costs when the matter is otherwise not capable of appeal are not met in the case at hand (see judgment 4A_134/2012, quoted above).

Therefore the Federal Tribunal finds that the matter submitted to this Court is not capable of appeal.

Judgment of the Swiss Federal Tribunal 4A_678/2015
22 March 2016
A. (Appellant) v. B. (Respondent)*

Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 16 September 2015

Extracts of the facts

B._____ (Claimant, Respondent) is a Brazilian football player domiciled in Brazil.

A._____ (Defendant, Appellant) is a Portuguese football club based in [name of city omitted] in Portugal. It is a member of the Portuguese Football Federation, which in turn belongs to the Fédération Internationale de Football Associations (FIFA).

On July 31, 2009, the parties entered into an employment contract for a fixed duration, between August 1, 2009, and June 30, 2014. The contract anticipated a gross monthly salary of EUR 16'670. Pursuant to a contract of August 7, 2009, B._____ was loaned to the football club, C._____, until June 30, 2010.

After the Portuguese football championship was finished in May, 2010, B._____ left Portugal for a vacation in his Brazilian home country. A dispute arose between the parties because he did not get back to Portugal before the beginning of the season on July 1, 2010.

By way of an email of July 9, 2010, A._____ communicated to the Player that he should have returned on June 28, 2010, or at the latest on July 1, 2010, that he was absent without leave and this justified immediate termination.

On August 19, 2010, B._____ filed a claim with the FIFA Dispute Resolution Chamber against
A._____ for damages amounting to EUR 800'160 for unjustified contract termination.

In a decision of January 17, 2014, the Dispute Resolution Chamber upheld the claim and ordered the Defendant to pay damages amounting to EUR 550'000 for breach of contract.

Both parties appealed the decision of the FIFA Dispute Resolution Chamber of January 17, 2014, to the Court of Arbitration for Sport (CAS).

A hearing took place in Lausanne on March 10, 2015.

In an arbitral award of September 16, 2015, the CAS rejected the Defendant's appeal. The Claimant's appeal was upheld in part and the decision under appeal was amended insofar as the Defendant was ordered to pay EUR 550'000, with interest at 5% from August 19, 2010. The Arbitral Tribunal also decided the costs and awarded compensation and rejected all other procedural submissions and claims.

In a civil law appeal the Defendant submits that the Federal Tribunal should annul the CAS arbitral award of September 16, 2015.

Extract of the legal considerations

1. The Appellant invokes Art. 190(2)(c) PILA and argues that some of its submissions were left undecided.

The Appellant suggests that its submissions in respect of to nos. 4.1 and 4.2 were clearly aimed at determining or achieving certainty as to whether the amount of EUR 500'000 – (meaning EUR 550'000) – was due net or gross. As the

* The original of the decision is in German.

Arbitral Tribunal ordered it to pay *"compensation for breach of contract in the amount of EUR 550'000"* (operative part n. 3) and its further submissions were rejected wholesale in n. 6 of the operative part, *"this issue, or this theme, was left open"*. Since the arbitral award does not cover this question even indirectly and it cannot be discerned from its reasons what the opinion of the Arbitral Tribunal was on this issue, there is a ground for appeal within the meaning of Art. 190(2)(c) PILA, despite the wholesale rejection of all other submissions at n. 6 of the operative part of the award.

According to Art. 190(2)(c) PILA, an arbitral award may be appealed when the arbitral tribunal decides some issues in dispute not submitted to the arbitral tribunal or when a legal submission remains undecided. According to the French wording of this legal provision, an arbitral award may be challenged when the arbitral tribunal awards more than or something other than what was sought to a party (BGE 116 II 639 at 3a, p. 642). According to the case law of the Federal Tribunal, there is no violation of the principle *ne eat iudex ultra petita partium* when the claim submitted is assessed legally in a completely or partly different manner from the submissions of the parties, provided it is encompassed within the legal submissions (BGE 120 II 172 at 3a, p. 175; judgment 4A_684/201412 of July 2, 2015, at 3.2.1; 4A_440/201013 of January 7, 2011, at 3.1; 4A_428/2010 of November 9, 2010, at 3.1; 4P.134/2006 of September 7, 2006, at 4; see also BGE 130 III 35 at 5, p. 39). Yet, the arbitral tribunal is bound by the subject and the scope of the claim, in particular when the claimant himself qualifies or limits his claims in his legal submissions (judgment 4A_684/201414 of July 2, 2015, at 3.2.1; 4A_440/201015 of January 7, 2011, at 3.1; 4A_464/2009 of February 15, 2010, at 4.1; 4A_220/2007 of September 21, 2007, at 7.2; see also judgment 4A_307/2011 of December 16, 2011, at 2.4).

Contrary to the Appellant's view, the Arbitral Tribunal did not leave its submission undecided. The Appellant made a number of submissions in the arbitral proceedings, including the alternate submission in the appeal brief that compensation to be paid to the Respondent should not exceed EUR 229'725. This was rejected and therefore addressed insofar as, contrary to the Appellant's submission, compensation was set at EUR 550'000, an amount covered both by the claim and the submission in the appeal. In connection with the submission made in the alternative for a finding that the compensation to be paid according to the employment contract should be net (submission n. 4.1 and 4.2), the Appellant does not argue that the Arbitral Tribunal should have expressly made such a finding *as to the salary*, but rather takes the view that, on the basis of the arbitral award, it is not clear if the *awarded damages of* EUR 550'000 were net or gross. Yet, there is no corresponding submission from the Appellant as to the *damages* to be paid, which is why the argument that the Arbitral Tribunal left this undecided fails. Without prejudice to the foregoing, the Appellant's view cannot be followed that it is unclear whether the amount it was ordered to pay by the Arbitral Tribunal would be net or gross, let alone that *"it would have been obliged to pay compensation in an unknown amount"*. Instead, it was ordered to pay EUR 550'000, with interest at 5% from August 19, 2010, to the Respondent for breach of contract according to the arbitral award. The amount to be paid is determined and the amount of the corresponding interest is determinable exactly. The arbitral award

under appeal cannot in good faith be understood as meaning anything other than the aforesaid amount shall be paid to the Respondent without deductions – thus as a net amount. The Appellant's argument that it could not know, on the basis of the arbitral award, *"whether the exact amount of EUR 550'000 should be paid or another amount after deductions [of taxes and social security payments],"* is simply not understandable, which also leads the connected argument of an alleged incompatibility with public policy into a vacuum (Art. 190(2)(e) PILA). Moreover, the Appellant does not show any violation of public policy when it describes the arbitral award as contradictory because it relied on both on Art. 337(c)(1) OR16 and Art. 337(c)(3) OR (see judgment 4A_448/2013 of March 27, 2014, at 3.2.2; 4A_654/201117 of May 23, 2012, at 4.2; 4A_464/2009 of February 15, 2010, at 5.1).

2. The Appellant argues that the Arbitral Tribunal violated the right to be heard (Art. 190(2)(d) PILA).

Art. 190(2)(d) PILA permits an appeal only when the mandatory procedural rules of Art. 182(3) PILA are violated. According to the latter provision, the arbitral tribunal must, in particular, guarantee the right of the parties to be heard. This essentially corresponds to the constitutional right embodied in Art. 29(2) BV18 (BGE 130 III 35 at 5, p. 37 *f.*; 128 III 234 at 4b, p. 243; 127 III 576 at 2c, p. 578 *f.*). Case law derives from this, in particular, the right of the parties to state their views as to all facts important for the judgment, to submit their legal arguments, to prove their factual allegations important for the judgment with suitable evidence submitted in a timely manner and in the proper format, to participate in the hearings, and to access the record (BGE 130 III 35 at 5, p. 38; 127 III 576 at 2c, p. 578 *f.*; each with references).

Whilst the right to be heard in contradictory proceedings according to Art. 182(3) and Art. 190(2)(d) PILA does not include the right to a reasoned international award according to well-established case law (BGE 134 III 18619 at 6.1 with references), there is a minimal duty of the arbitrators to review and handle the issues important for the decision. This duty is violated when the arbitral tribunal, due to oversight or a misunderstanding, overlooks some legally pertinent allegations, arguments, evidence, or offers of evidence from a party. This does not mean that the arbitral tribunal is compelled to address each and every submission of the parties (BGE 133 III 235 at 5.2 with references).

The Appellant shows no violation of the right to be heard in its argument – made without reference to the record – that it had *"taken the view in the arbitral proceedings that the salary amounts anticipated by the parties in the employment contract were gross, that their payment in such an amount was never owed and therefore they cannot be taken into account to determine compensation but must be reduced"*. Moreover, the Arbitral Tribunal did not overlook that the contractually agreed-upon monthly payment of EUR 16'670 was a gross amount and the Appellant submitted in the arbitration that the salary amount to be paid according to the employment contract was to be net. No violation of the right to be heard by the Arbitral Tribunal can be found before computing the maximum amount of the damages owed by the Appellant for the rest of the contractual period on the basis of the gross amount. Insofar as the Appellant submits to the Federal Tribunal its own contrary view as to the computation of damages and therefore the application of

Art. 337(c)(1) and (3) OR, it disregards that the right to be heard does not encompass a right to a substantively accurate decision (BGE 127 III 576 at 2.b., p. 578). The Appellant is not able to show in its submissions that the Arbitral Tribunal left some of its allegations or arguments undecided due to oversight or misunderstanding.

The argument of a violation of the right to be heard is unfounded.

Therefore, the Federal Tribunal finds that the appeal proves to be unjustified and must be rejected insofar as the matter is capable of appeal.

Arrêt du Tribunal fédéral 4A_690/2016
9 février 2017
Pape Malickou Diakhaté (recourant) c. Granada CF, Bursaspor Kulübü, Kayseri Erciyesspor, Fédération Internationale de Football Association (FIFA) (intimés)

Recours en matière civile contre la sentence rendue le 4 octobre 2016 par le Tribunal Arbitral du Sport (TAS)

Extrait des faits

Par sentence du 4 octobre 2016, le Tribunal Arbitral du Sport (TAS) a déclaré irrecevable l'appel interjeté par le footballeur professionnel sénégalais Pape Malickou Diakhaté (ci-après: le footballeur) contre la décision prise le 10 avril 2015 par la Chambre de Résolution des Litiges (CRL) de la Fédération Internationale de Football Association (FIFA) dans la cause opposant le footballeur au club de football professionnel espagnol Granada CF ainsi qu'à deux autres clubs de football turc, Bursaspor Kulübü et Kayseri Erciyesspor, et à la FIFA (CAS 2015/A/4262). Il a, en outre, rejeté l'appel formé par Granada CF contre la même décision (CAS 2015/A/4264), qu'il a confirmée. Dans le dispositif de celle-ci, la CRL avait condamné solidairement le footballeur et Kayseri Erciyesspor à payer à Granada CF la somme de 3'100'000 euros, intérêts en sus, à titre d'indemnité pour rupture de contrat sans juste cause, conformément à l'art. 17 al. 1 du Règlement du Statut et du Transfert des Joueurs (RSTJ).

Pour conclure à l'irrecevabilité de l'appel du footballeur, la Formation du TAS a jugé tardif le dépôt de la déclaration d'appel, faute pour l'intéressé d'avoir satisfait aux réquisits formels prévus à l'art. R31 al. 3 du Code de l'arbitrage en matière de sport (ci-après: le Code).

Le 5 décembre2016, le footballeur (ci-après: le recourant) a formé un recours en matière civile au Tribunal fédéral en vue d'obtenir l'annulation de ladite sentence.

Extrait des considérants

1. Dans un premier moyen, le recourant fait valoir, en substance, qu'en admettant la FIFA comme partie à la procédure, alors que lui-même s'était désisté de son appel à l'égard de cette intimée, et en fondant sa sentence d'irrecevabilité de l'appel sur l'objection soulevée par cette seule partie, la Formation du TAS aurait violé le principe de l'égalité des parties ainsi que son droit d'être entendu (art. 190 al. 2 let. d LDIP). Elle aurait, en effet, permis à cette association, bien qu'elle n'eût plus eu le droit d'intervenir en procédure d'appel pour avoir été juge de première instance par le truchement de la CRL, de prêter son concours à l'un des plaideurs, en l'occurrence l'ex-employeur du recourant, dans un conflit individuel de travail, contribuant de la sorte à rompre l'égalité des armes entre les parties à ce différend, et cela sans que la FIFA ait pu justifier d'un intérêt digne de protection à suivre à la procédure d'appel, comme c'eût pu être le cas s'il s'était agi d'un contentieux disciplinaire.

Selon la jurisprudence, la partie qui s'estime victime d'une violation de son droit d'être entendue ou d'un autre vice de procédure doit l'invoquer d'emblée dans la procédure arbitrale, sous peine de forclusion. En effet, il est contraire à la bonne foi de n'invoquer un vice de procédure que dans le cadre du recours dirigé contre la sentence arbitrale, alors que le vice aurait pu être signalé en cours de procédure (arrêt 4A_616/2015 du 20 septembre 2016 consid. 4.2).

Sous n. 15 de son mémoire, le recourant explique que, s'il a formellement mentionné la FIFA comme partie intimée dans sa déclaration d'appel, il l'a fait par inadvertance et s'est immédiatement désisté de son appel contre cette association, dès lors que ce moyen de droit ne visait que la décision prise par celle-ci. Selon lui, cette désignation formelle ne pouvait, en tout état de cause, légitimer la présence de la FIFA au cours de l'instruction et à l'audience du 9 juin 2016, du fait de ce désistement.

Cependant, loin de correspondre à la description qu'en fait le recourant, la manière dont la procédure s'est déroulée devant le TAS est tout autre.

D'abord, l'intéressé a effectivement mentionné la FIFA sous le titre "1.1 LES INTIMÉS" et la lettre "D-" de sa déclaration d'appel du 21 octobre 2015. Il l'a également désignée comme l'un des quatre *Respondents* dans son mémoire d'appel (*Appeal Brief*) du 28 octobre 2015.

Le 1er décembre 2015, le recourant a déposé sa réponse (*Statement of Defence*) relativement à la cause CAS 2015/A/4264. Cette écriture contient une remarque préliminaire, intitulée "*withdrawal of appeal against FIFA"*, dont le chiffre 4 est ainsi libellé:

"But it turns out that Pape Malickou Diakhaté and Gestion Services Ltd have no claim against FIFA whatsoever. As a consequence, they withdraw their appeal against FIFA and they request the CAS Court office, if not the Panel, to acknowledge receipt of the present statement and of the withdrawal of their appeal against FIFA".

Cette phrase apparaît pour le moins sibylline, puisqu'aussi bien le recourant n'avait pris aucune conclusion contre la FIFA dans sa déclaration d'appel et dans son mémoire d'appel. Il n'en ressort, en tout cas pas, la volonté clairement exprimée du recourant d'exclure la FIFA de toute participation à la procédure d'appel, d'autant moins que cette association était encore visée par l'appel de Granada FC, cause qui avait été jointe pour l'instruction et le jugement à celle concernant l'appel du recourant. C'est pourtant sur ce seul élément de preuve que ce dernier fonde sa prétendue mise à l'écart de la FIFA pour la suite de la procédure devant le TAS.

Le 2 mars 2016, la FIFA a déposé un mémoire de réponse aux appels du recourant et de Granada FC. La moitié environ de ce mémoire était consacrée à la démonstration de l'irrecevabilité et de l'absence de fondement de l'appel du recourant. Le TAS a notifié ce mémoire aux autres parties, dont le recourant, en date du 14 mars 2016. Dans un courrier électronique du lendemain, le conseil de l'intéressé a accusé réception de ladite lettre sans élever aucune objection quant au dépôt du mémoire en question.

Le recourant, nonobstant le retrait de son appel initialement dirigé formellement contre la FIFA, loin de se plaindre, comme il le fait aujourd'hui par le truchement d'un nouveau conseil, de la prétendue inégalité de traitement que constitue à ses yeux la participation de la FIFA à ladite procédure, n'a pas saisi les multiples occasions qui se sont présentées à lui pour ce faire. Il n'a, en particulier, pas requis que la réponse de la FIFA du 2 mars 2016 fût retirée du dossier de l'arbitrage dans la mesure où elle visait son appel, ni que les plaidoiries des représentants de la FIFA à l'audience du 9 juin 2016 devant le TAS fussent limitées à la réfutation des arguments avancés par Granada FC dans son appel séparé. Force est, dès lors, de déduire du comportement passif du recourant que celui-ci a admis tacitement que la FIFA pût suivre à la procédure d'appel.

Par conséquent, le moyen pris de la violation de l'égalité des parties est frappé de forclusion, si bien qu'il n'est pas possible d'en examiner les mérites.

2. Dans un second moyen divisé en deux branches, le recourant, invoquant l'art. 190 al. 2 let. e LDIP, fait grief au TAS d'avoir rendu une sentence incompatible avec l'ordre public.

On distingue un ordre public procédural et un ordre public matériel.

L'ordre public procédural, au sens de l'art. 190 al. 2 let. e LDIP, qui n'est qu'une garantie subsidiaire (ATF 138 III 270 consid. 2.3), assure aux parties le droit à un jugement indépendant sur les conclusions et l'état de fait soumis au Tribunal arbitral d'une manière conforme au droit de procédure applicable; il y a violation de l'ordre public procédural lorsque des principes fondamentaux et généralement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de la justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit (ATF 132 III 389 consid. 2.2.1).

Une sentence est contraire à l'ordre public matériel lorsqu'elle viole des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l'ordre juridique et le système de valeurs déterminants; au nombre de ces principes figurent, notamment, la fidélité contractuelle, le respect des règles de la bonne foi, l'interdiction de l'abus de droit, la prohibition des mesures discriminatoires ou spoliatrices, ainsi que la protection des personnes civilement incapables (même arrêt, ibid.).

Dans la première branche du moyen considéré, le recourant dénonce un formalisme excessif dont la Formation du TAS se serait rendue coupable à son détriment. Sans doute concède-t-il que les exigences formelles relatives au dépôt des écritures judiciaires sont justifiées par un intérêt digne de protection. Toutefois, selon lui, le règlement du droit de greffe et le dépôt, en temps utile, du mémoire d'appel accompagné des preuves littérales suffisaient, en l'espèce, à pallier l'éventuel vice de forme que constituait l'envoi de la déclaration d'appel par simple télécopie. Au demeurant, la sanction de l'irrecevabilité serait particulièrement sévère dans un cas de ce genre, dès lors que le Code ne prévoit pas de délai permettant à l'appelant de remédier au vice et de régulariser son acte, sans compter que l'emploi de la télécopie serait courant devant le TAS.

La motivation du recours sur ce point apparaît beaucoup trop étique pour que la Cour de céans puisse entrer en matière.

Quoi qu'il en soit, les formes procédurales sont nécessaires à la mise en œuvre des voies de droit pour assurer le déroulement de la procédure conformément au principe de l'égalité de traitement. Au regard de ce principe et sous l'angle de la sécurité du droit, un strict respect des dispositions concernant les délais de recours s'impose donc, sans qu'il y ait une contradiction entre pareille exigence et la prohibition du formalisme excessif (arrêt 5A_741/2016 du 6 décembre 2016 consid. 6.1.2 et les précédents cités).

Dans la seconde branche du même moyen, le recourant soutient qu'en mettant en œuvre la procédure arbitrale, en encaissant la somme de 35'000 fr. à titre d'avance de frais et en réceptionnant le mémoire d'appel du recourant alors même que la déclaration d'appel originale n'avait pas été envoyée dans le délai de 21 jours prévu par le Code, le TAS aurait violé le principe de la bonne foi par le fait d'adopter un comportement propre à tromper le recourant en lui faisant croire faussement que son appel était recevable.

Contrairement à ce que soutient le recourant aujourd'hui, ce dernier n'a jamais été amené par le TAS à croire faussement que son appel était recevable, puisqu'aussi bien la réponse à cette question dépendait de l'interprétation controversée de la disposition topique du Code, en l'occurrence l'art. R31 al. 3.

Cela étant, le présent recours ne peut qu'être rejeté dans la mesure de sa recevabilité.

3. Invoquant l'art. 64 al. 1 et 2 LTF, le recourant sollicite sa mise au bénéfice de l'assistance judiciaire et la désignation de son conseil comme avocat d'office.

L'art. 380 du Code de procédure civile du 19 décembre 2008 (CPC; RS 272), rangé sous le

titre 5 (Procédure arbitrale) de la partie 3 (Arbitrage) de cette loi, énonce que *"[l']assistance judiciaire est exclue"*. L'art. 380 CPC est une disposition de droit impératif, en ce sens qu'il interdit aux parties et au tribunal arbitral de convenir de faire supporter par l'Etat, au titre de l'assistance judiciaire, les frais de la procédure arbitrale. En revanche, il ne s'oppose pas ce que les parties adoptent d'autres solutions comme celle consistant à laisser ces frais à la charge d'une institution d'arbitrage (MARCO STACHER, in Commentaire bernois, Schweizerische Zivilprozessordnung, vol. III, 2014, n° 4 ad art. 380 CPC). C'est ce qu'a fait le TAS, pour ne citer qu'un exemple, en édictant des directives touchant l'assistance judiciaire sur le fondement de l'art. S6 § 9 du Code qui autorise le Conseil International de l'Arbitrage en matière de Sport (CIAS) à créer un fonds d'assistance pour faciliter l'accès à l'arbitrage du TAS de personnes physiques dépourvues de moyens financiers suffisants et à créer un guide d'assistance judiciaire du TAS déterminant les modalités d'usage du fonds (cf. MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Material, 2015, p. 97 ss).

Que le bénéfice de l'assistance judiciaire fournie par l'Etat soit exorbitant de la procédure d'arbitrage est une chose; qu'il le soit aussi de la procédure de recours contre une sentence arbitrale, conduite devant le Tribunal fédéral (art. 389 CPC et art. 191 LDIP) ou un tribunal cantonal (art. 390 CPC), en est une autre. La procédure de recours est une procédure étatique et, comme telle, tombe sous le coup de l'art. 29 al. 3 Cst. (RS 101) en vertu duquel toute personne qui ne dispose pas de ressources suffisantes a droit, à moins que sa cause paraisse dépourvue de toute chance de succès, à l'assistance judiciaire gratuite. L'art. 64 LTF, qui concrétise cette garantie constitutionnelle en ce qui concerne la procédure conduite devant le Tribunal fédéral et qui ne tombe pas sous le coup de la clause d'exclusion de l'art. 77 al. 2 LTF, n'opère pas de distinction en fonction de la procédure ayant abouti au prononcé de la décision soumise à l'examen du Tribunal fédéral. Rien ne s'oppose, dès lors, à ce qu'il vaille également dans le cas d'un recours en matière civile formé contre une sentence rendue dans le cadre d'un arbitrage interne ou international.

En vertu de l'art. 64 al. 1 LTF, une partie ne peut être dispensée de payer les frais judiciaires que si elle ne dispose pas de ressources suffisantes et que ses conclusions ne paraissent pas vouées à l'échec. En l'espèce, cette seconde condition cumulative n'est de toute évidence pas réalisée sur le vu du sort réservé aux griefs examinés plus haut. Par conséquent, le recourant ne peut pas prétendre à l'octroi de l'assistance judiciaire gratuite, quelle que soit par ailleurs sa situation financière. D'où il suit que les frais de la procédure fédérale, sensiblement réduits pour tenir compte de cet élément-ci comme de la nature du présent arrêt (une décision d'irrecevabilité), seront mis à la charge du recourant (art. 66 al. 1 LTF), étant précisé que la valeur litigieuse de la présente contestation se monte à 3'100'000 euros.

En conséquence, le Tribunal fédéral prononce le rejet de la demande d'assistance judiciaire présentée par le recourant et le rejet du recours dans la mesure où il est recevable.

Arrêt du Tribunal fédéral 4A_692/2016
20 avril 2017
Agence Mondiale Antidopage (AMA) (recourante) c. X._____, United States Anti-Doping Agency (USADA) (intimées)

Recours en matière civile contre l'ordonnance de clôture prononcée le 11 novembre 2016 par la Présidente de la Chambre arbitrale d'appel du Tribunal Arbitral du Sport (TAS)

Extraits des faits

Le 11 août 2016, l'Agence Mondiale Antidopage (AMA) a déposé une déclaration d'appel auprès du Tribunal Arbitral du Sport (TAS) pour contester une convention, intitulée *"Acceptance of sanction"*, que la gymnaste américaine X._____ (ci-après: l'athlète) avait passée le 13 juillet 2016 avec l'Agence américaine antidopage (United States Anti-Doping Agency; USADA). Le TAS a ouvert une procédure d'appel sous la référence CAS 2016/A/4743.

Par lettre du 31 août 2016, le directeur financier du TAS a réparti comme il suit l'avance de frais fixée à 36'000 fr.: 18'000 fr. pour la recourante et 9'000 fr. pour chacune des deux intimées. Ces montants devaient être versés jusqu'au 20 septembre 2016. L'USADA et l'athlète lui ont indiqué, par courriers électroniques des 6 et 9 septembre 2016, qu'elles n'avaient pas l'intention de payer leur part respective de l'avance de frais. Par fax du 9 septembre 2016, le directeur financier du TAS a rappelé aux parties que l'avance de frais devait être versée jusqu'au 20 septembre 2016 au plus tard, faute de quoi application serait faite de l'art. R64.2 du Code. Le 12 septembre 2016, constatant que les intimées à l'appel n'avaient pas obtempéré, il a invité l'AMA à payer la totalité de l'avance de frais, en conformité avec la disposition citée, soit la somme de 36'000 fr., dans le délai échéant le 20 septembre 2016; sa lettre précisait que, faute de paiement de ladite somme avant la fin de ce délai, l'appel serait réputé retiré.

Le 19 septembre 2016, l'AMA a versé la somme de 18'000 fr. sur le compte du TAS.

Par fax et lettre du 28 septembre 2016, le Greffe du TAS a invité l'appelante à lui fournir une preuve du paiement, dans le délai prescrit, des 18'000 fr. manquants.

Le même jour, l'AMA, agissant par le truchement d'un avocat, a envoyé au TAS une lettre dans laquelle elle a reconnu son erreur. Le conseil de l'AMA ajoutait qu'il serait excessivement formaliste de mettre un terme à la procédure d'arbitrage dans ces circonstances et il indiquait, à la fin de sa lettre, que sa mandante avait déjà donné des instructions pour le paiement des 18'000 fr. additionnels.

Le 29 septembre 2016, l'AMA a versé une somme de 18'000 fr. sur le compte du TAS.

Invitées à se déterminer sur le courrier du conseil de l'AMA du 28 septembre 2016, l'USADA et l'athlète ont adressé au TAS, le 30 septembre 2016, un courrier électronique et une lettre dans lesquels, invoquant l'art. R64.2 du Code, elles lui ont demandé de clôturer la procédure arbitrale, faute de paiement complet de l'avance par l'AMA dans le délai imparti.

L'AMA a en particulier fait valoir, dans une lettre du 3 octobre 2016, que le TAS ferait preuve de formalisme excessif s'il mettait un terme à la procédure.

Par décision du 11 novembre 2016, intitulée *"Termination Order"* et rendue sous la forme d'attendus, la Présidente de la Chambre arbitrale d'appel du TAS (ci-après: la Présidente) a clos la procédure *CAS 2016/A/4743* et rayé la

cause du rôle. La Présidente a indiqué ne voir aucune raison susceptible de justifier l'octroi à l'appelante d'un délai de paiement supplémentaire, étant donné le texte clair de l'art. R64.2 du Code. Dès lors, en vertu de cette disposition, la déclaration d'appel était réputée retirée, motif pris du non-paiement de la totalité de l'avance, si bien que le TAS devait mettre un terme à l'arbitrage.

Le 5 décembre 2016, l'AMA (ci-après: la recourante) a déposé un recours en matière civile au terme duquel elle demande au Tribunal fédéral d'annuler *"la sentence arbitrale"* rendue le 11 novembre 2016 par le TAS.

Extrait des considérants

1. 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*, qu'elle soit finale, partielle, préjudicielle ou incidente. En revanche, une simple ordonnance de procédure pouvant être modifiée ou rapportée en cours d'instance n'est pas susceptible de recours (arrêt 4A_600/2008 du 20 février 2009 consid. 2.3). Il en va de même d'une décision sur mesures provisionnelles visée par l'art. 183 LDIP (ATF 136 III 200 consid. 2.3 et les références). L'acte attaquable, du reste, ne doit pas nécessairement émaner de la Formation qui a été désignée pour statuer dans la cause en litige; il peut aussi être le fait du président d'une Chambre arbitrale du TAS, voire du secrétaire général de ce tribunal arbitral. Au demeurant, pour juger de la recevabilité du recours, ce qui est déterminant n'est pas la dénomination du prononcé entrepris, mais le contenu de celui-ci (ATF 142 III 284 consid. 1.1.1 et l'arrêt cité).

A considérer ne serait-ce déjà que son intitulé (*Termination Order*), la décision attaquée n'est pas une simple ordonnance de procédure susceptible d'être modifiée ou rapportée en cours d'instance. En effet, le TAS ne se contente pas d'y fixer la suite de la procédure, mais, constatant que l'avance de frais requise n'a pas été faite dans le délai imparti à cette fin, en tire la conséquence que prévoit l'art. R64.2 du Code, c'est-à-dire la fiction irréfragable du retrait de l'appel. Son prononcé s'apparente ainsi à une décision d'irrecevabilité qui clôt l'affaire pour un motif tiré des règles de la procédure. Qu'il émane de la Présidente plutôt que d'une Formation arbitrale, laquelle n'était du reste pas encore constituée, n'empêche pas qu'il s'agit bien d'une décision susceptible de recours au Tribunal fédéral (dans ce sens, cf. l'arrêt 4A_600/2008, précité, ibid.).

2. Dans un premier moyen, la recourante, invoquant l'art. 190 al. 2 let. d LDIP, reproche à la Présidente d'avoir violé son droit d'être entendue en n'examinant pas l'argument essentiel soulevé par elle, à savoir si une application stricte du texte de la disposition pertinente du Code se justifiait au regard des circonstances du cas concret et des intérêts en jeu.

L'art. R64.2 du Code énonce ce qui suit:

"Lors de la constitution de la Formation, le Greffe du TAS fixe, sous réserve de modifications ultérieures, le montant, les modalités et les délais de paiement de l'avance de frais. L'introduction de demandes reconventionnelles éventuelles ou de nouvelles demandes peut entraîner la fixation d'avances de frais complémentaires.

Pour fixer le montant de la provision, le Greffe du TAS estime les frais d'arbitrage qui seront supportés par les parties conformément à l'article R64.4. L'avance de frais est versée à parts égales

par la/les partie (s) demanderesse (s) /appelante (s) et la/les partie (s) défenderesse (s) /intimée (s). Si une partie ne verse pas sa part, une autre peut le faire à sa place; en cas de non-paiement de la totalité de l'avance de frais dans le délai fixé par le TAS, la demande/déclaration d'appel est réputée retirée et le TAS met un terme à l'arbitrage; cette disposition *s'applique également mutatis mutandis aux éventuelles demandes reconventionnelles".*

L'interprétation de cette disposition et son application aux circonstances de la cause, telles qu'elles ont été faites par la Présidente, échappent à l'examen de la Cour de céans. En effet, l'application erronée, voire arbitraire, d'un règlement d'arbitrage ne constitue pas en soi une violation de l'ordre public (ATF 126 III 249 consid. 3b et les arrêts cités). La recourante relève donc à juste titre, sous n. 38 de son mémoire, qu'elle "ne remet... pas du tout en cause l'interprétation de la disposition ou son contenu..".. Vrai est-il, toutefois, qu'elle s'écarte par la suite de cette déclaration d'intention, puisqu'elle soutient, en pure perte d'ailleurs, que la fixation de l'avance de frais serait intervenue "de manière formellement prématurée" sur le vu du début du texte de l'art. R64.2 du Code *("Lors de la constitution de la Formation"*; recours, n. 55.4).

En l'occurrence, les motifs qui étayent l'ordonnance de clôture laissent apparaître en filigrane le pourquoi du prononcé de cette décision. Il en appert clairement, encore que de façon plutôt implicite, que la Présidente a écarté le moyen pris du formalisme excessif parce que la recourante avait été dûment avertie, en temps voulu, du risque qu'elle prenait si elle ne versait pas la somme de 36'000 fr. le 20 septembre 2016 au plus tard et que, de surcroît, elle ne pouvait pas invoquer sa propre erreur pour échapper à la sanction expressément prévue par l'art. R64.2 al. 2 du Code.

3. En second lieu, la recourante soutient que la Présidente aurait fait preuve de formalisme excessif à son égard, violant ainsi l'art. 190 al. 2 let. e LDIP en tant qu'il commande le respect de l'ordre public procédural.

Une sentence est incompatible avec l'ordre public si elle méconnaît les valeurs essentielles et largement reconnues qui, selon les conceptions prévalant en Suisse, devraient constituer le fondement de tout ordre juridique (ATF 132 III 389 consid. 2.2.3). On distingue un ordre public procédural et un ordre public matériel. L'ordre public procédural, au sens de l'art. 190 al. 2 let. e LDIP, qui n'est qu'une garantie subsidiaire (ATF 138 III 270 consid. 2.3), assure aux parties le droit à un jugement indépendant sur les conclusions et l'état de fait soumis au Tribunal arbitral d'une manière conforme au droit de procédure applicable; il y a violation de l'ordre public procédural lorsque des principes fondamentaux et généralement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de la justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit (ATF 132 III 389 consid. 2.2.1).

Le formalisme est qualifié d'excessif lorsque la stricte application des règles de procédure ne se justifie par aucun intérêt digne de protection, devient une fin en soi, complique de manière insoutenable la réalisation du droit matériel ou entrave de manière inadmissible l'accès aux tribunaux (ATF 130 V 177 consid. 5.4.1 p. 183; 128 II 139 consid. 2a p. 142; 127 I 31 consid. 2a/bb p. 34). D'après la jurisprudence, la sanction de l'irrecevabilité du recours pour

défaut de paiement à temps de l'avance de frais ne procède pas d'un formalisme excessif ou d'un déni de justice, pour autant que les parties aient été averties de façon appropriée du montant à verser, du délai imparti pour le versement et des conséquences de l'inobservation de ce délai (ATF 133 V 402 consid. 3.3 p. 405; 104 Ia 105 consid. 5 p. 112; 96 I 521 consid. 4 p. 523).

La Ire Cour de droit civil n'a pas jugé excessivement formaliste le fait, pour le TAS, de sanctionner par une irrecevabilité le vice de forme que constituait l'envoi d'une déclaration d'appel par simple télécopie (arrêt 4A_690/2016, précité, consid. 4.2). Par identité de motif - pour en revenir à la question présentement litigieuse -, la même Cour avait déjà souligné, quelques années plus tôt, que le TAS pouvait constater, sans commettre un excès de formalisme, que la conséquence attachée par l'art. R64.2 du Code au défaut de versement de l'avance de frais en temps utile devait s'appliquer aux circonstances du cas qui lui était soumis, en dépit de l'allégation du recourant selon laquelle le TAS était en possession du montant de cette avance effectuée hors délai lorsqu'il avait rayé la cause du rôle (arrêt 4A_600/2008, précité, consid. 5.2.2). Les formes procédurales, a-t-elle rappelé à cette occasion, sont nécessaires à la mise en oeuvre des voies de droit, ne serait-ce que pour assurer le déroulement de la procédure conformément au principe de l'égalité de traitement. En décider autrement dans le cas d'une institution d'arbitrage reviendrait à oublier que, dans une procédure arbitrale, tout comme dans une procédure étatique, la partie intimée est en droit d'attendre du tribunal arbitral qu'il applique et respecte les dispositions de son propre règlement de procédure (ibid.).

Appliqués aux circonstances du cas concret, ces principes permettent d'écarter d'emblée le reproche de formalisme excessif que la recourante fait à la Présidente.

L'intéressée ne conteste ni le paiement tardif de l'avance de frais ni son erreur qui en est la cause. Elle cherche en vain à faire accroire que sa "confusion" aurait été favorisée par la manière de procéder du TAS. En effet, sous n. 18/19 de sa réponse, celui-ci démontre, au moyen d'un rappel chronologique des courriers échangés de part et d'autre, que la situation était parfaitement limpide, s'agissant du montant à verser (36'000 fr.), du délai imparti pour le versement (le 20 septembre 2016) et des conséquences de l'inobservation de ce délai (la présomption irréfragable du retrait de l'appel), ce que confirme on ne peut mieux, d'ailleurs, le message adressé le 13 septembre 2016 par le conseil de la recourante à un employé de celle-ci. Il n'importe, au demeurant, sur le vu de la jurisprudence susmentionnée et singulièrement de l'arrêt 4A_600/2008 précité dont elle conteste à tort les traits communs avec les circonstances de la présente cause, que la recourante ait versé une partie de l'avance dans le délai imparti. Qu'elle ait eu la volonté d'en verser ultérieurement le solde n'est pas non plus déterminant; de fait, l'obligation de verser l'avance de frais dans un délai péremptoire deviendrait lettre morte si l'on accueillait ce type d'argument fondé sur la seule intention, non prouvable, alléguée par le débiteur de l'avance.

Par ailleurs, on peut attendre d'une fondation de cette importance, qui a la haute main sur toutes les questions ayant trait au dopage dans le sport à quelque niveau que ce soit, qu'elle fasse le nécessaire pour être en mesure de se plier

aux exigences formelles dont le respect conditionne la bonne exécution de sa mission.

Dès lors, il y a lieu de réserver au moyen pris de la violation de l'ordre public procédural le même sort qu'à celui fondé sur une prétendue violation du droit d'être entendu de la recourante.

Informations diverses
Miscellanous

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