Bulletin TAS
CAS Bulletin

1/2010

TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT

Table des matières / Table of contents

Message du Secrétaire Général du TAS / Message from the CAS Secretary General

Articles et commentaires / Articles and commentaries

Jurisprudence majeure / Leading cases

Jurisprudence de la Chambre ad hoc du TAS à Vancouver / Jurisprudence of the CAS ad hoc Division in Vancouver

Jugements du Tribunal Fédéral / Judgments of the Federal Tribunal

Informations diverses / Miscellaneous

Message du Secrétaire Général du TAS

Après avoir été diffusé à une échelle restreinte, le Bulletin d'information du Tribunal Arbitral du Sport, appelé dorénavant "Bulletin TAS", renaît sous une nouvelle forme. Ce Bulletin nouvelle formule est désormais publié sur le site internet du Tribunal Arbitral du Sport (*www.tas-cas.org*) et est ainsi accessible à un large public. Ce Bulletin paraîtra deux fois par année, en mars et en septembre.

La plus grande partie de ce Bulletin est consacrée à la jurisprudence du TAS. Compte tenu du nombre élevé de sentences arbitrales rendues par le TAS chaque année, une sélection des sentences ayant un intérêt particulier et/ou un impact sur la jurisprudence du TAS a été effectuée. Dans un autre chapitre, la jurisprudence du Tribunal Fédéral concernant des affaires du TAS est également examinée. On relèvera à ce titre que le nombre de recours contre des sentences du TAS a connu une forte augmentation depuis l'année 2005 (11 recours déposés entre 1984 et 2004 contre 64 depuis 2005).

Le Bulletin TAS contient aussi quelques articles sur des sujets ayant un intérêt scientifique pour l'activité du TAS en général. Les articles qui nous sont proposés, que ce soit de l'intérieur du TAS ou de l'extérieur, sont soumis au comité de rédaction du Bulletin qui sélectionne les textes pouvant être publiés. Enfin, le Bulletin TAS fournit quelques informations générales sur les activités du Conseil International de l'Arbitrage en matière de Sport (CIAS) et du TAS.

Après avoir fêté ses 25 ans d'existence, le TAS a eu une année 2010 passablement chargée avec l'entrée en vigueur du Code de l'arbitrage en matière du sport révisé et la création de trois nouvelles Chambres ad hoc à l'occasion des Jeux Olympiques d'hiver à Vancouver, de la Coupe du Monde de la FIFA en Afrique du Sud et des Jeux du Commonwealth à New Delhi. A cela s'ajoute le traitement des procédures d'arbitrage et de médiation (environ 300 nouveaux cas chaque année) qui concernent de plus en plus de disciplines sportives et de nations. Le TAS continue ainsi son développement tout en veillant à défendre une justice sportive indépendante et autonome.

Compte tenu de son implication dans le monde entier, l'internet constitue un moyen de communication idéal pour le TAS. Le nouveau Bulletin TAS complète ainsi l'information spécialisée destinée aux athlètes, fédérations sportives, clubs, avocats, managers, étudiants, etc… disponible sur *www.tas-cas.org*.

Nous souhaitons que cette publication contribue à augmenter l'intérêt du monde du sport et de celui du droit pour un mécanisme de résolution des litiges sportifs qui a maintenant fait ses preuves mais qui reste en constante évolution.

Matthieu REEB
Secrétaire Général du TAS

Message of the CAS Secretary General

Having formerly been distributed on a restricted basis, the CAS Newsletter, from now on known as the "CAS Bulletin", is re-born in a new format. This new format bulletin is published on the website of the Court of Arbitration for Sport (*www.tas-cas.org*) and therefore accessible to a broad audience. The bulletin will be published bi-annually, in March and September.

The majority of the bulletin is devoted to the jurisprudence of the CAS. Given the high number of arbitral awards rendered by the CAS each year, awards of particular interest and/or which have an impact on the jurisprudence of the CAS were selected. In another section, the jurisprudence of the Federal Tribunal concerning CAS cases is examined. In this regard it is to be noted that the CAS has experienced a significant increase in the number of appeals made against CAS awards since 2005 (11 appeals filed between 1984 and 2004, and 64 filed since 2005).

The CAS Bulletin also contains several articles on subjects of technical interest about CAS activities in general. The articles we are offered, whether internally or externally to the CAS, are referred to the Editorial Board which selects the texts that can be published. Finally, the CAS Bulletin provides some general information about the activities of the International Council of Arbitration for Sport (ICAS) and the CAS.

Having celebrated 25 years of existence, in 2010 the CAS has had a fairly busy year with the coming into force of the revised Code of Sports-related Arbitration and the creation of three new ad hoc divisions for the Winter Olympic Games in Vancouver, the FIFA World Cup in South Africa, and the Commonwealth Games in New Delhi. To this is added the handling of arbitration and mediation procedures (around 300 new cases each year) which concern more and more sporting disciplines and nations. With this, the CAS continues its development whilst assuring its independent and autonomous resolution of sports-related disputes.

Given its world-wide coverage, the internet constitutes an ideal means of communication for the CAS. The new CAS Bulletin provides specialised information destined to athletes, sports federations, clubs, lawyers, managers, students, etc… and is available on *www.tas-cas.org*.

We hope that this publication helps to increase the interest of those in the worlds of sport and law for a means of resolving sports-related disputes which has a proven track record but remains in constant evolution.

Matthieu REEB
CAS Secretary General

Challenges for CAS decisions following the adoption of the new WADA Code 2009*

Prof. Dr Jens Adolphsen

*** The original version in German of this article is published in: Bernasconi/Rigozzi (editors), Sport Governance, Football Disputes, Doping and CAS Arbitration: CAS & FSA/SAV Conference, Lausanne 2008, Editions Weblaw, Bern 2009.**

I. Introduction

This article focuses on the requirements that future decisions of the CAS will have to meet due to changes of the WADA Code 2009. The main change - compared the first and the 2009 versions WADA Code - is that the initial harmonization is now being relaxed through elements of more flexibility. This article will be centred on this change. However, it first deals with a few rather technical questions, which the CAS will have to ask itself after any release of a new version of the WADA Code.

II. No direct application of the new WADA Code

The Code constitutes a set of rules of a private foundation *(Stiftung)* under Swiss law. As a set of rules falling under private law, it cannot therefore claim any direct applicability[1]. In other words: The WADA Code does not simply apply, it is agreed. Neither the original declaration of the first version at the World Conference on Doping in Sport in March 2003 in Copenhagen[2] nor the acclamation at the 2007 Conference in Madrid[3] can change this fact.

The parallel signature and ratification of the UNESCO Convention against Doping in Sport on 19 October 2005[4], giving effect to the Code, also does not alter the fact that the WADA Code lacks direct effect. Athletes are bound by the statutes of

1. Jens Adolphsen, Umsetzung des Welt Anti-Doping Code in Deutschland, in: Vieweg (ed.), Perspektiven des Sportrechts 2005, p. 81; see also Comment to introduction of part one of the Code (amended version): *"By their participation in sport, Athletes are bound by the competitive rules of their sport. In the same manner, Athletes and Athlete Support Personnel should be bound by anti-doping rules based on Article 2 of the Code by virtue of their agreements for membership, accreditation, or participation in sports organizations or sports events subject to the Code. Each Signatory, however, shall take the necessary steps to ensure that all Athletes and Athlete Support Personnel within its authority are bound by the relevant Anti-Doping Organization's anti-doping rules".*

2. http://www.wada-ama.org/rtecontent/document/code_v3.pdf (last viewed on 13.08.09).

3. http://www.wada-ama.org/rtecontent/document/WADA_Code_2007_3.0.pdf (last viewed on 13.08.08).

4. http://portal.unesco.org/en/ev.php-URL_ID=31037&URL_DO=DO_TOPIC&URL_SECTION=201.html (last viewed on 13.08.09).

their federation, whether they be the statutes of the international or the national federation, but never directly by the WADA Code itself. Even so, the rules of the international federations and those of the WADA Code can, of course, be identically worded. However, this does not change the fact that the substantive binding nature in fact ensues solely from the rules.

The CAS has resolutely stood firm on this in its decisions in recent years. It has always only taken the relevant rules into account and in only rare cases has it referred to the WADA Code to help with its interpretation because the relevant rules of the international association contained the term *"no significant fault"* without defining this any further[5]. Using the WADA Code to help with interpretation if the analogously drafted international rules do not govern certain issues does not breach the principle that the WADA Code itself is not directly applicable. In such cases the Code only serves to help with interpreting the rules of the association and so does not acquire direct effect.

The classification of the WADA Code as "*non self-executing*" has further consequences also in connection with the introduction of the new WADA Code 2009.

1. Although mentioned in Art. 25 of the WADA Code, there is no so-called "*Effective Date*". The date of 1 January 2009 was initially a request made of the signatories to bring their rules and regulations in line with the new WADA Code by that date.

   At the same time the term "*Effective Date*" probably indicates that the signatories should not bring rules and regulations amended beforehand into force until then.

   However, if individual signatories fail to comply with their obligation to bring their rules and regulations in line with the WADA Code by the stipulated date, the CAS remains mandatorily obliged to continue to apply the outdated rules and regulations, which do not comply with the WADA Code, after 1 January 2009.

   As an arbitration court, the CAS is bound by the contractual terms agreed between the parties. The fact that one party has failed to meet an external obligation, cannot cause the new rules and regulations to be anticipated.

   However, the parties are at liberty to agree that different contractual terms apply to a certain event or in connection with a dispute before the CAS; thus they can also agree to apply the WADA Code or its essential terms as a basis.

   It would therefore have been possible to agree the new WADA Code as binding for the Olympic Games in Peking because as regards this the IOC is in a position to organise the legal relationship accordingly on the basis of the registration form. The German IOC Vice-President made a comment to this effect in Madrid in 2007[6]. The *ad hoc division* of CAS could thus have been forced to adjudicate on this basis. It was a good decision that the IOC restrained. The Olympic Games take place on the basis of the rules of the international sports associations, who have each implemented the WADA Code very differently. Some have adopted separate rules, which largely correspond to the WADA Code[7]. Others, however, have integrated the Code into their existing rules. Not much imagination is required to picture the confusion in the event that the regulations of the IOC conflict with those of the international sports associations.

2. Due to the absence of direct applicability, the provisions on the new crown witness rules also did not apply before they had been effectively adopted by the association's rules. Corresponding applications for the sanction to be reduced up to 1/3 had therefore be dismissed as unfounded.

3. In the past, the fact that the WADA Code has not applied directly has, quite rightly, meant that the CAS has refused to act upon any appeal by WADA if the rules of the associations do not provide for such an appeal.

   Both the old and the new WADA Code provide in Art. 13.2.3 that WADA has the right to appeal to CAS. In the final analysis, this right to appeal is a procedural way of safeguarding the harmonization that has taken place. The purpose of the right to appeal is to ensure that the federations and associations enforce the WADA Code uniformly. Art. R47 of the Procedural Rules of the CAS provide:

   > "*An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body*

5. CAS 2007/A/1364.

6. http://www.dosb.de/de/leistungssport/anti-doping/news/detail/news/neuer_wada_code_verabschiedet_bach_die_neue_flexibilitaet_erlaubt_haerter_zu_bestrafen/608/nb/4/cHash/b0ba072a1a (last viewed on 14.08.08).

7. See the rules of the FEI under www.horsesport.org. or of the ISU under www.isu.org.

so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statues or regulations of the said sports-related body".

The CAS has therefore, quite rightly, dismissed an appeal by WADA in a case where an international federation had failed to meet its obligation to incorporate a rule corresponding to Art. 13.2.3 WADA Code in its rules[8]. Although the panel expressly regretted this decision, it did thereby strictly abide by the fact that the WADA Code cannot have any direct effect and that the rules must therefore be accordingly amended in this regard.

4. The new WADA Code provides in numerous Articles that personnel surrounding the athlete (Athlete Support Personnel) are also to be bound by anti-doping rules (Art. 20.3.3; 20.3.5; 20.3.9; 20.4.5; 20.5.6; 20.6.4; 20.6.5; 21.2). A question which the CAS will have to answer first and foremost is whether an arbitration agreement giving rise to the jurisdiction of the CAS even exists with such personnel (Art. R27 CAS Code). However, this question will often be lumped together with the question of being bound by the rules. The statutes of the international federations usually contain an arbitration clause, which provides that the CAS has jurisdiction as an appeal instance.

If an international federation imposes a sanction on the Support Personnel and one of these persons is of the opinion that he/she is not bound by the rules and there is no arbitration agreement, that person can file a suit with the state courts. However, it will probably also be held admissible for that person to turn to the CAS so that an ex post arbitration agreement can establish and assert that the person is not bound by the rules of the international federation for lack of any contractual relationship with the international federation.

Disputes on the jurisdiction to decide jurisdiction are therefore also conceivable.

The CAS will in future have to examine in depth whether the rules of the federations really cover Support Personnel. The WADA Code itself cannot do this; it only establishes an obligation to extend corresponding rules on the Support Personnel.

8. CAS 2006/A/1190.

III. Transitional provisions

A. Tempus regit actum

Already in its advisory opinion of 26 April 2005[9] the CAS made it clear that there is a problem in identifying the relevant substantive legal rule because the anti-doping rules were amended in relatively quick succession. In this advisory opinion the panel initially confirmed the principle of *tempus regit actum* ("*principle of no retroactivity*") and pointed out that, in order to determine an anti-doping rule violation, it is necessary to ascertain the legal situation at the time of the alleged violation.

The revised WADA Code includes this principle in Art. 25.2, which reads:

"*Non-Retroactive Unless Principle of Lex Mitior Applies*
With respect to any anti-doping rule violation case which is 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 the tribunal hearing the case determines the principle of lex mitior appropriately applies under the circumstances of the case".

At the same time, connected with this is the statement that even if an international federation has not meet its obligation to amend its rules by 1 January 2009, then of course the old rules remain in force and the CAS is itself therefore bound by said old rules as the basis between the parties upon which it is to make its decision. The result is that anti-doping rule violations, which occur after 1 January 2009, can therefore still be treated according to the old law. The fact that the decision by the CAS was not rendered until after 1 January 2009 was in principle irrelevant in the case of an anti-doping rule violation that had occured before 1 January 2009. Here too, the old law applied.

B. Adjustment of sanctions which have been imposed

Art. 25.3 provides for a retroactive application in the event that an anti-doping rule violation has been decided according to the old law, the decision was rendered prior to the Effective Date and the athlete is still serving the period of ineligibility after the Effective Date. In that case the athlete or any other person could apply to the anti-doping rule organization

9. CAS 2005/C/841 CONI.

which had results management responsibility for a reduction in the sanction according to the criteria of the new WADA Code. Such an application was only possible in cases where the period of ineligibility had not yet expired.

Strangely, such a possibility of reduction with recourse to the new WADA Code was provided only in the case that both the anti-doping rule violation and the federation's decision were before the Effective Date of 1 January 2009. However, this rule is probably based on a misinterpretation of the term "*Effective Date*", so it is to consider it expedient to also allow such a possibility of reduction if the decision was rendered according to the principle of *tempus regit actum* on the basis of the old law but after 1 January 2009. Ultimately, what is decisive is that there is a period of ineligibility after the Effective Date, which may be subject to reduction on the basis of the anticipatorily applicable new Code.

C. Lex mitior

The CAS has at least considered applying the principle of *lex mitior* in various awards.

However, WADA's drafting group deliberately decided not to expressly regulate the principle of *lex mitior*. It is merely mentioned in Art. 25.2 as a possibility of making an exception to the principle of *tempus regit actum*.

The possibilities of applying this principle in arbitration cases appear to be extremely limited: First, this is a principle of criminal law, which in the present case is not only a formal distinction.

Unlike private rules for doping-related disputes, criminal law always applies directly in the relevant state territory. However, as explained above, the WADA Code does not have direct effect. There is therefore in fact no "*less severe law that already applies*". Recourse to an applicable less severe law can, under no circumstances, lead to a direct application of the WADA Code. This contradicts its legal nature.

It was of course possible that the international federation had already amended its own rules to bring them in line with the new WADA Code after an anti-doping rule violation had been committed. Due to the *tempus regit actum* rule the old law initially remained the basis for the legal relationship with the athlete. This could therefore be a case for having recourse to an applicable less severe law. If, however, as suggested, one applies Art. 25.3 here, recourse to the *lex mitior* principle is not necessary.

In an arbitral award made in 2005[10] the panel considered applying the *lex mitior* principle because the applicable rules did not provide for any possibility of mitigating a standard sanction of 2 years. The panel considered applying the possibilities of mitigation provided under Art. 10.5.2 *(no significant fault or negligence)*. Better the principle of proportionality should have been applied here; the rules contained a lacuna, which had to be filled by interpretation on the basis of a standard that is particular to sport's law. However, this is not the application of the *lex mitior* principle.

As an arbitration court, the CAS will usually be bound by the contractual terms agreed between the parties, which excludes recourse to other rules. However, the parties are free to mutually declare their agreement to the application of less severe rules as a basis for the arbitration decision.

IV. The impact of mandatory law

The changes made under the new WADA Code had encountered a dynamic judicial environment. There are to be mentioned the decision by the ECJ in the case *Meca/Medina* and *Majcen* and the *Canas* judgment by the Swiss Federal Tribunal *(Schweizerisches Bundesgericht)*. Both judgments and the substantive changes to the new WADA Code ought to have a considerable impact on the future decisions of the CAS.

In the *Meca-Medina* and *Majcen* case the ECJ[11] decided, contrary to the court of first instance[12], that the doping rules of federations had to be measured against the standard of European cartel law. At first, that may seem to be a logical continuation of ECJ case-law. For German lawyers, the application of cartel law to review the sanctions of a federation is not anything unusual because under national law too claims are often based on cartel law[13]. The case may be different for Switzerland because in Switzerland the right of personality is given utmost importance[14]. Finally, one could also think that it is not so much the nature of the basis of the claim that is important, so long as courts apply a reasonably appropriate standard for review. Internationally, however, the application carries a completely different potential for conflict, which the ECJ did not even begin to recognize.

10. CAS 2004/A/787 = SpuRt 2005, 205, 207.

11. ECJ; judgment of 18.7.2006 - C-519/04 P.

12. ECJ, judgment of 30.9.2004 – case T-313/02. *Meja-Medina and Majcen/Commission* = SpuRt 2005, 20 (Schroeder 23); Orth, causa sport 2004, 195.

13. Jens Adolphsen *"Internationale Dopingstrafen"* [International Doping Sanctions], pp. 156 *et seq.*

14. For a comparison of laws see Jens Adolphsen, "*Internationale Dopingstrafen*" [International Doping Sanctions], pp. 124 *et seq.*

In his case before the Swiss Federal Tribunal *(Schweizerisches Bundesgericht) Guillermo Canas* objected to the failure to consider either US-Delaware law or the US-American Sherman Act and EC cartel law. In the end, the Swiss Federal Tribunal allowed the action for annulment solely because of the failure to apply US-Delaware law. By failing to consider the law of Delaware it considered that the right to a fair hearing had been denied (Art. 190(2) (d) Switzerland's Federal Code on Private International Law *(IPRG)*).

From the point of view of the conflict of laws it was simple to substantiate the need to apply the law of the state of Delaware in the present case because the parties had agreed this law as the basis for the legal relationship.

The question of the extent to which the CAS will in future be obliged to also review the non-compatibility of certain sanctions with cartel law as mandatory international law (so-called *Eingriffsnormen*, *loi de police,* mandatory law, definition in Article 9(1) Rome I-Regulation[15]*)* is a much more complex question.

It is probably by no means completely fanciful that athletes will in future object that, for example, an increase in the sanction for a first violation to four years (Art. 10.6), the continuing lack of flexibility in Art. 10.5.2 and possibly also the status during a period of ineligibility (Art. 10.10), are disproportionate and incompatible with cartel law. The standard is therefore not only Swiss law, whether that be the Swiss Civil Code *(ZGB)* or the Constitution or even the European Convention on Human Rights, but also cartel law.

In order to assess the future significance of mandatory law in arbitration proceedings before the CAS, a distinction must be made between European and national cartel law. In addition one must distinguish between the extent to which there is a duty to apply mandatory law and the extent to which there is a duty only to consider allegedly applicable mandatory law.

A. The mandatory application of European cartel law by the CAS

When analysing this one must take into account the fact that the CAS has its seat in Switzerland and not in a member state of the EU. It is therefore irrelevant that in 1999 the European Court of Justice emphasized the duty of the member states' state courts, with whom an application is filed to annul an arbitral award, to allow the action for annulment if they consider that the arbitral award conflicts with EC cartel law (Art. 81 Treaty Establishing the European Community)[16]. An obligation on the part of international arbitration courts, which have their place of arbitration in an EU member state, to apply the rules of EC cartel law was rightly inferred from this judgment. However, this only applies to arbitration courts in an EU member state, not to arbitration courts in Switzerland.

However, Articles 81 and 82 of the Treaty Establishing the European Community (after the Lisbon Treaty Article 101 and 102 Treaty on the Functioning of the European Union) have extraterritorial effect. The Swiss Federal Tribunal *(Schweizerisches Bundesgericht)* therefore held in 1992 already that an arbitration court, which had its seat in Switzerland, had an obligation to review EC competition law. In the specific case the parties had agreed that Belgian law was to govern their legal relationship[17].

The basis for binding the arbitration court by European cartel law was ultimately the agreement to the substantive law of an EU member state (Treaty Establishing the European Community as a *partie integrante* (integral part) of Belgian law). The prevailing opinion in Switzerland is that the remission under the conflict of law rules to the substantive law of a member state of the EU includes the mandatory law of said law. The background to this is the *"Schuldstatutstheorie" (Theory whereby the governing law basically also includes the mandatory laws of the foreign law)* and Art. 13 Switzerland's Federal Code on Private International Law *(IPRG)*[18].

If therefore international federations and athletes have agreed the law of a member state or if an objective connecting factor, especially due to the federation having its seat in a member state, means that the law of a member state applies, the CAS would also have to apply European cartel law.

B. The application of national cartel law by the CAS

The comments made so far have only concerned the application of European cartel law when the law of an EU member state applies.

The *Canas* case, in which an objection was raised about the failure to take into account the United States Antitrust Sherman Acts, i.e. the application of

15. Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable on contractual obligations, OJ L 177 4/07/2008, p. 6-16.

16. EuGHE [judgments of the ECJ] 1999 I-3079, 3094 (margin no. 41).

17. BGE [Decisions of the Swiss Federal Tribunal] 118 II 193.

18. Anton Schnyder, *Anwendung ausländischer Eingriffsnormen durch Schiedsgerichte* [The Application of Foreign Mandatory Laws by Arbitration Courts] RabelsZ 59 (1995), 293, 299.

national cartel law, is a clear illustration of the future problem.

1. Effects doctrine

Numerous states would like their national cartel law to apply whenever the domestic market is noticeably affected. This doctrine known as the «effects doctrine» originated in the USA[19]. Numerous countries have followed this example: Thus, German law contains a corresponding provision in Paragraph 130(2) German Act against Restraints of Competition *(GWB)*, Swiss cartel law contains a corresponding provision in Art. 2(2) Swiss Cartel Act *(KG)*. The Austrian Cartel Act *(Kartellgesetz)* likewise provides in Paragraph 6(1) that it must also be applied to foreign facts if they have an effect on the domestic market.

This domestic effect is the decisive factor for triggering the claim that national cartel law applies. Suspensions imposed by international sports federations have a noticeable effect on the domestic market if an athlete can no longer appear on the market as a provider of sporting performances in the sports market due to the suspension.

The unusual aspect about the application of national cartel law is that it applies irrespective of any choice of law by the parties, so it overrides the law that is otherwise applicable.

2. Obligation of the CAS to apply mandatory law

The change to the WADA Code could therefore in future quite possibly lead to athletes increasingly objecting to a breach of European or their own national cartel law because the corresponding market is affected if said athletes are excluded from practising their sport due to suspensions.

However, for the CAS it does not necessarily follow from the interest in applying national cartel law extraterritorially that this law will also be applied in the arbitration case contrary to any choice of law.

As has been seen, there is an obligation to apply supranational EU competition law only if the parties have chosen the law of an EU member state. Otherwise, there is a risk that the Swiss Federal Tribunal *(Bundesgericht)* will quash the arbitral award. This probably ensues from Art. 190(2) (b) Switzerland's Federal Code on Private International Law *(IPRG)*[20]. On the other hand, the application of Art. 190(2) (e) is probably excluded because the Swiss Federal Tribunal *(Bundesgericht)* later decided that the provisions of not every set of rules governing competition belong to essential, largely recognized system of values, which according to the prevailing opinion in Switzerland, should form the basis of every legal system[21].

An agreement on the law of an EU member state is, however, less common than EU cartel law not applying because the majority of sports federations have their seat in Switzerland and so there is a corresponding agreement of Swiss law.

There is likewise an obligation to apply national cartel law if the parties have chosen the law of an EU member state.

In addition, for civil tortious claims (omission, removal, damages, satisfaction and accounting for profits), Art. 137 Switzerland's Federal Code on Private International Law *(IPRG)* creates the obligation to apply the law of the state, on whose market the injured party has been directly affected by the obstruction to competition due to the suspension. However, it is disputed whether Art. 137 Switzerland's Federal Code on Private International Law *(IPRG)* also applies to arbitration courts (and the extent to which it overrides the otherwise applicable law.[22] If one assumes that CAS has to apply this law even contrary to a choice of law then foreign athletes could assert claims for damages before the CAS based on national cartel law.

C. The possibility of the CAS to apply mandatory law

Apart from these obligations to apply extraterritorially applicable cartel law, there is another possibility under Swiss law of applying said law.

19. US vs. Aluminium Co. of America (Alco), 148 F.2d.416, 443 (2d CIR. 1945).

20. BGE [Decisions of the Swiss Federal Tribunal] 118 II 193, comments on this by Anton Schnyder, *"Pflicht schweizerischer Schiedsgerichte zur Prüfung der Anwendbarkeit von Eingriffsnormen, insbesondere des EG-Wettbewerbsrechts"* [Obligation of Swiss Arbitration Courts to Review the Application of Mandatory Provisions, particularly of EC Competition Law], IPRax 1994, 465; Jens Adolphsen, *"Internationale Dopingstrafen"* [International Doping Sanctions], p. 289, 655.

21. BGE [Decisions of the Swiss Federal Tribunal] 132 III 389; for comments on the different scope of review of the provisions for quashing an award see Jens Adolphsen, *"Internationale Dopingstrafen"* [International Doping Sanctions], p. 289, 655.

22. Frank Vischer, Zürcher Kommntar, Art. 137 IPRG margin no. 14; agreeing with him Dasser/Drolshammer, Basler Kommentar, Art. 137 IPRG margin no. 23, which refer to the fact that a comparable schism exists in EC competition law. There the unlawfulness follows from EC competition law, whereas the liability arising therefrom derives from national law. As regards the latter schism see also Denis Esseiva, *"Die Anwendung des EG-Kartellrechts durch den schweizerischen Richter aufgrund des Artikels 137 IPRG"* [The Application of EC Cartel Law by Swiss Judges due to Article 137 Switzerland's Federal Code on Private International Law *(IPRG)*]. ZVglRWiss 94 (1995), 80, 103 *et seq.*. On this question see Adolphsen, *"Internationale Dopingstrafen"* [International Doping Sanctions], p. 292.

Art. 19 Switzerland's Federal Code on Private International Law *(IPRG)*[23] opens up a possibility of applying foreign national cartel law.

Under Art. 19(1) Switzerland's Federal Code on Private International Law *(IPRG)* a mandatory provision of a law other than that otherwise designated by Switzerland's Federal Code on Private International Law *(IPRG) may* be taken into account instead of the law that is otherwise designated by Switzerland's Federal Code on Private International Law *(IPRG)* if, pursuant to Swiss legal concepts, the legitimate and manifestly preponderant interests of a party so require and if the circumstances of the case are closely connected with that law.

In deciding whether such a provision is to be taken into account, its purpose is to be considered as well as whether its application would result in an adequate decision under Swiss concepts of law (Art. 19(2) Switzerland's Federal Code on Private International Law *(IPRG).*

These are evidently extremely complex conflict of law questions which statute resolves only in part and only in a vague and rudimentary manner. The ECJ obviously did not take these questions into account when it elevated cartel law to be the standard in international doping-related litigation.

It is therefore extremely difficult to say whether a particular cartel law has to be applied mandatorily in proceedings before the CAS; this partly also depends on the assessment of the respective panel.

An easier decision is the decision that corresponding pleadings in proceedings before the CAS should be considered. On the basis of the decision delivered by the Swiss Federal Tribunal *(Bundesgericht)* in the *Canas* case, if the party so pleads the CAS will in any event have to consider the underlying arguments.

In this regard it will be simple to draft in future a kind of template covering the question of the applicability of EC cartel law to be inserted into the decision.

However, this is probably more difficult for the consideration of national cartel law. In this regard the arbitration court must at least be required to deal with these questions. "*Hesitant indications*", as given by the Swiss Federal Tribunal *(Bundesgericht)* regarding its consideration of US Delaware law, are not sufficient. Furthermore, it is also sensible, even if not mandatory according to the decision by the Swiss Federal Tribunal *(Bundesgericht)*, to generally do this in the reasons for the arbitral award. Although it is correct that as regards this a superficial review would be sufficient, this should by no means satisfy the CAS's expectation that its case law be of a high-quality in terms of content.

The CAS may well therefore in future be faced with rather demanding questions concerning conflict of law rules and the application of national cartel law.

V. More flexibility regarding the penalty

A main focus of the changes made to the WADA Code is on more flexibility in the penalty. In the past this was achieved by partly departing from the harmonization trend in the first version of the WADA Code.

The discussion about the need to make the penalty more flexible must be seen in the light of the application of the doctrine of proportionality in the athlete's legal relations to the federation and in arbitration proceedings before the CAS.

The possibilities of reduction, which already existed under the old WADA Code, and which are also contained in the new WADA Code, are one way of expressing the doctrine of proportionality.

However, in the past it was often problematic whether - in certain cases where the WADA Code did not provide for a further reduction - contrary to the wording of the WADA Code and the corresponding rules of the international federation, a further reduction of the penalty should be possible by applying the doctrine of proportionality enshrined in the national law.

In order to solve this problem one first has to ask what task an arbitration court like the CAS has. At first, i.e. in the 1990s, the CAS usually considered itself bound by the provisions of the federation; the legal validity of the provisions was not reviewed[24].

Fortunately, the CAS has, in recent years, found a course that it has the right and duty to review the lawfulness of the agreed federation rules. This must be agreed with. The applicable national law takes precedence over the terms of the agreement; it forms the standard for reviewing the legal validity of the federation's rules. An arbitration court is obliged to review whether the agreed rules are compatible with a national law. The standard for this review is the law that applies to the legal relationship between the parties due to the parties' choice of law. In many

23. See Jens Adolphsen, *"Internationale Dopingstrafen"* [International Doping Sanctions], p. 292; Vischer, RabelsZ 53 (1989), 438, 447 *et seq.*

24. Authorities Jens Adolphsen, *"Internationale Dopingstrafen"* [International Doping Sanctions], p. 618.

cases this is Swiss law, the application of which is also in the end often helped by the CAS Code [25].

In various decisions the CAS has made clear its reservations about the system of the WADA Code that has existed to date.

Only in one case, the *Puerta* case[26] did the CAS fix a penalty contrary to the WADA Code. As regards this, after extensive considerations regarding the proportionality, the panel found that every sanction must be proportionate. If the sanction that would really have to be imposed according to the WADA Code is disproportionate, the question arises whether it is lawful under the regime of the WADA Code to impose a less severe penalty. Since, according to the old Code a period of ineligibility of eight years was to be imposed in the case of a repeated doping offence despite the athlete having twice been at fault only very slightly (as regards the change in the amended Code, see Art. 10.7), the CAS reduced the penalty to two years contrary to the provisions of the WADA Code.

The panel similarly had to deal with the doctrine of proportionality in the *Squizzato* case[27].

An Italian swimmer who was a minor (17 years of age) used an ointment containing anabolic steroids to treat a skin disease on her little toe. Her mother had obtained it, unaware of its composition, and the athlete applied it.

Here too the CAS considered that the athlete's fault was not significant and asked whether the minimal penalty of one year, which was to be imposed in this case, was compatible with the doctrine of proportionality. The panel applied Swiss law. The CAS held that the minor athlete was at fault, so it was not possible to completely eliminate a period of ineligibility (Art. 10.5.1. WADA Code 2004). In the context of Art. 10.5.2 WADA Code 2004 the panel wondered whether, if there has been no significant fault, the period of ineligibility may in actual fact be reduced to only one-half in every conceivable case. However, the panel left open the question of whether the wording of the WADA Code really prohibits further reducing the sanction and imposed a suspension of one year. However, this was done expressly with a feeling of "*unease*" and "*not without hesitation*".

25. Art. R58 CAS Code: *"Law Applicable: The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."*

26. CAS 2006/A/1025 *Mariano Puerta v. ITF*, Causa sport 2006, 365.

27. CAS/A/830 *G. Squizzato v. FINA*, SpuRt 2006, 30.

The comments made in this award about the legal nature of the WADA Code are important and succeed. The fact that the rules of a federation are derived from the WADA Code does not alter the legal nature of said rules; they are still federation rules, which cannot *a priori* replace either directly or indirectly fundamental legal principles such as the doctrine of proportionality for every conceivable case.

In the end it was these openly stated reservations, which - despite the legal opinions to the contrary - called for more flexibility.

The new WADA Code therefore now contains the category of specified substances in Art. 4.2.2, although it was already known under the old Code.

> *"Specified Substances*
> *All Prohibited Substances, except substances in the classes of anabolic agents and hormones and those stimulants so identified on the Prohibited List, shall be "Specified Substances" for purposes of the application of Article 10 (Sanctions on Individuals). Prohibited Methods shall not be Specified Substances".*

The category of specified substances is necessary solely as the basis for applying Art. 10. According to the comment to Art. 10.4, the distinction between specified and non-specified *substances* is made according to whether there is a greater likelihood that the presence of said substances has nothing to do with doping purposes[28]. Specified and non-specified substances are expressly not distinguished according to whether they are better or worse suited for the purposes of doping. For non-specified substances, i.e. the anabolic agents, hormones set out in Art. 4.2.2 and those stimulants so identified on the List, the one and only possibility of reduction that remains is the possibility under Art. 10.5 of the new WADA Code.

A. Possibilities of reduction in the case of specified substances

In the case of *specified substances* there is now the possibility of reduction under Art. 10.4. According to this, the penalty to be imposed for a first violation is at a minimum, a reprimand and a period of ineligibility of between nil and two years. As in the case of the rule that still exists under Art. 10.5.1, a reduction to nil is, in that case, therefore certainly conceivable.

28. Comment to Article 10.4: "*Specified Substances as now defined in Article 10.4 are not necessarily less serious agents for purposes of sports doping than other Prohibited Substances (for example, a stimulant that is listed as a Specified Substance could be very effective to an Athlete in competition); for that reason, an Athlete who does not meet the criteria under this Article would receive a two-year period of Ineligibility and could receive up to a four-year period of Ineligibility under Article 10.6. However, there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation.*"

For this the athlete must first establish how the substance entered his or her body or came into his or her possession, the standard of proof here being "*on a balance of probability*".

In addition the athlete must establish to the comfortable satisfaction of the hearing body that in taking said substance he or she did not intend to enhance his or her performance. The provision therefore covers the negligent or intentional taking of a substance, but under no circumstances the taking of a substance for doping purposes.

The appropriate period of ineligibility is then to be fixed depending on the degree of fault. In order to prove that there was no intention to enhance his or her performance, the athlete must plead objective circumstances that might lead the panel to be satisfied thereof. As regards this, the comment mentions the nature of the substance, the timing of its ingestion, the open, not concealed, use of the substance and a medical prescription, which substantiates that the substance was not prescribed for any sport-related reason[29]. Ultimately, the point is to prove - by objective circumstances - the absence of any intent to enhance the athlete's performance. The comment assumes that the greater the potential of the substance for enhancing performance, the higher this burden of proof is.

B. Reduction in the case of non-specified substances

As regards this, it is initially clear that in the case of non-specified substances both possibilities of reduction under Art. 10.5 are possibilities, but not Art. 10.4. The athlete can therefore still claim that he or she bears "*no fault*" or "*no negligence*" (Art. 10.5.1) with the consequence that here too a reduction to nil is possible.

If, on the other hand, the athlete claims "*no significant fault or negligence*" then all the problems, which the old version of the WADA Code posed for non-specified substances, continue to exist. The suspension can at most be reduced to one year.

In certain isolated cases the doctrine of proportionality can still not take full effect, so it is not possible to impose a sanction that is proportionate to the degree of fault.

A mere reference that the substances concerned here are non-specified substances, i.e. anabolic agents, hormones and stimulants, is not appropriate for disregarding the doctrine of proportionality in these cases. As stated in the comments to the Code themselves, specified and non-specified substances are not in principle distinguished according to whether they are appropriate for doping purposes. The only criterion that is decisive for classifying substances as specified substances is that there is a greater likelihood that the presence of said substances can be credibly explained by the argument that they were not used in order to enhance performance[30].

In the end therefore, the only criterion that decides whether the penalty to be imposed depends on fault or, in extreme cases, is irrespective of fault is whether the substance is classified as a specified or as a non specified substance. This is not convincable. One therefore wonders why the drafting group did not realise the original plans and include all prohibited substances as so-called "*specified substances*", or why the category of "*specified substances*" was not dispensed with altogether and why a provision allowing greater flexibility analogous to Art. 10.4 was not included for all substances.

Maybe in the case of today's non specified substances the proof that there was no intention to enhance performance would then fail. However, there is at least a possibility that the athlete does meet the burden of proof and that therefore the sanction can be reduced to a period approaching nil. In future therefore it will again become necessary in extreme cases to apply the doctrine of proportionality directly.

The reasons that were stated for maintaining 10.5.2. and the one year lower limit, were first and foremost reasons of general prevention that follow from the entire system. However, since there is now a possibility of a reduction to nil for specified substances, whether taken intentionally or negligently, this argument no longer cuts ice. In other words, the insertion of Art. 10.4 for specified substances will in future mean even more that a reduction under 10.5.2 will also be considered for non-specified substances contrary to the wording of the WADA Code.

As the CAS panel stated in the Danilo Hondo case,[31] it is the CAS's duty to in any event find an application, whether a sanction not complies only with the rules adopted by the sports organization but also with the fundamental principles of the legal system, in this case Swiss law.

29. Comment to Article 10.4: "*Examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent would include: the fact that the nature of the Substance or the timing of its ingestion would not have been beneficial to the Athlete; the Athlete's open Use or disclosure of his or her Use of the Substance; and a contemporaneous medical records file substantiating the non-sport-related prescription for the Substance. Generally, the greater the potential performance-enhancing benefit, the higher the burden on the Athlete to prove lack of an intent to enhance sport performance.*"

30. However, there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation.

31. SpuRt 2006, 71.

The principle of the proportionality of the sanctions is part of these fundamental principles and it is the arbitration court's duty to observe these taking into account the special circumstances of the case concerned.

C. Possibility of reduction in the case of specified substances pursuant to Art. 10.5

According to the comment, if specified substances have been proven the possibility of reduction under Art. 10.5.2 should not be applied in cases where Art. 10.4 already applies because Art. 10.4. already takes into consideration the degree of fault for the purposes of establishing the applicable period of ineligibility[32].

This comment can probably be understood to mean that Art. 10.5.2 is only not applied in cases where the period of ineligibility has been reduced under Art. 10.4 depending on the degree of fault.

If, on the other hand, a specified substance has been established and the athlete does not succeed in satisfying a panel that he or she did not intend to enhance his or her performance because, for example, the athlete fails to meet the standard of proof of "*comfortable satisfaction*", Art. 10.5 can be applied.

VI. Summary

The reform of the WADA Code and the insertion of flexibility at the expense of harmonization have been carried out only half-heartedly. Whether the category of "*specified substances*" is necessary at all is extremely doubtful. It is not really apparent why one does not apply Art. 10.4 for all substances and ultimately takes the nature of the substance into consideration in the evidentiary proceedings instead of excluding certain substances from the outset from the application of the flexibility rule.

Here WADA was obviously worried that the federations might abuse the flexibility allowed. However, in order to prevent this the procedural safeguard, that is leave to appeal to the CAS against decisions by the federations, would alone have sufficed. An additional substantive safeguard does not appear necessary.

Ultimately, all of the questions posed in the past remain; the scope of their application is of course reduced, but they are not resolved. It is therefore probably only a matter of time until the CAS again has to deal with a case in which the athlete claims that he or she bears "*no significant fault or negligence*" and the CAS considers that it is prevented from imposing a fault-based penalty on the basis of the new WADA Code due to the threshold of one year.

It is therefore necessary to help the state doctrine of proportionality to override and, contrary to the wording of the WADA Code, to impose penalties that fall below the lower limit of Art. 10.5.2.

32. "*Article 10.5.2 should not be applied in cases where Articles 10.3.3 or 10.4 apply, as those Articles already take into consideration the Athlete or other Person's degree of fault for purposes of establishing the applicable period of Ineligibility.*"

The Court of Arbitration for Sport: A subtle form of international delegation

Mr. Abbas Ravjani*

* JD 2009, Yale Law School. The author may be reached at abbas.ravjani@aya.yale.edu. The full article was first published in the Winter 2009 edition of the Journal of International Media and Entertainment Law.

I. Introduction

American cyclist Floyd Landis received his day in court – sort of. Landis has been stripped of his Tour de France championship because of doping violations, charges he contended were false[1]. In order to clear his name, Landis could not go to a typical court; he was subject to an arbitration agreement entered into by all cyclists competing in the Tour de France.[2] After exhausting all remedies within cycling channels, his only hope for recourse was the little-known Court of Arbitration for Sport (CAS) which ultimately ruled against him[3].

Landis is one of the many athletes that have had their fate decided by the CAS. The CAS is an arbitral body that handles cases arising out of international sports competitions and has appellate jurisdiction given to it by certain international federations, such as the International Cycling Union (UCI) under whose auspices the Tour de France is conducted. All matters before the CAS have the consent of the parties to the proceeding. Agreement to arbitration by the CAS is often a prerequisite for an athlete to compete in an international sports competition such as the Olympics. Though not a "court" in the traditional sense, the CAS has court-like tendencies and has over the years developed its own body of jurisprudence[4]. While CAS decisions do not officially create binding precedent for the Court to follow in future matters, many observers of the CAS argue that a type of *lex*

1. Brendan Gallagher, *Floyd Landis Could Compete in Tour de France Against Lance Armstrong Next Year*, Telegraph (London), Sep. 25, 2008, http://www.telegraph.co.uk/sport/othersports/cycling/2797108/Floyd-Landis-could-compete-in-Tour-de-France-against-Lance-Armstrong-next-year---Cycling.html.

2. UCI Cycling Regulations, Part 14 Anti-Doping Rules of the UCI 46-47 (2004); *see also* Court of Arbitration for Sport, Code of Sports-Related Arbitration, R27 Application of the Rules.

3. Court of Arbitration for Sport, CAS 2007/A/1394 Floyd Landis v/USADA 50, *available at* http://www.tas-cas.org/d2wfiles/document/1418/5048/0/Award%20Final%20Landis%20(2008.06.30).pdf.

4. Ken Foster, Lex Sportiva *and* Lex Ludica*: The Court of Arbitration for Sport's Jurisprudence*, *in* The Court of Arbitration for Sport 1984-2004 420, 437 (Ian S. Blackshaw, Robert C.R. Siekmann, Janwillem Soek eds. 2006) (acknowledging that the CAS is not a court but describing those characteristics that make it function like a court, including jurisdiction over most international sports disputes and the use of precedent).

sportiva is emerging and continues to grow as the Court matures[5]. In the past four years, the CAS caseload had increased dramatically. Sixty percent of the total cases over the life of the CAS (1984-present) were brought to the Court between 2004 and 2007[6].

Given these developments in international sports law and the trend towards a *lex sportiva*, the lack of attention given to the CAS's broad power to interpret international sports law is puzzling. International sports law has been viewed "*as much a matter of international law as sports law*"[7] and is an important aspect of transnational law that has developed its own distinctive body of rules over time[8]. Most countries and international sports federations have acceded to the jurisdiction of the CAS, despite some countries, including the United States, being concerned about the threat of their nationals being tried by foreigners in forums such as the International Criminal Court (ICC)[9]. One author argues that international sports law is respected as *opinio juris*[10]. This acceptance of the CAS is especially curious given the general hostility and skepticism of the United States towards international adjudication. With the CAS, a foreign body determines the fate of an American athlete, as in the Landis case. This type of international delegation would appear to have some sovereignty costs that have not been at the heart of the discussion surrounding the CAS. It would seem important for a government to have some control over how its citizens are treated, especially in a field with such mass appeal as sports. While most individuals may not be conversant on the intricacies of international human rights law, the average citizen easily understands –and probably has an opinion on– a sporting event. Sports have a profound influence on people worldwide and sports activity has been described as "*the largest social force of our time*"[11]. The stakes appear too high to let a foreign body determine the fate of a nation's athlete.

This article will offer some explanations as to why adjudication by the CAS has been relatively uncontroversial. Although the Court of Arbitration for Sport possesses similarities to arbitral bodies (which also tend not to be controversial), it also shares several attributes with the international courts to which commentators have so strenuously objected. There is reason to expect, then, that countries – especially the United States– would be reluctant to allow the rights of their athletes to be decided by the CAS. I argue that the CAS has avoided the typical criticisms lodged against international adjudication, including the erosion of sovereignty, for two main reasons.

First, states are more willing to delegate to an international tribunal when the delegation is perceived to be benign and has low visibility. Delegation that directly implicates the state either as a party to a dispute or through an official government representative, such as a military official, appears more facially threatening than an indirect delegation that implicates a state's citizens in an individual capacity. Athletes representing a nation typically appear before the CAS, not the nation itself. By being one step removed from the proceedings, a state has lowered the visibility of the delegation. However, low visibility delegation, whether direct or indirect, can still have a large impact upon international law. By signing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention, countries have implicitly delegated authority to all arbitral tribunals that meet the standard of a fair arbitral tribunal –a standard I argue that the CAS has met. As a result, this low visibility international delegation to the CAS has not conjured-up the typical arguments against international delegation. Similarly, the lack of a high-profile dispute implicating a specific country's sports team has kept issues of national pride from erupting when the CAS hands down an adverse decision. Individual athletes are predominantly the litigants before the CAS, rather than an entire national team, shielding the CAS from scrutiny –at least for the time being[12].

5. James A.R. Nafziger, Lex Sportiva *and CAS*, *in* The Court of Arbitration for Sport 1984-2004 409 (Ian S. Blackshaw, et al. eds. 2006).

6. CAS Statistics *available at* http://www.tas-cas.org/statistics (925 of the 1501 total cases ever filed with the CAS were filed between 2004 and 2007).

7. James A.R. Nafziger, *Globalizing Sports Law*, 9 Marq. Sports L.J. 225, 237 (1999).

8. Anthony T. Polvino, *Arbitration as Preventative Medicine for Olympic Ailments: The International Olympic Committee's Court of Arbitration for Sport and the Future for the Settlement of International Sporting Disputes*, 8 Emory Int'l L. Rev. 347, 349-350 (1994).

9. The United States passed the American Service-Members' Protection Act (also known as the Hague Invasion Act) into law in 2002. The American Service-Members' Protection Act, Pub. L. No. 107-206, 116 Stat. 899 (2002) (providing that "The United States will not recognize the jurisdiction of the International Criminal Court over United States nationals"); The United States also withdrew its signature from the ICC in 2002. Press Statement, U.S. Dep't of State, International Criminal Court: Letter to UN Secretary General Kofi Annan (May 6, 2002) (providing the text of a letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to U.N. Secretary General Kofi Annan), *available at* http://www.state.gov/r/pa/prs/ps/2002/9968.htm. *See also* John Yoo & Eric Posner, *International Court of Hubris*, Wall Street Journal, April 7, 2004 (criticizing the ICJ); Jack L. Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 Daedalus 47 (2003), *reprinted in* Foundations of International Law and Politics 350 (Oona A. Hathaway & Harold Hongju Koh, eds. 2005).

10. James A.R. Nafziger, International Sports Law 12 (2d ed. 2004).

11. *Id.* at 9 (*citing* Olympic Rev., March 1984 at 156). *See also* Jan Paulsson, *Arbitration of International Sports Disputes*, *in* The Court of Arbitration for Sport 1984-2004 40 (Ian S. Blackshaw et al. eds. 2006) (describing the passion and business behind sports).

12. Scant media attention has been brought to the CAS proceedings in March 2008 involving the case of well-known American cyclist Floyd Landis. While I concede that a well-known national icon, such as Michael Jordan, could evoke strong emotions and outcry, it is more likely that a national team being taken in front of the CAS would create such emotions.

Second, the CAS provides efficiency and effectiveness to international sports disputes. The use of arbitration in contractual disputes has increased over the years, with parties to contracts often preferring arbitral proceedings for a variety of reasons. While many of the arguments in support of arbitration are not unique to the CAS and can be seen in other types of international arbitrations, the complex rules of international sports competitions coupled with the need for swift decisions inherent in sporting events lend credence to the position that the CAS provides the optimal level of efficiency and effectiveness in resolving sporting disputes, thereby avoiding the sovereignty debates. States recognized the efficiency of delegation to the CAS for adjudicating doping disputes when they supported the World Anti-Doping Code, giving appellate authority to the CAS.

Part I of this article discusses the concept of international delegation and examines how delegation to the CAS fits within the broader international delegation literature. Part II addresses the question of why states delegate to the CAS in two sections. First, the delegation to the CAS has low visibility and is indirect. In particular, this section examines the impact of the low visibility delegation by international sports bodies and through the New York Convention. Second, the CAS is efficient and effective and these characteristics increase the acceptability of delegation to that body. This section also demonstrates how the CAS is best-suited to handle international sports disputes and why there has not been a large sovereignty outcry despite this foreign institution determining the fate of a particular country's citizens. Part III examines the impact of this delegation and then looks to the future of the CAS and the implications for both the field of international sports law and the broader area of international adjudication and delegation.

II. International delegation and the Court of Arbitration for Sport

International delegation is a contentious topic in international law as countries are sometimes hesitant to give up their sovereign control over adjudicating disputes that implicate their citizens. A large subset of international delegation has concerned economic and commercial matters, such as with the World Trade Organization, as countries have seen a compelling interest in pursing relationships with one another that produce mutual economic gain. Other areas of international law, such as human rights or criminal adjudication, have seen less success as nations attempt to protect their citizens from the perceived biases of foreign courts[13]. The field of international sports law is unique as non-state actors are the primary agents that participate in the international arena. International sports law is mostly private in nature, albeit under the color of some state authority. While corporate entities in commercial arbitration also share the non-state actor characteristic, the distinguishing aspect of sports is that athletes participate in international competition under the flag of a specific state, rather than as a solely private entity, and are perceived by society as ambassadors of a particular country, especially when they are draped with their national flag at a victory celebration. Each country has mechanisms that are put in place to select athletes to "represent" them during international competition[14]. Therefore, despite a lack of direct governmental link to a particular athlete or team, the overriding perception by spectators of sports is that a country is being represented during a particular international sports competition. This informal association adds additional importance to international competition for individual states, as their reputations are at stake.

This aura of state involvement in international sports competition would appear to favor some government involvement in safeguarding its name and reputation during these highly visible events. National governments, as in other areas of law, would want to retain control over how its citizens were treated when accused of wrongdoing. However, countries have not demanded such direct control. The current scholarly literature on international delegation attempts to define the concept of international delegation and also addresses the perceived costs and benefits of a state's decision to delegate authority. However, the literature lacks a comprehensive discussion of two key elements that are essential to the examination of international delegation: 1) the visibility and explicit nature of the delegation and 2) the efficiency and effectiveness of the bodies to which authority is delegated. A discussion of the CAS highlights these areas that the traditional literature has underdeveloped and shows when and how these issues matter in the discussion on international delegation.

Countries have decided to delegate authority over international sports law to private bodies, which have subsequently delegated additional authority to the CAS. First, I explore the literature on the concept of international delegation, placing the subject of international sports law within that discussion. Then, I examine the benefits and costs of such international delegation.

13. *See, e.g.*, Jack L. Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 Daedalus 47 (2003), *reprinted in* Foundations of International Law and Politics 350, 356 (Oona A. Hathaway & Harold Hongju Koh, eds. 2005).

14. *See infra*, Part II(A)(3).

A) International delegation defined

As the international community adapts to the globalizing world around it, an increasing number of international problems need to be dealt with collectively. Getting multiple countries to cooperatively make decisions in a timely fashion each time an international problem arises, no matter how small the issue, would be a difficult task. As a result, countries delegate authority over certain issues to other institutions. On its most basic, intuitive level, international delegation is the idea that a nation decides it will allow some other person or institution to make decisions on its behalf. Despite this simplistic notion of international delegation, there is a growing literature and debate on the issue.

Curtis Bradley and Judith Kelley define international delegation as "*a grant of authority by two or more states to an international body to make decisions or take actions*"[15]. A key aspect of their definition of international delegation is the *ex ante* grant of authority. Bradley and Kelley attempt to distinguish delegations from mere commitments, with the former having a grant of authority and the latter simply being a promise to act in a certain capacity[16]. Bradley and Kelley contend that grants of authority do not only have to allow an international body to take actions that bind a state under international law; in fact, they argue that international delegation can exist even when the international body can issue only non-binding statements[17]. As a result, they argue the degree and depth of an international delegation can be affected by the limits placed on the body to which power is delegated[18].

A second aspect of their definition worth noting is the breadth of what they consider an international body. Traditionally, scholars would point to state-run institutions, such as the United Nations Security Council, the European Union (EU), or the World Trade Organization (WTO), as examples of international bodies to which power has been delegated. While these traditional bodies are the subject of much scholarship, Bradley and Kelley also briefly discuss private bodies being granted authority by states. They identify the International Accounting Standards Board (IASB), a body that sets financial reporting standards that all EU countries must follow, as an example of a private body being delegated authority[19]. They argue that in situations in which private bodies receive authority from states or groups of states, an international delegation has occurred[20]. In this case, the European Commission delegated to the IASB. In the next section, I describe how the CAS is a similar to the IASB as it is also a private body that has been delegated authority by states to adjudicate international sports disputes, both implicitly and explicitly.

Other authors have also offered their perspectives on defining international delegation. The definition offered by Darren G. Hawkins, David A. Lake, Daniel L. Nielson, and Michael J. Tierney is similar to the Bradley-Kelley definition, but frames the issue as a principal-agent relationship and explicitly defines the grant of authority as "conditional"[21]. "*Delegation is a conditional grant of authority from a principal to an agent that empowers the latter to act on behalf of the former*"[22]. The Hawkins group focuses on the ability of the principal to rescind authority from the agent as an important aspect of the delegation relationship, which Bradley and Kelley would view indicative of the depth of the delegation.

Andrew Guzman and Jennifer Landsidle provide a critique of the Bradley-Kelley approach, claiming that their definition is overbroad[23]. Guzman and Landsidle emphasize the legal dimensions of delegation as providing a better guidepost for examining international delegation and look to the work of Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal who describe delegation in terms of grants of authority to "*implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules*"[24]. Edwards T. Swaine has a similar emphasis on rules in his discussion of international delegation[25]. All of these different methods of analyzing international delegations underscore the complexity of the issue and the importance of the concept to international law.

Despite this debate over what constitutes an international delegation, even Guzman and Landsidle concede that granting authority to an international tribunal –as opposed to simply international entities– to make decisions affecting

15. Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 Law and Contemporary Problems 1, 3 (2008).

16. *Id.*

17. *Id.* at 4.

18. *Id.*

19. *Id.* at 8.

20. *Id.* at 8-9.

21. Darren Hawkins et al., *Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory*, *in* Delegation and Agency in International Organizations 3, 7 (Darren Hawkins et al. eds., 2006).

22. *Id.*

23. Andrew T. Guzman & Jennifer Landsidle, *The Myth of International Delegation*, at 6, *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=andrew_guzman.

24. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 Int'l Org. 401, 401 (2000).

25. Edward T. Swaine, *The Constitutionality of International Delegations*, 104 Colum. L. Rev. 1492, 1507-12 (2004).

international law is the ultimate form of international delegation [26]. The development of the CAS as a body to which states delegate authority to adjudicate sports-related disputes will fit under many of the previously stated conceptions of international delegation, but can easily fit under the category of an international delegation to a tribunal despite being private in nature like the International Accounting Standards Board. Regardless of how the concept of international delegation is specifically defined, the CAS has received authority from states, both directly and indirectly, to adjudicate disputes that arise from international sports competition; as a result, a form of international delegation has occurred. However, the reasons why states have been willing to delegate need to be considered, both as to the various arguments on why states delegate in the broad sense, and then how the CAS fits into this framework.

B) Benefits and costs of international delegation

International delegation is done for a reason. The increase in acts of delegation confirms that states believe that delegation produces gains. Even some skeptics of international delegation see certain benefits in the use of international tribunals [27]. The most discussed perceived cost of international delegation is the loss of state sovereignty. Inherent in the act of delegating to another is the transfer of authority from one party to another. While a legitimate concern in some areas, Oona Hathaway directly disputes the conventional wisdom surrounding the sovereignty costs of international delegation by arguing that one must not only look at the loss of authority in the delegation but must also look at the fact that a state actor is *consenting* to that delegation [28]. Hathaway views the delegation as an act of "sovereign consent" that demonstrates a state's sovereign ability to delegate authority – a quintessential act of exercising state sovereignty [29].

Bradley and Kelley also discuss some of the relative costs of delegation. In particular, they note that the scope and range of issue areas involved can have an impact on the delegation costs [30]. When the issue at stake is relatively uncontroversial, cooperation can bring about significant social benefits [31]. The costs of the delegations may be low, but the net benefits are often quite large [32].

While the major cost associated with international delegation comes from the perceived loss of state sovereignty, there are many benefits that have been highlighted by scholars discussing international delegation. Hathaway explains some of the benefits of delegation that help explain generally why international delegation can be in a state's interest even though there may be some sovereignty costs associated with that delegation [33]. The first of these is the ability of a state to project its own values, such as human rights norms, through international agreements [34].

Two additional benefits that Hathaway articulates have more salience in the discussion of the CAS. States often delegate both as a way to coordinate their activity and as a means to overcome a collective-action dilemma [35]. In essence, delegation on specific issues provides for efficient outcomes that may not be achievable independently. For instance, states are willing to coordinate their activity by establishing uniform overflight rules [36]. Additionally, states can jointly agree to economic actions, such as lower tariffs, that could not be achieved through state-to-state action: reciprocity is needed through an international body [37]. These efficiency arguments as they relate to the CAS are discussed *infra* in Part II(B).

One of the most important benefits of international delegation – especially in relation to the CAS – is the gain achieved from specialization. As explained by the Hawkins group, states understand that sometimes a specialized body is in a better position to act on a particular international issue and that allowing that body to act on its behalf will produce more efficient outcomes than if they tried to act alone [38]. Specialized bodies often have greater expertise in a particular subject matter and can more effectively resolve disputes because of this core competence [39]. States have recognized the value of the CAS in providing this expertise on international sports disputes [40].

26. Guzman & Landsidle, *supra* note 23, at 15-16.

27. *See* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 Cal. L. Rev. 1, 6-7, 14 (2005) (describing some limited circumstances that delegation to tribunals may be effective).

28. Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 Law and Contemporary Problems 115, 121-22 (2008).

29. *Id.* at 122. For more development on the idea of consent in international delegation, *see id.* at 123-140.

30. Bradley & Kelley, *supra* note 15, at 30.

31. *Id.* at 27.

32. *Id.*

33. Hathaway, *supra* note 28, at 141.

34. *Id.* at 143.

35. *Id.* at 143-44.

36. *Id.*

37. *Id.* at 144.

38. Hawkins et al., *supra* note 21, at 13.

39. *See Id.* at 13-15; *see also* Bradley & Kelley, *supra* note 15, at 25-6.

40. *See infra* Part II (B).

III. Why states delegate to the Court of Arbitration for Sport

The scholarly literature provides insight into the general structure and benefits of acts of international delegation; however, it lacks a comprehensive discussion on the importance of certain more particularized aspects of the delegation process: the visibility of the delegation and the perceived efficiency and effectiveness of the bodies to which authority is delegated. Understanding these two aspects of delegation is important, especially as the skeptics of delegation become increasingly vocal in their opposition.

I define the visibility of a delegation to be indicated by the degree of direct state involvement in the action. Signing the Rome Statute to accede to the jurisdiction of the International Criminal Court would be an instance of high visibility delegation; on the other hand, an action that occurs under the aura of state involvement, but is instead carried out by non-governmental or other actors would be classified as low visibility. I argue that the low visibility delegations have the chance to be deeper and more widespread than the typical high visibility state delegations since they appear more benign and do not have huge political ramifications. Thus, the low visibility delegations provide an important window into how states might try to increase delegation without being perceived to sacrifice sovereignty.

Additionally, the efficiency and effectiveness of a particular arbitral body is important in garnering *ex ante* approval by states for specific acts of delegation. This aspect of delegation provides insights into state behavior and how to go about gaining support for future institutions.

The role of visibility in the success of delegation to the CAS is best examined through the prism of three particular examples: 1) the New York Convention; 2) the World Anti-Doping Code; and 3) domestic delegation that leads to CAS jurisdiction. Similarly, the efficiency and effectiveness of the CAS in handling international sports disputes is illustrated by three specific areas: 1) domestic court litigation that has helped shape the CAS; 2) features of the CAS that enhance efficiency and effectiveness; and 3) the perceptions of states.

A) States delegate control to the CAS – indirectly and directly: the importance of low visibility delegation to the CAS

States are more apt to delegate when the delegation does not appear facially to implicate state sovereignty. States do not see effective arbitration as a threat to state sovereignty; in fact, states are willing to delegate authority to arbitral institutions that can better adjudicate disputes on specific subject-matter[41]. However, one should not confuse less visible with less effective; in fact these low visibility delegations can have a profound impact on areas of international law. The lower visibility can allow for greater depth of delegation, as countries are less concerned with a huge public backlash against allowing decisions regarding their citizens to be subject to a foreign tribunal. Additionally, an act of international delegation does not have to be explicit. As demonstrated by the New York Convention, state actions can implicitly delegate authority and still retain features present in the traditional notion of an international delegation.

In the context of sports, two major acts of international delegation demonstrate the acceptance of the CAS as the venue of choice for international sports disputes. First, a state signing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention, implicitly delegates authority to any arbitral body that can prove itself as a legitimate tribunal – including the CAS. The New York Convention not only sets up a system that presumptively approves of arbitration, but the signing of the document is also an act of delegation that allows for the growth of more delegation – since any subsequent arbitral tribunal created is presumptively legitimate until domestic courts rule otherwise. Second, states convened in 2003 at the World Conference on Doping in Sport and adopted the World Anti-Doping Code, a document that specifically delegated final judicial authority to the CAS in disputes arising from alleged doping violations. These examples will help fill in some of the gaps in the existing international delegation literature by demonstrating the impact of the visibility of delegation. Since both of these delegation acts do not formally implicate the state in any proceedings, they would be considered low visibility delegations.

1) Low visibility delegation to the CAS through the New York Convention

International arbitration has been the dispute resolution mechanism of choice for many, especially in the commercial arena. While arbitral awards should be facially binding upon the parties to the proceeding, sometimes an additional mechanism is needed to enforce an award upon a specific party. To accommodate for this enforcement need, states came together in 1958 and adopted the New York

41. *See* Project on International Courts and Tribunals, The International Judiciary in Context (Chart), *available at* http://www.pict-pcti.org/publications/synoptic_chart.html (showing a chart with the wide-range of arbitral tribunals in existence today).

Convention. To date, 143 parties have signed the New York Convention[42] and it remains one of the foundational documents in the field of international arbitration. The Convention has been labeled the "single most important pillar on which the edifice of international arbitration rests"[43]. I contend that a state's adoption of the New York Convention is an implicit delegation of authority to *any* arbitral body – including the CAS – subject to certain provisions of the Convention by which state courts can vacate the awards of arbitral tribunals. In essence, the New York Convention allows for effective arbitration to occur by any arbitral body that can meet certain standards of fairness and legitimacy. The Convention grants *ex ante* authority to all arbitral tribunals to adjudicate matters, but limits that grant of authority to *ex post* scrutiny on a small subset of issues. Additionally, the implicit, less visible delegation of authority through the New York Convention is an act of delegation that allows for the growth of delegation over time. This single act of delegation – the signing of the New York Convention – has allowed for the proliferation of arbitral tribunals, such as the CAS, to occur unnoticed by many and has significant potential for more indirect delegations of authority over a wide-range of issues.

The adoption of the New York Convention does more than simply set forth the internationally accepted rules of arbitration. The distinction between this Convention, and for instance, the Vienna Convention of the Law of Treaties, is the degree of control states now have since the signing of the treaty. While the Vienna Convention sets forth the rules of the road, in order for that treaty to be of value, *states* have to enact other treaties that will benefit from the Vienna Convention's guidance on the appropriate procedures. This is different from the implicit delegation that occurs with the signing of the New York Convention. After signing, a state does not have to take any affirmative action with respect to the creation of other arbitral tribunals. Private actors create the arbitral tribunals whose awards states have already agreed to implement under the Convention, as long as they meet certain standards. This implicit delegation is similar to the model used by the International Centre for Settlement of Investment Disputes (ICSID); the major difference is that states only delegated to ICSID in its founding document[44], while states delegated to *all* future arbitral tribunals through the New York Convention.

In order to have an effective arbitral system, a balance must be struck between independence of the arbitral body and some sort of national judicial review[45]. Too much autonomy could lead to abuse of power, but too much national power to nullify awards would cripple the arbitration scheme[46]. The New York Convention attempts to balance the independence and judicial review interests. Articles I through IV of the New York Convention set forth the parameters by which a foreign arbitral award is enforceable by state courts. These articles provide the procedural rules states must follow in giving effect to arbitral awards. Included in these articles are the provisions for the arbitral agreement to be in writing and the procedures a party must take in order to submit an award for enforcement by a state[47].

However, Article V provides the *ex post* mechanism for judicial review of an award, but only on certain grounds. These limited grounds for review include: incapacity, lack of notice for arbitration, agreement not being in accordance with the law of the country in which the arbitration took place, or the award has already been set aside under the law of the country in which the arbitration took place[48]. Additionally, the award may be set aside if the subject matter was not capable of settlement by arbitration under laws of that country or if the enforcement of the award would be in violation of the public policy of that country[49]. These limited grounds of prohibiting enforcement mean that national "*[c]ontrol under the New York Convention essentially involves policing procedure and not substance*"[50]. United States federal courts have also agreed with this sentiment[51]. Since states only have these very limited grounds for vacating an arbitral award[52], I contend that states have *ex ante* implicitly

42. Convention on the Recognition and Enforcement of Foreign Arbitral Awards *available at* http://treaties.un.org/pages/participationstatus.aspx (select "CHAPTER XXII"; then select "Convention on the Recognition and Enforcement of Foreign Arbitral Awards") (listing parties ratifying the Convention).

43. J. Gillis Wetter, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal*, 1 Am. Rev. Int'l Arb. 91, 93 (1990).

44. *See* International Centre for the Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/9.htm.

45. W. Michael Reisman, Systems of Control in International Adjudication and Arbitration: Breakdown and Repair 113 (1992).

46. *Id.*

47. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I-IV, June 10, 1958, *available at* http://www.uncitral.org/pdf/1958NYConvention.pdf.

48. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V (1)(a-e).

49. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V (2)(a-b).

50. Reisman, *supra* note 45, at 115.

51. See Int'l Standard Electric Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial, 745 F.Supp. 172, 178 (S.D.N.Y. 1990) (holding that "'the competent authority of the country under the law of which, [the] award was made' refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted, and not the substantive law of contract which was applied in the case.").

52. One of the most telling cases of court deference to arbitral awards under the New York Convention is demonstrated by *National Oil Corporation v. Libyan Sun Oil,* 733 F.Supp. 800 (D. Del 1990). In the case, a U.S. court demonstrated the strong power of the New York Convention in enforcing an arbitral award against a U.S. company in favor of a state designated by the U.S. as a state-sponsor of terrorism.

delegated authority on a whole range of issues to arbitral institutions—including the CAS. The impact of this broad delegation of authority will be explored further in Part III.

Many of the awards rendered by the CAS need no outside actor for enforcement, since the sports competition can simply change its result or disqualify an athlete [53]. However, a contractual dispute or the payment of litigation costs could require the outside enforcement of the award. In that case, a state court could conduct an *ex post* review and refuse enforcement of the award under one of the enumerated grounds of the New York Convention discussed above, though the standard for refusing to enforce is high.

Conversely, challenges to the CAS award itself must be made to the Swiss Federal Tribunal—the court of the nation where the arbitration took place[54]. The CAS has been found to be a legitimate arbitral tribunal, meaning its awards can be enforced through the New York Convention[55]. In particular, when litigants challenged whether the CAS was a fair and impartial arbitral tribunal, the Swiss Federal Tribunal upheld the legitimacy of the CAS in both the *Gundel* and *Lazutina/Danilova* decisions discussed *infra* in Part II(B)[56]. The findings by the Swiss court on these challenges to the alleged flaws in a decision uphold the use of the New York Convention to enforce CAS awards when needed[57]. This does not mean that CAS awards will be recognized by the Swiss court in every case, but challenges to the independence or impartiality of the CAS will likely fail[58].

Other nations have also adopted the view that the CAS is a legitimate arbitral tribunal that operates under the parameters of the New York Convention. In light of the United States adoption of the New York Convention, U.S. courts have deferred to the judgment of arbitral tribunals in the area of sports [59].

The Justin Gatlin case demonstrates the unwillingness of United States courts to police the substance of CAS rulings unless they reach the point of violation of public policy [60]. Despite sympathizing with Gatlin and calling the actions of the CAS arbitrary and capricious, the Northern District of Florida held that Gatlin's only remedy for relief was the Swiss Federal Tribunal since challenges to the award had to be made in the seat of the arbitration under the New York Convention[61]. Additionally, an Australian court had the opportunity to examine a decision by the CAS and similarly held that the award should stand because it did not have jurisdiction to hear the case since the matter was *foreign* not *domestic*[62]. The Australian court refused to interfere with a CAS decision handed down by the Ad Hoc Division in Australia on behalf of an Australian athlete since Lausanne, Switzerland is the seat for CAS[63]. This decision implicitly upheld the legitimacy of the CAS as set forth by Swiss law in the *Gundel* decision and demonstrates the power of the New York Convention [64]. The New York Convention implicitly delegates an incredible amount of authority to arbitral tribunals and the CAS has benefited from this delegation.

2) Low visibility delegation to the CAS through the World Anti-Doping Code

The fight against doping in sport required collective action from a variety of stakeholders. Harmonizing the various doping standards into a unified set of principles was a major goal of the World Anti-Doping Agency (WADA) and their efforts came to fruition at the second World Conference on Doping in Sport held in Copenhagen, Denmark in March 2003. At this conference, some 1200 delegates representing 80 governments, the IOC, all International Federations for Olympic Sports, athletes, and others came together and unanimously agreed to adopt the World Anti-Doping Code (Code) as the basis for the fight against doping in sport [65]. Participants at the Conference demonstrated support for the Code by adopting the Copenhagen Declaration, the political document signed by governments at the Conference that explicitly stated each actor's role in supporting and implementing the Code [66]. The Code, which

The decision further highlights the narrow public policy grounds by which an arbitral award can be vacated.

53. This method of enforcement can be termed a "speech act" since stating a decision has the desired effect despite any potential resistance by a party. For instance, taking away a medal from someone does not require physically recovering the medal; by announcing a new winner, the sports body already inflicts the desired penalty even if the tangible material (the medal) is not recovered. Daniel H. Yi, *Turning Medals into Metal: Evaluating the Court of Arbitration for Sport as an International Tribunal*, 6 Asper Rev. Int'l Bus. & Trade L. 289, 322-324 (2006).

54. Matthieu Reeb, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, *in* The Court of Arbitration for Sport 1984-2004 31, 38 (Ian S. Blackshaw et al. eds. 2006).

55. *Id.*

56. *See* Digest of CAS Awards 1986-1998, at 543-44 (Matthieu Reeb ed. 1998).

57. *Id.*

58. Stephen A. Kaufman, *Issues in International Sports Arbitration*, 13 B.U. Int'l L.J. 527, 542-43 (1995).

59. *See, e.g.*, Slaney v. Int'l Amateur Athletic Fed'n, 244 F.3d 580, 601 (7th Cir. 2001) (rejecting an appeal from an arbitral tribunal under the enforcement feature of the New York Convention).

60. Gatlin v. U.S. Anti-Doping Agency, Inc. Order, June 24, 2008. Case No. 3:08-cv-241/LAC/EMT.

61. *Id.*

62. Nafziger, *supra* note 10, at 45-46 (*citing* Raguz v. Sullivan [2000] N.S.W. Ct. App. 240 (unpublished opinion), *reprinted in* G. Kaufmann-Kohler, Arbitration at the Olympics 51 (2001)).

63. *Id.* at 46.

64. *Id.*

65. World Anti-Doping Agency, What is the Code? Introduction, *available at* http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=364.

66. World Conference on Doping in Sport Resolution, Adopted by the World Conference on Doping in Sport, Copenhagen, Denmark, 5 March 2003.

entered into force on January 1, 2004[67], grants jurisdiction for appeals involving international-level athletes exclusively to the CAS[68]. I argue that the adoption of the World Anti-Doping Code is an explicit act of international delegation by states to the CAS, albeit indirect since states never directly interact with the CAS.

The Code attempts to provide the framework to harmonize the standards different International Federations used in adjudicating doping matters by setting forth guidelines for doping regulations[69]. Before the adoption of the Code, the CAS heard appeals on some doping disputes; however, the manner in which it did so was sporadic and unpredictable. While IFs still each have their own regulations for adjudicating doping disputes, certain aspects of the Code are supposed to be adopted verbatim and the other principles of the Code adopted with the same substantive intent[70]. One of the mandatory items is making the CAS the final appellate authority for disputes in cases involving international-level athletes[71]. Designating the CAS as the final appellate authority is one way the adoption of the Code served as act of international delegation to the CAS.

As a result of the Code's adoption and the passage of the Copenhagen Declaration, states committed to implement these principles at the national level. For instance, the U.S. created the United States Anti-Doping Agency (USADA) which functions independently as the drug testing arm for the USOC and any United States NGB[72]. The USADA implements the Code on behalf of the United States and has the authority to transmit drug testing information to relevant International Federations and WADA[73]. Parties to a dispute involving the USADA can ask for a hearing in front of the American Arbitration Association (AAA) and if not satisfied with the result, can appeal to the CAS[74].

The USADA sets forth the forgoing procedures in its Protocol for Olympic Movement Testing, but it also directly incorporates the Code into Annex A of the Protocol entitled: "*Articles from the World Anti-Doping Code that are Incorporated Verbatim into the USOC Anti-Doping Policies and the USADA Protocol for Olympic Movement Testing*"[75]. United States participation at the World Conference and its support for the Code at the governmental level indicated a willingness to delegate final judicial authority to the CAS, and this implicit delegation was codified on behalf of the United States by the USADA in the Protocol.

WADA, as a non-governmental organization, recognized that the Code it drafted may not be considered legally binding by states[76]. Consequently, a few different methods of rectifying this problem were put in place. First, the Copenhagen Declaration mentioned above was designed to be a political document that demonstrated commitment to the Code by states; though again, this can be seen merely as indicating interest in the Code, rather than being a legally binding mechanism. Second, the bigger political mechanism for adoption of the Code came from the United Nations Educational, Scientific, and Cultural Organization (UNESCO)-led effort to create an International Convention Against Doping in Sport[77]. Governments unanimously adopted this document at the 33rd UNESCO General Conference in Paris in October 2005[78]. At the time of publication, 105 states have ratified or acceded to the Convention[79] including the United States which recently ratified it during August 2008[80] and many more states indicating their intent to do so soon. The first session of the Conference of States Parties to the International Convention against Doping in Sport was convened on 5-7 February 2007 and brought together the 41 states that had ratified the Convention by the end of 2006[81]. "*The fight against doping was thus inscribed for*

67. "The current Code, which went into formal effect on 1 January 2004, underwent a thorough review and consultation with WADA stakeholders for its practical improvement. This 18-month, 3-phase process culminated at the Third World Conference on Doping in Sport in November 2007, at which time the WADA Foundation Board approved the newly Revised Code and identified the required implementation date for all stakeholders as being January 1, 2009." World Anti-Doping Agency, 2009 Code Implementation, *available at* http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=735.

68. World Anti-Doping Code art. 13.2.1.

69. World Anti-Doping Agency, What is the Code? Introduction, *available at* http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=364.

70. World Anti-Doping Code, Introduction.

71. World Anti-Doping Code art. 13.2.1. It is noteworthy that Article 13.2.2 pertaining to national-level athletes does not require appeals to be heard by the CAS; other tribunals deemed to meet certain standards, like AAA in the United States, are acceptable.

72. United States Anti-Doping Agency, Protocol for Olympic Movement Testing, at 1.

73. *Id.*

74. United States Anti-Doping Agency, Protocol for Olympic Movement Testing, at 10.

75. United States Anti-Doping Agency, Protocol for Olympic Movement Testing, Annex A.

76. World Anti-Doping Agency, Q&A on the Code *available at* http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=367.

77. *Id.*

78. *Id.*

79. International Convention Against Doping In Sport: Paris, 19 October 2005. List of parties *available at* http://portal.unesco.org/la/convention.asp?KO=31037&language=E&order=alpha.

80. White House Press Release, President George W. Bush, Message to the Senate of the United States, (February 7, 2008); UNESCO News Service, United States ratifies International Convention against Doping in Sport, *available at*: http://portal.unesco.org/en/ev.php-URL_ID=43227&URL_DO=DO_TOPIC&URL_SECTION=201.html.

81. Media Advisory, International Convention Against Doping in

the first time in international law, and governments, sports federations and civil society – as well as the Olympic movement – were provided with a binding legal instrument"[82]. Finally, the IOC has taken additional steps to ensure the Code is adopted by all members of the Olympic Movement by amending the Olympic Charter to make adoption of the Code mandatory[83]. All NOCs, IFs, and others that are a part of the Olympic Movement[84] will have to be bound by the Code.

These three mechanisms binding states and other international sports actors to the Code are important acts of international delegation to the CAS. States have directly signed documents supporting delegation to the CAS; have indirectly had their NOCs and other agencies, such as USADA, submit to jurisdiction; and continue to have their athletes compete in competitions that make jurisdiction to the CAS mandatory. In doing so, states explicitly granted their approval for the ability of the CAS to be a fair and neutral arbiter of sports disputes.

A final issue is why delegation to the CAS through the World Anti-Doping Code can be considered an act of low visibility delegation. As contrasted with the New York Convention example, states have directly endorsed the CAS through the Code. It might appear that this act of delegation could be considered a straightforward act of delegation by states; however, in many countries, including the United States, the specific delegation did not occur at the governmental level – the delegation occurred when the USOC, a non-governmental body, created the independent USADA which adopted the Code into its procedures[85]. States never formally directly delegated any authority to the CAS; they only indirectly did so through their internal regulatory bodies. They did however indicate their support for the Code in the Copenhagen Declaration and through the UNESCO document and as a result have implicitly ceded authority to the CAS. Thus, I consider the delegation to be low visibility since it does not facially implicate the state in any fashion but is done under the authority of the grant of delegated power by the state.

3) Domestic delegation within states triggers CAS jurisdiction

States also interact with the CAS through domestic delegations that have international implications – namely where states have chosen to delegate issues of international sports disputes to domestic agencies which then, in turn, submit to the jurisdiction of the CAS on behalf of the state. In essence, the adoption of the New York Convention and the World Anti-Doping Code by individual states are actions on the macro level that provide the authority under which state-created domestic agencies can interact with the CAS on the micro level. This implicit delegation of authority has gone unnoticed and demonstrates the ability of less visible delegation to have a profound impact on international law.

Unlike the typical instances of international delegation discussed earlier,[86] an act of domestic delegation indirectly leads to the international delegation to the CAS. Individual countries are represented at international sports competitions by national bodies. In the Olympics, each country must set up a National Olympic Committee (NOC) that is a particular country's representative at the Games[87]. While there is no explicit requirement for the NOCs to be completely independent of the government, the language of the Olympic Charter leans in that direction[88]. Additionally, at other non-Olympic international competitions, each country that participates usually has a National Governing Body (NGB) that organizes and is responsible for administering a particular sport. For instance, "USA Basketball" is responsible for putting together the U.S. team that competes in all international basketball competitions[89].

The state, as a sovereign entity, is usually not represented at these competitions, unlike, for example, the United Nations where a permanent representative is an agent of the state. Certain countries have gone a step further and have even completely removed the government from the process of making decisions concerning international sports competitions. As a result, they have delegated this authority over international law to their respective NOCs and NGBs. For instance, in the United States, the Ted Stevens Olympic and Amateur Sports Act,[90] creates the United States Olympic Committee (USOC) and

Sport: 41 States will take part in First Conference of States Parties, (Jan. 9, 2007) *available at* http://portal.unesco.org/en/ev.php-URL_ID=36578&URL_DO=DO_TOPIC&URL_SECTION=201.html.

82. *Id.*

83. International Olympic Committee, Olympic Charter, art. 44: World Anti-Doping Code (2007); *see* World Anti-Doping Agency, Q&A on the Code *available at* http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=367.

84. International Olympic Committee, Olympic Charter, art. 1: Composition and General Organisation of the Olympic Movement (2007).

85. United States Anti-Doping Agency, Protocol for Olympic Movement Testing, Annex A.

86. *See supra* Part I.

87. International Olympic Committee, Olympic Charter art. 28: Mission and Role of the NOCs (2007).

88. *Id.*

89. Inside USA Basketball *available at* http://www.usabasketball.com/inside.php?page=inside.

90. Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. §§ 220501 et seq. (1998).

lays out the rules for creation and governance of National Governing Bodies. The Stevens Act creates an independent, federally chartered corporation (the USOC) that will represent the interests of the United States in international sports competitions[91]. Through this domestic delegation, the U.S. has essentially ceded its sovereign authority to private, independent actors (the USOC and the NGBs for each sport) that will pursue the broad goals highlighted in the Act on behalf of the United States with theoretically no government control[92]. As a result, the United States has also delegated its authority on issues of international sports law, as the types of activities these domestically-created bodies will participate in are inherently international in nature.

This indirect international delegation through the Stevens Act leads to the jurisdiction of the CAS. The International Federations for each sport set the parameters for participation in their respective competitions. Whether in the context of the Olympic Games or the FIFA World Cup, each institution has created a mechanism for the adjudication of disputes that arise from international sports competitions. Increasingly, these bodies have acceded to the jurisdiction of the CAS[93]. In order to get access to these international competitions, countries, typically through their representatives (the NOCs), must be willing to play by the rules set forth by these bodies –including the jurisdiction of the CAS. Since the country is getting a tangible benefit by getting the ability to have its athletes compete in these competitions, few have questioned the de facto mandatory nature of the delegation or the sovereignty costs associated and have consented to CAS jurisdiction[94]. By competing in the Olympics, the USOC and its athletes are subject to CAS jurisdiction[95].

Delegation to domestic regulatory agencies is not a new phenomenon. Government officials, particularly elected officials, often delegate to agencies in order to benefit from the gains of specialization. Mark Thatcher specifically addresses this phenomenon of delegation to domestic regulatory agencies[96]. His analysis on why government officials would delegate authority on certain domestic matters to regulatory agencies sets the backdrop for my argument on why countries would similarly delegate to domestic actors that have the ability to act internationally in the field of sports.

Increased information requirements provide an obstacle for elected officials to gain any political benefit from certain actions, and as a result, politicians prefer to delegate those actions to regulatory bodies[97]. In essence, the benefits of certain programs and policies are too difficult to explain in the short attention span of the average voter that those issues become too costly for politicians to devote time towards. For instance, regulatory bodies have been created to address public policy problems, such as food safety or the environment, since these policy issues require more specialist involvement[98]. In addition to the lack of electoral benefit conferred by some of these very technical policy areas, officials can shift the blame for unpopular decisions to these regulatory bodies[99]. And to some extent, policymakers recognize the need for specialists dealing with technical matters to further efficiency.

These bodies provide a win-win solution for the politician: they focus on politically important issues and allow the politician to blame others when things go wrong in areas that have been delegated. However, the same substantive policy concern does not necessarily get delegated in every country. There is "*no automatic link between functional advantages of delegation and the creation of IRAs [independent regulatory agencies]*"[100]. In the sports context, it would seem counterintuitive for politicians to give up the ability to make decisions over international sports, an area of law that a large section of the voting population deeply cares about and has some knowledge of[101]. Sports arouse such high emotions from those who follow athletic competitions that it would seem politicians would want to benefit from being able to claim they were involved in the process at some level[102]. However, despite the emotions that sports

91. 36 U.S.C. § 220502.

92. Formally, there is no government involvement. But as will be discussed *infra* the government often has some influence on the positions these bodies take, such as in a boycott of the Olympic Games.

93. 36 U.S.C. §220503; International Olympic Committee, Olympic Charter art. 59: Disputes - Arbitration (2007) (Participation in the Olympics requires an IF or NOC to submit to CAS jurisdiction.).

94. *See* discussion on "consent" *supra* Part II.

95. Maidie E. Oliveau, *Navigating the Labyrinth of 'Amateur' Sports ADR Procedures*, 13 No. 3 Disp. Resol. Mag. 6, 7 (2007).

96. Mark Thatcher, *Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation*, *in* The Politics of Delegation 125 (Mark Thatcher and Alec Stone Sweet, eds. 2003).

97. *Id.* at 132.

98. *Id.* at 128.

99. *Id.* at 131.

100. *Id.* at 136.

101. I do concede that U.S. domestic sports—the NBA, NFL, or MLB—tend to be more popular in the United States than international sports such as soccer; however, this fact does not take away from my argument since the CAS only deals with international sporting competitions. Large international sports competitions, such as the Olympics, evoke a tremendous amount national pride and affect perhaps even a wider audience that the hardcore sports fan attuned to U.S. leagues. Additionally, for most of the rest of the world, sporting competitions that are conducted each year are more international or regional in scope that sports in the U.S.

102. There are instances when elected officials do get involved in sports, but those are generally only when tangible political gains can be achieved or are done at a high level of generality. For instance, the baseball steroids scandal caught the attention of Congress once the scandal caught the headlines of major media outlets. *See* Dave

elicit, the technical aspects of international doping regulations and other sports-related rules make sports a prime area in which a country would consider delegating to a regulatory body. It would be difficult for politicians to try to explain the intricacies of doping standards in international sports competitions, and indirectly allowing for the delegation of the job to a specialized body, like the CAS, does provide the politician some political cover and ability to cast blame if the CAS reaches an adverse decision.

However, this analysis does not provide all of the underlying reasons why politicians would let the domestic regulatory body independently sign the nation's name to arbitration agreements under the CAS or participate in competitions that have mandatory arbitration clauses with jurisdiction under the CAS. The efficiency and effectiveness of the CAS provides the other half of the story.

B) Delegation to the Court of Arbitration for Sport is efficient and effective

The second reason I contend that the CAS has avoided the major criticisms of international adjudication is that the CAS has proven to be an efficient and effective arbitral tribunal. The court that began operations in 1984 is strikingly different from the court that operates today. This willingness to evolve has kept its critics relatively silent. By no means is the CAS perfect, and it still has its fair share of critics; however, states have shown a willingness to legitimate the court as is shown by the adoption of the World Anti-Doping Code, which designates the CAS as the final appellate authority for all doping disputes arising from international competition. This recognition and explicit delegation by states, noted in the *Lazutina/Danilova* and *Gundel* decisions by the Swiss Federal Tribunal, underscores the efficiency and effectiveness of the CAS as a true international sports arbitral body. I argue that states are more willing to cede authority over their nation's citizens, even indirectly, when they believe the body to which authority is given is efficient and effective. This Section highlights those attributes that have led states to recognize the ability of the CAS to be an efficient and effective tribunal. First, it examines the impact domestic court litigation has had on the evolution of the CAS. Next, it explores the features that embody the efficient and effective institution. And finally, it analyzes the perceptions of efficiency and effectiveness and how perceptions correlate with a country's position towards the international tribunal.

1) The evolution of the CAS through litigation in state courts increased the efficiency and effectiveness of the institution

In addition to consent, the CAS needed to be perceived as an impartial judicial body that was independent from the International Olympic Committee (IOC) in order for the CAS to retain legitimacy over the long-term. From the founding of the CAS, the IOC had a major role –it was the IOC that saw a need for such a court and then spent the time and money to create the institution. For the first ten years of the CAS, the Court retained a heavy influence from the IOC, especially since the majority of the CAS's budget came from the IOC[103]. The IOC also had a great deal of control over the appointment of arbitrators and of the rules under which the CAS operated[104]. The strong links between the IOC and the CAS would be troublesome for the court's image as a neutral, independent body capable of fairly adjudicating international sports disputes.

The relationship between the IOC and CAS began to change as a result of a public law appeal of a CAS decision to the Swiss Federal Tribunal[105] in a case involving Elmar Gundel, a horse rider who had appealed his suspension by the International Equestrian Federation (FEI) to the CAS (hereinafter "*Gundel*")[106]. Gundel claimed that the CAS was not sufficiently independent of the IOC and FEI, and as a result, the CAS ruling against him should be abandoned. In its judgment in March 1993, the Swiss court upheld the judgment of the CAS, recognizing its role as "*a true arbitration court*"[107]. However, the court, in dicta, made it clear that certain aspects of the CAS's relationship with the IOC were troubling, especially the funding and membership links between the CAS and IOC[108]. In response to this judgment, the CAS underwent a restructuring process in late 1993 that focused on making the Court more independent of the IOC. These reforms, adopted in 1994, have set the CAS on a more autonomous path, solidifying its legitimacy as a true court of arbitration.

Sheinin, *Baseball Has A Day of Reckoning In Congress*, The Washington Post, March 18, 2005, at A01. Additionally, the President often invites winning athletes and teams for photo-opportunities at the White House. *See* White House Press Release, President Welcomes University of Texas Longhorns, 2005 NCAA Football Champions, to the White House (February 14, 2006) *available at* http://www.whitehouse.gov/news/releases/2006/02/20060214.html.

103. Reeb, *supra* note 54, at 33.

104. *Id.*

105. Swiss Courts had jurisdiction over challenges to the CAS in the *Gundel* case since the CAS's headquarters are in Switzerland.

106. Extract of the judgment of March 15, 1993, delivered by the 1st Civil Division of the Swiss Federal Tribunal in the case G. versus Fédération Equestre Internationale and Court of Arbitration for Sport (CAS) (public law appeal) (translation), CAS 92/63 G. v/ FEI *in* Digest of CAS Awards 1986-1998, at 561 (Matthieu Reeb ed. 1998) [hereinafter cited "*Gundel*"].

107. *Id.* at 543.

108. *Id.* at 570.

The 1994 reforms of the CAS responding to the dicta in the *Gundel* decision seemed to place the CAS on more independent footing. However, the CAS was subsequently challenged in 2003 when the Swiss Federal Tribunal once again examined whether or not the CAS was a sufficiently independent body able to resolve sports disputes – this time specifically in the backdrop of the court's relationship with the IOC. The Swiss Tribunal's decision on this matter arising from the 2002 Winter Olympics affirmed that the 1994 CAS reforms adequately addressed the independence concerns, leaving no doubt as to the credibility of the institution to handle international sports disputes.

The 2003 case involved two Russian cross-country skiers, Larissa Lazutina and Olga Danilova, who were challenging the decision heard on appeal by the CAS that upheld their ban from the 2002 Olympic Winter Games based on violations of doping (hereinafter "*Lazutina/Danilova*")[109] In the *Gundel* case, the "*Federal Supreme Court has accepted that the CAS may be considered a true arbitral tribunal for cases in which the IOC is not a party*,"[110] but in this 2003 case, the court would have the opportunity to decide whether the CAS could be considered a true arbitral tribunal even if the IOC was a party to this dispute – an issue the *Gundel* court addressed only in dicta. The *Lazutina/Danilova* case demonstrated that the 1994 reforms created true independence from the IOC and would have a lasting impact on the future of the CAS.

Not only did the Swiss court grant a stamp of legitimacy to the new CAS structure, it also furthered the contention that the CAS is a "*true 'supreme court of world sport'*"[111]. The Swiss Tribunal held: "*[I]t is clear that the CAS is sufficiently independent vis-à-vis the IOC, as well as all other parties that call upon its services, for its decisions in cases involving the IOC to be considered true awards, equivalent to the judgments of State courts*"[112]. Going one step further, the Swiss Tribunal discussed the adoption of the 2003 Copenhagen Declaration on Anti-Doping in Sport at the World Conference on Doping in Sport, in which many States, including China, Russia, and the United States, committed to adopting "*the World Anti-Doping Code as the basis for the worldwide fight against doping in sport*"[113]. Under the Code, the CAS is the appellate body for all doping-related disputes (such as the Floyd Landis case). The Swiss court viewed this delegation of authority by States as a "*tangible sign that States and all parties concerned by the fight against doping have confidence in the CAS. It is hard to imagine that they would have felt able to endorse the judicial powers of the CAS so resoundingly if they had thought it was controlled by the IOC*"[114]. This does not mean, however, that CAS awards will be recognized in every instance; but a challenge to the independence and impartiality of the tribunal will likely fail[115].

As the CAS continues to develop and becomes a body that sporting federations turn to more frequently, the importance of the institution in shaping international sports law will grow. Already the Court has made its mark in developing a body of jurisprudence on international sports issues, and the likely expansion of its role will depend on this legitimacy received from states. These two challenges to the independence of the CAS helped the court solidify itself as an efficient and effective tribunal.

2) Features of the CAS that demonstrate efficiency and effectiveness

The CAS is perceived to be efficient and effective by states since it is identified as providing timely judgments, independent experts familiar with sport issues, and cost-effective litigation[116]. Many of these features are also attributed to commercial arbitration; however the CAS goes beyond these attributes and performs an essential function as a body that centralizes dispute resolution in sport.

First, CAS arbitrations are quick and efficient. The most telling example of the CAS's efficiency is the Ad Hoc Division that is formed during the Olympic Games and other large international sports competitions, such as the World Cup[117]. The Ad Hoc Division addressed the need for quick turnaround on certain competition-related items (usually within 24 hours)[118]. The Ad Hoc Division also removed the organizer of the competition from the role of final arbiter on matters in which the organizer likely has some stake in the outcome. Additionally, the CAS "*appeals arbitration procedure provides for a four-month time limit from the filing of the request for arbitration to issue a final award*"[119]. Such self-imposed constraints on operation provide the CAS with a comparative advantage

109. Excerpt of the judgment of 27 May 2003, delivered by the 1st Civil Division of the Swiss Federal Tribunal in the case A. & B. versus International Olympic Committee (IOC) and International Ski Federation (FIS) (4P. 267, 268, 269 & 270/ 2002/ translation) *in* Digest of CAS Awards III 2001-2003, at 674, 675 (Matthieu Reeb & Estelle de La Rochefoucauld eds. 2004).

110. *Id.* at 679.

111. *Id.* at 688.

112. *Id.* at 689.

113. *Id.* at 688.

114. *Id.*

115. *See* Stephen A. Kaufman, Note, *Issues in International Sports Arbitration*.

116. Hilary A. Findlay, *Rules of a Sport-Specific Arbitration Process as an Instrument of Policy Making*, 16 Marq. Sports L. Rev. 73, 74 (2005).

117. The Ad Hoc Division grew out of a need to quickly adjudicate disputes arising during a competition that could not wait until the competition was over. Fifty-six cases have been submitted before Ad Hoc Divisions of the CAS. *See* CAS Statistics *available at* http://www.tas-cas.org/statistics.

118. Reeb, *supra* note 54, at 38.

119. *Id.* at 39.

and further the belief that the body is efficient and effective in handling sports disputes.

Second, CAS arbitrators are specialists in sports disputes. This characteristic is common to most arbitral bodies and is especially important in the context of sports, since the stakes for athletes competing in sport are very high[120].

A final general reason for the preference of arbitration is that the costs of adjudicating a dispute are usually lower than in domestic court. Litigants don't have to be fearful of high court costs when bringing their disputes to the CAS and they avoid the costs of extensive discovery as well. The low cost is even further amplified since the CAS bears most of the costs of the arbitration while the litigants are responsible only for a few fees[121].

While the CAS retains many of the positive attributes of conventional arbitral tribunals, it also adds value in other areas since it is in a better position than domestic courts to handle issues unique to sports. In particular, the CAS centralizes judicial interpretation of rules and regulations, allowing for increased predictability and fairness in outcomes. The *lex sportiva* that has emerged serves as a guide for future litigants. International sports competitions are conducted all around the world with 205 National Olympic Committees currently a part of the Olympic Movement[122]. Were sports disputes to be adjudicated in domestic courts, athletes and organizations such as the IOC would be subject to a variety of conflicting laws in multiple jurisdictions, a situation that would be difficult for all parties. The CAS centralizes the dispute resolution process, reducing transaction costs for all parties. Additionally, any potential "home field advantage" athletes might get litigating in their home country could be offset by the time and cost of litigation coupled with the chance that an institution such as the IOC might not recognize a perceived tainted court decision[123].

Second, allowing individual International Federations to have a purely internal hearing structure is not appropriate for adjudicating sports disputes[124]. Allowing an International Federation or even the IOC to be the sole party bringing an action against an athlete and also be the judge in such a case is unfair to the athlete. The CAS adds a layer of scrutiny to internal hearings, creating a fairer, more transparent process. The accountability mechanism the CAS provides was underscored in the *Gundel* decision. In that case, the Swiss Tribunal indicated a need for the IOC to be independent from the CAS so that the IOC would not be a party to a dispute that it would have an influence in deciding[125]. The CAS is essential to providing judicial review to internal IF hearings, especially for potential doping violations that can severely impact an athlete's career. Similarly, IFs, the IOC, and others prefer the CAS to be viewed as a neutral arbiter presiding over their sport or competition. For IFs and the IOC, being perceived as credible institutions in the eyes of their participants is crucial to their growth and success. These actors get to 'pass the ball' to the CAS to make decisions, providing themselves "*public relations insurance*" by potentially distancing themselves from criticism over potentially controversial decisions[126].

Finally, the CAS is set up in a manner that provides an easy mechanism for its decisions to be enforced. In addition to the enforcement through the New York Convention, many of the disputes adjudicated by the CAS can be enforced by speech alone. For instance, if an athlete is disqualified and refuses to give back possession of a gold medal, the consequences of that holdout are negligible. The CAS ruling that a particular athlete is or is not the gold medal *winner* is more important than being the gold medal *holder*. The value of the medal in possession of the disqualified athlete becomes meaningless if the rest of the world does not recognize the achievement[127]. As a result, the CAS rulings can have immediate teeth when implemented by all the International Federations and sporting competitions that have acceded to jurisdiction of the CAS.

3) Perceived effectiveness promotes delegation: two examples

The decision by a state to delegate authority entails an assessment of the costs and benefits associated with that action. At the heart of this calculus is the notion that a state delegates in order to further its interests and refuses to delegate when it is safeguarding something it believes it cannot place in the hands of others. However, an institution that is perceived to be effective is more likely to gain the acceptance of holdout countries or participants – even when the issue is of high importance. While there are many issues and countries to explore, I look particularly at

120. *See* Jessica K. Foschi, Note, *A Constant Battle: The Evolving Challenges in the International Fight Against Doping in Sport*, 16 Duke J. Comp & Int'l L. 457, 468 (2006).

121. Reeb, *supra* note 54, at 39.

122. International Olympic Committee, National Olympic Committees *available at* http://www.olympic.org/uk/organisation/noc/index_uk.asp.

123. Yi, *supra* note 53, at 301, 302.

124. *Id.* 304-09.

125. *Gundel, supra* note 106, at 569.

126. Yi, *supra* note 53, at 309-12.

127. *Id.* at 322-25.

the United States and the Fédération Internationale de Football Association (FIFA). Examining these entities' responses to the CAS will help further the argument that the perceived efficiency and effectiveness of the CAS aided the act of international delegation.

As one of the more vocal critics of international delegation, the United States has implicitly endorsed the CAS without any major problems. One of the biggest critiques leveled against international delegation is the perceived loss of sovereignty by letting American citizens be tried in venues such as the International Criminal Court. For the United States, military matters are of paramount importance. With the robust military presence of the U.S. worldwide, it believes that its troops would be vulnerable to prosecutions at the ICC under false pretext. In essence, this is an argument based, in part, on the *perceived* ineffectiveness of the ICC as a neutral tribunal that would only try those who commit true war crimes rather than engage in political prosecutions. This is one of the reasons the U.S. has not given its support to this perceived ineffective institution.

Conversely, the United States, through the authority given to a private, non-governmental entity (the USOC), has deemed the CAS to satisfy the criteria of an effective institution that can adequately adjudicate matters concerning U.S. citizens. The explicit adoption of the Copenhagen Declaration on doping coupled with the ratification of the UNESCO Convention signifies the acceptance of the CAS as an effective institution on the governmental level.

On the one hand, the ICC deals with issues of high importance to the state (military matters) but is perceived to have low effectiveness by the United States; while the CAS adjudicates issues of low to medium importance to the state (sports) but is perceived to be highly effective. I argue that perceived effectiveness of an institution is an important facet of a country's position on international adjudication, as is evidenced by the position of the United States on each institution; however there may be other factors at issue, especially relating to sovereignty loss and issues of national security with the ICC. The extent to which perceived effectiveness of the institution determines a country's position is unclear and should be a subject for further study.

Similarly, one can look to soccer's governing body, FIFA, and see how the evolution of the CAS led to that organization ceding authority over disputes to this international tribunal. The main stakeholders in FIFA are countries that have a very strong attachment to soccer, particularly in Europe. One might even joke that decisions over soccer trump sovereignty, especially given European acceptance of the ICC, [128] but initial hesitance of FIFA with respect to the CAS. However, over time, as the CAS began to prove itself a credible institution, FIFA and the countries involved, were willing to turn over some control over their beloved sport to this international tribunal [129].

IV. The impact and future of the Court of Arbitration for Sport

The Court of Arbitration for Sport provides an interesting look at a type of international delegation that has been underemphasized in the traditional literature. States have demonstrated their willingness to adjudicate international sports disputes through the CAS; however, the implications of that decision are unclear. This Part will examine the impact the CAS has had in the arena of international delegation. The first two sections examine the effect and importance of delegation to the CAS. The last section looks at the future of the Court, specifically with respect to U.S. involvement.

A) The effect of delegation to the CAS

Despite the initial inclination that delegation of authority by states over international sports disputes would reduce the amount of control a state had over the fate of its own citizens, the act of delegation to the CAS is actually a sovereignty enhancing device that adequately safeguards an athlete's rights without the extra burden for the state to get involved in all matters relating to international sports law. As a result of this delegation to the CAS, I contend that individual states retain the appropriate amount of control over potential disputes that affect their citizens while also allowing the state to exert its sovereign control in the international community.

First, when states put in place the mechanisms for delegation to the CAS, the act of delegation can be seen as the type of sovereignty enhancing action that Hathaway discusses [130]. Under the New York Convention, state courts are the *ex post* mechanism by which individual states can ensure that arbitral awards are legitimate; but in addition to ensuring the credibility of an award in a particular case, state courts, by maintaining the ability to review certain aspects of arbitral proceedings, actually enhance an arbitration body's credibility. In fact, having the state court provide an enforcement mechanism when a

128. *See* International Criminal Court, The States Parties to the Rome Statute *available at* http://www.icc-cpi.int/statesparties.html (showing 108 countries that are a party to the Rome Statute).

129. Foschi, *supra* note 120, at 463-64.

130. Hathaway, *supra* note 28, at 148-49.

party refuses to comply with the results of an arbitral body actually enhances the strength of the arbitral system, preventing bad actors from frustrating an arbitration proceeding[131]. States legitimate the arbitral process through their sovereign legal authority on a macro level when they adopt the New York Convention; but they also subsequently allow the arbitral bodies to self-regulate[132]. Consequently, one can view this act of international delegation as sovereignty enhancing, with great benefits to states. Arbitral bodies need state recognition in case certain actors do not implement the results of a proceeding; the coercive power of the state helps add a level of credibility that adds value for all actors in the process.

In legitimating the arbitral process, states are allowing arbitral tribunals to self-regulate and operate autonomously, but I contend that they do maintain an appropriate amount of control over the decisions of arbitral bodies, including the CAS. The use of the New York Convention's limited grounds for refusing to enforce an arbitral award provides for adequate state judicial *ex post* involvement without overburdening the state judicial system every time there is a dispute. Additionally, the ability to challenge a CAS award in Swiss courts, the seat of the arbitration, allows for *ex post* review. In fact, the CAS is the most appropriate judicial organ to handle international sports disputes, as is demonstrated by the fact that most states have indicated their support for the body when they adopted the World Anti-Doping Code.

B) The importance of lower visibility delegation

Delegation that is less visible provides states more latitude in pursuing their international interests. States feel less threatened when an act of delegation does not facially implicate their sovereignty; however, even a seemingly benign act of delegation can have profound implications for international law. The importance of such delegation cannot be emphasized enough, as it provides a means for specialist issues, such as sport, to be resolved quickly and efficiently. I argue that the manner in which delegation is conducted matters; if a state directly tried to accede to the jurisdiction of a tribunal like the CAS, it might encounter more opposition because of the perceived sacrifice of state sovereignty. By contrast, the less visible delegation allows for better and increased cooperation, but still adequately safeguards the rights of a state's citizens.

The New York Convention is the ultimate example of an instrument that has allowed for less visible delegation to grow over time. The creation of a system whereby arbitral tribunals can emerge as needed and already retain delegated enforcement authority from states through this Convention allows arbitral bodies that would potentially take years to form and garner affirmative consent from states to emerge in a quick and efficient fashion. Some might claim this is circumventing the democratic process since the government does not get to examine the merits of each created body; instead I argue that it is the appropriate amount of scrutiny by the government. These arbitral institutions must meet the minimum *ex post* safeguards of the Convention[133]; hence, state courts get the opportunity to ensure that the body is adjudicating disputes properly.

It makes sense from an efficiency point of view to allow *ex post* versus *ex ante* scrutiny of these developing tribunals. Often, there is an initial resistance to change in adjudication; allowing for only *ex post* review gives an arbitral institution the opportunity to develop on its own and prove itself as opposed to being denied even the chance to function because of an *ex ante* fear of change. If the skeptics to international adjudication were right and the body had some serious flaw, those deficiencies would emerge in the *ex post* review. The CAS went through such changes, as it has undergone transformations in response to court decisions that reviewed its independence. Allowing the arbitral body to be less visible from the outset is the best approach. Such low visibility helped states unanimously approve of the CAS as the final appellate authority for doping disputes when they adopted the World Anti-Doping Code. The low visibility of delegating to the CAS aided this impressive act of delegation. As the CAS becomes an increasingly important and known commodity by the public, the fact that it had more than twenty years to develop before it gets thrown into the spotlight will ensure fairness for the litigants and will instill confidence in the public that it can handle international sports law disputes. The visibility of the CAS in the future may subject it to more scrutiny given its increasing case load and use; however, since the Court has already proven to be willing to adapt and change, those questioning the erosion of sovereignty will likely be quieted without much effort. Other tribunals could also use this strategy of lowering visibility in order to avoid some of the typical criticisms lodged at international adjudication.

131. Reisman, *supra* note 45, at 107.

132. Tom Carbonneau, *The Remaking of Arbitration: Design and Destiny*, *in* Lex Mercatoria and Arbitration 23, 28 (Thomas E. Carbonneau ed., rev. ed. 1998).

133. *See supra* Part II(A).

C) United states CAS involvement: will it increase?

Despite the U.S. adherence to the CAS in international sports competitions and claims arising from doping, such as the Floyd Landis case, the United States has chosen not to use the CAS as the appellate authority to resolve other national sporting disputes that arise between the USOC, NGBs, and athletes. Under the Stevens Act, disputes arising with those bodies can be taken to the American Arbitration Association (AAA) for final resolution[134]. While other countries have designated the CAS to handle such domestic sports disputes and others have advocated for the U.S. to follow suit[135], there are likely reasons why the U.S. has not accepted CAS jurisdiction to date.

First, the Stevens Act was passed in 1978, roughly 6 years before the CAS came into existence in 1984. The U.S. system under the AAA has matured over the years and it does not seem that Congress has come to recognize a need for the use of a different body, especially since Congress could have altered the Act when it made revisions to the Act's amateur requirement in 1998. The United States is subject to the jurisdiction of the CAS, both in doping cases on appeal and all disputes that come out of international competitions that have adopted the CAS appellate jurisdiction (virtually all of them); however, it is unclear whether this momentum will lead the U.S. to abandon use of the AAA in favor of the CAS. If the United States were to modify the Stevens Act to place the CAS as the final appellate authority for domestic disputes, this would be an even bigger act of international delegation, since arbitration authority would be explicitly taken away from a solely American entity and placed in the hands of an international institution.

V. Conclusion

The CAS offers a shining example of the effect and benefits of less visible international delegation. The Court has gained the acceptance of the international community without much fanfare. The CAS may receive more attention because of its many recent high-profile cases, such as the Landis case, the case involving Oscar Pistorius (a runner who wears prosthetic racing blades who is challenging his eligibility for the Olympics)[136], and the appeal by Marion Jones' teammates challenging the decision of the IOC stripping them of the medals won on a team with Jones, who is serving a prison term stemming from her use of performance-enhancing substances[137]. However, given the record of the CAS thus far and its dramatically increased caseload in the last few years, it seems that the court has kept its detractors relatively silent.

Additionally, it seems that the proponents and drivers of the CAS see the development of a body of precedent – a *lex sportiva*. If the CAS begins to take on more of the attributes of a court by using precedent more frequently, one might see an increase in debate over the institution.

By maintaining its low visibility and proving its efficiency and effectiveness, the CAS has developed into an institution that provides for deep delegation while safeguarding the rights of individual litigants. Countries have shown their willingness to support the CAS both directly and indirectly. Future tribunals can learn from the successes of the CAS, in particular focusing on creating institutions that do not directly implicate sovereignty and are perceived to be efficient and effective. Gaining *ex ante* credibility while maintaining some level of *ex post* review is a winning formula for states; it gives states the proper incentive to commit to delegation without a huge threat to state sovereignty.

134. Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220529 (1998).

135. *See* Edward E. Hollis III, Note, *The United States Olympic Committee and the Suspension of Athletes: Reforming Grievance Procedures Under the Amateur Sports Act of 1978*, 71 Ind. L. J. 183, 200 (1995).

136. *Oscar Pistorius Receives His Day In Court*, Reuters, April 1, 2008, *available at* http://www.reuters.com/article/idUS157079+01-Apr-2008+PRN20080401.

137. *IOC votes to strip Jones' teammates of medals from 2000 Games*, Associated Press, April 10, 2008, *available at* http://sports.espn.go.com/oly/trackandfield/news/story?id=3339267.

Le Nouveau Code de l'arbitrage en matière de sport

Me Matthieu Reeb, Secrétaire Général du TAS

Par décision du 29 septembre 2009, le Conseil International de l'Arbitrage en matière de Sport (CIAS) a adopté plusieurs modifications du Code de l'arbitrage en matière de sport (Code). Les modifications principales sont décrites ci-dessous, accompagnées de quelques commentaires. Il s'agit de la troisième révision du Code depuis son entrée en vigueur le 22 novembre 1994. Le Code modifié est entré en vigueur le 1er janvier 2010. Toutefois, les procédures en cours au 1er janvier 2010 sont restées soumises au Règlement en vigueur avant 2010, sauf si les deux parties ont demandé l'application du nouveau Code.

Article S18
Les arbitres et médiateurs du TAS ne peuvent désormais plus agir comme conseil d'une partie devant le TAS. Si un arbitre du TAS agit néanmoins comme conseil devant le TAS, sa qualité de conseil ne pourra pas être remise en cause dans l'arbitrage en question. En revanche, le CIAS pourra prendre des mesures particulières à l'encontre de cette personne en ce qui concerne sa fonction d'arbitre/médiateur. Il est à relever que cette restriction ne s'applique qu'aux membres du TAS personnellement. Un associé de la même étude d'avocats qu'un membre du TAS peut donc théoriquement représenter une partie devant le TAS sans mettre son collègue arbitre ou médiateur du TAS en difficulté.

Article S20
Sous certaines conditions, il sera possible pour le TAS de transférer une procédure d'arbitrage de la Chambre ordinaire à la Chambre d'appel et vice versa. Jusqu'à fin 2009, ce transfert n'était pas possible. Ce changement doit permettre d'adapter la procédure applicable en fonction de l'évolution d'un arbitrage.

Article R31
Le dépôt et la communication de pièces jointes à des mémoires déposés par les parties pourront se faire par courrier électronique. Le Greffe du TAS pourra ainsi communiquer ces mêmes pièces par les mêmes moyens. Cette nouvelle règle ne s'applique pas au dépôt des mémoires.

Article R32
Une nouvelle disposition permet à la Formation arbitrale de suspendre une procédure d'arbitrage en cours pour une durée limitée. Cette nouvelle règle comble une lacune.

Article R34
La compétence de trancher les demandes de récusation est attribuée au Bureau du CIAS qui peut ensuite librement renvoyer un cas au CIAS (plenum). L'ancien règlement prévoyait la situation inverse. Pour des raisons d'efficacité, le CIAS a choisi d'attribuer cette compétence en priorité à son Bureau.

Article R37
Dans le cadre d'une procédure en matière de mesures provisoires, le Président de Chambre, si la Formation arbitrale n'est pas encore constituée, peut mettre fin à une procédure d'arbitrage s'il constate que le TAS n'est manifestement pas compétent pour juger l'affaire en question.

Articles R39 et R55
Le défendeur/intimé peut demander que le délai pour le dépôt de la réponse soit fixé après le paiement par le demandeur/appelant de l'avance de frais. Cette mesure vise à éviter que le défendeur/intimé engage des frais pour sa défense avant de savoir si le demandeur/appelant a payé sa part d'avance de frais.

Articles R40.3 et R54
La fonction de greffier ad hoc de la Formation arbitrale est officialisée dans le Code.

Article R41.3
Le délai pour permettre à un tiers de déposer une demande d'intervention est prolongé: anciennement, il coïncidait avec le délai pour le dépôt de la réponse; dorénavant une demande d'intervention peut être déposée dans un délai de dix jours suivant le moment où le tiers intervenant apprend l'existence de l'arbitrage mais avant l'audience ou avant la clôture de la procédure écrite si aucune audience n'a lieu.

Article R41.4
La Formation arbitrale dispose d'une plus grande liberté pour déterminer le statut des éventuels tiers intéressés et pour définir leurs droits dans la procédure d'arbitrage. En outre, une Formation arbitrale pourra autoriser le dépôt de mémoires *amicus curiae*.

Articles R44.1 et R51
Dans leurs écritures, les parties doivent indiquer non seulement les noms de leurs éventuels témoins et experts mais en plus indiquer un bref résumé des

témoignages présumés, à défaut de témoignages écrits détaillés et, pour les experts, mentionner le domaine d'expertise pour chacun d'entre eux.

Articles R46 et R59
Le CIAS a décidé d'officialiser la pratique du TAS visant à ne pas reconnaître les opinions dissidentes et à ne pas les communiquer.

Article R51
Une déclaration d'appel ne pourra être considérée comme un mémoire d'appel que si l'appelant en fait la demande par écrit. En l'absence d'une telle demande, et si aucun mémoire d'appel n'est déposé dans le délai prescrit, le TAS met un terme à la procédure d'arbitrage.

Article R52
Le CIAS officialise une pratique constante du TAS en confirmant qu'il peut envoyer une copie de la déclaration d'appel et du mémoire d'appel, pour information, à l'autorité qui a rendu la décision attaquée. En outre, le Président de Chambre ou le Président de la Formation, s'il est déjà nommé, dispose de pouvoirs plus étendus en matière de jonction de causes.

Article R55
La possibilité de déposer des demandes reconventionnelles en procédure d'appel est supprimée. Les personnes et entités qui souhaitent contester une décision doivent donc impérativement le faire avant l'expiration du délai d'appel applicable, quitte à retirer l'appel ultérieurement. Il n'est plus possible d'attendre que la partie adverse dépose un appel pour décider ensuite de déposer un contre-appel.

Article R56
Avec l'accord des parties ou décision spécifique du Président de la Formation, les parties peuvent non seulement produire de nouvelles pièces et formuler de nouvelles offres de preuve après la soumission de la motivation d'appel et de la réponse mais peuvent encore modifier leurs conclusions. En outre, une nouvelle disposition a été insérée pour permettre à une Formation arbitrale de tenter une conciliation en procédure d'appel.

Article R59
En procédure d'appel, le délai pour la communication de la sentence finale par le TAS était précédemment fixé à quatre mois à compter du dépôt de la déclaration d'appel. En raison des délais causés par des questions préliminaires liées à la constitution de la Formation, au choix de la langue et aussi au paiement des avances de frais, le CIAS a décidé de fixer un délai pouvant être mieux maîtrisé par les Formations arbitrales. Le nouveau délai pour rendre les sentences en matière d'appel est désormais fixé à trois mois à compter de la transmission du dossier de la procédure aux arbitres concernés.

Article R65.1
Après un examen attentif de la question des frais d'arbitrage et après consultation avec les entités qui contribuent au financement du TAS, le CIAS a décidé de maintenir le principe de la gratuité des procédures d'appel pour les affaires à caractère disciplinaire. Toutefois, la gratuité ne s'applique plus que pour les appels dirigés contre des décisions rendues par des fédérations ou organisations sportives internationales ou par des fédérations ou organisations sportives nationales agissant par délégation de pouvoir d'une fédération ou organisation sportive internationale. Alors qu'autrefois il suffisait qu'une partie ne soit pas domiciliée dans le même pays que les autres ou que l'athlète concerné soit de "niveau international" pour que la gratuité s'applique, le CIAS a choisi de retenir un critère objectif plus précis, correspondant à son rôle de tribunal international de dernière instance et tenant davantage compte des possibilités financières du TAS. Les décisions rendues par des fédérations ou organisations sportives nationales peuvent toujours être soumises en appel au TAS mais les parties doivent contribuer aux frais de la procédure. Le CIAS veillera cependant à ce que l'obstacle financier ne soit pas insurmontable pour les athlètes et adoptera prochainement de nouvelles directives concernant l'octroi de l'assistance judiciaire.

Article R68
Nouvelle disposition prévoyant une exclusion de responsabilité pour les arbitres et médiateurs du TAS, les membres du CIAS ainsi que les employés du TAS.

Enfin, un nouveau barème des frais a été adopté par le CIAS prenant davantage en considération la valeur litigieuse.

The new Code of Sports-related Arbitration

Mr Matthieu Reeb, CAS Secretary General

By decision of 29 September 2009, the International Council of Arbitration for Sport (ICAS) adopted several amendments to the Code of Sports-related Arbitration (Code). The main amendments are described here below, accompanied by a few comments. It is the third time that the Code is amended since its implementation on 22 November 1994. The amended Code entered into force on 1 January 2010. However, the procedures which were pending on 1 January 2010 remained submitted to the rules in force before 2010, unless both parties requested the application of the new Code.

Article S18
CAS arbitrators and mediators can no longer have the possibility of acting as Counsel for a party before the CAS. If a CAS arbitrator nevertheless acts as Counsel before the CAS, his/her function as Counsel will not be called into question in the arbitration at stake. However, the ICAS will have the power to take particular measures towards him/her with respect to his/her function as arbitrator/mediator. It shall be emphasized that this restriction applies only to the CAS members personally. A partner of the same law firm as a CAS member may therefore theoretically represent a party before the CAS without creating any difficulty to his/her colleague arbitrator/mediator of the CAS.

Article S20
Under certain conditions, it will be possible for the CAS to transfer an arbitration procedure from the Ordinary Division to the Appeals Division and vice-versa. Up to the end of 2009, such transfer was not possible. This change should allow to adapt the applicable procedure depending on the evolution of an arbitration.

Article R31
The filing and the communication of exhibits attached to written submissions filed by parties may be made by electronic mail. The CAS Court Office can then transfer the same exhibits by the same means. This new rule does not apply to the filing of submissions.

Article R32
A new provision allows the Arbitral Panel, or the Division President, to stay an ongoing arbitration procedure for a limited period of time. This new rule fills a gap.

Article R34
The power to settle petitions for challenge to an arbitrator is given to the ICAS Board, which may decide at its discretion to refer a case to the ICAS (plenum). The old regulations provided for the reverse order. For reasons of efficiency, the ICAS has chosen to assign this competence in priority to its Board.

Article R37
In relation to an application for provisional measures, the Division President, if the Panel has not been constituted yet, may terminate the arbitration procedure if he rules that the CAS has manifestly no jurisdiction to decide the case at stake.

Articles R39 and R55
The Respondent may request that the time limit for the filing of the answer be fixed after the payment by the Claimant/Appellant of the advance of costs. This measure aims at avoiding that the Respondent invests money for his/her defense before knowing if the Claimant/Appellant has paid his/her share of the advance of costs.

Articles R 40.3 and R54
The function of the *ad hoc* clerk to the arbitral Panel is now official in the Code.

Article R41.3
The time limit for a third party to file a request for intervention is amended: beforehand, it was the same as the deadline for the filing of the answer; now a request for intervention may be filed within 10 days after the arbitration has become known to the intervenor but before the hearing or before the closing of the evidentiary proceedings, if no hearing is held.

Article R41.4
The Arbitral Panel has more latitude to determine the status of potential third parties and to determine their rights in the arbitration procedure. Furthermore, a Panel may allow the filing of a*micus curiae* briefs.

Articles R44.1 and R51
In the written submissions, the parties shall list not only the names of potential witnesses and experts but also indicate a short summary of the expected testimony, in the absence of witness statements; for experts, their area of expertise shall be stated.

Articles R46 and R59
The ICAS has decided to confirm the CAS practice that dissenting opinions are not recognized and are not notified.

Article R51
A statement of appeal can be considered as an appeal brief only if the Appellant requests it in writing. In the absence of such request, and if no appeal brief is filed within the appropriate time limit, the CAS terminates the arbitration procedure.

Article R52
The ICAS confirmed the CAS practice and decided that the CAS Court Office shall send a copy of the statement of appeal and appeal brief, for information, to the authority which has issued the challenged decision. Furthermore, the Division President or the President of the Panel, if already appointed, enjoys a larger power with respect to the consolidation of cases.

Article R55
It will no longer be possible to file counterclaims in appeal procedures. The persons and entities which want to challenge a decision must do so before the expiry of the applicable time limit for appeal, even if it means withdrawing the appeal later. It is no longer possible to wait that the opposing party files an appeal to decide then to file a counter-appeal.

Article R56
With the agreement of the parties or by a specific decision of the President of the Panel, the parties have the possibility not only to supplement their arguments and produce new exhibits after the submissions of the appeal brief and of the answer but also to amend their requests for relief. Furthermore, a new provision has been included in order to allow Panels to attempt conciliation in appeal procedures.

Article R59
In appeal procedures, the time limit for the communication of the final award by the CAS was previously fixed at four months from the filing of the statement of appeal. Due to the delays caused by preliminary issues connected to the constitution of the Panel, the choice of the language and also the payment of the advance of costs, the ICAS has decided to fix a time limit which will be more under the control of the Arbitral Panel. The new time limit to render awards in appeals is now three months from the communication of the case file to the arbitrators concerned.

Article R65.1
After careful examination of the question of arbitration costs and after consultation with the entities contributing to the funding of the CAS, the ICAS decided to maintain the "free of charge rule" for appeal procedures related to disciplinary cases. However, this "free of charge rule" applies now only to appeals directed against decisions rendered by an International Federation or Sports body or by a National Federation or Sports body acting by delegation of power of an International Federation or Sports body. While it was previously sufficient for a party not to be domiciled in the same country as the others or for an athlete to be of "international level" in order for the "free of charge rule" to apply, the ICAS decided to retain a more accurate objective criteria, which fits in with the CAS status of last instance international tribunal and which takes more into account the financial means of the CAS. Decisions rendered by National Federations or Sports bodies may still be submitted to the CAS Appeals procedure but the parties have to contribute to the costs of such procedure. The ICAS will however make sure that the financial constraints will not be too onerous for athletes and will shortly adopt new guidelines regarding legal aid.

Article R68
This is a new rule providing for an exclusion of liability for CAS arbitrators and mediators, ICAS members and CAS employees.

Finally, a new schedule of costs has been also adopted by the ICAS, which takes more the value in dispute into account.

The sanctions imposed on the players for breach or unilateral termination of contract

The jurisprudence of the CAS regarding Article 17 para. 3 of the FIFA regulations on the status and transfer of players

Dr Jean-Phillipe Dubey, Counsel to the CAS

Article 17 of the FIFA Regulations on the Status and Transfer of Players (RSTP) is the central provision of Chapter IV of the Regulations dealing with the maintenance of contractual stability between professionals and clubs. Following the well-known *Bosman* decision of the European Court of Justice[1], the FIFA introduced the concept of contractual stability among the main principles that would from then on regulate the international transfers. Accordingly, the new regulations sought to ensure that, in the event a club and a player chose to enter into a contract, this latter would be honoured by both parties, therefore implementing the principle *pacta sunt servanda*.

As a consequence, a contract between a club and a player, if not expiring, may only be terminated by mutual agreement (Art. 13 RSTP), by either party if a just cause exists (Art. 14 RSTP) or by the player if he can invoke a specifically designed sporting just cause (Art. 15 RSTP). Any breach or unilateral termination of contract without just cause, while not forbidden[2], will lead to financial sanctions in any case (Art. 17 paras. 1 and 2 RSTP) as well as to disciplinary measures in some (Art. 17 paras. 3 to 5 RSTP). In other words, Article 17 RSTP does not provide a legal basis for a party to freely breach or unilaterally terminate an existing contract without just cause at no price or at a given fix price. Rather, the provision clarifies that a compensation will be due at all times and that disciplinary sanctions may also be pronounced if some conditions are met.

Although Article 17 also sets up sanctions for the clubs or for any person subject to the FIFA regulations *"who acts in a manner designed to induce a breach of contract between a professional [player] and a club"*, the purpose of this presentation is to give a short overview of the CAS case law only regarding the sanctions that may be imposed on the player in addition to the obligation to pay compensation when the player is in breach of his employment contract.

I. The legal nature of the sanction

Article 17 para. 3 RSTP improperly states that *"sporting sanctions"* shall be imposed on any player found to be in breach of contract. The true legal nature of the sanction is however not sporting, but disciplinary.

Indeed, a distinction is usually made between the two categories of measures: on the one hand, the objective of a sporting sanction is to ensure equal opportunity

1. Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASLB v. Jean-Marc Bosman*, [1995] ECR I-4921.

2. Unilateral termination is however not permitted during the course of a season (Art. 16 RSTP), save for just cause (but *not* for sporting just cause!).

between the competitors by penalising the breach of any rule aiming at avoiding for an athlete to gain undue advantage over the others. Since the goal is to restore the fairness of the competition, the sanction is automatic and does not depend on the degree of the player's fault (strict liability)[3]. On the other hand, the objective of a disciplinary sanction is more likely to be punitive and/or preventive, as the sanction is a form of penalty for the violation of a rule[4].

When sporting associations set up rules that prohibit participation to a competition as a penalty for the previous wrongful behaviour of an athlete, they in fact establish disciplinary sanctions rather than sporting sanctions[5]. Therefore, when FIFA sets up a rule that imposes a four-month restriction on playing in official matches (prohibition of participation to a competition) to any player found to be in breach of contract (wrongful behaviour of the player), it sets up a disciplinary sanction. This is acknowledged not only by the CAS[6], but also by FIFA itself[7].

II. The disciplinary sanctions imposed on the players

The disciplinary sanctions imposed on the players are provided for in Article 17 para. 3 RSTP. This provision makes a clear distinction between a breach or a unilateral termination of contract occurring during the so-called *"protected period"*[8] and one occurring after this period. In the first case, a sanction will be imposed consisting in a restriction of four months on playing in official matches or, if there are aggravating circumstances, of six months. In the second case, no sanction will be imposed except if the player fails to give due notice of termination within 15 days of the last match of the season.

A. The duty to impose an ineligibility sanction during the protected period

According to Article 17 para. 3 RSTP, *"sporting sanctions* shall *(…) be imposed"* on the players found to be in breach of contract. A literal interpretation of the provision should lead to the conclusion that the competent body has therefore a duty to impose an ineligibility sanction on the player when the latter breaches the contract during the protected period. This is the conclusion to which the panels have come to in many cases brought before the CAS. For instance, in a case involving a Senegalese player who had signed a contract with a French club while still under contract with a Norwegian club[9], the Panel came to the conclusion that it followed from a literal interpretation of Article 17 para. 3 RSTP *"that it is a duty of the competent body to impose sporting sanctions on a player who has breached his contract during the protected period: «shall» is obviously different from «may»; consequently, if the intention of the FIFA Regulations was to give the competent body the power to impose a sporting sanction, it would have employed the word «may» and not «shall»"*[10]. In the same way, in a case of a Libyan player who had breached his employment contract with a Saudi club without just cause, the Panel concluded that *"[w]hether or not the DRC was obliged to impose a sanction on the Player for breach of contract, it is the Panel's view that once the breach was confirmed by the DRC the only remedy available was the imposition of a sanction"*[11].

However, although the FIFA Dispute Resolution Chamber (DRC) usually applies the four months sanction rule on the player, there are cases in which it considered that the principle of proportionality required that the length of the sanction corresponded to the seriousness of the conduct leading to the sanction. In this respect, the DRC referred to the possibility of taking into consideration exceptional circumstances on the basis of which the sanction could be extended or, to the contrary, shortened or even lifted[12]. Therefore, some panels have been reluctant to automatically apply the four months suspension rule and have considered more adequate to rely on the real intention of the rule maker: *"(…) rules and regulations have to be interpreted in accordance with their real meaning. This is true also in relation with the statutes and the regulations of an association. Of course, if the wording of a provision is clear, one needs clear and strong arguments to deviate from it. (…) It is stable, consistent practice of FIFA,*

3. TAS 2007/O/1381, paras. 59-63.

4. *Idem*, para. 67.

5. *Idem*, paras. 77-79.

6. For instance in CAS 2004/A/780, order on provisional measures of 6 January 2005, para. 5.9: reference is made to the *"disciplinary Decision [that] was imposed pursuant to art. 23 (a) of RSTP"* (the latter being the former version of Art. 17 para. 3 RSTP).

7. In the same order, FIFA argued that *"the disciplinary measures provided for by the (…) Regulations serve as a deterrent against unjustified breach of contract and that suspending the effect of such a sanction would represent an inappropriate example towards all the football players"*; cf. CAS 2004/A/780, order on provisional measures of 6 January 2005, para. 5.6 i.f.

8. According to the Definitions contained in the Regulations, the "protected period" is *"a period of three entire seasons or three years, whichever comes first, following the entry into force of a contract, where such contract is concluded prior to the 28th birthday of the professional, or two entire seasons or two years, whichever comes first, following the entry into force of a contract, where such contract is concluded after the 28th birthday of the professional"* (no 7). The protected period starts again in case the duration of the initial contract is extended (Art. 17 para. 3 i.f.).

9. CAS 2008/A/1429 & 1442. Addressing a first issue, the Panel had come to the conclusion that the player had concluded a valid employment contract with IK Start (which the player contested) and that, as a result, the fact that the same player had subsequently concluded an employment contract with AS St-Etienne therefore implied that the existing contract with IK Start had been unilaterally broken without a valid reason during the protected period (para. 6.14).

10. CAS 2008/A/1429 & 1442, para. 6.23. See also CAS 2008/A/1568, para. 6.57.

11. CAS 2008/A/1674, para. 8.2.

12. DE WEGER F., The Jurisprudence of the FIFA Dispute Resolution Chamber, The Hague 2008, p. 113 ff. The FIFA Commentary of the RSTP provides that a player breaching his contract during the protected period *"risks"* a restriction on his eligibility to play; cf. FIFA Commentary on the Regulations for the Status and Transfer of Players, No 2 para. 2 ad Art. 17.

and of the DRC in particular, to decide on a case by case basis whether to sanction a player or not. Even though it is fair to say that the circumstances behind the decisions filed by FIFA to demonstrate such practice differ from case to case, there is a well accepted and consistent practice of the DRC not to apply automatically a sanction as per Art. 17 para. 3. Such interpretation of the rationale of Art. 17 para. 3 may be considered contrary to the literal interpretation, but appears to be consolidated practice and represents the real meaning of the provision as it is interpreted, executed and followed within FIFA"[13].

In the most recent awards related to the subject, the CAS panels have come to a solution that reconciles both trends, as is summarised in the case CAS 2008/A/1568: *"FIFA and CAS jurisprudence on this particular article 17 para. 3 may be considered not fully consistent, mainly since the decisions are often rendered on a case by case basis. The consistent line however is that if the wording of a provision is clear, one needs clear and strong arguments to deviate from it, that is to justify not imposing the sanctions as laid down in article 17 para. 3"*[14]. The principle is therefore that the four months sanction must be imposed except when exceptional circumstances command to apply the principle of proportionality in order to adapt the length of the sanction to the seriousness of the infringement. This is also in line with the 2001 version of the RSTP, of which Article 23 clearly specified that such sanction was to be applied *"other than in exceptional circumstances"*[15].

B. The aggravating circumstances

Article 17 para. 3 RSTP provides that in case of aggravating circumstances, the restriction on the eligibility of the player will be of six months. However, no definition of these "aggravating circumstances" is given in the Regulations or in the Commentary of the Regulations. It will therefore be up to the jurisprudence of both the DRC and the CAS to outline the notion insofar as the number of cases will allow it, as, to our knowledge, only one CAS award has dealt with it for the time being.

In this particular case, an Egyptian player had signed in January 2005 an employment contract with the Greek club of PAOK while still under contract with the Egyptian club Zamalek[16]. The DRC found the player to be in breach of the contract without just cause and declared him ineligible to play for four months. After his suspension, the player played for PAOK for one year and then left on 14 April 2006 for a 10-day holiday in his country of origin, where he was called to serve the military service and was therefore obliged to stay for the next three years. While in Egypt, the player signed a new employment contract with Zamalek in November 2006. Again, the DRC found that the player had breached his contractual obligations with PAOK without just cause and imposed a restriction of six months on his eligibility to play in official matches, which the player contested before the CAS[17].

As regards the "impossibility of performance", the Panel explained that it could qualify as a reason to void a contract or to terminate it without consequences for any of the contracting parties if two criteria were met: a) the impossibility was unforeseen, and b) the debtor was not responsible for the impossibility. The Panel found that neither of the two criteria was met in the case at hand since the player could not have been unaware when he had signed the contract with PAOK that the military service was mandatory in his country and that by visiting it in April 2006 he had acted at least negligently, in that he had accepted the risk of being retained for not having served his military obligations[18]. The player was therefore to be considered liable for the breach of the contract with all the financial and disciplinary consequences attached to this breach.

As regards the disciplinary sanctions, the Panel noted that the player had breached employment contracts twice within a time period of 18 months, therefore showing *"remarkable disrespect towards one of the main principles of professional football: contractual stability"*. Contrary to the player's submission that the notion of "aggravating circumstances" had to be differentiated from a repeated offence, the Panel found that a repeated offence was to be regarded as an aggravating circumstance likely to entail the more severe sanction of six months[19].

13. CAS 2007/A/1358, paras. 120-121.

14. See CAS 2008/A/1568, paras. 6.58-6.59; see also CAS 2007/A/1429 B. v. FIFA and IK Start & CAS 2007/A/1442, para. 6.24.

15. Circular No 769 of 24 August 2001 that informed the National Associations of the amendments to the regulations regarding international transfers provided that the DRC had to take into account *"all relevant circumstances, be they factual or legal, in fixing the duration of the sanction, in accordance with general principles of law"* (p. 11). In the *Mexès* case, the Panel upheld the findings of the DRC with regard to the exceptional circumstances that justified imposing a sanction of only six weeks of ineligibility to play to the player. The DRC had found that the very long contractual relationship between the player and AJ Auxerre (7 years) as well as the persistent lack of collaboration of the club towards the player were mitigating circumstances (TAS 2004/A/708 Mexès c. FIFA & TAS 2004/A/709 AS Roma c. FIFA & TAS 2004/A/713 AJ Auxerre c. AS Roma et Mexès, sentence du 11 mars 2005, para. 81). In another case however, the Panel found that the fact that a player was not qualified to play for his new club during two months due to the opposition of another club was not an exceptional circumstance that justified to reduce the four months suspension of the player (TAS 2006/A/1082 Real Valladolid c. B. & Club Cerro Porteño & TAS 2006/A/ 1104 B. c. Real Valladolid, sentence du 19 janvier 2007, para. 101).

16. CAS 2008/A/1448. The contract with Zamalek indicated a period of validity until the 2005-2006 season.

17. The player submitted that he had a just cause to terminate the employment contract on the basis of "impossibility of performance" due to *force majeure*, since he had been arrested upon his arrival in Egypt and obliged to join the army forces for a period of three years without being able to travel abroad.

18. CAS 2008/A/1448, para 7.3.

19. CAS 2008/A/1448, para. 7.4.7.

C. The possibility to impose an ineligibility sanction after the protected period

According to Article 17 para. 3 *in fine* RSTP, if a player breaches his employment contract without just cause after the protected period, no ineligibility sanction will be imposed except if the player fails to give due notice of termination within 15 days of the last match of the season.

Even in this latter case, such sanction is not mandatory: the Regulations provide that *"[d]isciplinary measures* may *(…) be imposed"*. In any case, the sanction will need to be in direct relation to the moment when the termination of the employment contract was notified. The four-month restriction on eligibility is not applicable in such situations, as it would be excessive[20].

D. The notion of "official matches"

The ineligibility sanction applies to the "official matches" of the player. The Regulations define the "official matches" as the *"matches played within the framework of organised football, such as national league championships, national cups and international championships for clubs, but not including friendly and trial matches"*[21]. In the abovementioned *S. & Zamalek SC* case, the player had submitted that a match of his national team did not fall under the definition of "official matches" in the Regulations.

Recalling the aforementioned definition as well as the definition of "organised football"[22], the Panel found that the list of the official matches was rather indicative and not limited since it started with the words "such as". Furthermore, neither of the two definitions did exclude matches between representative teams of associations, organised under the auspices of FIFA (e.g. the FIFA World Cup) or a confederation (e.g. the Africa Cup of Nations)[23]. When declared ineligible for playing in official matches, a player was therefore also prevented to take part in a game with his national or representative team.

E. The starting date of the sanction

According to Article 17 para. 3 RSTP, the sanction shall take effect *"from the start of the following season at the new club"*. The Commentary of the RSTP points out that the aim of the provision is to ensure that the sanction is effective for the player and the new club, since a sanction that would be imposed during the period between two seasons would have no deterrent effect. However, if the player is *prima facie* responsible for the breach of contract without just cause when it happens, registration for the new club will only be granted after the decision on the merits of the matter. During the period between the breach and the decision on the merits, the player will remain registered with his former club and the sanction will only take effect as from the registration with the new club[24].

It exists therefore a risk that the sanction will in fact last longer than four months since it seems hardly conceivable that a player who breached his contract or unilaterally terminated it will keep playing with his former club until a decision on the substance of the case will be taken by the DRC. For example, if the decision is taken at the end of October, a player who terminated his contract without just cause in June, at the end of the previous season, will not be able to play with his new club from the beginning of the new season, say, beginning of September, until the end of October, and then will be suspended for four months if he is found responsible for the breach. Moreover, if an appeal is filed with the CAS against the decision of the DRC, the factual suspension could even be longer since the final decision on the merits would only be taken at the end of the proceedings before the CAS.

The risk is however more theoretical than real since, following respective jurisprudence of the CAS according to which a player cannot be compelled to remain with or return to his former club[25], it is nowadays common practice for the Single Judge of the FIFA Players' Status Committee to provisionally grant registration for the new club after the breach or the unilateral termination has occurred, without waiting for and pending the decision on the substance of the case. Besides, if it does not appear *prima facie* that the player has no reasonable chance of success, the stay of the execution of the decision appealed against will usually be granted before the CAS, based on the assertions that 1) the player would suffer irreparable harm if he was deemed ineligible to play for a certain period of time but that a Panel were eventually to find that the suspension should be set aside, and 2) as regards the balance between, on one side, the interest of the player not to suffer irreparable harm and, on the other side, the interest of FIFA to maintain contractual stability, the interest of the player will prevail since the stay of the execution of the decision will only have the effect of postponing

20. FIFA Commentary on the Regulations for the Status and Transfer of Players, No 2 para. 5 ad Art. 17, note 86.

21. Definition no 5 RSTP.

22. According to Definition no 6 RSTP, "organised football" is the *"association football organised under the auspices of FIFA, the confederations and the associations, or authorised by them"*.

23. CAS 2008/A/1448, para. 7.4.10.

24. FIFA Commentary on the Regulations for the Status and Transfer of Players, No 2 para. 2 ad Art. 17, note 82.

25. See *infra*.

the potential sanction, but not to cancel it, therefore not undermining its deterrent effect[26]. As for the period of suspension possibly served between the notification of the DRC decision and the granting of the stay of the decision by the CAS, it will be discounted from the four months suspension, in case the latter is confirmed[27].

In more recent cases, the panels have opted for a literal interpretation of the provision in order to tackle the problem of the usual delay between the decision of the DRC and the notification of said decision to the player[28]. They found that the literal interpretation of the words *"following season"* referred to the season after the event that had given rise to the termination of the contract and that, therefore, the sanction had to start from the commencement of the next season wherever the player might find himself[29]. In another case[30], the Sole Arbitrator decided that the sanction had to take effect *"as from the first day of the registration of the player with a new club"*[31], therefore leaving open the question as to whether it meant the actual new club (this being the logical conclusion ensuing from a literal interpretation of *"the following season at the new club"*[32] contained in Article 17 para. 3 RSTP and from a teleological interpretation of the provision, since the objective of FIFA was that the sanction would also have a deterrent effect on the club hiring the player in breach[33]) or any new club that the player would join after completion of his actual employment contract (the use of the word *"registration"* appearing to favour this interpretation). As regards the length of the suspension, the Panel in the *Al-Hilal* case decided that the period that had lapsed as between the notification of the DRC decision to the stay of execution of the decision had to be discounted[34], therefore adopting the same solution than in the older cases.

As regards the question of whether the suspension should start on the day of the notification of the CAS decision or on the first day of the new season following the completion of the actual one, the Panel in the *Mexès* case stated that, as the new season had already started, it was impossible to follow the letter of the provision and that, therefore, the sanction had to take effect on the day of the notification of the CAS decision[35]. This solution had already been adopted in the *Ortega* case[36]; it was also in line with the position of the DRC which is to consider the wording of the provision as a mere guideline, not strictly binding but giving also the possibility to decide on another starting point for the player's sanction[37]. In the *Al-Hilal* case however, the Panel decided that, according to a clear, unambiguous and literal interpretation of Article 17 para. 3 RSTP, the sanction was to commence from the commencement of the next season wherever the Player may find himself[38].

F. The addressee of the appeal against the sanction

If a player wants to appeal against the sanction imposed upon him, he must summon the correct respondent. In a case in which he had brought before the CAS the decision by the DRC that had found him to be in breach of his employment contract, a player only named his former club as respondent, but not FIFA. The Panel found that while the club had standing to be sued with respect to the financial sanction imposed upon the player, it was clearly not the case as regarded the disciplinary sanction since, by seeking the annulations of it, the player was not claiming anything against the club, but against FIFA. It was therefore only FIFA that had standing to be sued with regard to the disciplinary sanction; since the player had only directed his appeal against his former club and not against FIFA, he could not seek relief for the disciplinary sanction[39].

III. Can other measures be taken against the player?

If a player is found to have breached or unilaterally terminated his employment contract, can other measures (be they disciplinary or injunctions) be taken against him? Although Article 17 para. 3 RSTP does not provide for any other sanction, clubs often ask, *inter alia*, that the player be compelled to remain with or return to his former club.

In a case where the player had terminated his employment contract, the former club had requested

26. See e.g. CAS 2008/A/1674, order on request for provisional and conservatory measures of 14 November 2008, paras. 7.11 ff.; CAS 2004/A/780, order on provisional measures of 6 January 2005, paras. 5.10 ff.

27. CAS 2004/A/780, para. 114.

28. Although the usual delay is of two or three months, it occasionally happens that it is much longer; for instance, in the case CAS 2008/A/1674 Al Hilal Al-Saudi Club v. FIFA, the decision of the DRC was dated 30 November 2007 but had only been notified to the parties on 29 September 2008.

29. For instance CAS 2008/A/1674, para. 8.3.2; CAS 2008/A/1429 & 1442, para. 5 of the operative part.

30. CAS 2007/A/1369.

31. Our emphasis.

32. Our emphasis. The use of the article "the" indeed supposes that the club in question is already identified.

33. See the FIFA Commentary on the Regulations for the Status and Transfer of Players, No 2 para. 2 ad Art. 17, note 82.

34. CAS 2008/A/1674, para. 8.3.3.

35. TAS 2004/A/708 & TAS 2004/A/713, para. 83.

36. CAS 2003/O/482, para. 13.3.

37. Cf. CAS 2008/A/1674, order on request for provisional and conservatory measures of 14 November 2008, para. 7.15.

38. CAS 2008/A/1674, para. 8.3.2. For this reason, FIFA is now considering amending Article 17 para. 3 RSTP in order for it to provide a legal ground for more flexibility.

39. CAS 2008/A/1677, paras. 92-96.

FIFA that the player be ordered to return to it immediately. In its decision, the DRC had deemed the contract to still be valid and had ordered that the player immediately resume duty with his former club. The player appealed of this decision before the CAS; in its award, the Panel found that although the player had no valid reasons to terminate his employment contract early, the decision of the DRC regarding the obligation to resume services with the former employer could not be upheld. The Panel recalled the position of Swiss law as well as of CAS jurisprudence, which is that if a player is terminating his employment contract without valid reasons, he is – notwithstanding the possibility of disciplinary sanctions – obliged to compensate for damages, if any, but not obliged to remain with the employer or to render his services there against his will[40].

In other cases, the panels had the occasion of pursuing the same reasoning with regard to other national laws, always coming to the same result. For instance, in a case involving a Brazilian player and a Greek club, the Panel stated that it was not only the position under Swiss law, but also under Greek and common law that a person *"should not be compelled to remain in the employment of a particular employer. An employee who breaches an employment contract by wrongful and premature withdrawal from it may be liable in damages, but not to an injunction"*[41]. In a case involving a Dutch club, the Panel repeated that it was the position under Swiss law and under the CAS jurisprudence that an employee who breaches an employment contract may not be liable to an injunction to remain with his employer. It added that the Dutch club had not demonstrated that Dutch law or any other law applicable to the employment contract would prohibit the player to be transferred from the Dutch club to another one[42].

In the latest cases, the panels have confirmed this longstanding CAS jurisprudence. In a case involving a Polish player who had unilaterally terminated his employment contract with a club of his country to join an Italian club, the Sole Arbitrator recalled the findings of one of the former cases and stated that he did not see any reason to depart from the position expressed in it[43].

IV. Standing of the clubs regarding the sanction imposed on the player

Although the player is the first one to be affected by the sanction of ineligibility to play, the new club may also be affected by the suspension since it momentarily looses the services of an element on which it was obviously counting. Can therefore the new club substitute itself for the player in order to appeal against the sanction?

Also, the former club may have an interest that the player who breached an employment contract that he had with it be suspended so to serve as an example towards other players of its rooster that might also be tempted to leave. It may also be simply willing to prevent the player in breach to play, at least for a while. However, are those interests sufficient to require that a sanction be imposed on the player or that the sanction be aggravated?

A. Standing of the new club to appeal against a sanction imposed on the player

As regards the first question, a panel was once confronted with a club appealing against the decision of the DRC to impose an eligibility restriction of four months to one of its players. As the Respondent, the FIFA had submitted that the club was *"the wrong plaintiff and [had] no active legal standing to appeal the sporting sanction in question"*, as it was *"affected by the sanction for the breach of contract only indirectly"*[44].

For the Panel, the issue was to determine whether the club had a *"sufficient interest"* in the matter being appealed. It first stated that *"sufficient interest"* was *"a broad, flexible concept free from undesirable rigidity, which includes whether the club can demonstrate a sporting and financial interest"*. It then referred to former CAS jurisprudence, emphasising that the requirement was satisfied if it could be stated *"that the appellant (i) is sufficiently affected by the appealed decision and (ii) has a tangible interest, of financial or sporting nature, at stake"*. Finally, it considered that in the individual case, the club was directly affected by a decision of the DRC since, as a result of the decision, it was deprived of a player's services throughout his suspension, which had a direct impact on the club's team. The fact that the club had paid a substantial sum to retain the player and continued to pay the player's salary, despite the player's suspension, was also an argument. Furthermore, as the club was found jointly and severally liable to pay the compensation awarded by the DRC, it had a financial interest to appeal the sanction[45].

40. CAS 2006/A/1100, para. 8.3 with references.

41. CAS 2004/A/678, para. 8.3.

42. CAS 2005/A/835 & 942, para. 117 with references.

43. CAS 2008/A/1691, para. 59 with reference to CAS 2006/A/1100, para. 8.3.

44. CAS 2008/A/1674, order on request for provisional and conservatory measures of 14 November 2008, para. 3.11.

45. CAS 2008/A/1674, order on request for provisional and conservatory measures of 14 November 2008, paras. 7.2-7.6 with reference to CAS 2005/A/895, para. 67.

B. Standing of the former club to require that a sanction be imposed on the player

As far as the second question is concerned, the Panel in the *Mexès* case found that the duration of a suspension regarding a player who is not anymore part of its rooster had no effect on this player's former club. Therefore, the latter had no legally protected interest to require that a sanction be imposed on the player or that the sanction be aggravated[46].

The CAS confirmed this orientation in a later case in which the Panel stated that no rule of law, either in the FIFA Regulations or elsewhere, was allowing the club victim of the breach of contract to request that a sanction be pronounced. Indeed, the system of sanctions laid down rules that applied to the FIFA, on the one side, and to the player or to the club that hired the player, on the other side. A third party had no legally protected interest in this matter[47].

46. TAS 2004/A/708, para. 78.

47. TAS 2006/A/1082 & 1104, para. 103.

Lifetime ineligibility according to the WADA Code

Issues related to lifetime ineligibility in doping cases in the light of the jurisprudence of the Court of Arbitration for Sport (CAS)

Dr Despina Mavromati, Counsel to the CAS

I. The 2009 WADA Code (2009 WADC): provisions on lifetime ban

A. Life ban as regulated in the 2009 WADC

The 2009 World Anti-Doping Code (2009 WADC) foresees the sanction of ineligibility for life[1] in various provisions and for various violations of the anti-doping rules. In most cases, a life ban is not a so-called "standard" sanction, but the adjudicating instance enjoys a certain degree of flexibility. In this respect, according to Article 10.3.2, for trafficking or attempted trafficking, administration or attempted administration of prohibited substance or prohibited method, the period of ineligibility is a minimum of four years up to lifetime ineligibility, unless the conditions for establishing a reduced sanction are met. Moreover, a violation of an anti-doping rule involving minors is considered to be a particularly serious violation. It results in lifetime Ineligibility if committed by the medical or other personnel of the athlete[2] for violations including prohibited substances which are not included in the list of specified substances.

The flexibility of the adjudicating instance when imposing the disciplinary sanction is also reflected in cases in which an athlete or other person successfully establishes in an individual case that he bears no significant fault or negligence (see, for instance, Article 10.5.2 of the 2009 WADC): the adjudicating instance has the prerogative to reduce the otherwise applicable period of ineligibility, and in case a life ban was to be imposed on the athlete, the adjudicating instance has the power to reduce the otherwise applicable sanction, but no less than eight (8) years.

Inversely, there are circumstances which may justify the imposition of a period of ineligibility greater than the standard sanction (see comment to Article 10.6 of the WADC), such as the athlete or other person committing the antidoping rule violation as

1. For the purposes of this paper, "lifetime ineligibility", "life ban" and "ineligibility for life" are considered as having an identical meaning.

2. For the purposes of this paper, "he" is also used to refer to female persons.

part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations; or the use / possession of prohibited substances- or methods on multiple occasions. The list enumerated in the comment to Article 10.6 is not exclusive and other aggravating factors may also justify the imposition of a longer period of ineligibility. It is noted that "*Violations under Articles 2.7 (Trafficking or Attempted Trafficking) and 2.8 (Administration or Attempted Administration) are not included in the application of Article 10.6 because the sanctions for these violations (from four years to time Ineligibility) already build in sufficient discretion to allow consideration of any aggravating circumstance*".

Finally, according to Article 10.7.3, a third anti-doping rule violation always results in a lifetime period of ineligibility, except if the third violation fulfils the condition for elimination or reduction of the period of ineligibility under Article 10.4 or involves a violation of Article 2.4 (filing failures and/ or and missed tests). In these particular cases, the adjudicating instance has the flexibility to impose a suspension from eight (8) years up to a life ban on the athlete.

B. Second anti-doping rule violation and life ban according to the WADC

Under the terms of the 2009 WADC, the second anti-doping rule violation does not automatically or does not always lead to lifetime ineligibility. Article 10.7.1 includes a table indicating the cases of a second anti-doping rule violation which may lead to lifetime ineligibility. In this respect, the 2009 WADC differentiates between the different "categories" of anti-doping rule violations and refers to standard sanctions; reduced sanctions for specified substances under Article 10.4; refusal to submit to sample collection; no significant fault or negligence under Article 10.5.2; aggravated circumstances which may increase the period of the sanction; and, finally, trafficking which is alone a very serious offence of the anti-doping rules.

In case of a first doping offence including trafficking, the second violation will almost always lead to a life suspension unless the second violation consists of a reduced sanction including a specified substance under Article 10.4 of the 2009 WADC. In those cases, the sanction to be imposed will vary between 8 years and a life ban. In all other cases, a second violation involving trafficking will lead to life ineligibility.

As regards aggravating sanctions foreseen in Article 10.6 of the 2009 WADC, second violations lead to a ten-year suspension up to a life ban for cases of missed tests or refusal to submit to sample collection and cases where no significant fault or negligence could be established. For a second violation involving a standard sanction, a case of trafficking or a (second) aggravating sanction, the applicable sanction is the (standard) life ban.

The applicable sanction in case of a first standard sanction and a second violation including trafficking or aggravating circumstances will be the life ban, whereas in case of two standard violations the sanction will vary from eight-years up to a life ban.

In case of a first doping offence with no significant fault or negligence or for missed tests or failure to submit to sample collection, a second anti-doping rule violation can only result in a life ban if it is associated with an aggravating sanction of Article 10.6 (10 years up to life ban) or trafficking (standard life ineligibility).

Finally, if the first anti-doping rule violation concerns a reduced sanction for specified substances under Article 10.4, a second anti-doping rule violation may lead to a life ban only in case of trafficking. In this case, the adjudicating instance has the margin to impose from ten years up to a life ban.

II. CAS case law on lifetime ban

A. Fixed sanctions imposing life ineligibility and CAS power to modify fixed sanctions

In 2002, WADA had not yet adopted the WADC. CAS Panels had however imposed the life ban in some instances[3]. Prior to the adoption of the WADC, international federations used to regulate the sanction of a life ban (or rather the reasons leading to such sanction) individually and in a somehow fragmented way. While some rules provided for a flexible sanction, in case of a second offence, which could lead to a life ineligibility (see for instance Article 130 of the UCI Anti Doping Examination Regulations), other Anti-Doping rules were stricter, in that they provided for a fixed life ban (in case of a second anti-doping rules violation, see for example Rule 60.2(a) (ii) of the IAAF Anti-Doping Rules). As stated in CAS 2002/A/383[4], fixed sanctions do not require any proof that the penalty being applied is just and equitable, but only that the doping violation has occurred[5].

3. See CAS 2002/A/383, para. 193; see Richard MCLAREN, Doping Sanctions: What Penalty?, International Sports Law Review, 2002, p. 23, 27.

4. See 2002/A/383, para. 193.

5. See also MCLAREN, *op. cit.* fn.3, p. 25.

More precisely, and as established through the previous CAS case law[6], the fixed sanction provided for by the anti-doping regulations of an international federation and the imposition of such a fixed sanction on the athletes should in principle be automatically applied by the CAS Panels, unless their application is arbitrary or the sanctions are excessive or unfair. In CAS 96/157 the Panel emphasized that "*(...) it can intervene in the sanction imposed only if the rules adopted by the FINA Bureau are contrary to the general principles of law, if their application is arbitrary or if the sanctions provided by the rules can be deemed excessive or unfair on their face*".

In 2002/A/383 (para. 195), under the application of the so-called fixed sanction (i.e. life ban) for the second violation of the anti-doping rules, the Panel imposed a life-ban on the athlete (in accordance with IAAF Rule 60.2 a). The Panel, although recognizing that a life-ban was a very harsh penalty, found that the life ban sanction imposed by the IAAF according to its regulations was reasonable and appropriate (*see below under "proportionality"*). The reason was that in case of a fixed sanction foreseen by the regulations of the federation (in casu the IAAF), the CAS Panel had no jurisdiction to consider exceptional circumstances in fixing the sanction since this was not provided by the rules[7].

B. Proportionality of a life ban according to CAS Panels

Apart from the specific case of fixed sanction that has been presented above (where CAS Panels have little – or almost no flexibility), several CAS panels have observed that "*[w]hatever the nature of the offence may be, […] the special circumstances of each case must be taken into account when determining the level of the sanction*"[8]. It bears mention that, whereas the case 2000/A/218 did not relate to a life-ban, the Panel referred to the need to take into consideration the specific circumstances of each case.

1. First doping violation and lifetime ineligibility

In general, "*arguments for the life-time ban for first time ADR violations sit uncomfortably with the legal concept of proportionality, since it is simply not proportionate to prevent a professional person from pursuing his chosen profession after one isolated proven transgression of the rules; moreover, an instant lifetime ban leaves no room for the concepts of genuine contrition, insight and rehabilitation; these are not just idealistic notions as chambers himself has demonstrated*" (see also Norris J., *Drugs A life-time ban for first time cheats?*, in Inside Track, May 2009, p. 2).

However, in CAS 2001/A/330, the Panel found that the lifetime ineligibility imposed on the athlete for his first doping violation was proportionate (paras. 46-47) because, according to the Panel, some international federations were willing to impose higher minimum sanctions as a "*demonstration of their determination and commitment to the eradication of doping in their sport*"[9].

Another criterion justifying the lifetime ineligibility would be the particularly serious character of the offence. For example, the anti-doping rules of the International Ski Federation (FIS) consider a case to be particularly serious if the anti-doping rule violation is committed on a minor[10].

In CAS 2008/A/1513, the Panel established some additional criteria regarding the proportionality of the life ban. The case concerned a coach of the national cross-country skiing team who was sanctioned for life following a multiple doping offence (possession of a prohibited method and intentional assistance to violate the anti-doping rules of an international federation). The Panel stressed the importance of taking the principle of proportionality into account, particularly in cases where the applicable rules regarding the extent of the sanction grant CAS an ample scope. The Panel went on to note that the sanction imposed must be proportionate and in line with the seriousness of the offence. While the previous instance (i.e. the FIS Doping Panel) considered the anti-doping rule violations as two separate infractions, the CAS Panel considered them as one anti-doping rule violation and determined the applicable sanction on the basis of Article 2.8 FIS anti-doping rules, which carries the most severe sanction. In this respect, the FIS Doping Panel imposed the highest possible sanction (according to Art. 10.4.2 FIS anti-doping rules, the period of ineligibility imposed is a minimum of four years up to lifetime ineligibility, in the light of the fact that violations of Art. 2.8 FIS anti-doping rules are considered particularly serious under the WADC[11]).

On its side, the CAS Panel also found that the offence committed by the coach was a serious offence, since the coach provided substantial help for multiple third-party anti-doping rule violations and he was involved in, so to speak, a larger doping conspiracy and thereby demonstrated a high degree of criminal energy. Furthermore, such doping

6. However, for non doping-related cases, see CAS 96/157, Award of 23 April 1997, Matthieu Reeb (ed.), CAS Digest I, p. 351, 358-359, para 22 and CAS 2002/A/360, para. 59.

7. See CAS 2002/A/383, para. 199.

8. CAS 2000/A/218, para. 79, Matthieu Reeb (ed.), CAS Digest II p. 411, 417, para. 17.

9. CAS 2001/A/330, paras. 46-47.

10. See 2008/A/1513, para. 30.

11. See CAS 2008/A/1513, para. 29.

practices were particularly dangerous for the athletes concerned. However, the CAS Panel found that the offence had not reached a level of seriousness that would justify the highest possible sanction, i.e. the coach's life ineligibility from participating directly or indirectly in any FIS sanctioned event for the rest of his life. According to the Panel, such a sanction would be appropriate if the coach was the principal or the leader of the doping conspiracy surrounding the Austrian cross-country ski team, and the Panel had substantial doubts about this (i.e. the Panel could not exclude that other, higher-ranking officials, were at the top of the doping conspiracy). The Panel concluded that the coach had a decisive leadership responsibility in the doping scandal, but not the sole or supreme leadership responsibility and therefore it was not appropriate to penalise the coach as the head; it thus decided to impose only a limited period of ineligibility to be proportional[12].

By calculating the sanction to be imposed on the coach, the Panel considered the age of the coach, together with the date of his retirement and imposed a sanction corresponding to the 2/3 of his remaining career up to his retirement (i.e. 15 years) rather than a life ban (see CAS 2008/A/1513, para. 32).

2. Proportionality of a life-ban for a second doping offence

In CAS 2002/A/383 (para. 198), the Panel found that the lifetime suspension imposed on the athlete for his second doping offence was "*severe but not disproportionate*". The Panel's findings were based on several factors: in particular, the Panel took into consideration the fact that the athlete was *not* a first time offender (and the same argument was used in an American Arbitration Association (AAA) arbitration, even though the applicable rule in question (i.e., Article 130 UCI anti-doping rules) provided the panel with some discretion in fixing the sanction)[13]. Therefore, at the time the award CAS 2002/A/383 was rendered, the basic criterion in order to deem a life-ban proportionate was the fact that the athlete committed the same infraction twice, and this was equally in favour of the legal doctrine[14].

3. Other arguments in favour of lifetime ineligibility

Other factors that are generally taken into account are the levels of the prohibited substance found into the athlete's urine sample (this applies, in principle, to the so-called "threshold substances"). In CAS 2002/A/383, the Panel compared the level of the prohibited substance found in the athlete's urine sample to other IAAF affiliated athletes[15]. In CAS 2002/A/383 (para. 195), the courts found that a life ban was proportionate (i.e., as a reasonable restraint of trade) in order to protect the athlete's own health, to discourage young people from doing the same and to protect other athletes' right to a fair competition (i.e reasons of public interest).

In CAS 2008/A/1572, 1632 & 1659 (para. 4.81) the Panel calculated the applicable sanction and imposed a life ban on the athlete on the basis of the fact that the second doping offence of the athlete (tampering with a doping control) was committed under aggravating circumstances and therefore an aggravated sanction was warranted. According to the CAS Panel, "*tampering is a particularly serious offence because tampering reveals that the Athlete knew about the presence of testosterone which she tried to hide by the manipulation. It is not only the intake of testosterone but also the additional effort to manipulate the doping control (...)*"[16].

In 2008/A/1585 & 1586, the CAS Panel found that the doping offences were so serious that justified the maximum sanction (i.e life ban), even if the applicable regulations provided for a sanction between eight years up to lifetime ineligibility.

4. Professional athletes as persons whose work is regulated

In 2006/A/1149 & 1211[17] the athlete (a football player) was tested positive twice, and the second doping offence occurred during the period of suspension. The Panel rejected the athlete's argument that the second test was conducted while he was serving his suspension and therefore the prohibited substance detected had remained in his body from the time of the initial test. Moreover, the Panel noted that, according to Art. 66 of the FIFA Disciplinary Code, athletes were obliged to undergo doping tests while serving suspension.

The athlete argued that a life ban would deprive him of the possibility to pursue his preferred profession. However, the Panel noted that those who seek to make their livelihood in professional sports should not violate the anti-doping rules. Those rules exist not only in the interest of an athlete's own health, but also in the public interest of discouraging doping among younger athletes, as well as of ensuring that

12. See CAS 2008/A/1513 para. 31.

13. see AAA N° 30-190-00505-02, *USADA c Tammy Thomas*, Award of 6 September 2002, p. 19, available at http://www.usantidoping.org.

14. MCLAREN, *op. cit.* fn. 3, p. 32.

15. *Slaney v. Int'l Amateur Ath. Fedn*, 244 F.3d 580, 7th Cir. Ind. Mar. 27, 2001 and *Johnson v. Athletics Canada*, [1997] O.J. No. 3201, DRS 98-01748 Court File No. A4947/97.

16. See CAS 2008/A/1572, 1632 & 1659, para. 4.82.

17. See CAS/A/1149 & 1211, paras. 47 ff.

all professionals compete with an equality of arms, and that those for whom sports have an important meaning are not disaffected by the degeneration of ethical standards. Interestingly, the Panel associated professional athletes to physicians or public servants or accountants (i.e. persons whose work is regulated) and noted that those persons face disqualification if they violate the rules to which they are held. According to the Panel, anti-doping rules are designed and intended to protect athletes who compete fairly, and to punish those who do not. The latter should thus be prepared to face the consequences when they transgress the rules.

5. Expulsion for life for disciplinary cases unrelated to doping offences

The CAS also had to deal with the case of a life-ban for another disciplinary matter – this time a doping-unrelated case. In CAS 2007/A/1291, a licensed swimming coach entered into a fight with his daughter during the preparations for a competition and the fight was captured by a remote video camera and later circulated into the media. FINA found that the coach had violated its code of conduct by damaging the image of the FINA activities and bringing them into disrepute. The CAS Panel found[18] the coach's conduct aggressive and violent "*to such a degree that it constitutes an act of misbehaviour within the meaning of Article 2 (b) of the FINA Code of Conduct*". However, the Panel clarified that the coach did not bring the sport into disrepute but his conduct had the potential of bringing the sport into disrepute. The Panel found that the initial sanction imposed by FINA, namely an expulsion for life "*from activities under the jurisdiction of FINA and Member Federations*" was a harsh, severe and disproportionate sanction in the circumstances of the particular case, especially in the light of the fact that it was not successfully established that the conduct of the coach brought the sport of swimming into disrepute. Finally, the Panel found that the appropriate sanction was that of suspension rather than expulsion, and, after taking into consideration the special nature and unusual circumstances of the conduct of the coach, imposed a suspension for a period of 8 months as an "*appropriate and proportionate sanction*" for his conduct[19].

One could more generally infer that in this kind of disciplinary cases, the CAS Panels are more reticent to impose a lifetime suspension as they are in purely doping-related matters.

18. See CAS 2007/A/1291, paras 12 ff.

19. See CAS 2007/A/1291, para. 28.

C. Difference between recidivism and "second doping offence"

According to the CAS case law, the second doping offence does not presuppose two identical doping violations, but those may be different in nature: in CAS 2006/A/1159, the athlete's first violation consisted of the possession of prohibited substances; less than four months after his return to competition, the athlete committed his second doping offence. The Panel took into consideration the fact that the athlete committed his second infraction in such a short timeframe and rejected the athlete's argument that the second offence was a case of "*recidivism*" and not a second violation as such, on the grounds that the offenses committed (possession of doping substances on the one side and use of doping substances on the other) were not of the same nature[20]. According to the application of the IAAF anti-doping rules, the doping offences are considered *lato sensu*, and do not presuppose the same form of offence.

D. Second violation and the "exceptional circumstances" defence

In CAS 2006/A/1159, the Panel tried to examine whether the lifetime ineligibility following the establishment of the second violation of the anti-doping rules by the athlete could be avoided through the existence of "*exceptional circumstances*". However, it rejected the argument that the substance detected in the athlete's urine sample (methadone) was considered as "*atypical*" and would not enhance the athlete's performance on the grounds that the list of prohibited substances was established every year by WADA for all athletes: the Panel was thus not obliged to examine the specific character of the prohibited substance or the effect the substance could have on the specific sport. The Panel equally rejected the athlete's argument that he was not conscious of taking the prohibited substance, and repeated the athlete's personal responsibility of what enters his body, but also the duty of care of professional athletes, especially after the first doping offence (also in line with the well-established CAS case law on the subject)[21].

In CAS 2008/A/1585 & 1586 (para. 114 ff.) the Panel dealt with an athlete who had committed multiple doping offences. However, the Panel, because of the seriousness of having to decide upon a life ban (and in order to clearly establish that multiple doping offences were committed), required the production of further documents relating to the first anti-

20. See CAS 2006/A/1159, para. 47.

21. See *inter alia* TAS 2004/A/690, TAS 2005/A/847, TAS 2003/A/484, TAS 2005/A/990 and CAS 2006/A/1067.

doping rule violation the athlete was accused of. The documents establish with certainty that the first violation, which was notified to the athlete in 2004, concerned charges for a violation of IAAF anti-doping rule 32.2 (c) (refusal or failure to submit to doping control) and of rule 32.2 (e) (tampering with doping control), and that the athlete accepted the two-year ineligibility decided by the IAAF disciplinary committee and renounced appealing to the CAS. Consequently, the Panel found that the existence of a first anti-doping rule violation by the athlete and its proper notification to the athlete have been proven.

Concerning the athlete's second anti-doping rule violation, committed in 2007 and relating to the presence of a prohibited substance (IAAF Rule 32.2 (a)), the Panel stressed that neither the results of the A and B samples nor any aspect of the testing had been challenged. Consequently, the existence of the anti-doping violation could be established and the question that remained was whether (according to IAAF Rule 40.2) "… *there are exceptional circumstances in the case such that the athlete or other person bears no fault or negligence for the violation*" enabling the ineligibility sanction to be eliminated[22].

In accordance with IAAF Rule 40.2, in order to benefit from a finding of exceptional circumstances, "… *the athlete must establish how the prohibited substance entered his system…*". The Panel considered the athlete's explications (i.e that the prohibited substance entered her body due to the ingestion of contaminated meat or food supplements) as unconvincing according to the balance of probabilities test[23] since the athlete adduced no concrete evidence as to how the prohibited substance entered her body[24]. It therefore found that the athlete had committed two separate violations and, due to the seriousness of the doping offences, imposed the lifetime ineligibility on the athlete.

E. Second anti-doping rule violation through the notification of the first violation

In CAS 2008/A/1572, 1632 & 1659, the athlete, a Brazilian swimmer, faced a life ban for multiple doping offences. The CAS Panel considered that the athlete committed three anti-doping rule violations (on 25 and 26 May 2006, on 13 July 2007, and on 12 July 2007 respectively), each of which would have the consequence of a separate sanction[25]. The first two anti-doping rule violations consisted of the presence of testosterone (committed on 25-26 May 2006 and on 13 July 2007, respectively) and according to the FINA Rules (DC 10.2) each one entailed the imposition of a two year period of ineligibility. According to the applicable FINA Rules (DC 10.4.1 in conjunction with DC 10.2), the same period of ineligibility would have to be imposed on the athlete for the third anti-doping rule violation committed in the form of tampering with a doping control (on 12 July 2007).

Furthermore, according to the Panel's findings, in the situation of three separate doping offences, the sanction to be imposed on the athlete had to follow the rules on multiple anti-doping rule violations (see CAS 2008/A/1572, 1632 & 1659, para. 4.50). For a second anti-doping rule violation DC 10.2 provides for a sanction of lifetime ineligibility. As a condition for the determination of a second violation under DC 10.2, according to DC 10.6.1, the second antidoping rule violation must have been committed "*after the competitor ... received notice ...of the first anti-doping rule violation*". The problem that arose related to the manner that the sanction had to be calculated for the multiple anti-doping rule violations and from which point in time a second (or third) anti-doping rule violation could be considered as a second (or third) violation for purposes of imposing sanctions.

In the decision rendered by the FINA Doping Panel, it was held that (para. 41 of the decision rendered by the FINA Doping Panel of 3.09.2008) "*for purposes of imposing sanctions under FINA Rules DC 10.2 and 10.4.1 a second rule violation may be considered only if FINA can establish that the Competitor committed the second anti-doping rule violation after the Competitor received notice, or after FINA made a reasonable attempt to give notice of the first anti-doping rule violation (FINA Rule DC 10.6.1). In this regard "notification" does not mean notification of the decision confirming the violation. It means the notification of the factual circumstances, i.e. the identified presence of a prohibited substance in the A Sample of a Competitor*". In other words, the FINA Doping Panel considered that for the establishment of the second violation (for the calculation of the sanction and not for the establishment of the violation as such) there is no need to wait for the decision on the first violation to become final, but suffices to have the notification of the factual circumstances that prove the presence of the prohibited substance in the A Sample of the Athlete.

In 2008/A/1572, 1632 & 1659, the CAS Panel repeated the position held by the FINA Panel and stressed

22. See CAS 2008/A/1585 & 1586, para. 118.

23. According to CAS jurisprudence, the balance of probability standard means that the athlete bears the burden of persuading the judging body that the occurrence of the circumstances on which he relies is more probable than their non-occurrence or more probable than other possible explanations of the doping offence (see CAS 2004/A/602; CAS 2007/A/1370 & 1376; TAS 2007/A/1411).

24. See CAS 2008/A/1585 & 1586, para. 119 f.

25. See CAS 2008/A/1572, 1632 & 1659, para. 4.47.

that for the purpose of imposing sanctions for multiple violations a lifetime sanction is conditional upon the receipt of notice of the first violation prior to the second one[26]. The CAS Panel noted, however, that the athlete did not receive a formal notification of the first anti-doping rule violation due to delays of the national federation of the athlete, as provided for in the course of the results management process according to DC 7.1.3, or that FINA was not in a position to adduce evidence to this effect.

The CAS Panel proceeded then to the evaluation of the meaning of the term "*notice ...of the first anti-doping rule violation"* in accordance with the established methods of legal interpretation; the wording of the terms in their context and in the light of the objective and purpose of the norm[27]. It noted that the term *notice* is not restricted to a formal act of notification but rather referred to the mere knowledge of a fact. In the particular case, the athlete had received notice when she obtained "*the knowledge of an anti-doping rule violation*". To this point, the CAS Panel interpreted the meaning of the "*anti-doping rule violation"* within the meaning of the rules of FINA (DC 10.6.1). Accordingly, the CAS Panel found that the interpretation of the FINA Rules equated *anti-doping rule violation* with the *adverse analytical finding*[28]*,* whereas the definitions attached to the DC provide that *adverse analytical finding* is the "*report from a* laboratory ... *that identifies in a specimen the presence of a prohibited substance*". The Panel also referred to FINA DC 2, which defines *anti-doping rule violation* as "*The presence of a prohibited substance ...*" and noted that this is a wide definition giving room for further interpretation. To this end, the CAS Panel employed the analogous provisions of the WADA Code as an interpretation tool of the corresponding rules of FINA. Article 10.6.1 of the 2003 WADC 2003, as in force at the time of the doping controls at stake to which DC 10.6.1 corresponds, provided that *"received notice ... of the first anti-doping rule violation"*, while the Comment to 10.6.1 referred to *"notice of the first positive test"*, that is the notification of an adverse analytical finding based on the A sample in the course of the results management process according to DC 7.1.3 and Article 7.2 of the 2003 WADC (see CAS 2008/A/1572, 1632 & 1659, para. 4.59).

The CAS Panel concluded that, in the normal course of the handling of an alleged anti-doping rule violation, the notification in the results management process is a sufficient condition for a second violation. The notification in the results management process is more than the knowledge of the mere laboratory report of an adverse analytical finding. The additional conditions for such notification are that notification is only issued upon the *initial review* conducted by the responsible anti-doping organization according to DC 7.1.2, which leads to the result that no therapeutic use exemption has been granted and no apparent procedural departure undermines the validity of the analytical finding. The CAS Panel further noted that, all further steps available to the athletes, such as the request for the analysis of the B sample, request for a hearing, appeal of decisions etc., are legal remedies which *do not* affect the validity of the suspension as such. The rationale for this conclusion was that a different interpretation would facilitate athletes to commit further doping offences after notification without the risk of lifetime ineligibility for a second violation[29].

Within the particular frame of the Case CAS 2008/A/1572, 1632 & 1659, the Panel found that the handling of the first anti-doping rule violation by the athlete's national federation was "unusual". While the national federation was the responsible anti -doping authority for the tests conducted during the national championships, the Panel found that no proper results management process took place upon report of the adverse analytical finding based on the A samples[30]. After FINA was informed of the adverse analytical finding by the end of June 2006, FINA kept the case under observation. However, the national federation adopted the position that the analysis results were not sufficient to establish an anti-doping rule violation and to suspend the athlete and later FINA requested the national federation to proceed with the results management process and to hold a hearing. Almost one year after the first doping violation took place, a hearing took place in order "*to discuss the adverse analytical finding"* with the athlete attending. Despite the adverse analytical finding and FINA´s opinion the Panel decided not to suspend the Athlete. After the analysis of the B samples which confirmed the exogenous origin of testosterone, FINA again requested the national federation to organize a hearing and to reach a final decision; however the national federation took over the matter and referred the case to its Doping Panel[31].

The criterion that the CAS Panel employed in order to see whether a substantial notification took place was that "*the Athlete was deeply involved in her case after the adverse analytical finding was reported on 29 June 2006. At the hearing held on 11 May 2007, at the latest, the Athlete was in a position similar to that if she had received the notification in the results management process. She was informed about the adverse analytical finding, about her right to request the*

26. See CAS 2008/A/1572, 1632 & 1659 para. 4.52.

27. See CAS 2008/A/1572, 1632 & 1659 para. 4.54.

28. CAS 2008/A/1572, 1632 & 1659, para. 4.57.

29. See CAS 2008/A/1572, 1632 & 1659 para. 4.60.

30. See CAS 2008/A/1572, 1632 & 1659, para. 4.66.

31. See CAS 2008/A/1572, 1632 & 1659, para. 4.66.

B sample analysis and to have a hearing. In the case before it the Panel considers the state of information the Athlete received about her doping case at or before 11 May 2007 to be at least equivalent to the notification in the results management process according to DC 7.1.3. In the normal course of anti-doping proceedings the notification and suspension would have been made within the period of time much shorter than one year"[32].

In the same case, the CAS Panel further interpreted the purpose and the object of FINA DC 10.6.1[33]: before an athlete is sanctioned for life for a second doping offence, he must have been aware of a first violation and, hence been warned that he or she has been "caught", and in the case CAS 2008/A/1572, 1632 & 1659 this condition was fulfilled because the athlete had been informed about the factual basis of the doping offence and that proceedings had been initiated.

In another case[34] concerning a Brazilian bobsleigh rider (dos Santos), the ad hoc panel differentiated *adverse analytical finding* from *anti-doping rule violation* and came to the conclusion: "*Only after that process* [results management, B sample analysis, hearing to contest the adverse analytical finding, added by this Panel] *has been completed and the adverse analytical finding is confirmed is an anti-doping rule violation found*." Although this might seem contradictory to the Panel's findings in the CAS 2008/A/1572, 1632 & 1659, it is not because the ad hoc panel found that an anti-doping rule violation is "found" if an appealable decision that an anti-doping rule violation was committed has been rendered by any authority[35]. What actually happened in the case of *dos Santos* and was not considered sufficient by the ad hoc panel was that the Brazilian Olympic Committee, in disregard of the prohibition of any public disclosure, publicly announced the adverse analytical finding. Furthermore, the ad hoc panel did not decide on a possible second anti-doping rule violation and, hence, its construction does not constitute precedence for the understanding of DC 10.6.2 or similar rules. Instead, the ad hoc panel had to decide whether or not *dos Santos* actually committed an anti-doping rule violation at a given date which would have justified his exclusion from the Winter Games. At the time the ad hoc panel had to decide only the positive laboratory report was provided and illegally published – roughly five weeks after the sample collection. The results management process had not even started or at least was not finished. No provisional suspension was imposed.

Finally, in another case[36], the Panel found that due to the fact that the athlete committed her first anti-doping rule violation in 2004 and the second occurred in 2007, the second violation was committed a substantial period of time after the athlete had received notice of the first violation in the year 2004, and considered that the conditions for admitting a multiple violation under IAAF Rule 40.6[37] were fulfilled.

F. Lex mitior and life ban

As a general rule, the principle of lex mitior applies to doping cases and aims to protect athletes by permitting the retroactive application of a provision if this is more favourable to the athlete. Article 25.2 of the 2009 WADC provides that "*With respect to any anti-doping rule violation case which is pending as of the effective date and any antidoping 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 the panel hearing the case determines the principle of "lex mitior" appropriately applies under the circumstances of the case*." The principle is of particular importance when the Panel is confronted with athletes facing lifetime ineligibility: there can be significant differences between the different applicable regulations granting the Panel a greater flexibility as to the determination of the sanction.

In order for a Panel to apply the lex mitior principle, it previously has to determine which substantive provisions are really more favourable to the athlete. However, this is not always easy to compare – in legal and factual terms – the older and the most recent version of the anti-doping rules to be applied in order to establish which version constitutes lex mitior and could be more favourable to the athlete. The Panel left this question open in CAS 2008/A/1572, 1632 & 1659 because it reached the conclusion that the lifetime ineligibility would have to be applied under the application of both rules[38]. After a first appreciation and comparison of the two texts, the Panel could not tell whether the 2009 FINA Doping Control Rules (2009 DC), which is analogous to the 2009 WADC, constitutes a *lex mitior* compared to the 2003 rules: in the particular case, while the 2009 rules foresee a sanction from eight years up to lifetime ineligibility, the older (2003) rules foresaw a fixed standard lifetime ineligibility sanction. On the other side, the Panel also took other parameters into consideration, and noted that the new rules,

32. See CAS 2008/A/1572, 1632 & 1659, para. 4.68.

33. Analogous to Article 10.6.1 of the 2003 WADC and Article 10.7.4 of the 2009 WADC.

34. CAS ad hoc Division O. G. Torino 2006/010.

35. See also CAS 2008/A/1572, 1632 & 1659 para. 4.62.

36. See CAS 2008/A/1585 & 1586, para. 120.

37. IAAF Rule 40.6 is analogous to Article 10.7.4 of the 2009 WADC.

38. CAS 2008/A/1572, 1632 & 1659, paras 4.74 ff.

albeit more lenient at first sight, provide (in DC 10.9) for aggravating circumstances which justify the imposition of a period of ineligibility greater than the standard sanction and those provisions have also to be taken into account when determining the *lex mitior*.

In CAS 2008/A/1572, 1632 & 1659 the Panel calculated the applicable sanction on the basis of the 2009 rules, in an effort to see whether it could impose a lower sanction than the lifetime ineligibility which it would have to impose should it apply the 2003 rules[39]. It then considered the second doping offence of the athlete (tampering with a doping control) as committed under aggravating circumstances and therefore imposed an aggravated sanction. According to the CAS Panel, "*tampering is a particularly serious offence because tampering reveals that the Athlete knew about the presence of testosterone which she tried to hide by the manipulation. It is not only the intake of testosterone but also the additional effort to manipulate the doping control (...)*"[40].

In another case, the CAS Panel concluded that the principle *lex mitior* was of no assistance to the athlete in the particular case, since the application of the 2009 IAAF Rules would not lead to a lower sanction than the one determined on the basis of the 2007 IAAF Rules, which would have to be applied under the principle *tempus regit actum*[41]. The Panel first applied Rule 48.1-2 of the 2009 IAAF Competition Rules[42], according to which the 2009 Rules came into effect on 1 January 2009 and were non-retroactive unless the principle of "lex mitior" applied. The Panel had thus to examine whether a lower sanction would apply to the athlete under the new system of sanction introduced in Rule 40.7 of the 2009 IAAF Rules with respect to multiple violations[43].

Like in the case CAS 2008/A/1572, 1632 & 1659, the Panel then found that, at the very least the athlete had committed two standard sanctions, which under the rule required an ineligibility sanction of between 8 years and a life ban. Moreover, based on the evidence on record there was no doubt that both violations should be deemed very serious in nature, and the Panel could not find substantial evidence in order to consider that the athlete did not intentionally commit both violations. The Panel found that a life ban should be imposed on the athlete, even under the 2009 IAAF Rules and did not answer to the question whether the violations would formally qualify as being committed in aggravating circumstances as defined under the 2009 IAAF Rules[44].

G. Life ban and departure from international standard for testing

In CAS 2008/A/1607, the Panel dealt with a biathlon athlete who committed her second doping offence and was sanctioned by the international federation with lifetime ineligibility from participation in sport. The athlete challenged the decision to the CAS, arguing that the decision should be annulled (and therefore the ban should be lifted) because of the athlete's inability to have a representative present for the opening and testing of the "B" sample. Although not directly dealing with the issue of proportionality of a life ban, the Panel stated that, especially in cases where the athlete is facing a lifetime ban as the result of an alleged anti-doping rule violation and because of the significance of the consequences of such ban for the athlete, it is important that procedures are followed correctly and that information concerning the rights and remedies of an athlete is communicated clearly.

In its decision, the CAS Panel repeated that, because the consequences of anti-doping rule violations can be so significant for an athlete, the *World Anti-Doping Code* and its associated standards and rules necessarily include a number of checks and balances to ensure a fair outcome. In this respect, the Panel stressed the importance of having a representative present for the opening and testing of a "B" Sample according to the WADC, even though some experts say that such presence is not really necessary.

In the particular case, the Panel noted that the international federation –although it was obliged to do so– did not attempt to canvass alternative dates with the laboratory, following the athlete's request for a different testing date. Instead of this, the international federation obtained an independent witness to attend in place of the unavailable witness designated by the athlete, a gesture which the appellant and her representative rejected. The Panel noted that, because of the significance of the consequences for an athlete facing a lifetime ban as the result of an alleged anti-doping rule violation, procedures should be followed correctly and that information concerning the rights and remedies of an athlete should be communicated clearly.

According to the Panel in 2008/A/1607, although Article 3.2.2 of the 2003 WADC provided that *"Departures from the International Standard for Testing which did not cause an Adverse Analytical Finding or other anti-*

39. CAS 2008/A/1572, 1632 & 1659, para. 4.81.

40. See CAS 2008/A/1572, 1632 & 1659, para. 4.82.

41. See CAS 2008/A/1585 & 1586, para. 127.

42. Rule 48.1-2 of the 2009 IAAF Competition Rules is analogous to Article 25.2 of the 2009 WADC.

43. See 2008/A/1585 & 1586, para. 123.

44. Article 40.6 of the 2009 IAAF Rules.

doping rule violation shall not invalidate such results (…)", in the particular case, the error was serious enough to invalidate the "B" sample result (and referred to CAS 2002/A/385 *"As a matter of principle, the Panel is of the opinion that, even if a procedural error is unlikely to affect the result of a B-sample analysis, such error can be so serious as to lead to the invalidity of the entire testing procedure."*[45]. The Panel, however, did not try to see whether the international federation could prove that the presence of the Appellant's representative would have made any difference to the outcome. Instead of this, the Panel focussed on whether the federation's failure to follow the applicable rules by failing to make reasonable attempts to accommodate the appellant's request for a different testing date invalidated the "B" sample result.

The Panel concluded that by failing to make any efforts to reasonably accommodate the appellant's request to have her "B" sample opened and tested in the presence of her technical representative, the federation had failed to adhere to both the *IBU Anti-Doping Rules* and to the *International Standard* in force at the time of the alleged anti-doping rule violation and applicable to the opening and testing of the athlete's "B" Sample and, as a result, that the outcome of the "B" Sample testing could not be accepted as part of the evidence of the Appellant's alleged anti-doping rule violation[46].

Interestingly, the Panel stressed that the athlete's right to be given a reasonable opportunity to observe the opening and testing of a "B" sample was of sufficient importance that it needed to be enforced even in situations where all of the other evidence available indicated that the Appellant committed an anti-doping rule violation[47]. As a result, it upheld the athlete's appeal and annulled the decision rendered by the international federation imposing a life ban on the athlete.

H. Life ban and reformatio in pejus

Even in cases dealing with athletes facing the lifetime ineligibility sanction, CAS Panels have stated that the principle *reformatio in pejus* does not apply as long as the CAS has, according to Article R57 of the CAS Code the right to rule *de novo* and as long as the more severe sanction has been duly requested by a party.

A. Rigozzi argues that "*en dépit du plein pouvoir d'examen dont il dispose, le TAS s'est montré généralement hésitant à procéder à une reformatio in pejus*"[48]. Logically the arbitrators could not just increase the ineligibility period in the absence of a party's submission to this end[49]. This means that in cases where the sports federation limits itself by asking the CAS Panel to confirm the decision it undertook in the previous instance, the CAS Panel can simply not go ultra petita and impose a greater sanction, even if the applicable regulations allow for such an increased penalty.

In CAS 2008/A/1585 & 1586, the athlete was arguing that the appealed decision wrongly imposed on her a four-year ban, whereas IAAF in its counterclaim submitted that the athlete committed a second anti-doping rule violation and should therefore be declared ineligible for life under the IAAF Rules. The athlete supported that a life ban could not be applied because there had been no repeated antidoping violation and that, in any event, a sanction beyond four years could not apply due to the prohibition of "*reformatio in pejus*"[50].

The Panel found that under Article R57 of the CAS Code, the Panel had the authority to evaluate and decide the case *de novo* and had therefore the power to vary a sanction in either direction provided that such variation had been duly requested by a party. Provided that the sports federation had lodged a counterclaim requesting the CAS to impose a life ban on the athlete, the Panel determined that the existence of two violations had been established (the first in 2004 and the second in 2007) and that such violations should be qualified as multiple violations in the meaning of the IAAF Rules. In other words, the combination of CAS' full power of review (provided in Art. R57 of the CAS Code) and a counterclaim of the sports federation lead to the non-application of the principle non reformatio in pejus for doping cases.

It has to be noted, however, that according to the latest version of the CAS Code (which entered into force on 1.1.2010), counterclaims are no longer permitted at an appeal level and thus the parties should lodge a separate appeal (as long as the deadline has not yet been surpassed). This practically means that the principle *no reformatio in pejus* will be de facto respected within the framework of the appeal lodged (by the athlete), unless a separate and distinct appeal has been lodged at the same time (i.e. in respect of the applicable deadlines for lodging an appeal) by the sports federation asking for a greater penalty.

45 See CAS 2002/A/385 paras. 22 ff.

46 See CAS 2008/A/1607, para. 29.

47 See CAS 2008/A/1607 para. 32.

48 See RIGOZZI, op. cit., 47 n. 1369.

49. See CAS 2008/A/1585 & 1586, para. 111.

50. See CAS 2002/A/360 and CAS 2008/A/1585 & 1586 para. 111.

Standing to be sued, a procedural issue before the Court of Arbitration for Sport (CAS)

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

Ms Estelle de La Rochefoucauld, Counsel to the CAS

I. Issue of merits or admissibility ?

Until recently the jurisprudence of the CAS was not quite clear as to whether the prerequisite of the standing to be sued was to be treated as an issue of the admissibility of an appeal[1] or of merits[2]. In CAS 2008/A/1639, the Panel considered that in an appeal that is directed against a "wrong" Respondent because the latter has no right to dispose of the matter in dispute, the claim filed by the Appellant is admissible but without merit. The CAS Panel saw itself comforted in its reasoning by the jurisprudence of the Swiss Federal Tribunal according to which the prerequisite of the standing to be sued is to be treated as an issue of merits and not as a question for the admissibility of an appeal[3]. This jurisprudence has been recently confirmed in TAS 2009/A/1869, award of 3 July 2009.

1. CAS 2006/A/1189, para. 61 *et seq.*, CAS 2007/A/1329-1330, paras. 30-32.

2. CAS 2008/A/1517, para. 135.

3. Cf. ATF 128 II 50, 55: "*Sur le plan des principes, il sied de faire clairement la distinction entre la notion de légitimation active ou passive (appelée aussi qualité pour agir ou pour défendre; Aktiv- oder Passivlegitimation), d'une part, et celle de capacité d'être partie (Parteifähigkeit), d'autre part. La légitimation active ou passive dans un procès civil relève du fondement matériel de l'action; elle appartient au sujet (actif ou passif) du droit invoqué en justice et son absence entraîne, non pas l'irrecevabilité de la demande, mais son rejet" and* ATF 126 III 59 c. 1a; ATF 123 III 60 c. 3a.

II. No Specific rules as to the standing to be sued

CAS Panels have consistently noted that neither the CAS Code nor the FIFA Regulations contain any specific rule regarding the standing to be sued issue[4].

In particular, in CAS 2008/A/1639, the Panel held that according to Art. 23 of the FIFA Regulations on the Status and Transfer of Players (RSTP), a decision reached by the Single Judge may be appealed before the CAS as long as all internal remedies have been exhausted. The provision does not specify, however, against whom the appeal must be directed. Contrary to the decision in CAS 2007/A/1403[5] the Panel considered that the same is true for the FIFA Statutes. In particular the Panel held that it does not follow from the wording in Art. 62 *et seq.* of the FIFA Statutes[6] that FIFA allows for cases to be resolved

4. CAS 2008/A/1468, para. 82; CAS 2008/A/1517, para. 133; CAS 2008/A/1518, para 119.

5. In CAS 2007/A/1403, the Panel held that FIFA has ensured the recognition and enforcement of CAS awards by including in its body of rules an appeal provision to CAS. The Panel considered that from that perspective and whenever there is an appealable decision, in accordance with FIFA Statutes, FIFA shall have passive legal standing (paras. 49ff).

6. Art.62: Court of Arbitration for Sport (CAS)
1. FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents.
2. The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various

by the CAS irrespective of the parties standing to sue or to be sued. Therefore, the Panel came to the conclusion that there is no specific provision in the FIFA regulations and that the question of whether or not the Respondents have the standing to be sued must be derived from the subsidiarily applicable Swiss law.

III. Standing to be sued according to Swiss law

Under Swiss law, a decision by an association like FIFA may be challenged pursuant to Art. 75 of the Swiss Civil Code (CC). Under the heading "*protection of member's rights*", the provision reads as follows:

> *"Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month from the day on which he became cognizant of such resolution".*

Art. 75 CC has consistently been interpreted by Swiss legal doctrine and jurisprudence to mean that it is the association which has the capacity to be sued[7].

Nevertheless, according to CAS 2008/A/1517, CAS 2008/A/1518, Art. 75 of the Swiss CC does not apply indiscriminately to every decision made by an association but one has to determine whether the appeal against a certain decision by an association falls under Art. 75 Swiss CC on a case-by-case basis. If, for example, there is a dispute between two association members (e.g. regarding the payment for the transfer of a football player) and the association decides that a club (member) has to pay the other a certain sum, this is not a decision which can be subject to an appeal within the meaning of Art. 75 Swiss CC. The sports association taking a decision is not doing so in a matter of its own, i.e. in a matter which concerns its relationship to one of its members, rather it is acting as a kind of first decision-making instance, as desired and accepted by the parties. In this respect, in CAS 2009/A/1828 and in CAS/A/1829 the Panel was called to settle a dispute between a national football club and a football national association from another country in connection with the issuance of a provisional registration for two players with the national association and to the granting of an International Transfer Certificate (ITC). The Panel considered that FIFA was acting in the proceedings as the authority deciding to grant or to refuse the authorization to provisionally register players (Single Judge decision). In this context, the Panel considered that FIFA simply authorized a national association to register a player without undertaking anything itself in the proceedings. The Panel held therefore that it did not seem possible for FIFA to be considered as a party to the proceedings (marg. no. 69-72).

Hence, one part of the doctrine tries to limit the scope of application of Art. 75 CC by restricting the protected membership related sphere. In their view Art. 75 CC "*does not apply indiscriminately to every decision made by an association … Instead, one has to determine in every case whether the appeal against a certain decision falls under Art. 75 Swiss Civil Code, i.e. whether the prerequisites of Art. 75 of the Swiss Civil Code are met in a specific individual case*"[8]. In CAS 2008/A/1639, the Panel underlines that this idea to limit the notion of membership related dispute covered by Art. 75 CC has been taken up by several CAS Panels. The Panel in the case CAS 2006/A/1192 for example was called to settle a dispute between a player and his club for an alleged breach of the contract by the club. The dispute was decided at a first level by an organ of FIFA. When analyzing the applicability of Art. 75 CC to said decision by FIFA, the Panel stated that "*at any rate, the present matter is clearly not a membership related decision, which might be subject to Art. 75 CC but a strict contractual dispute. Accordingly, the Panel holds that Mr. M. does have standing to be sued*" (marg. no. 41-48)[9].

Pursuant to the interpretation according to which only the association has the capacity to be sued, the appeal cannot be directed primarily against the members of the respective organ that has passed the decision or the members of the association[10]. In principle however, an association has a certain margin of discretion when designing the conditions for an appeal against its internal decisions/resolutions. In CAS 2008/A/1639, the Panel stated that in principle however, the rights and obligations resulting from membership in an association point in several directions, i.e. towards the association as such but also towards the other individual members. Disputes between members of an association can, therefore, not be excluded at the outset from the membership related sphere. This is all the more true in view of the fact that an association which settles disputes

regulations of FIFA and, additionally, Swiss law.
Art. 63: Jurisdiction of CAS
1. Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question.
2. Recourse may only be made to CAS after all other internal channels have been exhausted (…).

7. Heini/Scherrer, *"Basler Kommentar",* 2nd edition, 2002, note 20 on Art. 75 Swiss Civil Code; Riemer H.M, op. cit., note 60 et seq. on Art. 75 Swiss Civil Code; cf. BGE 122 III 283.

8. Bernasconi/Huber, Appeals against a Decision of a (Sport) Association: The Question of the Validity of Time Limits stipulated in the Statutes of an Association, published in German in the review SpuRt, 2004, Nr. 6, p. 268 *et seq.*

9. see also CAS 2005/A/835 & 942, marg. no. 85 *et seq.*

10. Handkommentar zum Schweizer Recht/Niggli, 2007, Art. 75 ZGB marg. no. 5; Basler Kommentar ZGB/Heini/Scherrer, 3rd ed. 2006, Art. 75 marg. no. 21; Berner Kommentar zum schweizerischen Privatrecht/Riemer, 1990, Art. 75 marg. no. 60.

between its members in application of its own rules and regulations is of course (also) pursuing goals of its own and, hence, is also acting in a matter of its own. Thus, in CAS 2008/A/1639 the Panel expressed doubts whether – in the absence of any specific rules in the statutes and regulations of a federation – it subscribes to the narrow interpretation given by Bernasconi/Huber to the notion "membership related dispute"[11].

In CAS 2008/A/1639, the Panel underlined that the purpose of Art. 75 CC is to protect the individual in its membership related sphere from any unlawful infringements by the association[12]. In view of this legislative purpose Art. 75 CC is construed and interpreted in a broad sense[13]. In particular the term "resolution" in Art. 75 CC does not only refer to resolutions passed by the assembly of an association but, instead, encompasses any other (final and binding) decision of any other organ of the association, irrespective of the nature of such decision (disciplinary, administrative, etc.) and the composition of said organ (one or several persons).

Hence, contrary to the reasoning in CAS 2009/A/1828 and 1829 (cf. *supra*), in CAS 2008/A/1639, the Panel considered that the issuance of a provisional registration for a player with a national federation touches upon the relationship between FIFA and its members. It does not interfere with the relationship among clubs. The proceedings put in place to grant or refuse an International Transfer Certificate (ITC), in the Panel's view, are meant to protect an essential interest of FIFA. This is evidenced by the wording in Art. 9 of the RSTP and Art. 2 of the Annex to the RSTP. According to these rules, only the national federations are involved in the process of the issuance of the ITC. Furthermore, the new federation of the player has no claim of its own against the former federation to grant the ITC. Instead, if the former federation does not deliver the ITC the issuance of the ITC lies in the sole competence of FIFA. Furthermore, in exercising its exclusive competence FIFA does not act like a court of first instance in a dispute between its members. Instead, when assuming the competences conferred on it according to the RSTP FIFA is exercising an administrative function and, thus, having an impact on the rights and duties of its individual members in the sense of Art. 75 CC. The mere fact that several (and not just one) member is affected by FIFA's administrative act does not change the nature of the "appealed decision". If one applies the principles laid down in Art. 75 CC to the case at hand then the dispute must be considered to be a membership related dispute with the consequence that it must (also) be directed against FIFA.

Moreover, in CAS 2008/A/1639 the Panel stated that Art. 75 CC must be applied *mutatis mutandis* to Art. 62 *et seq.* of the FIFA Statutes, because the purpose of Art. 62 *et seq.* of the FIFA Statutes is to confer to CAS the competence to decide the dispute *in lieu* of the otherwise competent (Swiss) Courts. Since, however, the CAS assumes comparable functions as state courts it is hardly conceivable why the question as to which party has standing to be sued should – absent any specific rules in the Statutes to the contrary – be answered differently for state court proceedings and for arbitral proceedings.

IV. Standing to be sued according to the jurisprudence of the CAS

A. Principle

According to the CAS jurisprudence and Swiss law, applicable pursuant to the FIFA Statutes and to Art. R58 of the CAS Code, a party has standing to be sued (*légitimation passive*) and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it[14].

In other words, the defending party has standing to be sued if it is personally obliged by the "disputed right" at stake[15].

In CAS 2006/A/1206, the Panel considered that although disciplinary proceedings may be initiated by FIFA to sanction a person for not complying with the decisions of its bodies and of CAS finally settling a dispute between this person and a national federation, the latter is not a party to the disciplinary proceedings. Therefore, the national federation cannot be considered as the "passive subject" of the claim brought before the CAS by way of appeal against the Disciplinary Committee (DC) decision, as its rights are not concerned by the DC decision and as it has no power whatsoever to sanction the person's failure to comply with FIFA bodies' and CAS decisions. It is hence clear that the national federation does not have any standing to be sued

11. Netzle S. SchiedsVZ 2009, 93 *et seq.*

12. ATF 108 II 15, 18.

13. ATF 118 II 12, 17 seq.; 108 II 15, 18 seq; Handkommentar zum Schweizer Recht/Niggli, 2007, Art. 75 ZGB marg. no. 6 seq; Heini/Portmann, Das Schweizer Vereinsrecht, Schweizerisches Privatrecht II/5, 2005, marg. no 278; Basler Kommentar ZGB/Heini/Scherrer, 3rd ed. 2006, Art. 75 marg. no. 3 *et seq*; Berner Kommentar zum schweizerischen Privatrecht/Riemer, 1990, Art. 75 marg. no. 7 *et seq.*, 17 *et seq.*; Fenners H., Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport, 2006, marg. no. 208.

14. CAS 2006/A/1189, paras. 6.4-6.5, CAS 2006/A/1192, paras. 41-46; CAS 2007/A/1329 & CAS 2007/A/1330, para. 27; CAS 2007/A/1367, para 37; *op cit* CAS 2008/A/1517; *op cit.* CAS 2008/A/1518.

15. CAS 2006/A/1206, paras. 26-30; CAS 2008/A/1468, paras. 82-87; CAS 2008/A/1517; CAS 2008/A/1518.

(*légitimation passive)* and cannot, as such, be identified as a respondent in the arbitration.

Furthermore, in CAS 2008/A/1517 and CAS 2008/A/1518*,* the Panel has stated that a Respondent to a CAS procedure has standing to be sued if in filing a claim to FIFA when there might have been a possibility that another national tribunal was competent to hear the case pursuant to the FIFA Regulations, the Respondent could have breached his contractual duties. Accordingly, the Appellant is entitled to direct its appeal before the CAS at the Respondent in order to require him to refuse the FIFA's jurisdiction to rule on the issue of sanction and compensation.

B. CAS's power of review with regard to the standing to be sued issue

1. Application of Art. R47 of the Code of Sports-related Arbitration (the Code)

In CAS 2008/A/1517 and CAS 2008/A/1518*,* the Panel held that pursuant to FIFA's recognition of the jurisdiction of the CAS in the FIFA Statutes, the parties to a contractual dispute before the DRC and FIFA agree to the application of Art. R57 of the CAS Code, which gives CAS full power to review the matter in dispute.

2. CAS scope of review with regard Art. R48 of the Code

Art. R48 of the Code is meant to help the appellants when they fail to provide some of the elements of their statement of appeal but it is not meant to cure a major procedural mistake such as that of the Appellant's. Indeed, if an appellant forgets to specify a respondent, the CAS Court Office will ask the appellant to provide such name within a short deadline, in order to be able to notify the statement of appeal to the named respondent. However, once an appellant does name a respondent, even if it's the wrong respondent, the CAS Court Office must register such respondent's name into the CAS role and summon it into the proceedings. This means that the arbitration procedure has been set in motion and that the summoned party has the opportunity to appear before the CAS, in particular to claim its lack of standing to be sued and ask for legal costs, or else it may risk that the Panel does not recognize its right not to be involved in the arbitration.

In other words, the CAS Court Office has no duty and no power to check whether an appellant has named the right respondent and, hence, Art. R48 cannot be invoked by the appellant in such a situation. However, it is up to the appointed Panel to examine the file and determine whether the summoned respondent lacks standing to be sued[16].

Moreover, in the CAS system for a statement of appeal against a given respondent to be admissible it is necessary not only that it names that respondent, but also that it contains an actual claim against the subject indicated as respondent. The simple indication of the respondent does not mean *per se* that arbitration can proceed against that respondent, unless a specific claim is brought against it[17].

In CAS 2007/A/1329, CAS 2007/A/1330 & CAS 2007/A/1367, the CAS jurisprudence has considered that the attempt to shift the arbitration proceedings from an initial respondent (a club or a player) to a new respondent (FIFA) must be construed, from a legal standpoint, as the filing of a new appeal altogether. Therefore, the request contained in the appeal brief and directed against the new respondent must in fact be considered as a new statement of appeal leading to a new and different arbitration procedure. In this respect, the summoning of FIFA as the new respondent can be admissible only if it has been made within the 21-day time limit provided by the FIFA Statute.

In CAS 2007/A/1367, the Panel has also established that a person or body who gets involved in an arbitration is entitled to know, at an appropriate point in time, whether it is formally considered to be a party since as a formal party to the proceedings, it has a different position to that of a non party – e.g. by participating directly in the composition of the Panel pursuant to Art.R50 and R53 of the CAS.

3. Burden of proof

Considering the proof of the Respondent's status, in CAS 2007/O/1398, the Panel has stated that a "proof of payment" can be taken as an indication that a match agent is the debtor of the claim, and also a party to the Agreement. Moreover, a match agent that from the correspondence is considered as a party to an agreement gives the clear impression that he considers himself as the Claimants' debtor. Therefore, a match agent becomes a party to the Agreement even if he is not clearly indicated as such therein, so long as the common will of the parties was that the match agent was to become a party to the Agreement and hence respondent in the proceedings.

16. CAS 2007/A/1329 & CAS 2007/A/1330, paras. 37-40; CAS 2008/A/1620, paras. 4.9-4.16.

17. CAS 2005/A/835 & 942, paras. 85-88.

C. Contractual matters

1. Player's standing to be sued in the context of a contract subject to the rules of FIFA

In CAS 2006/A/1192, the Panel stated that an employment contract which is a contract between a member club of a national association, which in turn is a member of FIFA, and a professional player, is subject to the rules of FIFA, which are applicable to any dispute arising out of the breach of that contract by one of the parties. It follows, therefore, that if FIFA provides for a 2-stage jurisdiction system in case of a dispute arising out of the termination of a contract the dispute will be decided by that system, including that part which provides for the exclusive competence to decide on the amount of compensation to rest with the DRC. The player has to abide by that rule, as he and the club have to abide by all of the provisions of the contract. Therefore, in raising a defense of lack of jurisdiction before FIFA, the player may breach his contractual duties. Accordingly, the club is entitled to direct its appeal at the player in order to require him to accept the FIFA jurisdiction to rule on the issue of sanction and of compensation. At any rate, such matter is clearly not a membership related decision, which might be subject to Art. 75 CC but a strict contractual dispute[18].

On the other hand, in CAS 2007/A/1248, the Panel considered that in a loan agreement case (non-return of the Player) where the appellant Club- does not name the Player, but only the other Club with whom the Player has registered as Respondent, the CAS is not in a position to consider the behavior and/or the possible breach of the alleged contract by the Player, nor may it rule as to whether the respondent Club can be held liable, as the liability of the Club, according to the relevant provisions of the FIFA Regulations (Art. 17 RSTP) would be subsidiary to that of the Player. Failure to include the Player as a party to the CAS proceedings precludes the CAS from entertaining any claim and/or allegations relating to the Player[19].

2. FIFA invited by the CAS to participate in the proceedings

In CAS 2007/A/1388 & CAS 2007/A/1389, the Panel considered that if the parties to the proceedings have not applied for FIFA to be joined as a party in the appeal (which involves a decision by the CAS as to the granting or rejection of a procedural application), opportunity is nevertheless given to FIFA to participate in the proceedings, on a voluntary basis, in its capacity as the body appealed against. This invitation, which can be accepted or declined by FIFA, is made by the CAS on its own initiative. If FIFA declines to participate, any claim against FIFA is struck out on the grounds that the body against whom the said order is sought is not a party to the proceedings[20].

3. FIFA's right to intervene

In contractual matters, FIFA offers a dispute resolution system, where FIFA is not a party but a neutral entity that is called on to settle a strict contractual dispute between its members in a matter that does not concern FIFA's relationship with one of its members. This neutral position is not changed by the fact that the Appellant has the chance to get the case reviewed by the CAS pursuant to FIFA's recognition of the jurisdiction of the CAS in the FIFA Statutes. Nevertheless, the appeal filed before CAS challenging the decision of the FIFA Dispute Resolution Chamber (DRC) could concern FIFA. Therefore, FIFA could have intervened in the CAS arbitration proceedings by making use of Art. R41.3 of the Code. However, when FIFA was given the opportunity to participate in these proceedings under Art. 41.3 (intervention) of the CAS Code, it declined to do so[21].

In CAS 2007/A/1287, the Panel has established that when merely acting as the competent deciding body of first instance in a dispute between two or more parties regarding transfer or contractual matters, FIFA cannot, in principle, be named as a respondent in the appeal procedure. Indeed, FIFA cannot be considered as the "passive subject" of the claim brought before the CAS by way of appeal against its decision, as its rights are not concerned by the relief sought by the appellant(s). It is hence clear that FIFA does not have any standing to be sued (*légitimation passive*). However, when deciding to proceed on the merits of the case by formally requesting from CAS that it rejects the appeal and confirms its decision, FIFA thus acts as a party intervening in the case. In the particular case, the CAS Panel therefore considered FIFA as one of the respondents in the proceedings only as a result of an intervention in the proceedings, which became effective when the Appellant reiterated its will to address the appeal against FIFA and FIFA formally requested from CAS in its answer that it rejects the appeal and confirms the Decision. By doing so, FIFA, indeed, decided to proceed on the merits of the case and thus acted as a party intervening in the procedure[22].

18. CAS 2008/A/1192, paras. 45-47.

19. CAS 2007/A/ 1248, para. 30(b).

20. CAS 2007/A/1388 & CAS 2007/A/1389, para. 99.

21. CAS 2008/A/1517; CAS 2008/A/1518.

22. CAS 2007/A/1287, paras. 42-45.

D. Disciplinary matters

1. Principle

The FIFA disciplinary proceedings are primarily meant to protect an essential interest of FIFA, i.e. full compliance with the decisions rendered by its bodies. Indeed, the appeals against the decisions of the disciplinary bodies regard only the existence of a disciplinary infringement under FIFA rules, the power of FIFA to impose sanctions and the appropriateness and proportionality of such FIFA sanctions[23].

2. Determination of the person(s) or association(s) having standing to be sued

If the appellant(s) is/are seeking something only against FIFA and the relief requested affects FIFA only, only FIFA has standing to be sued in such appeals brought before CAS[24].

In this respect, if a player wants to appeal against the sanction imposed upon him, he must summon the correct respondent. In CAS 2008/A/1677, the player had brought before the CAS the decision by the DRC that had found him to be in breach of his employment contract. The player only named his former club as respondent, but not FIFA. The Panel found that while the club had standing to be sued with respect to the financial sanction imposed upon the player, it was clearly not the case as regarded the disciplinary sanction since, by seeking the annulations of it, the player was not claiming anything against the club, but against FIFA. It was therefore only FIFA that had standing to be sued with regard to the disciplinary sanction; since the player had only directed his appeal against his former club and not against FIFA, he could not seek relief for the disciplinary sanction[25].

In CAS 2006/A/1206, the Panel stated that if the FIFA Disciplinary Committee Decision challenged before the CAS is only and solely meant to sanction a coach for not complying with the Players' Status Committee (PSC) decision, whereby the coach was ordered to pay the national football association that used to employ him an amount of money, the national football association, however de facto interested in the outcome of the appeal, is not a party to the FIFA proceedings and cannot be considered as the "passive subject" of the claim brought before the CAS by way of appeal against the DC decision. Indeed, its rights are not concerned by the DC decision and the national football association has no power whatsoever to sanction the person's failure to comply with FIFA bodies' and CAS decisions. It is hence clear that the national association does not have any standing to be sued (*légitimation passive)* and cannot, as such, be identified as a respondent in the arbitration.

Moreover, in CAS 2007/A/1358 and in CAS 2007/A/1359, the Panel considered that when deciding to take part in the proceedings before CAS by filing an answer asking the Panel to reject the appeal and to confirm the decision of one of its bodies in a matter that is, at least to some extent, of a disciplinary nature, FIFA acts as a party intervening in the case and must therefore be considered to have the standing to be sued[26].

E. Standing to be sued with regard to sporting sanctions

In CAS 2008/A/1677, whereas the Panel emphasised that under Swiss law, the defending party has standing to be sued if it is personally obliged by the "disputed right" at stake and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it, it also established that while a club has standing to be sued with respect to the financial aspect of a case, it is not the case with respect to the sporting sanctions imposed to the player, as nothing is claimed against the club nor sought from it[27].

Furthermore, in CAS 2007/A/1369, the Sole Arbitrator agrees that an appeal against any sporting sanctions imposed by the competent FIFA bodies must also be filed against FIFA, in accordance with the CAS case-law[28].

23. CAS 2006/A/1206, para. 29; CAS 2007/A/1329 & CAS 2007/A/1330, para. 30, CAS 2008/A/1620, paras. 4-6.

24. CAS 2007/A/1329 & CAS 2007/A/1330, para. 31; CAS 2008/A/1620, para. 4.7.

25. CAS 2008/A/1677, paras. 92-96.

26. CAS 2007/A/1358 & CAS 2007/A/1359, para. 74.

27. CAS 2008/A/1677, paras. 93-96.

28. CAS 2007/A/1369, paras. 231-232.

Arbitration CAS 2007/A/1370
Fédération Internationale de Football Association (FIFA) v. Superior Tribunal de Justiça Desportiva do Futebol (STJD) & Confederação Brasileira de Futebol (CBF) & Mr Ricardo Lucas Dodô
&
Arbitration CAS 2007/A/1376
World Anti Doping Agency (WADA) v. Superior Tribunal de Justiça Desportiva do Futebol (STJD) & Confederação Brasileira de Futebol (CBF) & Mr Ricardo Lucas Dodô

11 September 2008

Football; doping (fenproporex); CAS jurisdiction; applicable law; no fault or negligence; no significant fault or negligence; burden of proof; duty of care of the athlete; commencement of the suspension period

Panel:
Prof. Massimo Coccia (Italy), President
Mr. Peter Leaver QC (United Kingdom)
Mr. José Juan Pintó (Spain)

Relevant facts

Mr Ricardo Lucas, better known as Dodô (the "Player" or "Mr Lucas" or "Dodô"), is a Brazilian football player born on 2 May 1974 in São Paulo. He has been registered in the last couple of seasons with the Confederação Brasileira de Futebol (CBF), having played in 2007 for the club Botafogo de Futebol e Regatas ("Botafogo" or the "Club") and in 2008 for the club Fluminense.

On 14 June 2007, Dodô was selected for an in-competition anti-doping control on the occasion of the Brazilian championship match between Botafogo and Vasco da Gama. The test was performed by the WADA-accredited LADETEC laboratory of Rio de Janeiro. The urine sample provided by the Player revealed the presence of "Fenproporex", a prohibited substance appearing on the 2007 Prohibited List under category S6, stimulants. Fenproporex is a strong stimulant, precursor to amphetamine.

The Player had already undergone in-competition doping tests on 6 and 16 May 2007, and was tested again on 30 June 2007, always with negative results.

After the Player was notified that his "A" Sample of 14 June 2007 had tested positive, he requested the analysis of the "B" Sample. The test on the B Sample confirmed the adverse analytical finding.

On 9 July 2007, the Superior Tribunal de Justiça Desportiva do Futebol (STJD), the highest sports court in Brazilian football, provisionally suspended the Player for 30 days.

On 11 July 2007, on the advice of Dr Alexandre Pagnani (President of the Brazilian Association of Studies and Fight on Doping, ABECD), Botafogo sent several nutritional supplements regularly used by the team to the University of São Paulo Laboratory for Toxicological Analyses (the "USP Laboratory") to be tested in order to ascertain the possible presence of Fenproporex.

The USP Laboratory's report, dated 13 July 2007 and consisting of a single page signed by the laboratory director and by the person in charge of the analysis, stated that the analysis had found the presence of Fenproporex in some caffeine capsules produced by "Farmácia de Manipulação Pharmacy". The analysed capsules were taken from three containers, two sealed (lots no. 348877 and 348873) and one unsealed and partially used (lot no. 3419560), which had been sent to the USP Laboratory by Botafogo. The USP Laboratory's report did not specify which, nor how many, caffeine capsules were found to be contaminated, but did state that the USP Laboratory *"does not assume liability for the origin of the material delivered for analysis"*.

In the disciplinary proceedings brought by the Brazilian Sports Prosecutor against the Player before the 2nd Disciplinary Commission (the "Disciplinary

Commission"), the Player relied on the USP Laboratory's report to argue that the prohibited stimulant had entered his body without his knowledge and will through the contaminated caffeine capsules manufactured by the local producer Pharmacy 65 Manipulação Ltda. ("Pharmacy 65 Manipulação") that the Botafogo medical staff had given him to ingest before the match. The Player has declared throughout the Brazilian and CAS proceedings that he trusted the team doctors and essentially took whatever was given to him, as he had no reason to make particular inquiries or to have doubts about the various products that were regularly administered to him.

On 24 July 2007, the Disciplinary Commission imposed a 120 day suspension to the Player, stating that the explanation given by the Player was implausible, especially in light of the fact that no other Botafogo player had tested positive in that or in other matches.

The Player lodged an appeal with the STJD. On 2 August 2007, the STJD decided by majority vote to set aside the Discplinary Commission's decision and to acquit the Player (the "Appealed Decision"). The STJD accepted the Player's argument that he had been an innocent victim of contamination and that he had not been negligent.

The CBF notified the Appealed Decision to FIFA on 20 August 2007. WADA was informed of the Appealed Decision on 22 August 2007.

On 6 and 11 September 2007, respectively, FIFA and WADA filed statements of appeal against the decision of the STJD with the CAS.

On 10 December 2007, the Panel issued an Order on Application for Provisional Measures which dismissed a request for provisional measures filed by FIFA. The Panel held that it was not satisfied that FIFA had discharged the burden on it of demonstrating that a provisional suspension of the Player was necessary to protect its position or that the harm or inconvenience that it would have suffered from the refusal of the provisional suspension would have been greater than the harm or inconvenience that the Player would have suffered if such measure had been ordered.

By letter dated 26 March 2008, the Player objected to the request of WADA to hear as witness a representative of Pharmacy 65 Manipulação since (i) Dodô had filed a claim against such company with a Brazilian court and (ii) this evidentiary request of WADA was not mentioned in its appeal brief. On 31 March 2008, the President of the Panel decided to accept the request. On 29 April 2008, WADA sent to the CAS the written witness statement of Mr Milton Luis Santana Soares, owner and chief executive officer of Pharmacy 65 Manipulação.

A hearing took place in Lausanne on 19 and 20 May 2008.

Extracts from the legal findings

1. CAS jurisdiction over the CBF and the STJD

First of all, the Panel observes that the CBF is a member of FIFA and, as such, is contractually bound to respect the Statutes of FIFA to which it has voluntarily adhered.

Article 61 of the applicable 2007 version of the FIFA Statutes provides that, once all internal remedies have been exhausted, FIFA and WADA are both entitled to appeal to the CAS against doping-related decisions adopted by FIFA members such as the CBF. Hence, the CBF is legally bound to yield to an appeal to the CAS brought by FIFA and/or WADA against one of its final doping-related decision.

However, the CBF argues that Article 61 of the FIFA Statutes is of no relevance here because the Appealed Decision was not adopted by the CBF but rather by the STJD, that is a wholly independent judicial body.

Nevertheless, having reviewed Brazilian law and Brazilian sports rules, as well as the documents on file, the Panel has formed the view that the STJD is a justice body which, although independent in its adjudicating activity, must be considered part of the organisational structure of the CBF.

With regard to Brazilian law, first of all the Panel observes that Article 217, paras. 1 and 2, of the Constitution of the Federal Republic of Brazil mentions *"sports justice bodies" ("justiça desportiva")* for the purposes of providing that Brazilian ordinary courts have jurisdiction over sporting matters only when sports proceedings have been exhausted and that sports justice bodies must exhaust such proceedings within sixty days. It is worth mentioning that, contrary to what the Player alleges, Article 217 of the Brazilian Constitution does not specify how sports justice bodies must be structured and whether they are to be independent and set up inside or outside the organisational structure of sports federations. Article 217 leaves the regulation of those details to ordinary laws.

Then, the Panel notes that pursuant to Article 23, para. I, of Lei Pelé, the statutes of Brazilian sports federations must provide for the institution of sports justice bodies in accordance with the requirements of Lei Pelé.

In compliance with Lei Pelé, the STJD and the Disciplinary Commissions have been instituted as independent and autonomous sports justice bodies by Articles 69-71 of the CBF Statutes and have been given authority to judge whether disciplinary violations have been committed by anyone – associations, clubs, players, coaches, etc.– directly or indirectly affiliated to or registered with the CBF. In other words, the CBF has wholly entrusted its vested disciplinary power to the STJD and the Disciplinary Commissions.

In independently exercising such disciplinary power on behalf of the CBF, the STJD is obliged *"to comply with the Statutes, regulations, circulars and decisions and Code of Ethics of FIFA"*, as well as *"to respect the principles and rules of the FIFA Disciplinary Code, of universal application, and the Brazilian Code of Sports Justice (CBJD), of national application"* (Article 70, para. 3, of the CBF Statutes).

The Panel also notes that under Article 50, para. 4, of Lei Pelé, sports federations must finance the functioning of the sports justice bodies that operate with them.

Then, the Panel notes that Article 70, para. 1, of the CBF Statutes confers on the President of the CBF the formal power to appoint the nine judges of the STJD. Pursuant to Article 55 of Lei Pelé, such appointment is done upon indication by the CBF (two judges), by the clubs participating in the top professional championship (two judges), by the Brazilian Bar (two judges), by the referees (one judge) and by the players (two judges). Therefore, seven judges out of nine are designated by the CBF itself or by bodies or individuals operating within the CBF, being affiliated thereto (the clubs) or registered therewith (the referees and the players).

Moreover, according to Article 41, para. XXIII, of the CBF Statutes, the President of the CBF must enforce the rulings of the sports justice bodies.

The Panel also notes that Article 22, para. 3-VII, of the CBF Statutes provides that the General Assembly of the CBF has the power to decide on appeals against the final rulings of the sports justice bodies concerning the loss of affiliation or exclusion of affiliated entities (such as clubs). So, there is at least one topic in which the STJD's judgment yields to that of the main body of the CBF.

In addition, the Panel notes that the STJD's President, in a letter dated 13 September 2007 to the CBF's Secretary General, has clearly stated that *"the Superior Tribunal de Justiça Deportiva do Futebol, thus, has no own legal personality. It is just one of the bodies of the CBF, as well as the Board of Directors (with executive powers) and the General Meeting (with internal legislative powers). As one of the bodies of CBF, the STJD does not constitute a governmental body. Despite that, Article 52 of Law 9615 of 1998 attributes organizational autonomy and decision-making independence from CBF to STJD".* [Emphasis added]

In the light of the foregoing, the Panel is of the opinion that the STJD is a justice body which is an integral part of the organisational structure of the CBF, with no legal personality of its own. The fact that in Lei Pelé, in the CBF Statutes and in the Brazilian Code of Sports Justice there are rules protecting the autonomy and independence of the STJD vis-à-vis the executive and legislative powers of the CBF does not alter the fact that the STJD has been instituted by (and thus owes its legal birth and existence to) the CBF Statutes and is financially and administratively dependent on the CBF (*"dependência físico-financeira"* as characterized by Dr Paulo Marcos Schmitt in his article *Organização e competência da justiça desportiva*, published in *Código Brasileiro de Justiça Desportiva – Comentários e Legislação: Ministério do Esporte*, ass. Comunicação Social, Brasília/DF, 2004, pp. 23-44).

In the Panel's view, it is a commendable feature of the Brazilian sports system that sports federations are organised in accordance with the principle of separation of powers. This means that the Presidency, the Secretariat and the Board, the executive branch of the CBF –of Directors– is not permitted to encroach on the domain of the judicial branch –the STJD, the Disciplinary Commissions and the Arbitration Court– and vice-versa. This happens also in other football associations. However, the praiseworthy independence and autonomy of the STJD in adjudicating the disputes brought before it does not entail that the STJD is a body which could legally stand alone if the CBF did not exist.

Indeed, in the Panel's opinion, the *"stand-alone test"* is the decisive test to reveal whether a given sports justice body pertains in some way to the structure of a given sports organization or not. If the CBF did not exist, the STJD would not exist and would not perform any function. In this respect, the similarity that the STJD suggested between itself and the CAS – *"Just as the CAS is independent of the IOC and the other sports institutions that finance the CAS or nominate its members, the STJD is independent of the CBF"*– is wholly misplaced. Apart from the fact that CAS arbitrators

are appointed by a private Swiss foundation, the International Council of Arbitration for Sport, which is also responsible for the financing of the CAS, the CAS would legally stand alone and exist as an arbitration institution even if the IOC or any of the international federations suddenly disappeared (or simply withdrew their choice of the CAS as arbitration forum). In contrast, the STJD would not legally stand alone if the CBF did not exist.

Accordingly, the Panel is of the view that (at least) for international purposes the decisions of the STJD, although independently reached, must be considered to be the decisions of the CBF. In other words, the CBF is to be considered responsible vis-à-vis FIFA (or other international sports bodies) for the decisions adopted by the STJD. This is exactly the same legal situation as we have in public international law, where States are internationally liable for judgments rendered by their courts, even if under their constitutional law the judiciary is wholly independent of the executive branch.

In conclusion, the Panel finds that the STJD has no autonomous legal personality and may not be considered as a Respondent on its own in a CAS appeal arbitration concerning one of its rulings; consequently, the procedural position of the STJD before the CAS must be encompassed within that of the CBF. Therefore, the Panel holds that the Appealed Decision must be considered as a doping-related decision adopted by a national federation and thus, pursuant to Article 61 of the FIFA Statutes, the CAS has jurisdiction to hear WADA's and FIFA's appeals against the CBF.

2. CAS jurisdiction over the player

The Panel notes that the Player is registered as a professional athlete with the CBF and that, by his deliberate act of registering, he has contractually agreed to abide by the statutes and regulations of the CBF.

The Panel also notes that in the third clause of the employment contract which the Player signed with Botafogo on 16 January 2007, the Player has explicitly declared to be cognisant of and to pledge to respect, besides his contract, the rules of the CBF.

Article 1, para. 2, of the CBF Statutes provides *inter alia* that all athletes must comply with the rules of FIFA. Article 61 of the FIFA Statutes entitles FIFA and WADA to appeal to the CAS against doping-related decisions adopted by national federations. In the Panel's view, while the Player's argument based on the fact that Article 136 of the Brazilian Code of Sports Justice provides that the STJD's decisions are not subject to appeal may be relevant at national level, it is irrelevant for international purposes, because Article 61, para. 7, of the FIFA Statutes specifies that appeals to the CAS are in fact directed against *"internally final and binding doping-related decision"*.

In connection with the provision of the CBF Statutes requiring all CBF players to comply with FIFA rules, the Panel remarks that it is the Brazilian legislation itself which strengthens the status of international sports rules within the Brazilian sports system. Indeed, Article 1, para. 1, of Lei Pelé expressly states that official sports practice in Brazil is governed by national and *international* rules and by sporting practice rules of each type of sport, accepted by the respective national federations. The Panel also observes that Article 3, para. III, of Lei Pelé specifically imposes on athletes practising professional sport the duty to abide by international sports rules, besides Lei Pelé and national sports rules.

The Panel finds these provisions of Lei Pelé particularly wise, insofar as international disciplinary rules are concerned. Indeed, strengthening by law the application of international rules tends to remove *"the temptation to assist national competitors by over-indulgence. The objective is to subject all athletes to a regime of equal treatment, which means that national federations must be overruled if they look the other way when their athletes breach international rules"* (CAS 2006/A/1149 & 2007/A/1211, para. 27).

In the Panel's view, as a result of the above quoted express legislative provisions, international sports rules are directly applicable to Brazilian sport; accordingly, any athlete registered with a Brazilian federation is directly bound by the international rules accepted by that federation, including any provision therein giving jurisdiction to the CAS, as is the case here with doping-related decisions under Article 61 of the FIFA Statutes. In this respect, the Panel observes that a player who has been exposed to an international experience, having played international matches with both his clubs and his national team, must be particularly aware of the existence of international rules directly applicable to him.

Accordingly, the Panel does no more than to observe that the Player has accepted to be bound by the rules of the CBF and by the rules of FIFA.

In light of the foregoing, in accordance with Article R47 of the Code of Sports-related Arbitration (the "CAS Code"), the CAS has jurisdiction to hear WADA's and FIFA's appeals against the two Respondents CBF and Mr Ricardo Lucas Dodô.

The Panel wishes to point out, by analogy to what another CAS Panel stated in the above quoted CAS 2006/A/1149 & 2007/A/1211 case, that it would be a mistake to consider this conclusion to be contrary to Brazilian interests. First, the prosecution of anti-doping violations is in the interest of all Brazilian clubs and players who respect the anti-doping rules. Secondly, all Brazilian federations, clubs and players obviously benefit from the coherent and effective anti-doping regime which FIFA has sought to establish whenever Brazilian clubs or selections are engaged – as often happens, due to the world-renowned excellence of Brazilian football – in international matches and tournaments.

3. Applicable law

The Panel has noted above that Brazilian law explicitly imposes on Brazilian federations and athletes the observance of international sports rules. It is worth adding that, with specific reference to doping and anti-doping controls, the Brazilian Code of Sports Justice confirms and reinforces the status of international anti-doping rules within the Brazilian sports system, providing for the obligation to comply also with international rules (Article 101). In line with such provisions of the Brazilian Code of Sports Justice, Article 65 of the CBF Statutes provides that the prevention, fight, repression and control of doping in Brazilian football must be done complying also with international rules.

The Panel has already noted that the CBF itself dictates its own compliance, as well as that of its clubs, athletes etc., with FIFA rules (see Articles 1, para. 2, and 5, para. V, of the CBF Statutes). Moreover, the CBF imposes the application of the *"principles and rules of the FIFA Disciplinary Code"* in any disciplinary proceedings concerning its clubs, athletes, etc., considering those principles and rules *"of universal application"* and the Brazilian Code of Sports Justice *"of national application"* (see Article 70, para. 3, of the CBF Statutes). In the Panel's view, this CBF statutory provision, acknowledging the legal primacy of FIFA disciplinary principles and rules, although drafted as a rule concerning the law that must be applied by the STJD, implies the obvious consequence of its applicability in any international proceedings reviewing a decision issued by the STJD.

The Panel has also already observed that the Player, in addition to the duty imposed on him by Lei Pelé to respect international sports rules, has contractually agreed, by his deliberate act of registering as a professional athlete with the CBF, to comply with CBF rules and, thus, with FIFA rules too.

The Panel also remarks that Article 60, para. 2, of the FIFA Statutes – contractually accepted by the CBF and the Player, as already explained – provides that in CAS proceedings *"CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law"*.

In light of the foregoing, the Panel is of the opinion that the *"applicable regulations"* under Article R58 of the CAS Code are primarily the rules of FIFA – accepted by all parties – and, subsidiarily, the rules of the CBF. In other words, in case of inconsistency between a CBF provision and a FIFA provision, the FIFA provision must prevail. Otherwise, the deference to international sports rules proclaimed in Brazilian legislation and the obligation assumed by CBF in its own Statutes (and accepted by its clubs, players, etc.) to comply with FIFA rules would become mere lip service. The compliance with and enforcement of FIFA rules is even indicated in Article 5, para. V, of the CBF Statutes as one of the CBF's basic purposes.

In particular, considering that this is a disciplinary case involving an athlete of international status, the Panel is of the view that the FIFA Disciplinary Code – incorporating by express reference (at Article 63, para. 1) the FIFA Doping Control Regulations – must prevail, in case of conflicting provisions, over the Brazilian Code of Sports Justice and the CBF Doping Control Regulation because, as expressly acknowledged by the CBF Statutes, the FIFA disciplinary rules are of *"universal application"* whereas the corresponding CBF rules are merely of *"national application"* (Article 70, para. 3, of the CBF Statutes).

In addition, the right of appeal to CAS against national decisions – granted to FIFA and WADA under Article 61, paras. 5 and 6, of the FIFA Statutes – confirms that national football associations (which, as members of FIFA, have the collective legislative power to enact and modify the FIFA Statutes) have expressed the clear wish to pursue uniform interpretation and application of anti-doping rules and sanctions vis-à-vis athletes of international status throughout the football world. Such uniform interpretation and application would be imperilled or impeded if the CAS – absent any mandatory rule or public policy principle imposing such legal course – had to accord precedence to domestic anti-doping rules over a FIFA disciplinary system contractually accepted, on a basis of reciprocity, by all national football associations and their affiliated clubs and registered individuals.

Furthermore, the Panel notes that the Player, in his appeal to the STJD (lodged on 26 July 2007) against the Disciplinary Commission's decision, expressly invoked in his favour (in addition to some

national rules) the application of the WADA Code, in particular of Article 10.5 (*"Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances"*), motioning for his acquittal "*or eventualiter for the application of a sanction in accordance with the provisions of the WADA Code*" ("*ou eventualmente lhe aplicar a pena em consonância com os artigos do Código Mundial Antidoping*"). During the CAS proceedings, the Player has slightly modified his position, arguing at the hearing that the WADA Code is applicable only on a subsidiary basis. In any event, it seems to the Panel that, by explicitly invoking the rules of the WADA Code, the Player has accepted the application of those rules in his favour as well as to his detriment.

The applicability of the WADA Code is confirmed by the fact that the STJD did apply the WADA Code (in addition to Brazilian rules, FIFA rules and general principles of law) in performing its disciplinary function on behalf of the CBF. Indeed, as the President of the STJD himself explained in his letter to the CAS dated 24 September 2007, the STJD's decision to acquit the Player *"was based on general principles of law, the provisions of the CBJD and the rules of international sports law, particularly articles 2.1 and 10.5.1 of the World Anti-Doping Code [...], which inspired article 65 of the FIFA Disciplinary Code (FDC)"*.

Therefore, considering that (i) FIFA and WADA have also invoked during these proceedings the application of the WADA Code; (ii) various Brazilian rules impose deference to *normas internacionais*, i.e. international rules (see Articles 1, para. 1, and 3, para. III, of Lei Pelé, Articles 101 and 248 of the Brazilian Code of Sports Justice and Article 65 of the CBF Statutes); and (iii) the WADA Code inspired the anti-doping rules of FIFA, the Panel finds that the rules of the WADA Code can also be complementarily applied in this arbitration as regulations whose application has been invoked, and thus accepted, by all parties.

In the Panel's view, Brazilian law may be applied on a subsidiary basis as the law of the country in which the body which has issued the challenged decision is domiciled. Taking into account Article 60, para. 2, of the FIFA Statutes, Swiss law may also be additionally applied, particularly in reference to the interpretation and application of FIFA rules, which are rules issued by a private association incorporated in Switzerland.

In conclusion, the Panel holds that the present case must be adjudicated on its merits applying primarily FIFA rules, complementarily the WADA Code and, subsidiarily, CBF rules and Brazilian law. Additionally, Swiss law might also be applied in connection with the interpretation and application of FIFA rules.

The Panel deems also worth clarifying that, as to the applicable rules setting out the list of prohibited substances and methods (the "Prohibited List"), the 2007 Prohibited List of CBF and FIFA is perfectly consistent with that of WADA. Indeed, the CBF Doping Control Regulation provides that any modification to the list determined by WADA and accepted by FIFA prevails over the CBF list, and the FIFA Doping Control Regulations expressly state that the FIFA 2007 list is *"taken from the 2007 [WADA] Prohibited List, International Standard"* and *"is adapted according to the revised versions in the World Anti-Doping Code"*.

4. Sanction

It is undisputed that the analysis of both urine samples A and B delivered by the Player on 14 June 2007, on the occasion of the match between Botafogo and Vasco da Gama, showed evidence of an adverse analytical finding of Fenproporex, that is a stimulant included in section S6 of the 2007 Prohibited List. As a result, the Panel finds that the objective presence of Fenproporex in the Player's urine samples, regardless of the athlete's subjective attitude (i.e. his possible intent, knowledge, fault or negligence), constitutes an anti-doping rule violation proven to the Panel's comfortable satisfaction, bearing in mind the seriousness of the allegation.

Under Article 65, para. 1(a), of the FIFA Disciplinary Code, the sanction for a first offence is a two-year suspension. In light of the above discussion on the law applicable in this appeal arbitration, the Panel cannot take into account the lesser sanction set out by Article 244 of the Brazilian Code of Sports Justice (between 120 and 360 days of suspension) because (i) this sanction is merely of national application whereas the FIFA sanction is of universal application, as acknowledged by the CBF Statutes; and (ii) the two-year sanction is among the FIFA mandatory rules that must be incorporated without exception in the national disciplinary regulations (Article 152 of the FIFA Disciplinary Code).

The Panel remarks that, under the FIFA Disciplinary Code, the two-year sanction may be eliminated or reduced if the Player discharges the burden of proving that *"he bears no fault or negligence"* (Article 65, para. 3) or, at least, that *"he bears no significant fault or negligence"* (Article 65, para. 2). According to CAS jurisprudence, the possible application of such twofold exception *"is to be assessed on the basis of the particularities of the individual case at hand"* (CAS 2004/A/690).

Article 106, para. 2, of the FIFA Disciplinary Code provides that in *"case of a doping offence, it is incumbent*

upon the suspect to produce the proof necessary to reduce or cancel a sanction. For sanctions to be reduced, the suspect must also prove how the prohibited substance entered his body".

Accordingly, relying on a long line of CAS cases (see e.g. CAS 2006/A/1067, para. 6.8) and on the WADA Code principles related to the athletes' fault or negligence, the Panel observes that the Player, in order to establish that he bears *no fault or negligence*, must prove: (a) how the prohibited substance came to be present in his body and, thus, in his urine samples, and (b) that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered the prohibited substance. The proof of both (a) and (b) would eliminate the Player's two-year sanction.

In order to establish that he bears *no significant fault or negligence*, in addition to the proof of (a) above, the Player must prove: (c) that his fault or negligence, when viewed in the totality of the circumstances and taking into account the requirement of (b) above, was not significant in relationship to the anti-doping rule violation. The proof of both (a) and (c) would reduce the Player's sanction to a penalty ranging between one year and two years (Article 65, para. 2, of the FIFA Disciplinary Code: *"the sanction may be reduced, but only by up to half of the sanction"*).

The Panel observes that, in light of the CAS jurisprudence, the burden of proving the above is a very high hurdle for an athlete to overcome (cf. e.g. CAS 2005/A/830; TAS 2007/A/1252). Indeed, the WADA Code's official comment to Article 10.5 unequivocally states that the mitigation of mandatory sanctions is possible *"only in cases where the circumstances are truly exceptional and not in the vast majority of cases".*

With regard to the standard of proof required from the indicted athlete, the Panel observes that, in accordance with established CAS case-law and the WADA Code, the Player must establish the facts that he alleges to have occurred by a *"balance of probability"*. According to CAS jurisprudence, the balance of probability standard means that the indicted athlete bears the burden of persuading the judging body that the occurrence of the circumstances on which he relies is more probable than their non-occurrence or more probable than other possible explanations of the doping offence (see CAS 2004/A/602, para. 5.15; TAS 2007/A/1411, para. 59).

a) Evidence of how the prohibited substance entered the Player's body

In these proceedings, exactly as in the STJD proceedings, the Player has argued that the prohibited stimulant came to be present in his system because the caffeine capsules that were administered to him before the match against Vasco da Gama had been contaminated with Fenproporex during the production process at the premises of Pharmacy 65 Manipulação.

As evidence of such alleged contamination, the Player relies essentially on the report dated 13 July 2007 issued by the USP Laboratory. However, in light of the balance of probability standard, the Panel finds the evidence provided by such USP Laboratory's report to be inadequate to discharge the burden on the Player.

The Panel accepts the evidence given by Dr Pagnani that the USP Laboratory is a reliable laboratory and does not wish to speculate as to why the caffeine capsules were sent to be analysed all the way from Rio de Janeiro to São Paulo (rather than to the local WADA-accredited laboratory). Nor the Panel wishes to cast any doubt on the correctness of the analyses performed by the USP Laboratory and on the accuracy of its report. However, the Panel cannot read in the USP Laboratory's report more than what is expressly stated therein.

Having carefully scrutinized the USP Laboratory's report, the Panel has noted the following specific matters:

- In comparison to many detailed laboratory reports that these arbitrators have seen in other doping cases, the USP Laboratory's report is very short and sketchy and gives scant details of the analysis.

- The disclaimer at the bottom of the report (the USP Laboratory *"does not assume liability for the origin of the material delivered for analysis"*) warns about the absence of any custodial procedures prior to the delivery of the caffeine capsules to the USP Laboratory and, thus, raises serious doubts as to what was truly given to be analysed. The Player has argued, relying on the testimony of Dr Pagnani, that this is a standard annotation that bears no relevance. However, the Panel observes that the annotation has been typed and signed by the USP Laboratory Director and by the person responsible for the analysis; given the described reliability of the USP Laboratory, it is an annotation that can by no means be ignored.

- The report, in describing the containers in which the caffeine capsules were contained, does not indicate the presence of any player's name on the

labels although, according to the evidence heard at the hearing, each container was personalised with the player's name written on it due to the different weight of the players and the consequent different quantity of caffeine needed (2 mg for each kg of weight).

- The USP Laboratory received three containers of caffeine capsules, two of them sealed and one open and partially used. According to the evidence provided by Dr Vilhena, the two sealed containers had been delivered by Pharmacy 65 Manipulação to Botafogo (for the players Dodô and L.) on 27 June 2007, whereas the open container had been delivered to Botafogo on 20 April 2007 and used by Dodô during May and June 2007. So, given that Dodô's positive testing was on 14 June 2007, the only relevant analysis to provide evidence of how Fenproporex came to be in the Player's body is that of the capsules contained in the container delivered on 20 April 2007; however, the USP Laboratory's report has not indicated how many capsules were in that container nor how many of them were found to contain Fenproporex.

- Indeed, in the report it is only generically stated that there was a positive result of the presence of Fenproporex. The Panel has heard the evidence of Dr Pagnani testifying that the USP Laboratory found that all capsules in all three containers tested positive for Fenproporex. The Panel does not consider it necessary to express any conclusion as to whether it accepts Dr Pagnani's evidence in this regard, because the Panel finds it quite extraordinary that the USP Laboratory's report does not specify which capsules and from which containers, nor how many, were found to be positive for Fenproporex, nor how much Fenproporex was found, nor whether the positive result came from contaminated caffeine capsules or whether it came from Fenproporex capsules found in the containers given for the analysis.

In addition to the above unusual elements, the Panel observes that, strangely, nobody from the USP Laboratory was called by the Player to give direct evidence on the analysis performed. Such evidence could have possibly clarified some of the doubts raised by the disappointingly inadequate content of the USP Laboratory's report.

The Panel finds also noteworthy that the Player's urine samples delivered at the anti-doping controls of 6 May, 16 May and 30 June 2007 showed no presence of Fenproporex. Indeed, on the basis of the evidence provided by Dr Vilhena, in that period the Player ingested before matches – except for night matches starting at 21:45 – the caffeine capsules taken from the container delivered by Pharmacy 65 Manipulação to Botafogo on 20 April 2007, and later sent to the USP Laboratory for analysis. Accordingly, the Panel is asked to conclude that inside the container delivered in April only the capsules ingested by the Player on 14 June 2007 and those analysed by the USP Laboratory on 13 July 2007 were contaminated, while the other capsules contained pure caffeine. The Panel finds this possibility quite implausible.

With regard to the implausibility of the contamination explanation, it is to be noted that Pharmacy 65 Manipulação, as testified by its owner and CEO, Mr Milton Luís Santana Soares, provided to Botafogo a total of 808 caffeine capsules in 2006 and 2007 with not a single case of adverse analytical finding, except for Dodô's case. It is also interesting to note that Fenproporex is a very costly substance – much more expensive than caffeine – subjected to strict controls by public authorities, in particular by the Brazilian agency of health vigilance, ANVISA. Mr Soares also testified that in his company's premises, as required by the law, the production of caffeine capsules and Fenproporex capsules is done at different times and in different places. In addition, the Panel finds quite remarkable the evidence provided by Mr Soares that the caffeine capsules can be easily opened and closed again and the containers can be unsealed and sealed again, rendering a deliberate contamination possible at any time after the end of the production process.

The Panel also notes that on the occasion of the anti-doping controls related to the matches of 1 April 2007 (Botafogo-Vasco da Gama) and 29 April 2007 (Flamengo-Botafogo), the Botafogo's team doctor did declare on both medications list forms that all players had been administered caffeine, while the tested players A., T. (twice) and M. did declare on their respective doping control forms that they had taken caffeine. However, as already mentioned, on the occasion of the doping control that yielded Dodô's adverse analytical finding neither the team doctor nor Dodô declared the use of caffeine on the same forms. Therefore, the proof that the Player did ingest a caffeine capsule on the day of his positive testing is left to the Player's own words, given that the Club's nutritionist, Dr Vilhena, acknowledged at the hearing that she did not personally witness the Player's ingestion of caffeine.

In the light of all the above elements, the Panel is not willing to share the STJD's conclusion that the explanation offered by the Player is acceptable. In the Panel's view, the evidence submitted by the Player as to both the ingestion of a caffeine capsule prior to the

match and the contamination of that caffeine capsule is unsatisfactory.

In particular, the Panel would have expected a much more detailed and unambiguous report by the USP Laboratory, thoroughly illustrating its analytical findings. The Panel finds also quite difficult to believe, considering the high cost of Fenproporex and the public controls to which is subject, that a producer might inadvertently mix Fenproporex with the much cheaper and unrestricted caffeine. Besides, if the production process of Pharmacy 65 Manipulação was so unreliable as to lend itself to such an accidental contamination, it would be a quite unlikely event that only a few caffeine capsules out of many hundreds ended up being contaminated. Given the Botafogo players' intensive ingestion of those caffeine capsules before matches, one would expect some more adverse analytical findings in the many anti-doping controls which they underwent, particularly in the period of May and June 2007.

Given the stringent requirement for the Player to offer persuasive evidence of how the positive finding of Fenproporex occurred, the Panel finds that the Player's explanation would have needed more persuasive evidence to pass the balance of probability test. In other terms, the Panel is not persuaded that the occurrence of the alleged ingestion of Fenproporex through a contaminated caffeine capsule is more probable than its non-occurrence. The Panel has no reason to think that the Player is a cheat. However, in view of (i) the fact that Botafogo's staff was accustomed to dispensing to their players before or during matches no less than five nutritional supplements (declaration by Dr Vilhena) including a stimulant such as caffeine – forbidden until 2004 and permitted nowadays, but still subject to the WADA monitoring program – and (ii) the circumstance that the Player, as he explicitly admitted, essentially ingested whatever the Club's staff gave him, the Panel finds the occurrence of contamination less likely than the possible deliberate administration of a Fenproporex capsule to the Player.

Accordingly, the Panel holds that, on the balance of probability, the Player has failed to establish how the prohibited substance entered his system.

b) Player's caution and degree of fault or negligence

With regard to the duty of caution required under the applicable rules, the Panel shares the following opinion expressed by another CAS Panel: *"No fault" means that the athlete has* fully complied *with the duty of care. […] "No significant fault" means that the athlete has* not fully complied *with his or her duties of care. The sanctioning body has to determine the reasons which prevented the athlete in a particular situation from complying with his or her duty of care. For this purpose, the sanctioning body has to evaluate the specific and individual circumstances. However, only if the circumstances indicate that the departure of the athlete from the required conduct under the duty of utmost care was* not significant*, the sanctioning body may […] depart from the standard sanction"* (CAS 2005/C/976 & 986).

In the light of such definition of the athlete's duty of care, even if the Player's explanation of how Fenproporex had come into his body was supported by plausible evidence (*quod non*), it seems to the Panel that the Player's behaviour was significantly negligent under the circumstances. His departure from the required duty of utmost caution was clearly significant. Indeed, the Player did not exercise the slightest caution.

Questioned at the hearing on the caution that he took before ingesting the caffeine capsules and the other nutritional supplements that the Botafogo's staff regularly gave him, the Player candidly answered that he simply trusted his employer and the team doctors and never knew exactly how and where the products were manufactured nor who produced them. Apart from the justification that he relied on the Club's doctors, the Player has not even attempted to demonstrate that he exerted some particular care before ingesting those products. Questioned about his experience with his current club (Fluminense), the Player testified that he was still being administered several products before matches, but was not able to mention their names or what they were.

The Panel finds extraordinary this Player's admission that, despite having already had a positive test, he is still passively ingesting a variety of products administered to him by his current club without asking any information or doing any research on his own.

As seen above, the Player has the burden to establish that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered a prohibited substance. Although the Panel is satisfied that the Player did not *"know or suspect"* that the caffeine capsule could be contaminated by a prohibited substance, the Panel cannot accept that the Player *"could not reasonably have known or suspected"* that this was so.

The Panel notes in particular the clear and public warning issued by the CBF to Brazilian football players (and their doctors) as to the risk of contaminated nutritional supplements. Article

8 of the CBF 2007 Doping Control Regulation reads as follows: *"COMMON MISTAKES BY THE ATHLETE OR PHYSICIAN THAT CAN BRING ABOUT A POSITIVE TEST. […] DO NOT use medications, nutritional supplements or vitamins of dubious origin. DO NOT trust the composition declared on leaflets and labels of medications, nutritional supplements and pharmaceutical and homeopathic productions. Verify the reliability of the supplier, as there are many cases of omitted mention in labels of stimulants and anabolic agents"*.

The Panel also notes that the WADA Code – published even in a Portuguese version in the WADA internet site– provides at article 2.1.1 that it *"is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body"*. This means that the Player is personally responsible for the conduct of people around him from whom he receives food, drinks, supplements or medications, and cannot simply say that he trusts them and follows their instructions.

Then, the WADA Code's official comment to Article 10.5 (provision whose application was expressly invoked by the Player) reads as follows: *"a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the administration of a prohibited substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any prohibited substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink)"*.

The circumstances of the present case are quite typical and fall squarely in the warnings set out in the quoted Article 8 of the CBF 2007 Doping Control Regulation as well in the WADA Code's comment to Article 10.5. Indeed, there have been so many anti-doping cases where the athlete has attempted to justify himself on the basis of a contaminated supplement that practically every sports or anti-doping organization in the world has issued warnings against the use of nutritional supplements.

In addition, the Panel notes that, according to the concurrent evidence put forward by Dr Pagnani and Dr Vilhena, there have been in Brazil various publicly known cases of contaminated nutritional supplement that yielded positive anti-doping tests. Such cases, showing the high risk of contamination of nutritional supplements in Brazil, should have rendered the Player acutely aware of the risk and induced him to refuse the caffeine capsules given to him. All the more so, as the Player has declared that he never felt that caffeine contributed any particular benefit to his sporting performance.

Notwithstanding the extensive information available that should have alerted him to the risk of a doping offence, the Player chose to do nothing, simply and without question ingesting every product administered to him. Even accepting that the Club has a serious responsibility towards the Player, the Panel finds that the Player's conduct in the circumstances amounted to a significant disregard of his positive duty of caution. Indeed, nothing prevented the Player from complying with such duty and refusing the products given to him or, at least, checking personally how, where and by whom the products were manufactured. The Panel finds that nowadays an athlete of Dodô's stature, age and experience cannot merely rely on his team's staff in using supplements and vitamins. As another CAS Panel has vividly put it, this Player's attitude is *"tantamount to a type of wilful blindness for which he must be held responsible. This "see no evil, hear no evil, speak no evil" attitude in the face of what rightly has been called the scourge of doping in sport – this failure to exercise the slightest caution in the circumstances – is not only unacceptable and to be condemned, it is a far cry from the attitude and conduct expected of an athlete seeking the mitigation of his sanction for a doping violation"* (CAS 2003/A/484).

Therefore, the Panel finds that the Player's degree of *"fault or negligence"*, viewed in the totality of the circumstances, is clearly *"significant"* in relation to the anti-doping rule violation.

Notwithstanding the fact that the Panel is finding against the Player, the account given by the Club's nutritionist prompts the Panel to make clear that the Club's habit of handing out numerous capsules and supplements to its players as well as the Club's system of obtaining, keeping, guarding and dispensing those capsules and supplements seem, to say the least, imprudent. Indeed, what this case has highlighted is that it is the players who end up bearing any consequences of such a club's attitude, in terms of both health and sanctions. In this respect, the Panel wishes to recall the WADA Code warning clause to be found at the very beginning of the Prohibited List and which any athlete or club's staff or doctor should always bear in mind: *"The use of any drug should be limited to medically justified indications"*.

In conclusion, the CAS has jurisdiction *ratione materiae* and *ratione personae* to entertain the appeals of the FIFA and the WADA in respect of the CBF and Mr Ricardo Lucas Dodô, while it has no jurisdiction *ratione personae* in respect of the STJD.

The appeals of FIFA and WADA against the decision dated 2 August 2007 of the STJD are upheld.

Arbitration CAS 2008/A/1458
Union Cycliste Internationale (UCI) v. Alexander Vinokourov & Kazakhstan Cycling Federation (KCF)
23 July 2009

Cycling; doping/use of a prohibited method; interpretation of the wording of a Commitment signed by the rider; payment of a contribution as a condition for the Rider's reinstatement

Panel:
Prof. Christoph Vedder (Germany), President
Mr. Beat Hodler (Switzerland)
Mr. Michele Bernasconi (Switzerland)

Relevant facts

The Union Cycliste International (UCI), the Appellant, is the international federation governing the sport of cycling worldwide. It is an association which comprises the national federations which govern the sport of cycling in their respective countries as members and has its registered office in Aigle, Switzerland.

Mr. Alexander Vinokourov, the First Respondent ("the athlete" or "Mr. Vinokourov") is an international professional cyclist of Kazakh nationality, under the jurisdiction of the Kazakhstan Cycling Federation. He holds a licence issued by the Kazakhstan Cycling Federation. He has participated in and ranked highly in numerous international top-level competitions, such as the Tour de France in 2003 where he was placed third.

The Kazakhstan Cycling Federation, the Second Respondent (KCF) is the national federation responsible for the sport of cycling in Kazakhstan and, as such, member of UCI.

Mr. Vinokourov, as a member of the UCI Pro Team "Astana", participated in the 2007 Tour de France, which was held from 7 July to 29 July 2007. He was submitted to an in-competition blood doping test, according to the UCI Anti-Doping Regulations (ADR) which revealed the presence of a "mixed red blood cell population indicating homologous blood transfusion". Mr. Vinokourov was notified that he was tested positive on 24 July 2007. The same day, he was suspended by his team and left the Tour de France. Mr. Vinokourov has not competed since then.

Upon receipt of the analysis results, the UCI, by letter of 30 July 2007, asked the KCF to initiate disciplinary proceedings against Mr. Vinokourov. After a hearing held on 5 December 2007 before the KCF´s Anti-Doping Commission in Almaty, Kazakhstan, this Commission, which had doubts about the reliability of the tests, mainly decided on the same day to disqualify Mr. Vinokourov for a period of one year.

After the communication of the Anti-Doping Commission´s decision, in a press conference held on 7 December 2007, Mr. Vinokourov declared publicly that he would end his career.

In the course of the proceedings the contentious matters of the dispute have changed considerably. Originally, by 17 January 2008, UCI lodged an appeal against the decision of KCF´s Anti-Doping Commission to impose on Mr. Vinokourov a sanction of one year only. In its Statement of Appeal and Statement of case, in particular in the prayers for relief, UCI requested the Panel to state that an anti-doping rule violation took place and declare Mr. Vinokourov ineligible for two years. The extension of the period of ineligibility required by UCI pursuant to Article 277 ADR 2004 was only mentioned in the reasoning of the "Statement of case" of 18 December 2008.

As Mr. Vinokourov, in his answer of 27 January 2009, admitted to have committed an anti-doping rule violation and accepted a two years sanction the original issues of the dispute were settled and the continuing dispute focussed on the matter of the date of the reinstatement. Mr. Vinokourov submitted arguments against the application of Article 277 ADR 2004 in his case. The issue of Article 277 ADR 2004 gave rise to the exchange of further written submissions. The date of the commencement of the period of ineligibility, however, was not disputed: 24 July 2007.

In its Additional submission of 26 March 2009, UCI abandoned the application of Article 277 ADR 2004 because Mr. Vinokourov was not removed from UCI´s registered testing pool. Therefore the issue of an extension of the period of ineligibility based on Article 277 ADR was no longer a matter of dispute.

At this stage, all matters raised by UCI in its appeal and dealt with in the parties´ submissions are resolved.

However, UCI, in its Additional Submission, introduced the payment of the contribution allegedly due under the "Rider´s commitment" as a condition for Mr. Vinokourov´s reinstatement. Against this argument Mr. Vinokourov submitted various counter-arguments including that the submission is inadmissible because, according to R51 and R56 CAS Code, it was submitted out of time. Mr. Vinokourov also submitted that the Commitment is null and void and that it is unenforceable because Mr. Vinokourov was not free to sign or not to sign the Commitment. By reference to the *Canas* decision of the Swiss Federal Tribunal an undertaking signed by an athlete as a precondition to participate in an event is unenforceable under Swiss law. According to declarations made by UCI´s officials and by representatives of the Tour organizer the signature of the Commitment was a *conditio sine qua non* to participate in the Tour de France which is the most important event in the cycling calendar. Mr. Vinokourov further submits that the Commitment constitutes an excessive obligation within the meaning of Art. 27 Swiss Civil Code and is not justified by a paramount public interest of the fight against doping under Art. 28 Swiss Civil Code. A two years suspension plus the payment of an annual salary would be disproportionate.

But, on the other hand, Mr. Vinokourov explicitly declared his consent to the Panel´s power to decide on the matter of the validity of the Commitment and submitted prayers for relief, accordingly.

Whereas UCI introduced the "Commitment" mainly as a condition for Mr. Vinokourov´s reinstatement, Mr. Vinokourov goes beyond and requests the Panel to decide on the existence of his alleged obligation to pay the contribution including the validity of the Commitment as an independent matter separate from the issue of the date of his reinstatement.

Both the UCI and Mr. Vinokourov claim the reimbursement of their legal fees and other costs incurred.

As it is of paramount importance for Mr. Vinokourov to know with certainty the date of his eligibility to compete as soon as possible, he proposes a Partial Award on all the parties´ prayers for relief except UCI´s prayers relating to the payment of the contribution as a condition for the reinstatement.

Extracts from the legal findings

1. Anti-doping rule violation and consequences

Mr. Vinokourov committed an anti-doping rule violation according to Article 15 par. 2 ADR 2004. The analysis of both the A and the B samples conducted by the WADA accredited laboratory in Chatenay-Malabry, France, revealed the presence of a mixed red blood cell population indicating homologous blood transfusion which constitutes the use of a prohibited method in the sense of Article 15 par. 2 ADR 2004 in connection with M 1 of the WADA 2007 Prohibited List (blood doping).

Mr. Vinokourov was not able to challenge the validity of the laboratory findings and explicitly admitted to have committed an anti-doping rule violation.

UCI´s ADR, in its Article 261, for an anti-doping rule violation according to Article 15 par. 2 ADR provides for a sanction of two years. By explicitly accepting the two years period of ineligibility Mr. Vinokourov waived the opportunity to claim the existence of exceptional circumstances which, according to Articles 264 *et seq.* ADR 2004, could reduce the period of ineligibility.

According to Article 275 as read together with Articles 217 *et seq.* and Article 268 ADR 2004 the period of Mr. Vinokourov´s ineligibility commenced on 24 July 2007, the day on which he was suspended by his team and left the Tour de France. This date is not disputed by either party nor is disputed the fact that Mr. Vinokourov did not participate in any race since then.

The results obtained by Mr. Vinokourov during the Tour de France 2007 are automatically annulled according to Articles 256 and 257 ADR 2004. Results obtained later, if any, are disqualified, according to Article 274 ADR 2004.

2. The date of the reinstatement according to UCI´s ADR 2004

Based on the foregoing considerations and, in particular, according to Articles 261 par. 1 and 275 ADR 2004 the sanction of two years' ineligibility extends to 23 July 2009.

As UCI is no longer of the opinion that Art. 277 ADR applies to Mr. Vinokourov´s case and the Panel

does not see the elements of that provision met in this particular case, an extension of the period of ineligibility, as initially submitted by UCI, cannot be justified on the basis of Article 277 ADR 2004.

3. The payment of the contribution according to the rider´s commitment as a condition for reinstatement

According to R51 and R56 CAS Code, the Panel would have to reject UCI´s submission in relation to the Commitment as delayed. Neither did the UCI and Mr. Vinokourov agree in advance nor did the Panel order that further submissions may be made concerning the Commitment. No exceptional circumstances could have justified such kind of a late submission. The Panel allowed further submissions exclusively in relation to Article 277 ADR 2004. However, as Mr. Vinokourov in his response expressly agrees to the extension of the claim made by UCI, the Panel will deal with the issue of the Rider´s commitment as a potential condition for reinstatement.

The "Rider´s commitment", signed by Mr. Vinokourov on 29 June 2007, *i.e.* 8 days before the Tour de France 2007 started, does not establish the payment of the contribution as a condition for the reinstatement. Pursuant to the Commitment the payment of the contribution is an obligation "*in addition to the standard sanctions*". The standard sanction according to the anti-doping regulations, *i. e.* ineligibility for two years, remains unaffected. The Commitment, in its original French version, speaks of "*sanction réglementaire*" which clearly shows that the Commitment is an additional and distinct measure. The payment of the contribution is "*in addition*" to the sanction and, hence, separate and independent of the regular sanction. Furthermore, the Commitment aims at the payment of a "*contribution to the fight against doping*" which is supposed to be payable to the Council for the Fight Against Doping. This wording differs considerably from terms such as "fine", as used in the later Article 326 ADR 2009 which would have clearly indicated the meaning of a sanction or even a contractual penalty. Mr. Vinokourov, when he accepted and signed the Commitment, reasonably could have been of the understanding that the Commitment had nothing to do with a possible doping sanction, in particular the duration of a suspension.

The Panel notes that UCI, in its letter to the President of the KCF, dated 6 October 2008, did not link the payment of the contribution to the date of Mr. Vinokourov´s reinstatement. In the letter to Mr. Vinokourov of 9 October 2008 UCI only mentioned the alleged extension according to Article 277 ADR 2004 and, hence, fixed the date of re-eligibility for 7 April 2010. The payment of the contribution was only indirectly mentioned by reference to the letter to the KCF.

This understanding of the wording of the Commitment is supported by the context of the Commitment. It is an ad hoc-measure taken by the UCI in order to counteract the rumours nourished by the so-called Puerto affair shortly before the Tour de France. The Commitment itself, as the beginning of its first paragraph shows, was a mere symbolic action which mainly addresses to the public, the legal validity of which was doubted even by the UCI President and high officials. For that purpose UCI created the payment of an annual salary as a severe additional sanction. In this situation, if UCI had wished to make the fulfilment of the Commitment a condition for the reinstatement, this would have had to be phrased unequivocally in the Commitment itself. A clear wording of the Commitment would have been necessary also because the relevant anti-doping regulations, at that time, did not contain such a condition for reinstatement.

In the absence of a contractual condition for Mr. Vinokourov´s reinstatement an extension of the sanction could be based exclusively on the set of rules which specifically govern anti-doping rule violations and their consequences. However, UCI´s ADR 2004, which apply to the case do not mention a payment whatsoever as a sanction or a precondition for the reinstatement of an athlete who had served a period of ineligibility. As the Panel already stated, Mr. Vinokourov will be eligible to compete as from 24 July 2009 according to the applicable ADR 2004.

In compliance with Article 10.12 of the WADA Code 2009 UCI introduced into its ADR 2009 a new Article 326 which provides for the imposition of fines "*in addition to the sanctions*" provided for generally. According to Article 326 par. 1 lit. a ADR 2009 in a situation where a sanction of two years or more is imposed, a "*fine*" equal to the net annual income shall be inflicted. However, neither Article 326 nor any other rule of the ADR 2009 nor the WADA Code 2009 make the reinstatement dependent on the prior payment of the fine.

Only by virtue of a footnote attached to Articles 324 and 325 ADR 2009 which deal with the conditions for the reinstatement such as testing and the consequences of retirement - the previous Art. 277 ADR 2004 - the payment of the fine is made conditional for the reinstatement, indirectly. The footnote refers to an Article 12.1.034 which is found under "Amendments to other regulations"

which reads:

> *"The person suspended shall not, upon expiry of the period of suspension, be returned his licence or given a new licence and shall not be eligible to participate in cycling events in whatever capacity if he has not fulfilled all his obligations under the present regulations or under any decision taken in accordance therewith".*

However, according to the transitional rule of Article 373 ADR 2009 the provisions of the new ADR do not apply to an anti-doping rule violation which occurred prior to 1 January 2009, unless one of the new rules is a *lex mitior*. Article 326 ADR 2009, as read with Article 12.1.034, does not constitute a rule more favourable to Mr. Vinokourov than the rules of the ADR 2004. Therefore, Article 326 ADR 2009 does not apply to Mr. Vinokourov´s reinstatement.

In accordance with and on the basis of Article 10.12 WADA Code 2009 UCI, in its ADR 2009, has introduced the imposition of a fine as an additional sanction which is new in the anti-doping law. Article 326 ADR 2009 provides a new category of an anti-doping sanction and is not a mere clarification or codification of the legal situation that already existed under the previous rules. Therefore, Article 326 ADR 2009, as amended by Article 12.1.034, cannot be taken into consideration for the interpretation of the ADR 2004 in the sense that the payment of a fine is a condition for reinstatement already under the ADR 2004.

In the situation where the payment of the contribution is not conditional for Mr.Vinokourov´s re-eligibility the Panel leaves open the issue whether or not the Commitment is legally valid and the alleged obligation arising from it is enforceable.

4. Merits of the dispute in relation to the obligation to pay the contribution under the "Rider's commitment"

UCI and Mr. Vinokourov are in dispute about the validity and enforceability of the Commitment. Whereas UCI is of the opinion that the commitment is legally valid and, in particular, that Mr. Vinokourov was free to sign, the latter challenges the commitment mainly because he was not free to sign or reject the commitment which was a precondition for his participation in the Tour de France.

The Panel was requested by UCI, in its 5th prayer for relief in the "Additional Submission" of 26 March 2009, to decide, first, on the payment of the contribution as an independent matter and, second, on the payment to be conditional for the reinstatement. Mr. Vinokourov, in his "Response" of 9 April 2009 agreed to this new subject-matter of the dispute and requested the Panel to decide. However, the Panel is of the opinion that this issue, given the amount of money at stake and the general importance of such an extra-regulatory contractual sanction, needs more consideration with respect to the facts and the law.

Therefore, because the issue of the date of Mr. Vinokourov´s eligibility to compete does not tolerate further delay, the Panel decided, according to Article 188 Swiss Statute on Private International Law, to issue a Partial Award regarding the date of Mr. Vinokourov´s reinstatement only.

5. Summary

Based on the foregoing considerations the Panel comes to the conclusion that Mr. Vinokourov committed an anti-doping rule violation in the form of blood doping and, therefore, is to be declared ineligible to compete for two years commencing on 24 July 2007. Hence, the decision of KCF´s Anti-Doping Commission of 5 December 2007 must be reversed. As Article 277 ADR 2004 does not apply and the payment of the "contribution" under the "Rider´s commitment" is not conditional for Mr. Vinokourov´s reinstatement the two years period of ineligibility will elapse on 23 July 2009 and Mr. Vinokourov will be eligible to compete internationally as from 24 July 2009.

The dispute about the payment of the contribution as a matter independent of the dispute on the date of Mr. Vinokourov´s reinstatement is not yet ready for a decision. Hence, the Panel issues its decision as a Partial Award, according to Art. 188 Swiss Statute on Private International Law.

Arbitration CAS 2008/A/1485
FC Midtjylland A/S v. Fédération Internationale de Football Association (FIFA)
6 March 2009

Football; international transfer of minor players; scope of application of Art. 19 RSTP; application of EC Law in general; application of the Cotonou Agreement; application of the Charter of Fundamental Rights of the EU

Panel:
Mr. Stuart McInnnes (United Kingdom), President
Mr. Lars Halgreen (Denmark)
Prof. Luigi Fumagalli (Italy)

Relevant facts

FC Midtjylland A/S ("the Appellant" or "Midtjylland") is a football club with its registered office in Herning, Denmark. Midtjylland is a Danish Premier League Club. It has established cooperation with FC Ebedei, a Nigerian Club. The official website of Midtjylland contains the following information on this cooperation: *"FC Midtjylland has established cooperation with the Nigerian club FC Ebedei, which plays in the second tier of Nigerian football. (…) The cooperation with FC Ebedei means that FC Midtjylland has the purchase option on the club's biggest talents. Oluwafemi Ajilore, who debuted with FC Midtjylland in 2004 as a 19 years old, is the first talent to come from FC Ebedei to FC Midtjylland. The cooperation also includes players below the age of 18, as FC Midtjylland has the possibility of enrolling young Nigerian talents in the Club's Football Academy".*

On 6 June 2006, Midtjylland registered three minor Nigerian players ("the Players"), all born in 1989 and previously registered with the Nigerian club FC Ebedei.

On 1 February 2007 Midtjylland applied for player permits for three players ("the Younger Players"), all born in 1990 and also previously registered with the Nigerian club FC Ebedei.

The Danish Football Association issued the necessary licences in favour of the Players and registered them as amateurs in accordance with the Danish Football Association's definition of amateur players. According to this definition, a player may receive a maximum total amount of DKK 24,000 (EUR 3,219) per calendar year without losing his amateur status. The Danish Football Association declined to issue amateur player permits to the Younger Players pending resolution of an ongoing case before the Players Status Committee concerning potential violation of Art. 19 of FIFA's Regulations for the Status and Transfer of Players ("the RSTP").

Both the Players and the Younger Players have been granted a residence permit by the Danish Immigration Service, allowing a short-term stay, as students. The permits granted to the Players and the Younger Players do not include the right to work.

The Players have been given an upper secondary school education, in a public school in Denmark. The Younger Players have likewise participated in 10th grade schooling at Ikast Youth Center and have attended school for 13,3 hours per week (10 lessons of 1 hour and 20 minutes), which comprise lessons in ordinary Danish classes, English classes, sports classes, Danish culture classes, art and human rights classes.

The Appellant explained that the Nigerian students under the age of 18 who play football with the Appellant receive contributions towards board and lodging and a little pocket money. According to the Appellant, the total amount of these contributions do not exceed DKK 24,000 per student, on an annual basis, in order for these students to be registered as amateur players according to the regulations of the Danish Football Association (DBU).

In February 2007, the FIFPro contacted FIFA alleging that Midtjylland was systematically transferring minor Nigerian players, in violation of Art. 19 para. 1 RSTP. On 25 October 2007, the Players' Status Committee (PSC) issued a decision against Midtjylland and the Danish Football Association, stating as follows in relevant parts ("The Decision"): *"(…) 7. (…) Art. 19 of the Regulations relating to the protection of minors is applicable to both amateur and professional players. (…) 13. (…) The protection of minors, in fact, constitutes one of the principles included in the agreement that was concluded between FIFA, UEFA*

and the European Commission in March 2001 and is one of the pillars of the Regulations. In this respect, the Committee recalled that the inclusion of this provision was the result of an alarming situation that had occurred relating to abuse and maltreatment of many young players, mostly still children. The Committee emphasized that solely an interdiction allowing only very limited exceptions under specific circumstances could bring a halt to such a situation and protect minor players from their rights being infringed upon. Furthermore, the Committee agreed that such aim can only be reached by a strict, consistent and systematic implementation of Art. 19 of the Regulations pointing out that no means allowing a more lenient modus operandi appear to exist. Moreover, the members of the Committee underlined that the consistent implementation of Art. 19 of the Regulations offers clubs and players legal security and complies with the principle of good faith. 14. On account of the above considerations and in strict application of Art. 19 of the Regulations, the Committee has to reject the arguments put forward by both the DBU and FC Midtjylland. (…)".

For the above mentioned reasons, the PSC decided the following: *"1. The Danish Football Association (DBU) has been issued with a strong warning for the infringement of Art. 19 para. 1 of the FIFA Regulations for the Status and Transfer of Players. 2. FC Midtjyland has been issued with a strong warning for the infringement of Art. 19 para. 1 of the FIFA Regulations for the Status and Transfer of Players. 3. (…)".*

On 14 February 2008, Midtjylland filed a statement of appeal with the Court of Arbitration of Sport (CAS) directed against the Decision.

Extracts from the legal findings

1. Is Art. 19 RSTP applicable to professional and amateur minor players?

The Appellant's submissions are based on the assumption that Art. 19 would have to be applied only to professional players especially because Art. 19 para. 2 (b) ii) mentions the case where the minor should *"cease playing professional football"*. The Panel however considers that Art. 19 applies equally to amateur and professional minor players.

Firstly, a literal construction of the provision does not indicate that the application of the provision would be limited to professional players. The title of the chapter V of the RSTP, under which Art. 19 has been set, refers to *"International Transfers involving Minors"*. The term *"Transfer"* is to be linked with the notion of *"Registration"*, which applies to both amateur and professional players (Art. 5 para. 1). Furthermore, Art. 19 is entitled *"Protection of Minors"* and Art. 19 para. 1 refers to *"Players"* without any specification as to the status of these players. It is thus clear to the Panel that Art. 19 has been drafted to apply to minor players in general, irrespective of whether they are professional or amateur according to the Regulations. Any other construction would be contrary to the clearly intended objective and spirit of the regulation. The Panel accepts that to apply Art. 19 RSTP restrictively to professional players only could result in obviating protection of young amateur players from the risk of abuse and ill treatment which was clearly not within the anticipation of the scope of the regulation.

In view of the finding that the protection provided by Art. 19 RSTP applies equally to amateur and professional minor players there is no need for the Panel in the present dispute to determine whether the Players registered with the DBU are to be considered as amateur or professional according to Art. 2 RSTP. On this issue, despite registration of the Players as amateurs by the DBU, the Panel notes that CAS case law has taken a broad approach in the interpretation of the notion of professional status, in the application of the RSTP 2001 (see CAS 2006/A/1177, especially para. 8.4).

Finally, the Panel notes that the status of *"Professional"* or *"Amateur"* as defined by the RSTP is not to be confused with any other status, which is not specific to the RSTP or to the activity of playing football, such as the status of *"Worker"* or *"Student"*.

2. Does the application of Art. 19 RSTP to the present case contradict any mandatory provision of public policy or any other provision of EC Law?

The Appellant submits that a strict application of Art. 19 RSTP would contravene the EC Legislation.

The Appellant's submissions are based on the assumption that EC Law would be binding upon the CAS, as regards disputes connected with FIFA Regulations. This assumption is not correct. Art. R58 of the Code provides that the Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties. In the present case, it is not disputed that the parties have accepted Art. 60 para. 2 of the FIFA Statutes, which provides for the application of the various regulations of FIFA and, additionally, Swiss law. It is recognized by the relevant Swiss authors, as well as by CAS case law, that Art. 187 of the Swiss Private International Law (SPIL) allows an Arbitral Tribunal to decide the dispute in application of private rules of law, as sporting regulations or rules issued by an international federation (see amongst others Rigozzi A., L'arbitrage international en matière de sport, Bâle 2005, N. 1178; see also TAS/2005/A/983-984, especially para. 62

ff.). In consequence, the direct application of EC Law provisions or principles has been excluded by the parties and the Appellant cannot claim the application of non mandatory provisions of EC law.

Even if the parties have chosen to submit their dispute to private rules of law and to Swiss law, an Arbitral Tribunal having its seat in Switzerland has, to a certain extent, to take into consideration the application of mandatory foreign laws where this is justified by a sufficient interest (see Poudret/Besson, Comparative Law of International Arbitration, 2nd ed., London 2007, N. 707c, p. 615). In order to claim that a specific provision of EC Law is to be applied in cases involving FIFA Regulations and submitted to Art. 60 para. 2 of the FIFA Statutes, one has to establish that the relevant EC provisions are of a mandatory nature according to Swiss law, which is the law of the seat of the arbitration.

Before deciding whether Art. 19 RSTP contradicts a provision or principle of EC Law that would have to be considered as mandatory by the Panel, it is to be examined whether Art. 19 RSTP contradicts any provision of EC Law at all. The Panel will in consequence address the submissions made in connection with the Cotonou Agreement, the case law of the European Court of Justice on the prohibition of discrimination of workers and the freedom of assembly and of association.

The Appellant refers to Art. 13 para. 3 of the Cotonou Agreement, which reads as follows: *"The treatment accorded by each Member State to workers of ACP countries legally employed in its territory, shall be free from any discrimination based on nationality, as regards working conditions, remuneration and dismissal, related to its own nationals. Further in this regard, each ACP State shall accord comparable non discriminatory treatment to workers who are national of a Member State"*. It seems to the Panel that this provision could have a direct effect on the signatory States.

The Panel is of the opinion that Art. 13 para. 3 of the Cotonou Agreement confers the right to non discrimination of ACP nationals only as regards employment terms and conditions, but not as regards access to employment. The text of Art. 13 para. 3 of the Cotonou Agreement refers expressly to *"Workers of ACP countries legally employed in its territory"*. The Panel has concluded that the Players are not to be considered as legally employed in Denmark. The Appellant submits that they have no employment contract and are not employed in Denmark. Furthermore, according to the Danish immigration legislation, they are to be considered not as *"workers"*, but as *"students"*. The Residence permits of the Players, produced with the Appeal Brief, mention expressly that the residing authorisation does not include the right to work.

It is accordingly to be considered that the Players are outside of the scope of application of Art. 13 para. 3 of the Cotonou Agreement, because they are not workers. In consequence, this provision is not relevant as regards the registration of the Players with the Appellant.

The Appellant furthermore submits that the case law of the European Court of Justice, especially the *Simutenkov* case, would support the point of view that the Players have a legal claim to be treated equally to citizens of the European Union or of the European Economic Area, that is to say, to benefit from the exception of Art. 19 para. 2 b) RSTP.

The Appellant refers to the judgment of the Court of Justice dated 12 April 2005, in the case C-265/03. In this case, the Court ruled that Art. 23 para. 1 of the Partnership Agreement between the EC and the Russian Federation must be construed to preclude application to a professional sportsman of Russian nationality, who is lawfully employed by a club established in a member State, of any rule drawn up by a sports federation of that State, which provides that clubs may field, in competitions organized at national level, only a limited number of players from countries which are not European Economic Area nationals.

In the Panel's view, this decision concerns only citizens who are lawfully employed, that is to say players which have to be considered as *"workers"*. The Panel has determined that the Players do not hold the status of workers but are students.

Furthermore, it is clear to the Panel that the European Court of Justice interpreted Art. 23 of the Agreement between the EC Community and the Russian Federation as being relevant only with regard to working conditions, remuneration or dismissal, and not as regards the rules concerning access to employment (see Simutenkov case, C-265/03, para. 37). The Agreements concluded between the EC Community and third countries, prohibiting discrimination as regards working conditions, have a scope of application which is clearly limited to foreigners legally employed in the member States. They do not apply to foreigners who are not yet legally employed and want to enter the employment market. Any other construction of these agreements would be in total contradiction with the immigration limitations of each member state and allow any national of the states with which the EC Community has an agreement to enter the territory of the Member

State, without any restriction.

In the light of the above mentioned, the Panel is of the opinion that the rules provided by Art. 19 RSTP do not contradict any provision, principle or rule of EC Law, of mandatory nature or not.

The Appellant also claims that Art. 19 RSTP contradicts Art. 12 of the Charter of Fundamental Rights of the European Union, on the freedom of assembly and of association. As submitted by FIFA, the Charter of Fundamental Rights is not a legal document having binding effect. In consequence, one cannot rely upon Art. 12 in order to assert any legally enforceable right.

Furthermore, the Panel considers that the registration with a football club is not protected by the right to freedom of peaceful assembly and to freedom of association provided by Art. 12 of the Charter. In that respect, it is clear that Art. 19 RSTP does not prevent the Players from playing football or from joining other people in order to play football.

Finally, the Panel also notes that certain rules may constitute a restriction to fundamental rights, when such rules pursue a legitimate objective and are proportionate to the objective sought. In the instant case, the Panel fully endorses the opinion expressed in the Arbitral Award CAS 2005/A/955 and CAS 2005/A/956, especially in para. 7.2, and considers that FIFA rules limiting the international transfer of minor players do not violate any mandatory principle of public policy and do not constitute any restriction to the fundamental rights that would have to be considered as not admissible.

In conclusion, the Panel is of the opinion that Art. 19 RSTP, as applied by the Players Status Committee in the challenged decision, does not contradict any provision of public policy or any provision of EC Law.

In conclusion, the Panel finds that the Appellant has breached Art. 19 RSTP and that it was justified to impose a sanction for the registration of the Players. Furthermore, the Panel is of the opinion that the nature and the level of sanction imposed on the Appellant is totally appropriate. Midtjylland's Appeal is therefore dismissed.

Arbitration CAS 2008/A/1575
Fédération Internationale de Football Association (FIFA) v. Malta Football Association (MFA) & M.
&
Arbitration CAS 2008/A/1627
World Anti Doping Agency (WADA) v. Malta Football Association (MFA) & M.

9 February 2009

Football; doping/cocaine; scope of application of FIFA anti-doping regulations & of national anti-doping regulations; applicable law: application of FIFA antidoping regulations by reference?; sanction

Panel:
Mr. Lars Hilliger (Denmark), President
Mr. Goetz Eilers (Germany)
Mr. Stephan Netzle (Switzerland)

Relevant facts

The Fédération Internationale de Football Association (FIFA) is the International Federation of Football with its registered office in Zurich, Switzerland.

The World Anti-Doping Agency (WADA) is the international independent organisation created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms. It coordinates the development and implementation of the World Anti-Doping Code (WADC). It is a Swiss private law Foundation with corporate seat in Lausanne, Switzerland and its headquarters in Montréal, Canada.

The Malta Football Association (MFA) is the national football federation in Malta and affiliated with FIFA since 1960.

The football player M. ("the Player") is playing for the Maltese football club "Mosta FC", which team is affiliated with the MFA.

On the occasion of an in-competition test performed on January 2, 2008 on a bodily sample provided by the Player, after the match of his team against Tarxien Rainbows FC, the Player tested positive to metabolites of cocaine.

The sample was analyzed by the Antidoping Laboratory of Dresden, which is accredited by WADA.

On February 11, 2008, the MFA Executive Committee decided to temporarily suspend the Player from February 19, 2008.

At a meeting before the Medical Committee of the MFA held on February 15, 2008, the Player admitted having taken the forbidden substances during a New Year's party.

In a decision dated March 25, 2008, the MFA Control and Disciplinary Board imposed to the Player a one year period of ineligibility starting on February 19, 2008 for his violation of the anti-doping rules.

The decision of the MFA Control and Disciplinary Board, which is documented in the very brief fax sent to FIFA, can be summarized in essence as follows:

> *"(...)The case was referred to the Medical Committee, which heard the evidence of the player and concluded that the player had taken the banned substances willingly and knowingly but he also gave the impression that he was sorry for having been caught not for what he had done and in all probability he had no intention to enhance his performance. The Medical Committee recommended that the seasonal circumstances that probably led the player to abuse of these substances should be considered as a mitigating factor.*
>
> *(…) The Control and Disciplinary Board, after hearing the evidence of the player and the Club delegate concerned, and taking into account the report made by the Medical Committee of the Malta Football Association, suspended M. for one (1) year, starting from 19th February 2008 when he was suspended temporarily by the Executive Committee".*

On June 10, 2008 FIFA filed with CAS a statement of appeal against the decision taken by the MFA Control and Disciplinary Board and completed it with an appeal brief sent on July 10, 2008 submitting to set aside the decision passed on 25 March 2008 by the Control and Disciplinary Board of the MFA and pass a new decision imposing a two-year suspension on the player M.

On August 5, 2008, WADA filed as well an appeal against the decision taken by the MFA Control and Disciplinary Board and confirmed its statement of appeal with the filing of an appeal brief on October 30, 2008. WADA submitted to CAS to set aside the decision passed by the Control and Disciplinary Board of the MFA in the matter of M. and to sanction the latter with a two years period of suspension.

The MFA replied to FIFA's submissions in an answer dated July 28, 2008 and submitted to CAS that FIFA's appeal brief above referred to be rejected.

Extracts from the legal findings

1. Jurisdiction and admissibility

The jurisdiction of CAS is not disputed and all parties signed the order of procedure but the Player alleged that he is "non-suited" since Art. 61 para. 5 of the 2007 FIFA Statutes would provide FIFA with a right of appeal only against its members. According to the Player, FIFA would therefore have a right of action against the MFA but not against him.

At the moment of the anti-doping test, the Player was registered with the MFA, which is a member of FIFA.

Pursuant to article 13 par. 1 lit. (a) and (d) of the 2007 FIFA Statutes in force as from August 1, 2007, all national federations members of FIFA must comply "*fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time*" and have to "*ensure that their own members comply with the Statutes, regulations, directives and decisions of FIFA bodies"*. Pursuant to article 2 of the FIFA Doping Control Regulations, "*all associations shall (…) undertake to comply with these FIFA Doping Control Regulations*".

The 2002 edition of the MFA Statutes provides under clause 3 par. (i) that the MFA's duty is to "*observe, the rules, bye-laws, regulations, directives and decisions of the Federation Internationale de Football Association (FIFA)*". The MFA Statutes further provide under clause 3 par. (ii) that "(…) *in so far as the affiliation to FIFA is concerned, the Association recognizes the Court of Arbitration in Lausanne, Switzerland (CAS), as the supreme jurisdictional authority to which the Association, its Members and members thereof, its registered players and its licensed coaches, licensed referees and licensed players' agents may have recourse to in football matters as provided in the FIFA Statutes and regulations*". As to the specific question of the rules applicable to the Player, notably the arbitration clauses, the Panel notes that the MFA Statutes provide under clause 78 that "*Players are only allowed to take part in football matches under the jurisdiction of the Association and/or FIFA and/or UEFA on condition that they observe the rules, bye-laws, regulations and decisions of the Association, FIFA and UEFA* (…)". The MFA Statutes further provide under clause 79 par. (iv) that "*the registration of a person as a player with the MFA shall imply that such person shall be subject to the jurisdiction and to all the rules and regulations of the MFA and of those national and international organizations of which the MFA may be a member*". According to clause 80 par. (i) of the MFA Statutes, the registration to the MFA is preconditional to the registration with a Club belonging to the MFA.

The Panel comes thus to the conclusion that the arbitration clause provided in favor of CAS under article 61 of the 2007 FIFA Statutes which were in force when the decision of the MFA Appeals Board was issued, applies without any doubt to all parties, including the Player, and that CAS has jurisdiction. The Panel points out that this conclusion is limited to the issue of the applicability of FIFA and MFA arbitration clauses in relation with CAS jurisdiction. The issue of the applicability of FIFA material antidoping rules and of the FIFA material regulations as provided under the Disciplinary Code will be addressed under the point "Applicable law".

As to the admissibility of the appeals, the decision appealed against by FIFA and WADA is a decision issued by the MFA Control and Disciplinary Board, which is, according to clause 61 par. 1 subpar. of the MFA Statutes "*competent to deal with and take all necessary disciplinary action for any violation of any of the rules, by-laws or regulations of the Association or the Laws of the Game* (…)". The Panel noted that under clause 66 par. 1 subpar. (i) of its Statutes the MFA establishes an appeal authority, the MFA Appeals Board which is "*competent to take cognisance of and decide upon appeals against decisions of the Council and other bodies of the Association* (…)" and that under clause 67 of its Statutes, it establishes a further appeal authority which is competent to review decisions of the Appeals Board, namely the MFA Independent Arbitration Tribunal. As no request was filed by the Player before the MFA Appeals Board, the Panel, based on the MFA Statutes, notes that decision of the Control and Disciplinary Board is an internal final and binding doping-related decision, which is undisputed.

Based on article 61 par. 5 and 6 of the 2007 FIFA Statutes, FIFA and WADA have therefore a right to appeal before CAS against this decision.

As to the time limit to lodge an appeal before CAS, article 61 par. 1 and par.7 of the 2007 FIFA Statutes provide that the appeal must be lodged "*within 21 days of notification of the decision in question*" and that "*the time allowed for FIFA and WADA to lodge an appeal begins upon receipt by FIFA or WADA, respectively, of the internally final and binding decision in an official FIFA language*". The decision was notified to FIFA by means of a fax dated June 6, 2008 and FIFA's appeal was lodged on June 25, 2008, therefore within the statutory time limit set forth by the 2007 FIFA Statutes, which is undisputed. As to WADA, the decision was notified to it by an email of FIFA dated July 21, 2008 and WADA lodged its appeal on August 5, 2008, which was as well within the statutory time limit set forth by the 2007 FIFA Statutes and which is also undisputed.

It follows that the appeals are admissible.

2. Applicable law: scope of application of FIFA and national antidoping regulations

The main question that the Panel has to deal with is the one of the applicable regulations to the present case. FIFA claims that the FIFA antidoping regulations, namely the FIFA Doping control regulations 2008 together with the FIFA Disciplinary Code entered into force on September 1st, 2007, are applicable to the exclusion of the MFA Regulations. WADA holds a slightly different position. WADA claims indeed that the FIFA antidoping regulations are applicable but argues that those FIFA regulations do not contradict the MFA regulations which, according to WADA, are clearly compatible with the FIFA ones. As to the MFA, the national association clearly expresses that FIFA antidoping regulations are not applicable at the national level and that only the MFA antidoping regulations can apply to the present case.

The Panel noted that it was not the first case where CAS had to decide on the question of the scope of application of FIFA and national antidoping regulations and on the question of potential conflicts between those regulations. In CAS 2007/A/1446, 4.5 et seq, CAS concluded that FIFA antidoping regulations were applicable because the last version of the Qatari Football Association (QFA) Statutes and QFA Regulations referred to the FIFA antidoping regulations but not to any specific and extensive QFA antidoping rules. The regulations of the QFA named "*Competition Domestic for 1st and 2nd Division Club*" provided under article 96 that "*it was prohibited to use illegal drugs for activation according to FIFA regulations (…) which contain a list of illegal materials and methods*". In the same case, CAS decided that *"Based on the very clear wording of the FIFA Statutes and of the FIFA Doping Control Regulations and, on the fact that nothing in the QFA Statutes or Regulations provides for any contrary interpretation and on the numerous references to the FIFA regulations by the QFA official bodies during the procedure before the QFA disciplinary committee, the Panel concludes that the FIFA Statutes, Regulations and Directives are directly applicable to the present case"* (CAS 2007/A/1446, 4.8). In that context, CAS pointed out that "*the suspension for a specified period is one of the sanctions provided under article 60, which is in line with the FIFA Disciplinary Code".*

The Panel notes that the use of the terms "directly applicable" by CAS did not mean in the specific case that CAS considered that the FIFA antidoping regulations were applicable per se but that the numerous references to the FIFA antidoping regulations in the QFA regulations lead to the application in casu of the FIFA antidoping regulations which operated as complementary regulations of the QFA. As the QFA had not edicted specific antidoping rules, the FIFA antidoping rules could be applied by CAS without any restriction. This interpretation by CAS contradicts FIFA's opinion but is somehow in line with WADA's position when WADA seems to recognize that in order to apply FIFA antidoping regulations, such application should not contradict MFA regulations.

In another case quoted by FIFA and WADA (CAS 2007/A/1370 & 1376), CAS admitted that the FIFA antidoping rules were applicable to the player because, on the one hand, Brazilian law imposed on Brazilian federations and athletes the observance of international sports rules and, on the other hand, article 65 of the Statutes of the Brazilian football federation provided that *"the prevention, fight, repression and control of doping in Brazilian football must be done complying also with international rules"*. The Brazilian football federation apparently considers FIFA Disciplinary code "of universal application". Eventually CAS pointed out that the compliance with and the enforcement of FIFA rules is even indicated in Article 5, par.V of the Brazilian football federation statutes as one of the basic purposes of this Federation. In that case, CAS thus drew the conclusion that the Brazilian national regulations acknowledged the legal primacy of FIFA disciplinary principles and that the FIFA rules were applicable (CAS 2007/A/1370 & 1376, 101 *et seq.*). The Panel sees here again that in order to apply FIFA antidoping regulations, the national federation regulations must be taken into consideration.

In the present case, FIFA seems to draw the conclusion from article article 60 par. 2 of the 2007

FIFA Statutes, which provides that "*CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law*" that FIFA Regulations are directly applicable to the Player and that no transcription in the national federation regulations would be necessary. FIFA and WADA seem to consider that previous CAS case law, notably the ones quoted above confirm this interpretation of article 60 para.2.

The Panel notes on one hand that FIFA is an association of national federations and international confederations. As such FIFA issued various regulations on the basis of the competences which were granted to it by its members. Such competences are notably granted to FIFA in its Statutes.

On the other hand it is undisputable that FIFA's members, in particular the national football federations, are issuing their own national regulations and thus retain, in accordance with the FIFA Statutes, their own regulatory competences, notably with regard to national competitions. In principle FIFA regulations thus apply to international games only.

However the Panel points out that FIFA and its members are aware of the need to set international standards which should be applicable in any type of football competitions be it at national or international level, be it professional or amateur competitions. In order to pursue this objective, FIFA and its members can decide that FIFA issues regulations which are directly applicable at national level or that FIFA issues international regulations which need to be adopted by each FIFA member in order to be applicable at national level.

In antidoping matters, the Panel stresses first that FIFA and many other international federations insisted on the fact that the World Anti-Doping Code (WADC) was not directly applicable to them but that it was necessary that it be adopted by federations in order to be applicable to their individual members. In this respect FIFA and WADA are thus correct when they rely on the FIFA Disciplinary Code and FIFA antidoping regulations and not on the WADC in their statements of appeal. However, the Panel notes further that FIFA not only issued antidoping regulations at FIFA level but requested from its members to issue similar regulations. This whole set of national regulations on antidoping matters tends to prove that FIFA antidoping regulations are not directly applicable at national level, otherwise those national regulations would be useless at best or conflict with FIFA regulations at worst.

The Panel checked first whether FIFA Regulations provided for their direct applicability at national level or not. Should no clear answer be found in FIFA Regulations as to their scope of application, the Panel decided that it would then address the issue of the potential conflict between FIFA rules and national rules, bearing in mind that the various CAS precedents expressly referred to national regulations or national civil law before concluding that FIFA regulations were applicable per reference.

According to article 2 "*Scope of application: substantive law*" of the FIFA Disciplinary Code (FDC) the FDC "*applies to every match and competition organized by FIFA. Beyond this scope, it also applies if a match official is harmed and, more generally, if the statutory objectives of FIFA are breached, especially with regard to forgery, corruption and doping. (…)*". The present disciplinary case is not related to a match or a competition organized by FIFA, so it does not fall within the scope of the FDC as far as the first sentence of article 2 FDC is concerned. However this is a doping case and as such the Panel finds that it falls within the scope of the second sentence of article 2 FDC, as part of the statutory objectives of FIFA. In other words should the Player have perpetrated a doping offence during the game organized by the MFA, he would be subject to the FDC, on the basis of article 2 FDC, 2nd sentence.

The Panel needs to understand whether a sanction imposed on the basis of the FDC applies to international matches and competitions or to national matches and competitions as well. In this respect article 2 FDC remains unclear. Should the sanctions provided by the FDC apply to national competitions, national bodies should then apply the FDC and not their national regulations. This would therefore mean that the FDC is directly applicable and that all doping cases would be subject to the same rules in any national federation.

However the Panel is of the opinion that article 152 FDC is clearly excluding the direct applicability of the FDC at national level, notably the provisions on doping offences, for the following reasons:

(1) Article 152 FDC par. 1 clearly specifies that national associations must adapt their provisions in order to comply with the FDC for the purpose of harmonizing disciplinary measures. If the provisions of the FDC on doping offences were directly applicable, the wording of article 152 FDC would be totally different, as no adaptation would be necessary and no harmonization would be needed, the direct applicability of those FIFA rules ensuring that the same disciplinary measures are taken worldwide.

(2) Article 152 FDC par. 2 provides that the associations will incorporate *inter alia* antidoping regulations into their own regulations in accordance with their internal association structure. This shows that a process of transposition of the relevant regulations of the FDC is necessary in order for those regulations to be applicable at national level. This process is in particular due to the internal structure of each association.

(3) Article 152 FDC par. 5 specifies various sanctions against the association which infringes this article. The Panel sees in this series of sanctions a clear proof that the FDC regulations on doping offences are not directly applicable and that FIFA needs to "threaten" the associations with sanctions in order to ensure that national antidoping regulations are harmonized with the FDC.

(4) Eventually the Panel observes that according to FIFA circular number 1059 which is publicly accessible and was consulted by the panel *ex officio* FIFA provided the national federations with a deadline to proceed with the amendments to their antidoping regulations. In case of the national associations passing the deadline, FIFA threatens them with fines, whereas no reference is made to a potential direct applicability of the relevant regulations of the FDC.

During the hearing, FIFA admitted that according to article 2 FDC, this code applies in principle only to FIFA competitions but it claimed that it applied as well to doping matters in other competitions based on article 2 FDC, second sentence. As mentioned above, the Panel is of the opinion that doping offences committed during matches or competitions not organized by FIFA may indeed fall in the scope of application of the FDC. This is not contradicted by the Panel's opinion that the antidoping regulations of the FDC are not directly applicable at national level but means that FIFA can sanction a player, who committed a doping offence during a national competition, with regard to matches and competitions organised by FIFA. This is confirmed by an in depth analysis of the meaning of article 2 FDC, second sentence.

Under chapter 1 "organization", section 1 "Jurisdiction of FIFA, associations, confederations and other organizations", article 77 "General rule", the FDC provides that "*with regard to matches and competitions not organized by FIFA (cf. art.2), associations* (…) *are responsible for enforcing sanctions imposed against infringements committed in their area of jurisdiction. If requested, the sanctions passed may be extended to have worldwide effect* (cf. art. 143 ff.) [para.1]. Article 77 FDC provides further that *"the judicial bodies of FIFA reserve the right to sanction serious infringements of the statutory objectives of FIFA* (cf. final part of art. 2) *if associations* (…) *fail to prosecute serious infringements or fail to prosecute in compliance with the fundamental principles of law"* [para. 2]. Article 77 FDC then foresees that "*associations* (…) *shall notify the judicial bodies of FIFA of any serious infringements of the statutory objectives of FIFA"* (cf. final part of art. 2).

Far from considering articles 77, 143 and 144 FDC as mere jurisdictional clauses, the Panel came to the conclusion that the system put in place under the FDC shows that FIFA has exclusive competences at international level whereas national federations have exclusive competences at national level. However, in order to avoid that doping offences remain unsanctioned at international level, the FDC obliges the national federations to disclose them to FIFA judicial bodies. Should the national associations fail to meet their disclosure obligations, then the FDC authorizes FIFA judicial bodies to sanction only at international level doping offences committed during national matches or competitions.

The Panel noted as well with interest that according to article 144 lit d) FDC a request for extension is approved by FIFA's judicial bodies if "*the decision complies with the regulations of FIFA"*. This provision combined with article 77 para.2 FDC ensures that FIFA judicial bodies impose or extend sanctions at international level on all doping offences committed worldwide during matches or competitions not organized by FIFA. The Panel finds that the FDC applies to every match and competition organized by FIFA if its statutory objectives on doping are breached in any type of match or competition, be it organized by FIFA or not.

The Panel concludes that this corresponds to a literal and systematic interpretation of article 2 FDC. It thus appears that the Panel's decision not to recognize the direct application of the FDC when it comes to sanctions imposed against players on national matches and competitions is not only in line with CAS precedents but above all with FDC's scope of application as defined under article 2 FDC.

As to national decisions on doping offences and as mentioned before, the disciplinary measures provided under article 152 FDC ensure that the associations implement the necessary antidoping regulations. On top of that article 61 paragraphs 5 and 6 grants to FIFA and WADA a right of appeal in order to ensure that national judicial bodies apply correctly their

national antidoping regulations.

The Panel concludes that in order to ensure the harmonization of doping sanctions at national level FIFA cannot claim the direct applicability of the FDC antidoping regulations but must use its disciplinary prerogatives provided under article 152 FDC in order to have national antidoping regulations amended accordingly. Once the national antidoping regulations have been harmonized, it is then FIFA's and WADA's duty to ensure that those national regulations are correctly applied by the national judicial bodies, using their right of appeal if necessary.

Having excluded FIFA's submissions on the direct applicability of the FDC at national level, the Panel then considered WADA's position which sees the FDC antidoping regulations as being part of the national antidoping regulations per reference, as expressed during the hearing, or as prevailing on the national antidoping regulations should there be a conflict between those rules. In this respect, the Panel admitted that the CAS jurisprudence quoted by WADA and summarized above clearly recognized that the FDC antidoping regulations could apply at national level per reference, be it for instance through national civil law, as in the Brazilian case mentioned above or through the Statutes and antidoping regulations of the relevant national association in the same case or in the Qatari cases. On the other side, CAS quoted jurisprudence is very reluctant to recognize that the FDC antidoping regulations prevail as a general rule on national antidoping regulations. This would in practice mean that the FDC is directly applicable at national level, which the Panel already excluded.

However, as rightly claimed by the MFA, the MFA Statutes and MFA antidoping regulations do not leave any room for such an interpretation. The MFA Statutes do indeed refer to the FIFA regulations but together with the UEFA and MFA regulations. The clear wording of the MFA Statutes shows that there is no intention on the MFA side to extend the scope of application of the FIFA or UEFA regulations per reference. In other words, each set of regulations is applicable within its proper scope. CAS is competent as the highest external jurisdiction of the MFA with respect to disputes related to MFA Regulations. CAS competence cannot be interpreted as an admission of the applicability of FIFA Regulations to national cases, as wrongly claimed by FIFA on the erroneous basis of article 60 par. 2 of the FIFA Statutes.

As to the MFA antidoping regulations and procedures, contrary for instance to the Qatari antidoping regulations and procedures, very few references are made to FIFA regulations. As to specific references to FIFA in the MFA Charter, the fact that as an introduction to the Charter, the MFA expresses that "*the Maltese government is a signatory of the anti-doping convention of the council of Europe*" and that the Charter is "*in accordance with the policies of FIFA and UEFA and in accordance with the recommendations laid down by the World Anti-Doping Agency (WADA)*" cannot lead to the conclusion that any provision of the Charter which might be contrary to the FDC or the WADC is automatically superseded by the relevant FDC or WADC provision.

The Panel came to the conclusion that the MFA antidoping regulations should be applied independently and without any reference to the FDC antidoping regulations which are therefore not applicable in the present case, considering that the decision appealed against and the Parties' submissions deal with the sanction of a player at national level.

Considering now the question of the applicable rules of law or of the applicable law, the Panel notes that the Parties do not specifically agree on any applicable rules of law to the present arbitration. As to the applicable law, the Panel considers that one could consider, on the basis of Art. R58 of the Code, that Maltese law is applicable as the challenged decision was issued by the MFA Control and Disciplinary Board who must apply the Laws of the Republic of Malta, which govern the MFA Statutes and consequently all the subordinated MFA Regulation, as provided under paragraph 158 of the MFA Statutes. However, as mentioned above, the MFA Statutes specifically refer to the FIFA Statutes which provide, in the 2007 edition, under article 60 par. 2, that CAS will apply Swiss law "additionally" to the FIFA Regulations. Far from seeing in this a conflict of governing laws, the Panel considers that, in this specific case, where FIFA Regulations are partly applicable as mentioned above, Swiss law should apply additionally, if this is needed. The Panel notes however that none of the parties draw arguments from the respective national laws and that it did not need eventually to refer to or consult *ex officio* Swiss or Maltese law. This question is thus here actually not relevant and the Panel does not need to further develop the reasons for his decision on the applicable law.

3. Merits

a) doping offence

Cocaine, MDMA and MDA being class S6, Stimulants, according to the 2007 and 2008 WADA List classifications and to the MFA Charter, those substances are thus prohibited at all times, in and

out of competition. The presence of MDA, MDMA and Cocaine in the Player's bodily sample constitutes therefore an anti-doping rule violation or a doping offence according to section 4 of the MFA Charter.

b) Mitigating circumstances and sanction

According to section 6 art. 1.2 of the MFA Doping Charter a one year sanction may be scaled down or extended in particular circumstances. As the Player did not file an internal appeal against the MFA Control and Disciplinary Board's decision and thus logically did not request CAS to scale down the sanction imposed on him, the Panel, according to the prohibition to decide *ultra petita*, may not review whether mitigating circumstances exist and should only consider whether the MFA Control and Disciplinary Board should have extended the standard period of suspension. In this respect, the Panel alike FIFA, WADA and the MFA, considers the case of the Player as a very standard one. In other terms no party refers to any particular factual circumstances which should justify an extension of the one-year period of suspension provided under section 6 art. 1.1 of the MFA Doping Charter.

As to the applicable regulations, the Panel already excluded the direct application of the FIFA DC and thus of the 2 year period of suspension provided by it. The Panel does further not agree with WADA when it claims that based on section 6 art. 1.2 of the MFA Doping Charter, it could extend the sanction up to two years and thus reach the minimal sanction provided by the FIFA Disciplinary Code. WADA's reasoning would indeed lead to constantly extend the period of suspension independently from the particular circumstances of the case which is clearly not the objective of section 6 art. 1.2 of the MFA Doping Charter. As there is no particular circumstance in the present case, which could lead the Panel to decide to extend the period of suspension, the decision of the MFA Control and Disciplinary Board is confirmed.

Arbitration CAS 2008/A/1639
RCD Mallorca v. The Football Association (FA) & Newcastle United
24 April 2009

Football; transfer; lis pendens in the proceedings before the CAS; power of the CAS Panels to take amicus briefs into account without the consent of the parties; standing to be sued as an issue of merits and not as an issue of admissibility; purpose of Art. 75 CC and standing to be sued

Panel:
Prof. Ulrich Haas (Germany), President
Mr. José Juan Pintó (Spain)
Mr. Mark Hovell (United Kingdom)

Relevant facts

Real Club Deportivo Mallorca, SAD ("RCD Mallorca" or "the Appellant") is a professional football club with its seat in Mallorca, Spain. It is affiliated to the Royal Spanish Football Federation ("the RFEF" or "the Spanish FA"), a federation in turn affiliated to the Fédération Internationale de Football Association, the world governing body of football (FIFA).

Newcastle United FC ("Newcastle" or the "First Respondent") is a professional football club with its seat in Newcastle upon Tyne, England. It is affiliated to the Football Association.

The Football Association (FA or the "Second Respondent") was founded in 1863 and is the association responsible for organising and supervising football in England. The FA is a member of the Union des Associations Européennes de Football (UEFA) and of FIFA.

On 9 August 2005, the Appellant concluded an employment contract with the Argentinian footballer G. ("the Player"), whose date of birth is 5 July 1983. The validity of this contract was set to expire on 30 June 2010.

By means of a letter addressed to the Appellant and dated 30 May 2008, the Player announced that he wished to render his services to another club than RCD Mallorca. On 1 July 2008, the First Respondent signed an employment contract with the Player valid from the date of signature until 30 June 2013. On this same date, the Appellant presented a claim before an ordinary Spanish court against the Player regarding the termination of the contractual relationship. The Appellant extended this claim to include the First Respondent on 4 July 2008.

Also on 1 July 2008, the FA sought to obtain the International Transfer Certificate (ITC) for the Player from the RFEF. As the Second Respondent did not receive a reply from the RFEF, it turned upon Newcastle's request to FIFA on 10 July 2008, requesting the international clearance for the Player.

On 14 July 2008, FIFA invited the RFEF to issue the ITC for the Player or, alternatively, to provide an explanation for its refusal. After expiry of the deadline set by FIFA, which had remained without a response by the RFEF, FIFA set a second and final deadline on 22 July 2008, ordering the RFEF to comply with the contents of its previous letter and setting the prospect for a decision by the Single Judge of the FIFA Players' Status Committee ("the Single Judge") based solely on the documents contained in the file.

In reply to this correspondence, the Appellant contacted FIFA on 23 July 2008, outlining that the Player was still legally bound to its club by means of an employment contract valid from 8 August 2005 until 30 June 2010. In addition, the Appellant announced that it had commenced legal proceedings against the Player and the First Respondent before the ordinary courts in Spain.

On 13 August 2008, the Single Judge passed a decision regarding the international clearance for the Player, so as to enable him to register with the First Respondent. The decision reads – *inter alia* – as follows:

> *"… on the basis of art. 23 par. 3 and Annexe 3 of the Regulations on the Status and Transfer of Players (hereinafter: the Regulations), as a general rule, [the Single Judge] was compentent to deal with the present request for authoristation to provisionally register the player in question.*

Furthermore, the Single Judge stated that pursuant to art. 22 of the Regulations, the Spanish club was at liberty to refer the contractual employment-related dispute to a civil court. Yet, the ordinary Spanish court is competent to deal with the contractual dispute arisen between the parties involved as to the substance. But, it is only the Single Judge of the Players' Status Committee who is competent to hear disputes pertaining to the issuance of an ITC. In fact, such matters cannot be referred to ordinary courts (cf. art. 64 par. 2 of the FIFA Statutes)".

With respect to the pending case before the ordinary Spanish court, the Single Judge:

"… was eager to emphasise that the present decision does not prejudice any decision of a competent body as to the substance of the contractual dispute".

The Single Judge decided to authorise the provisional registration of the Player with the First Respondent, with immediate effect.

By letter dated 26 August 2008, the Appellant filed its Statement of Appeal with the Court of Arbitration for Sport (CAS) against the decision rendered by the FIFA Single Judge. The appeal is directed against Newcastle and the FA.

On 14 October 2008, FIFA communicated that it renounces to its right to intervene in the arbitration proceedings. With the same correspondence, FIFA filed - however – a submission entitled "*amicus curiae brief*", which expanded its position on the dispute.

The CAS Court Office forwarded the correspondence received from FIFA to the parties, asking whether they would accept the "*amicus curiae brief*" presented by FIFA to be part of the file.

Whilst the First Respondent did not object to the "*amicus curiae brief*" to be taken on file, the Appellant underlined that FIFA has no part in the arbitration and is, thus, not entitled to file submissions in the present proceedings. However, the Appellant insisted that it would not have any objections if FIFA intervened in the proceedings as a respondent party.

On 15 January 2009, the CAS Court Office informed the Parties that the Panel decided not to admit the "*amicus curiae brief*" submitted by FIFA on 14 October 2008 as part of the file, thus considering FIFA a non-party in the proceedings.

Extracts from the legal findings

1. Lis pendens

The question of *lis pendens* in the case at hand is governed by the Swiss Private International Law Act (PIL), since the CAS has its seat in Switzerland and at least one of the parties at the time of the conclusion of the arbitration agreement did not have its domicile or habitual residence in Switzerland (Art 176(1) PIL, and, with respect to *lis pendens* Art. 186 of the PIL provides in Art 186 (1bis): *"The arbitral tribunal rules on its jurisdiction. (1bis) It rules on its jurisdiction irrespective of a claim based on the same subject matter between the same parties pending before another state court or arbitral tribunal, unless serious reasons demand for the proceedings to be suspended".*

The proceedings before the Spanish courts and before this arbitral tribunal do not have the same subject matter. While the state court proceedings deal with the (contractual) consequences of a breach of a labour contract concluded between the Appellant and the Player, the case presented by the Appellant before this arbitral tribunal deals - in essence – with the question whether or not FIFA is competent to issue a (provisional) ITC in relation to the Player. Since the subject matters before this arbitral tribunal and before the Spanish state courts differ, the Panel has no grounds to further investigate the prerequisites of Art 186(1bis) PIL, since there is – from the outset – no issue of *lis pendens* here. Even if the Panel would have found that proceedings concerning the same subject matter were pending before the Spanish courts and CAS, the Panel is of the opinion that there are no "considerable reasons" within the meaning of Art 186 (1bis) PIL to suspend the present proceedings.

2. The status of FIFA in the present proceedings

With its letter dated 14 October 2008, FIFA presented the Panel with a statement on this dispute, which it specified as "*amicus curiae"* brief. Contrary to the case CAS 2008/A/1517, the parties to the present proceedings have not unanimously accepted the "*amicus intervention*" by FIFA.

Having considered the positions of both parties on the admissibility of the "*amicus curiae"* brief as well as FIFA's arguments, the Panel decided on 15 January 2009 not to admit it as part of the file for the following reasons:

Literally translated "*amicus curiae"* means "*friend of the court*". The term *amicus curiae* or *amicus* brief describes an instrument allowing someone who is not a party to a case to voluntarily offer special perspectives,

arguments or expertise on a dispute, usually in the form of a written *amicus curiae* brief or submission, in order to assist the court in the matter before it. It is exactly this (and only this) role that FIFA seeks to play in these proceedings.

Amicus participation has a tradition in common law countries, yet is less known in the civil law tradition (cf Stumpe F. SchiedsVZ 2008, 125, 127). On an international scale, *amicus* briefs are know in proceedings before the European Court of Human Rights (ECHR) (Art 36(2) ECHR. The provision, however, does not allow for unsolicited *amicus curiae* briefs) and in European Competition Law, where the cooperation between national courts and the European Commission is construed on an *amicus* basis (Cf. Art 15 EC-Regulation 1/2003). In arbitration *amicus curiae* briefs have gained a certain degree of acceptance in disputes relating to international investments. In particular two decisions by NAFTA tribunals have received a high degree of attention in that respect (Methanex and UPS, cf *Friedland*, The amicus role in international arbitration, in Mistelis/Lew (Ed), Pervasive Problems in international arbitration, 2006, p. 321 *et seq*). Reasons put forward in favour of *amicus* participation are –*inter alia*– that proceedings affecting the pubic interest are not concluded collusively, unrepresented persons and the public interest are protected by *amicus* participation and that the transparency that goes along with *amicus* participation strengthens the confidence in the outcome of the arbitration process (cf Shelton 88 AJIL [1994] p. 611, 612).

In absence of an express consent by the parties there are two sets of requisites for submissions of *amicus* briefs. The first is intrinsic of the arbitral process. According to it, arbitrators must find themselves empowered to accept *amicus* submissions. The second is extrinsic to the arbitral process, i.e. there must be *amici* with a vital interest in the subject matter.

On the first requirement –arbitral power to accept *amicus* submissions– the starting point must be the Code. Unlike for example ICSID-Arbitration Rules (Art 37(2), cf Kreindler/Schäfer/Wolff, Schiedsgerichtsbarkeit, 2006, marg. no 380) the CAS Code is silent on the issue, whether or not the Panel may take *amicus* briefs into account without the consent of the parties. In particular no power of the Panel to accept *amicus* briefs may be inferred from Art 57(1) 3rd sentence of the Code, since the *amicus* brief is not a part of the "file of the federation". The question, therefore, is whether the Panel may derive the respective power from Art 182(2) PIL. This provision states: *"If the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration"*.

Art 182(2) PIL is only applicable, if "*the parties have not determined the procedure*". In the case at hand the parties have referred the dispute to the CAS and, thus, have made a choice as to the applicable procedure, i.e. the CAS Code. The latter does not contain a *lacuna* in respect of *amicus* submissions which would make it necessary to fall back on Art 182(2) PIL. On the contrary, the Panel is of the view that –absent any express agreement of the parties to the contrary– the Code enumerates in an exhaustive manner all possible ways of participation in a proceeding before the CAS, i.e. as an appellant, a respondent, joinder or intervenor. In summary, therefore, the Panel holds that the Code as it stands now does not confer to the Panel the power to accept *amicus* briefs (submitted by non-parties).

Subsidiarily the Panel wants to point out that Art 182(2) PIL –even if it were applicable– does not oblige the Panel to accept non-solicited submissions by non-parties. The provision grants wide discretion to the Panel in determining the applicable rules of procedure. This discretion is not confined in the case at hand by a standing practice in international arbitration to accept unsolicited *amicus* briefs. On the contrary, the Panel is of the view that there is no general principle permitting written submissions by non-parties in private international arbitration. Even in state arbitration proceedings unsolicited *amicus* briefs are not admitted as a general rule in the absence of explicit rules allowing for it.

In addition, the Panel holds that *amicus* briefs tend –as in the case at hand– to support one party to the detriment of the other. Thus, *amicus* briefs interfere with the concept of two-party arbitration and may cause an imbalance between or an unequal treatment of the parties (cf Stumpe F., SchiedsVZ 2008, 125, 129). The Panel holds, therefore, that the discretion conferred on it by Art 182(2) PIL must be exercised with caution. *Amicus* briefs should only be accepted where their disadvantages are offset by their positive effects. This may be the case in proceedings demanding for greater transparency because of the public interest at stake. In the UPS case, for example the tribunal accepted *amicus* briefs as the matter in dispute dealt with a claim by a US company contending that a Canadian state monopoly unfairly limited its ability to compete in the Canadian express courier business. In this proceeding the *amicus* brief was filed by the Canadian Postal Workers Union and the Council of Canadians on the grounds that the UPS claim would harm the employment status of Canadian postal workers and the services

provided to those who depended upon Canada Post. In the "Methanex case", in which the *amicus* brief was equally accepted by the tribunal, the matter in dispute concerned an investor's claim for compensation because of an environmental regulation adopted by the state of California prohibiting the use of a fuel additive, which the claimant produced. The *amici* in this case were environmental groups, who argued that the investor's claim would have chilling effects on the willingness of state and federal governments to implement environmental legislation. The character of the arbitration proceedings which may be suited for *amicus* briefs is best described by the Methanex tribunal (Methanex v. US, Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amicus Curiae*" dated 15.01.2001, para. 49). The arbitral tribunal held: *"There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties".*

Appropriate cases that allow for *amicus* submissions to be taken into account without the consent of the parties are, thus, disputes that are likely to affect persons beyond those involved as parties. Only if there is a public dimension to the matter at stake the disadvantages incurred with amicus briefs may be compensated by its advantages. It does not come as a surprise, therefore, that *amicus* briefs so far have only been an issue in proceedings that affect the public, chiefly dealing with financial, environmental and human rights consideration. In the view of the Panel the case in dispute does not reach this threshold and, therefore, even if Art 182(2) PIL would allow for the acceptance of *amicus* briefs, there is no obligation to do so. The present case does not affect a public interest other than the one that this formation shall for the sake of good administration of justice apply the rules and regulations correctly.

In light of the above considerations the Panel, therefore, rejects FIFA's request for consideration of its *amicus curiae* brief.

3. The relief sought by the Appellant

The Appellant seeks as a primary relief a declaratory judgment by CAS that "*FIFA is not competent in order to authorize to the player … to be registered by other National association …*". The purpose of this request is not quite clear to the Panel and, thus, has to be interpreted by it. A declaratory judgment that FIFA is not competent to authorize the registration of the Player with a new federation is of no legal interest to the Appellant as long as the ITC issued by FIFA remains in place. The Appellant's prayer for relief, therefore, only makes sense if it is directed against the decision of the Single Judge. The Panel, thus, interprets the Appellant's primary prayer for relief as seeking a judgment by the CAS that the decision by the Single Judge is unlawful and, hence, has to be set aside. It results from this interpretation that the Appellant's primary and subsidiarily sought reliefs pursue the same goal but for the fact that with the latter the Appellant – in addition – requests CAS to impose also sanctions upon the First Respondent.

4. Standing to be sued

The First Respondent asks for the present appeal to be dismissed as it deems that it is directed at the wrong parties. It maintains that the Appellant did not designate FIFA as a respondent to this procedure and that, therefore, the Panel cannot consider the Appellant's requests for relief. In summary the First Respondent claims that neither it nor the Second Respondent have the standing to be sued with respect to the jurisdictional challenge and the challenge to the authorisation granted by the Single Judge.

a) Issue of merits or admissibility?

Upon examining the jurisprudence of the CAS it is not quite clear whether the prerequisite of the standing to be sued is to be treated as an issue of merit (eg CAS 2008/A/1517, marg. no. 135) or of the admissibility of an appeal (eg CAS 2006/A/1189, marg. no. 61 *et seq.*; CAS 2007A/1329-1330, marg. no. 32). In this case the Panel holds that an appeal that is directed against a "wrong" Respondent because the latter has no right to dispose of the matter in dispute, the claim filed by the Appellant is admissible but without merit. This tribunal sees itself comforted in its reasoning by the jurisprudence of the Swiss Federal Tribunal (cf ATF 128 II 50, 55: "*Sur le plan des principes, il sied de faire clairement la distinction entre la notion de légitimation active ou passive (appelée aussi qualité pour agir ou pour défendre; Aktiv- oder Passivlegitimation), d'une part, et celle de capacité d'être partie (Parteifähigkeit), d'autre part. La légitimation active ou passive dans un procès civil relève du fondement matériel de l'action; elle appartient au sujet (actif ou passif) du droit invoqué en justice et son absence entraîne, non pas l'irrecevabilité de la demande, mais son rejet".*)

b) No specific rules as to the standing to be sued in the FIFA regulations

According to Art 23 of the RSTP, a decision reached by the Single Judge may be appealed before the CAS. The provision does not specify, however against whom the appeal must be directed. Contrary to the decision CAS 2007/A/1403 marg. no. 49 ff) this Panel holds that the same is true for the FIFA Statutes. In particular it does not follow from the wording in

Art 62 *et seq* of the FIFA Statutes that FIFA allows for cases to be resolved by CAS irrespective of the parties' standing to sue or to be sued. Therefore, the Panel comes to the conclusion that there is no specific provision in the FIFA regulations and that the question whether or not the Respondents have the standing to be sued must be derived from the subsidiarily applicable Swiss law.

c) Standing to be sued according to Swiss law

Under Swiss law, a decision by an association like FIFA may be challenged pursuant to Art 75 of the Swiss Civil Code (CC). Under the heading "*protection of member's rights*", the provision reads as follows:

> *"Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month from the day on which he became cognizant of such resolution".*

The purpose of this provision is to protect the individual in its membership related sphere from any unlawful infringements by the association (cf ATF 108 II 15, 18). In view of this legislative purpose Art 75 CC is construed and interpreted in a broad sense (cf ATF 118 II 12, 17 *seq*.; 108 II 15, 18 seq; Handkommentar zum Schweizer Recht/Niggli, 2007, Art 75 ZGB marg. no. 6 *seq*; Heini/Portmann, Das Schweizer Vereinsrecht, Schweizerisches Privatrecht II/5, 2005, marg. no 278; Basler Kommentar ZGB/ Heini/Scherrer, 3rd ed. 2006, Art 75 marg. no. 3 *et seq*.; Berner Kommentar zum schweizerischen Privatrecht/Riemer, 1990, Art 75 marg. no. 7 *et seq*., 17 *et seq*.; Fenners H., Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport, 2006, marg. no. 208). In particular the term "resolution" in Art 75 CC does not only refer to resolutions passed by the assembly of an association but, instead, encompasses any other (final and binding) decision of any other organ of the association irrespective of the nature of such decision (disciplinary, administrative, etc.) and the composition of said organ (one or several persons). In light of the foregoing the decision by the Single Judge dated 13 August 2008 must be interpreted as a "resolution" by FIFA in the terms of Art 75 CC.

The party having standing to be sued in matters covered by Art 75 CC is –according to the Swiss legal doctrine– "only" the association. Pursuant to this the appeal cannot be directed primarily against the members of the respective organ that has passed the decision or the members of the association (cf Handkommentar zum Schweizer Recht/Niggli, 2007, Art 75 ZGB marg. no. 5; Basler Kommentar ZGB/Heini/Scherrer, 3rd ed. 2006, Art 75 marg. no. 21; Berner Kommentar zum schweizerischen Privatrecht/Riemer, 1990, Art 75 marg. no. 60). The question is, however, if there are exceptions to this rule.

Bernasconi/Huber try to limit the scope of application of Art 75 CC by restricting the protected membership related sphere. In their view Art 75 CC "*does not apply indiscriminately to every decision made by an association … Instead, one has to determine in every case whether the appeal against a certain decision falls under Art 75 Swiss Civil Code, i.e. whether the prerequisites of Art 75 of the Swiss Civil Code are met in a specific individual case. If, for example, there is a dispute between two association members (e.g. regarding the payment for the transfer of a football player) and the association decides that a club (member) has to pay the other a certain sum, this is not a decision which can be subject to an appeal within the meaning of Art 75 Swiss Civil Code.* […] *A dispute between two football clubs, i.e. two association members, therefore, is not a dispute which can be appealed against under Art 75 Swiss Civil Code. The sports association taking a decision is not doing so in a matter of its own, i.e. in a matter which concerns its relationship to one of its members, rather it is acting as a kind of first decision making instance, as desired and accepted by the parties*". (Bernasconi/ Huber, Appeals against a Decision of a (Sport) Association: The Question of the Validity of Time Limits stipulated in the Statutes of an Association, published in German in the review SpuRt, 2004, Nr. 6, p. 268 *et seq*). This idea to limit the notion of membership related dispute covered by Art 75 CC has been taken up by several CAS formations. The Panel in the case CAS 2006/A/1192 for example was called to settle a dispute between a player and its club for an alleged breach of the contract by the club. The dispute was decided at a first level by an organ of FIFA. When analyzing the applicability of article 75 CC to said decision by FIFA, the Panel stated that "*at any rate, the present matter is clearly not a membership related decision, which might be subject to Article 75 CC but a strict contractual dispute. Accordingly, the Panel holds that Mr. Mutu does have standing to be sued*" (marg. no. 41-48; see also CAS 2005/A/835 & 942, marg. no. 85 *et. seq*.).

The Panel holds that an association –in principle– has a certain margin of discretion when designing the conditions for an appeal against its internal decisions/resolutions. The Panel has, however, doubts whether –in the absence of any specific rules in the statutes and regulations of a federation– it subscribes to the narrow interpretation given by Bernasconi/Huber to the notion "*membership related dispute*" (cf also Netzle S. SchiedsVZ 2009, 93 *et seq*.). A membership relation is not just one-dimensional. Instead, the rights and obligations resulting from membership in an association point in several directions, i.e. towards the association as

such but also towards the other individual members. Disputes between members of an association can, therefore, not be excluded from the outset from the membership related sphere. This is all the more true in view of the fact that an association which settles disputes between its members in application of its own rules and regulations is of course (also) pursuing goals of its own and, hence, is also acting in a matter of its own. Ultimately, the question if and to what extent the opinion of Bernasconi/Huber should be followed can be left unanswered here, since the appeal filed by the Appellant does neither fulfill the prerequisites of the principles laid down in Art 75 CC nor the conditions of the (supposed) exception to this rule.

The issuance of a provisional registration for a player with a national federation touches upon the relationship between FIFA and its members. It does not interfere with the relationship among clubs. The proceedings put in place to accord or refuse an ITC, in the Panel's view, are meant to protect an essential interest of FIFA. This is evidenced by the wording in Art 9 of the RSTP and Art 2 of the Annex to the RSTP. According to these rules, only the national federations are involved in the process of the issuance of the ITC. Furthermore, the new federation of the player has no claim of its own against the former federation to grant the ITC. Instead, if the former federation does not deliver the ITC the issuance of the ITC lies in the sole competence of FIFA.

Furthermore, in exercising its exclusive competence FIFA does not act like a court of first instance in a dispute between its members. Instead, when assuming the competences conferred on it according to the RSTP FIFA is exercising an administrative function and, thus, having an impact on the rights and duties of its individual members in the sense of Art 75 CC. The mere fact that several (and not just one) member is affected by FIFA's administrative act does not change the nature of the "appealed decision". If one applies the principles laid down in Art 75 CC to the case at hand then the dispute must be considered to be a membership related dispute with the consequence that it must (also) be directed against FIFA.

d) Application of Art 75 CC to Art 62 *et seq.* of the FIFA Statutes

The last question that remains to be solved is whether the principles enshrined in Art 75 CC must be applied *mutatis mutandis* to Art 62 *et seq.* of the FIFA Statutes. The Panel holds that this is the case. The purpose of Art 62 *et seq.* of the FIFA Statutes is to confer to CAS the competence to decide the dispute *in lieu* of the otherwise competent (Swiss) Courts. Since, however, the CAS assumes comparable functions as state courts it is hardly conceivable why the question as to which party has standing to be sued should – absent any specific rules in the Statutes to the contrary - be answered differently for state court proceedings and for arbitral proceedings.

e) Summary

Summoning up the Panel holds that neither the First nor the Second Respondent have standing to be sued in respect of the primary request filed by the Appellant and that, therefore, the appeal must be dismissed insofar. The same is true for the secondary relief sought by the Appellant. Also the motion to amend or to supplement an (administrative) decision by an organ of a federation must –like the request to set aside such decision– be directed against the "proper" party, i.e. FIFA. Since the Appellant failed to comply with this, also the motion for secondary relief must be dismissed.

Since it is the responsibility of the Appellant to fulfil the prerequisites of an appeal the Panel sees no duty on the part of FIFA to cure the omissions by the Appellant by stepping into this procedure as an intervenor. The Panel, therefore, sees no issue of *venire contra factum proprium* on FIFA's side in the case at hand.

Arbitrage TAS 2008/O/1643
Vladimir Gusev c. Olympus sarl
15 juin 2009

Cyclisme; résiliation unilatérale du contrat passé entre un cycliste et son équipe; qualification juridique du contrat; absence de justes motifs; conséquences financières d'une résiliation unilatérale sans justes motifs; demande d'une indemnité additionnelle en réparation du tort moral

Formation:
Me José Juan Pinto (Espagne), Président
M. Guido De Croock (Belgique)
Me Michele Bernasconi (Suisse)

Faits pertinents

M. Vladimir Gusev ("le demandeur" ou "le cycliste") est un coureur cycliste professionnel russe.

Olympus sarl ("la défenderesse" ou "l'équipe") est une société ayant son siège au Luxembourg. La défenderesse est la responsable financière de l'équipe professionnelle de cyclisme Astana et exploite la licence professionnelle UCI Pro Tour pour l'équipe jusqu'en 2010.

En date du 15 novembre 2007, les parties ont signé un contrat intitulé *"Professional Rider Team Agreement For A Self-Employed Rider"*.

Ce contrat était conclu pour une durée de deux ans et prévoyait pour le demandeur une rémunération de EUR 275'000.-- pour l'année 2008 et de EUR 340'000.-- pour l'année 2009.

Ce contrat contient notamment, sur le thème de la résiliation du contrat, les clauses suivantes:

> *"PREAMBULE, E. Conditions suivantes: Le Cycliste accepte de mettre à la disposition de l'Equipe son dossier médical et son anamnèse clinique. Ces informations doivent être jugées satisfaisantes par l'équipe médicale de la Société avec délivrance d'une approbation formelle avant l'entrée en vigueur du présent Accord. Si, à l'entrée en vigueur du présent Accord, cette condition n'est pas intégralement et inconditionnellement remplie, la Société aura le droit de refuser l'Accord. Si les analyses médicales annuelles programmées ensuite par Olympus relèvent une anomalie de nature biologique, physiologique (ou autre) qui, de l'avis de l'équipe médicale d'Olympus, serait incompatible avec le cyclisme professionnel, la Société aura le droit de refuser le présent Accord";*
>
> *"1. Prestations du Cycliste, (b) (iv): Le Cycliste respectera les statuts et le règlements de l'UCI, des Fédérations nationales applicables, toute loi nationale antidopage des pays qui accueillent les courses cyclistes professionnelles auxquelles il participe et le Code de Conduite publié par l'Agence Mondiale Antidopage, de même que les règles ou le Code de Conduite de l'Equipe et la politique antidopage de l'Equipe. La Société communiquera au Cycliste et lui remettra les documents écrits contenant les règles et/ou le code de conduite de l'Equipe. Le non-respect inconditionnel de cette obligation sera considéré comme une violation grave de la part du Cycliste";*
>
> *"5. Etat de santé du Cycliste et tests antidopage et médicaux, (c): Dans certains cas, la Société et l'Equipe peuvent demander au Cycliste de se soumettre à des tests antidopage et/ou éthyliques. Si la Société et l'Equipe ont une raison de suspecter que le Cycliste fait usage de drogues, substances toxiques, alcools, narcotiques ou autre substance sous contrôle ou dopante, le Cycliste peut être envoyé auprès d'un laboratoire d'analyse certifié pour y être soumis aux examens nécessaires. De temps en temps, l'UCI et d'autres Organes gouvernementaux peuvent exécuter des tests antidopage de contrôle pour déceler un usage éventuel de substances interdites ou sous contrôle. Le Cycliste se montrera tout à fait prêt à se soumettre à ces analyses. Si le Cycliste refuse, sans raison valable, de se soumettre à ces tests ou s'il omet l'un de ces tests pour quelque raison que ce soit, la Société pourra mettre fin au présent Accord conformément aux conditions de résiliation de cet Accord ou bien suspendre le Cycliste conformément aux règlements de l'UCI ou à ceux des Fédérations affiliées, en faisant parvenir une notification écrite au Cycliste";*
>
> *"12. Résiliation par la Société, (a): La Société peut résilier le présent Contrat sans préavis ni responsabilité de préjudice en cas de négligence grave*

de la part du Cycliste ou de suspension de ce dernier conformément aux dispositions des règlements UCI pendant la durée résiduelle de l'Accord. Par négligence grave il faut également entendre la violation des normes antidopage nationales des pays où le Cycliste prend part à des événements de cyclisme professionnel, la violation des règlements UCI ou de ceux des Fédérations nationales, du Code de Conduite publié par l'Agence Mondiale Antidopage, du Code de Conduite ou de la politique antidopage de l'Equipe, la collaboration, directe ou indirecte, avec un autre entraîneur, médecin ou professionnel de santé sans l'assentiment préalable écrit de la Société, le refus de disputer des courses cyclistes malgré les invitations réitérées en ce sens de la part de l'Equipe. S'il y a lieu, le Cycliste devra prouver qu'il n'est pas en mesure de participer à une épreuve". (Traduction libre)

Par courrier du 23 juillet 2008 à l'attention de M. Vladimir Gusev, Olympus sarl a résilié avec effet immédiat le contrat conclu au motif que le rapport médical du coureur indiquait des anomalies dans les valeurs d'urine et de sang rendant le coureur suspect d'avoir utilisé une substance interdite par l'AMA.

Il était également précisé dans ce courrier qu'à compter du 23 juillet 2008, M. Vladimir Gusev ne faisait plus partie de l'équipe Astana.

La résiliation du contrat a par la suite été annoncée par Olympus sarl par voie de presse. Olympus sarl a également indiqué quelles étaient les raisons ayant présidé à la résiliation de ce contrat, à savoir une suspicion de dopage.

Par courrier du 29 juillet 2008, l'Union Cycliste Internationale (UCI) informait la Fédération russe de cyclisme, soit pour elle son Président M. Alexander Gusyatnikov, que les analyses sanguines de M. Vladimir Gusev n'excèdent pas les limites qui auraient dû impliquer une déclaration d'incapacité, conformément aux règles pertinentes de l'UCI.

L'UCI indiquait également que M. Vladimir Gusev était dès lors autorisé à participer à des événements cyclistes réglementés par l'UCI.

Par acte du 1er septembre 2008, M. Vladimir Gusev a saisi le TAS d'une requête d'arbitrage aux fins de voir condamner Olympus sarl en raison des faits précédemment expliqués.

Par mémoire réponse du 8 octobre 2008, Olympus sarl s'est opposée aux prétentions du demandeur et annonçait une demande reconventionnelle d'un montant de EUR 1 million, fixé *ex aequo et bono.*

M. Vladimir Gusev a adressé son mémoire au TAS en date du 27 novembre 2008. Il conclut au paiement des montants suivants:

- EUR 500'416.67 à titre de salaire, cela en application de l'art. 337c al. 1 du Code des Obligations (CO), plus intérêts à partir du 27 novembre 2008;

- EUR 154'750.-- au titre de l'indemnité prévue par l'art. 337c al. 3 CO, plus intérêts à partir du 27 novembre 2008;

- EUR 5'000'000.-- à titre du dommage subi en relation avec la violation de la personnalité, plus intérêts à partir du 1er septembre 2008;

- EUR 30'000.-- à titre de tort moral, cela en application des art. 49 *cum* 328 CO, plus intérêts à partir du 27 novembre 2008.

Dans son mémoire réponse du 12 janvier 2009, Olympus sarl conclut au rejet de la demande de M. Vladimir Gusev et à la condamnation de celui-ci au paiement d'un montant à titre de dommage moral fixé *ex aequo et bono* à EUR 1 million, avec suite d'intérêts.

Extraits des considérants

1. Qualification juridique de la convention signée

La Formation considère qu'il se justifie, dans un premier temps, d'analyser en détails quelle est la nature juridique de la convention conclue entre les parties le 15 novembre 2007.

Le demandeur soutient qu'il s'agit d'un contrat de travail. La défenderesse soutient quant à elle qu'il ne s'agit aucunement d'un contrat de travail mais bien au contraire d'une convention de collaboration à titre indépendant, sans réel rapport de subordination.

L'un des principes essentiels du droit suisse est celui de la liberté contractuelle (art. 19 al. 1 CO). En droit suisse, une convention est valable, sauf si elle a pour objet une chose impossible, illicite ou contraire aux mœurs (art. 20 al. 1 CO).

Selon l'article 319 al. 1 CO, *"par le contrat individuel de travail, le travailleur s'engage, pour une durée déterminée ou indéterminée, à travailler au service de l'employeur et celui-ci à payer un salaire fixé d'après le temps ou le travail fourni (salaire aux pièces ou à la tâche)".*

De cette définition légale, l'on peut tirer quatre éléments caractéristiques du contrat de travail:

premièrement, le travailleur s'engage à travailler, soit déployer une activité; deuxièmement, le travailleur déploie cette activité dans la durée; troisièmement, le travailleur agit au service de l'employeur, c'est-à-dire dans un rapport de subordination; enfin, le travailleur perçoit un salaire (Aubert G., Commentaire Romand du Code des Obligations, Bâle 2003, ad art. 319 CO, n. 1).

La distinction entre le contrat de travail et les autres contrats, notamment le mandat, revêt une importance considérable. *"En effet, à la différence des règles gouvernant ces autres contrats, celles qui touchent le contrat de travail restreignent très fortement l'autonomie des parties (cf. CO 361 et 362). (…)"* (Aubert G., *op. cit.*, ad art. 319 CO, n. 22).

La doctrine unanime souligne que *"le régime du contrat de travail comportant de nombreuses règles impératives, l'on ne saurait permettre aux parties de s'y soustraire en décidant d'exclure l'application du droit du travail à leurs relations, quand bien même ces dernières répondraient à la définition du contrat de travail selon CO 319 I. C'est dire que la qualification, opérée à la lumière des critères objectifs contenus dans cette définition, revêt un caractère impératif: la qualification voulue par les parties constitue, tout au plus, un indice non décisif"* (Aubert G., *op. cit.*, n. 23).

Au vu de ce qui précède, du contenu de la convention conclue et des arguments développés par les parties dans leurs écritures ainsi que lors de l'audience qui s'est tenue, la Formation considère qu'il ne fait aucun doute que le contrat conclu est un contrat de travail au sens des articles 319 et suivants CO.

En effet, il résulte du contenu de la convention précitée un clair rapport de subordination entre Olympus sarl et le cycliste, en l'espèce M. Vladimir Gusev. Sur ce sujet, la Formation retient en effet comme déterminants les arguments avancés par M. Vladimir Gusev, notamment l'obligation de ne participer qu'à des courses pour l'équipe, l'interdiction d'effectuer certains sports sans le consentement de l'équipe et la soumission à la tactique de course. La Formation note également, sur ce sujet, l'obligation de tenir informée l'équipe de son programme d'entraînement, celui-ci devant être conforme aux standards minimums définis par l'équipe, l'interdiction de collaborer avec un autre entraîneur, médecin ou professionnel de santé sans le consentement d'Olympus sarl, l'interdiction de travailler pour une autre équipe et l'interdiction de faire de la publicité pour des sponsors différents de ceux de l'équipe.

La Formation est d'avis que les obligations susmentionnées illustrent l'existence d'un lien de subordination et d'une relation de travail. Le fait que les parties aient stipulé dans quelques clauses de leur contrat qu'elles n'étaient pas liées par une relation contractuelle de travail au sens des articles 319 et suivants du CO ne saurait modifier ce constat. En effet, la Formation considère qu'au vu de l'analyse globale du contrat et des dispositions juridiques, les parties ont conclu un contrat travail et ce indépendamment de la qualification qu'elles ont retenue.

Les arguments soulevés par Olympus sarl ne permettent pas d'inverser ce constat.

Au vu de ce qui précède, la Formation considère que les articles 319 et suivants CO sont applicables et que c'est à la lumière de ces dispositions que la résiliation de la convention conclue devra être examinée.

2. Résiliation de la convention conclue

Selon l'article 357 al. 2 CO, *"en tant qu'ils dérogent à des clauses impératives, les accords entre employeurs et travailleurs liés par la convention sont nuls et remplacés par ces clauses; toutefois, les dérogations stipulées en faveur des travailleurs sont valables"*.

Le droit du travail est un domaine du droit dans lequel le législateur a prévu un certain nombre de dispositions absolument impératives, auxquelles il ne peut être dérogé ni au détriment du salarié, ni au détriment de l'employeur (article 361 CO) (Aubert G., *op. cit.*, ad art. 361-362 CO, n. 1).

L'article 361 CO liste les dispositions absolument impératives.

L'article 337 al. 1 et 2 CO qui traitent de la résiliation immédiate pour juste motifs sont des dispositions absolument impératives (article 361 CO).

Selon la doctrine, *"il ne suffit pas que les rapports de confiance entre les parties soient subjectivement détruits. Encore faut-il que, objectivement, selon les règles de la bonne foi, l'on ne puisse plus attendre de la partie qui a donné le congé la continuation des rapports de travail jusqu'à l'échéance du contrat. En cela, le contrat de travail se distingue du contrat de mandat, auquel, en principe, chacune des parties peut mettre fin librement avec effet immédiat, pour des raisons purement subjectives (CO 404). Le juge apprécie librement l'existence de justes motifs, en appliquant les règles du droit et de l'équité (CC 4), compte tenu de tous les éléments du cas particulier, notamment la position et la responsabilité du travailleur, le genre d'emploi et la durée des rapports contractuels, ainsi que de la nature et de l'importance des manquements"* (Aubert G., *op. cit.*, ad art. 337 CO, n. 2-3).

Seul un manquement particulièrement grave du travailleur justifie son licenciement immédiat. Si le manquement est de gravité moyenne ou légère, il ne

peut entraîner une résiliation immédiate que s'il a été répété malgré un ou plusieurs avertissements (Aubert G., *op. cit.*, ad art. 337 CO, n. 4).

La doctrine a également précisé qu'est injustifié le licenciement prononcé sur la base de soupçons qui se révèlent par la suite mal fondés. Le licenciement immédiat est par contre justifié si l'employeur parvient à établir les manquements soupçonnés et que ces derniers constituent de justes motifs conformément à l'article 337 CO (Aubert G., *op. cit.*, ad art. 337 CO, n. 4; Wyler R., Droit du Travail, 2ème éd., Berne 2008, p. 494-495).

En l'espèce, compte tenu de la qualification juridique retenue de la convention signée, la Formation considère que le courrier adressé par Olympus sarl à M. Vladimir Gusev le 23 juillet 2008 constitue une résiliation immédiate du contrat de travail au sens de l'article 337 al. 1 CO.

Il reste dès lors à examiner si ladite résiliation doit être considérée comme justifiée ou pas, ce qui revient à examiner l'existence de "justes motifs" de résiliation au sens de l'article 337 al. 1 CO.

A titre préalable, la Formation note que la résiliation du 23 juillet 2008 est motivée comme suit:

> *"nous avons reçu un rapport médical du Dr. Damsgaard qui indique des anomalies dans les valeurs de votre urine et de votre sang. Vous trouverez ci-joint une copie de ce rapport".* (Traduction libre)

Par ailleurs, la Formation retient comme déterminant, pour l'examen des éventuels justes motifs, ceci:

- Les conclusions du Dr. Rasmus Damsgaard telles qu'elles résultent de son courriel du 20 juillet 2008 sont libellées comme suit:: *"Le test urinaire pour l'EPO hautement suspect combiné aux variations dans le profil sanguin individuel sont de solides indicateurs d'une stimulation de la moelle causée par de l'EPO exogène ou par une substance avec effet similaire comme par exemple CERA. Sur la base de ces deux faits, le coureur est considéré comme suspect d'avoir utilisé une substance interdite par l'AMA"*); (Soulignement ajouté) (Traduction libre)

- Olympus sarl n'allègue pas, ni ne démontre à satisfaction de droit, que les résultats des analyses médicales de M. Vladimir Gusev constituent une violation des règles fixées par l'AMA ou l'UCI;

- Le communiqué de presse d'Olympus sarl est libellé comme suit: *"Bien que ses résultats n'indiquent pas l'utilisation d'une substance interdite, les valeurs de Vladimir ont excédé les paramètres normaux établis par le Dr. Damsgaard et n'étaient pas conformes avec l'accord strict signé par tous les trente cyclistes"* ; (Traduction libre)

- M. Vladimir Gusev a pu participer à différentes compétitions suite à son licenciement, l'UCI ayant d'ailleurs confirmé à la Fédération cycliste de Russie, par courrier du 29 juillet 2008, que celui-là était autorisé à participer à des compétitions réglementées par l'UCI;

- Interpellée par la Formation lors de l'audience, le Conseil d'Olympus sarl a confirmé que M. Vladimir Gusev a été licencié pour un profil suspect.

Au vu de ces éléments, la Formation retient qu'il n'y avait pas de justes motifs de résiliation avec effet immédiat du contrat de travail de M. Vladimir Gusev. Le simple fait, de l'aveu même d'Olympus sarl, que les analyses, notamment d'urine, du coureur Gusev aient été suspectes n'autorisait en aucun cas Olympus sarl à résilier avec effet immédiat le contrat conclu.

Olympus sarl n'était dès lors pas en droit de mettre fin unilatéralement et immédiatement au contrat conclu, que ce soit sur la base du paragraphe E du Préambule, de l'article 5, de l'article 12 ou d'un autre article de la convention du 15 novembre 2007.

Par surabondance de moyens, la Formation retient que la disposition du contrat de travail du 15 novembre 2007 qui semble régir précisément la situation dans laquelle Olympus sarl s'est trouvée suite au courriel du Dr. Rasmus Damsgaard du 20 juillet 2008 est régie par l'article 5 lettre c dudit accord.

Cette disposition prévoit notamment que si l'équipe a une raison de suspecter qu'un coureur fait usage de drogues ou de substances dopantes, ledit coureur peut être envoyé auprès d'un laboratoire d'analyse certifié pour y être soumis aux examens nécessaires. Le cycliste doit se montrer disposé à se soumettre à ces analyses; à défaut, l'équipe peut notamment mettre fin au contrat.

Or en l'espèce, suite au courriel susmentionné du Dr. Rasmus Damsgaard, Olympus n'a pas demandé à M. Vladimir Gusev de se soumettre à des analyses auprès d'un laboratoire accrédité. Bien au contraire, Olympus sarl a immédiatement résilié le contrat de travail conclu.

La Formation a demandé aux parties, en fin d'audience, de commenter cette disposition de la convention du

15 novembre 2007. Le Conseil de M. Vladimir Gusev a indiqué qu'il considérait que cette disposition contractuelle n'avait pas été respectée par Olympus sarl. Le Conseil d'Olympus sarl a au contraire précisé qu'il appartenait au coureur de solliciter de nouvelles analyses, ce qui, de l'avis de la Formation, n'est pas compatible avec le texte clair de l'article 5 lettre c du contrat de travail, lequel prévoit ce qui suit:

> *"5. Etat de santé du Cycliste et tests antidopage et médicaux, (c): Dans certains cas, la Société et l'Equipe peuvent demander au Cycliste de se soumettre à des tests antidopage et/ou éthyliques. Si la Société et l'Equipe ont une raison de suspecter que le Cycliste fait usage de drogues, substances toxiques, alcools, narcotiques ou autre substance sous contrôle ou dopante, le Cycliste peut être envoyé auprès d'un laboratoire d'analyse certifié pour y être soumis aux examens nécessaires. De temps en temps, l'UCI et d'autres Organes gouvernementaux peuvent exécuter des tests antidopage de contrôle pour déceler un usage éventuel de substances interdites ou sous contrôle. Le Cycliste se montrera tout à fait prêt à se soumettre à ces analyses. Si le Cycliste refuse, sans raison valable, de se soumettre à ces tests ou s'il omet l'un de ces tests pour quelque raison que ce soit, la Société pourra mettre fin au présent Accord conformément aux conditions de résiliation de cet Accord ou bien suspendre le Cycliste conformément aux règlements de l'UCI ou à ceux des Fédérations affiliées, en faisant parvenir une notification écrite au Cycliste".*
> (Traduction libre)

Sur ce sujet, la Formation note également que l'"Institut für Dopinganalytik und Sportbiochemie Dresden" précise dans son rapport du 17 juillet 2008 ceci: *"For this reason further target testing is recommended"*. Or cela n'a pas été fait par Olympus sarl.

La Formation tient à souligner qu'il est évidemment louable que des équipes cyclistes mettent en place un système interne performant de lutte anti-dopage. Un tel système de contrôle ne saurait cependant permettre à une équipe, notamment cycliste, de résilier avec effet immédiat un contrat de travail sur la base de simples soupçons de dopage.

Il appartient par ailleurs à l'équipe qui souhaite mettre en place un tel système d'assurer au coureur des garanties procédurales adéquates conformes aux standards de l'UCI et de l'AMA.

Il est en effet essentiel, même si la lutte anti-dopage est assurément une priorité, de permettre au coureur de faire valoir ses arguments de manière efficace.

Sans vouloir entrer dans les détails du système de contrôle mis en place par l'équipe Astana, la Formation se limite à noter qu'il n'a pas été démontré que le code de conduite de l'équipe et/ou les normes de l'équipe, mentionnées notamment à l'article 1 lettre b chiffre 4 du contrat de travail du 15 novembre 2007, ont été remis à M. Vladimir Gusev. Olympus sarl n'a d'ailleurs pas produit à la procédure un exemplaire du code de conduite de l'équipe et des normes de l'équipe. La Formation note également que le Dr. Rasmus Damsgaard a admis lors de son audition par la Formation, contrairement à ce qui est précisé dans son courriel du 20 juillet 2008 à l'attention de M. Johan Bruyneel (traduction libre: *"L'échantillon a été envoyé à un autre laboratoire accrédité par l'AMA pour confirmation"*), que l'échantillon analysé n'a jamais été adressé à un autre laboratoire accrédité par l'AMA, mais que ce ne sont que les résultats de l'analyse qui ont été adressés à un autre laboratoire pour confirmation.

Au vu de ce qui précède, comme déjà indiqué, la Formation retient qu'Olympus sarl n'était pas en droit de résilier avec effet immédiat le contrat de travail conclu pour justes motifs.

Il y a dès lors lieu d'examiner à présent les conséquences de cette résiliation, à la lumière notamment de l'article 337c CO.

3. Conséquences financières de la résiliation immédiate injustifiée du contrat de travail

L'article 362 CO prévoit que l'alinéa 1 de l'article 337c CO est de nature relativement impérative. *"L' al. 2 doit également être considéré comme relativement impératif, car une extension des circonstances permettant une imputation sur le montant à verser par l'employeur reviendrait en réalité à permettre une diminution de la créance de l'art. 337c al. 1 CO, ce qui est manifestement contraire au caractère relativement impératif de ce premier alinéa. L'art. 337c al. 3 CO est également de nature relativement impérative. Il n'est pas mentionné à l'art. 362 CO, car il s'adresse au juge et non aux parties, étant rappelé que l'énumération des art. 361 et 362 CO n'est pas exhaustive"* (Wyler R., *op. cit.*, p. 520).

L'article 337c al. 1 CO prévoit que *"lorsque l'employeur résilie le contrat sans justes motifs, le travailleur a droit à ce qu'il aurait gagné si les rapports de travail avaient pris fin à l'échéance du délai de congé ou à la cassation du contrat conclu pour une durée déterminée"*.

Bien qu'il s'agisse d'une créance en dommages-intérêts, elle n'est pas réductible pour cause de faute concomitante éventuelle du travailleur (Aubert G., *op. cit.*, ad art. 337c CO, n. 2; ATF 120 II 243, c. 3).

Cette créance est immédiatement exigible (article 339 al. 1 CO).

Selon l'alinéa 3 de cette même disposition, *"le juge peut condamner l'employeur à verser au travailleur une indemnité dont il fixera librement le montant, compte tenu de toutes les circonstances; elle ne peut toutefois dépasser le montant correspondant à six mois de salaire du travailleur"*.

Il s'agit d'une indemnité spéciale dont le but est de dissuader l'employeur de prononcer à la légère une résiliation avec effet immédiat. *"Cette indemnité vise aussi à réparer le préjudice découlant du congé abrupt et dépassant le montant du salaire dû selon CO 337 c I, en particulier le tort moral. De ce fait, elle ne laisse guère de place à l'application cumulative de CO 49"* (Aubert G., *op. cit.*, ad art. 337c CO, n. 12).

"Parmi les circonstances dont le juge doit tenir compte pour fixer le montant de la pénalité figurent notamment la situation sociale et économique des deux parties, la gravité de l'atteinte à la personnalité de la partie congédiée et des effets économiques du congé, l'intensité et la durée des relations de travail, la manière dont celui-ci a été donné, l'âge du travailleur, sa faute concomitante; aucun de ces facteurs n'est décisif en lui-même" (Aubert G., *op. cit.*, ad art. 337c CO, n. 13; cf. également Wyler R., *op. cit.*, p. 517).

"Le Tribunal fédéral a interprété CO 337c III en ce sens que, sauf circonstances particulières, l'indemnité est due dans tous les cas de licenciement immédiat injustifié" (Aubert G., *op. cit.*, ad art. 337c CO, n. 15; cf. également ATF 116 II 300, JdT 1991 I 317 et Wyler R., *op. cit.*, p. 517).

En l'espèce, le contrat de travail conclu l'était pour une durée de deux ans, c'est-à-dire jusqu'à la fin de l'année 2009.

Or il a pris fin en date du 23 juillet 2008.

M. Vladimir Gusev est dès lors en droit de prétendre, en application de l'article 337c al. 1 CO, au versement de ce qu'il aurait gagné si son contrat de travail n'avait pas été résilié avec effet immédiat.

Cela représente la somme de EUR 500'416.67 (EUR 160'416.67 pour l'année 2008 et EUR 340'000.-- pour l'année 2009).

Un tel montant ne peut pas être déduit des sommes fixées en application de l'article 337c al. 2 CO étant donné qu'il n'est pas établi qu'une fois son contrat avec Olympus sarl résilié, le coureur ait perçu une quelconque rémunération de la part d'un autre employeur. En fait, l'affirmation de l'Olympus sarl selon laquelle le coureur était sous contrat avec l'équipe Kathusa s'est avéré erronée, cette dernière ayant certifié avoir refusé toute relation contractuelle avec le coureur.

La Formation a par ailleurs décidé d'accorder à M. Vladimir Gusev une indemnité supplémentaire équivalente à six mois de salaire, cela en application de l'article 337c al. 3 CO, soit l'indemnité maximale.

La Formation retient en effet comme déterminants, pour accorder l'indemnité maximale prévue par la loi, en plus de l'absence de justes motifs au moment de la résiliation du contrat , la légèreté avec laquelle Olympus sarl a estimé que M. Vladimir Gusev avait enfreint le contrat du 15 novembre 2007, alors que Olympus n'avait elle-même pas respecté les procédures internes en matière de contrôle antidopage, la manière dont le licenciement a été communiqué à M. Vladimir Gusev, les conséquences de cette résiliation sur les possibilités actuelles de M. Vladimir Gusev de rejoindre une nouvelle équipe et l'annonce faite par Olympus à la presse des raisons de la résiliation du contrat de travail du 15 novembre 2007 alors même que M. Vladimir Gusev ne faisait l'objet que d'une suspicion de dopage.

Cela représente la somme de EUR 153'750.-- (EUR 275'000.-- + EUR 340'000.-- / 2 = EUR 307'500.-- / 2 = EUR 153'750.--).

Olympus sarl sera dès lors condamnée à payer à M. Vladimir Gusev la somme de EUR 654'166.67, avec intérêts à 5 % dès le 27 novembre 2008, conformément aux conclusions prises par M. Vladimir Gusev dans son mémoire d'arbitrage du 27 novembre 2008.

En effet, selon l'article 104 CO, *"le débiteur qui est en demeure pour le paiement d'une somme d'argent doit l'intérêt moratoire à 5 pour cent l'an, même si un taux inférieur avait été fixé pour l'intérêt conventionnel"*.

A toutes fins utiles, la Formation rappellera que ces montants ne sauraient être diminués, comme le soutient Olympus sarl, en application de l'article 12 lettre a de la convention signée. En effet, comme indiqué *supra*, les articles 337c al. 1 et 3 CO sont des normes relativement impératives.

4. Autres prétentions de M. Vladimir Gusev

M. Vladimir Gusev réclame également le versement d'une somme de EUR 5 millions à titre de *"dommage en manque à gagner provoqué par la violation de la personnalité"* ainsi qu'une somme de EUR 30'000.-- comme tort moral, cela en application des articles 49 et 328 CO.

Ces prétentions seront rejetées pour les motifs suivants.

En ce qui concerne le versement réclamé de EUR 5 millions à titre de *"dommage en manque à gagner provoqué par la violation de la personnalité"*, la Formation retient que le demandeur a échoué dans l'obligation qui était la sienne de prouver concrètement l'existence de ce dommage, cela conformément aux exigences de l'article 8 du Code civil.

La Formation retient bien au contraire qu'il est raisonnable de prévoir que M. Vladimir Gusev pourra trouver un nouvel employeur à brève échéance compte tenu de ses qualités de cycliste, telles qu'elles ont notamment été expliquées par son agent, M. Raimondo Scimone, à l'audience.

Par ailleurs, il est à noter que la Formation a déjà accordé à M. Vladimir Gusev le versement d'une indemnité équivalente à six mois de salaire, cela en application de l'article 337c al. 3 CO. Ladite indemnisation est déjà de nature à prendre en compte le préjudice important subi par le demandeur du fait de la résiliation immédiate injustifiée de son contrat de travail.

Rien ne permet cependant de penser que M. Vladimir Gusev ne sera pas engagé par une nouvelle équipe dans les dix prochaines années du fait de la résiliation immédiate injustifiée du contrat de travail de M. Vladimir Gusev et de la communication qui s'en est suivie.

Il y a par ailleurs lieu de considérer que la motivation de la présente décision sera également de nature à rétablir M. Vladimir Gusev dans son honneur dans la mesure notamment où la Formation y constate clairement qu'Olympus sarl a résilié le contrat de travail qui la liait à M. Vladimir Gusev sur la base d'un simple soupçon de dopage, dopage qui n'a aucunement été démontré.

En ce qui concerne la demande de réparation du tort moral lié à l'annonce par communiqué de presse des raisons de la résiliation du contrat du demandeur, la Formation retient que cet élément a déjà été pris en compte dans la fixation de l'indemnité prévue par l'article 337c al. 3 CO.

Accorder à M. Vladimir Gusev une indemnité fondée sur les articles 49 et 328 CO reviendrait à prendre deux fois en compte l'atteinte à la personnalité causée par la médiatisation des motifs de la résiliation du contrat qui liait Olympus sarl à M. Vladimir Gusev, ce qui ne serait pas admissible.

La Formation retient également que le Tribunal fédéral a eu l'occasion de préciser, s'agissant de l'article 336a al. 2 CO, que l'indemnité prévue par cette disposition ne laisse guère de place à l'application cumulative de l'article 49 CO, car elle embrasse toutes les atteintes à la personnalité du travailleur qui découlent de la résiliation abusive du contrat. *"Seule demeure réservée l'hypothèse dans laquelle l'atteinte serait à ce point grave qu'un montant correspondant à six mois de salaire du travailleur ne suffirait pas à la réparer. Sous cette réserve, l'application parallèle de l'art. 49 CO ne saurait entrer en ligne de compte que dans des circonstances exceptionnelles"* (Wyler R., *op. cit.*, p. 552; cf. également TF 16 juin 2005, arrêt 4C.84/2005).

Ces considérations peuvent, de l'avis de la Formation, s'appliquer par analogie à l'article 337c al. 3 CO.

De plus, le Tribunal fédéral a également précisé, s'agissant de l'article 337c al. 3 CO, que l'indemnité prévue par cet article couvre le tort moral subi par le travailleur (TF 22 février 1994, SJ 1995 802 = JAR 1995 198).

En l'espèce, la Formation considère que le tort moral subi a déjà été pris en compte dans la fixation de l'indemnité prévue par l'article 337c al. 3 CO et qu'il n'y a dès lors pas lieu à une indemnisation supplémentaire en application de l'article 49 CO. L'on ne saurait en effet considérer que les circonstances du cas d'espèce sont à ce point exceptionnelles qu'elles doivent entraîner, en sus, l'application de l'article 49 CO. Cela est d'autant plus vrai que la Formation a décidé d'accorder à M. Vladimir Gusev l'indemnité maximale prévue par l'article 337c al. 3 CO.

Arbitration CAS 2008/A/1658
SC Fotbal Club Timisoara S.A. v. Fédération Internationale de Football Association (FIFA) & Romanian Football Federation (RFF)
13 July 2009

Football; definition of the term "decision"; CAS Jurisdiction regarding the appeal against a FIFA decision; standing to appeal; validity of a FIFA decision imposing a sanction on a club through the club's national federation

Panel:
Mr. Lars Hilliger (Denmark), President
Mr. Rui Botica Santos (Portugal)
Prof. Ulrich Haas (Germany)

Relevant facts

FIFA is the International Federation of Football (Fédération Internationale de Football Association) with its registered office in Zurich, Switzerland.

The Romanian Football Federation (RFF) is the national football federation in Romania and affiliated with FIFA since 1923.

S.C. Fotbal Club Timisoara S.A. ("the Appellant") is a football club affiliated to the RFF and playing in the Romanian Liga 1.

On December 5, 2006, CAS issued an award in the proceedings CAS 2006/A/1109 between the Appellant, acting under its previous name CS FCU Politehnica Timisoara and SC FC Politehnica Timisoara SA. The object of the proceedings was the claim made by SC FC Politehnica Timisoara SA that the Appellant's club name, colours and logo created a risk of confusion between the two clubs and consequently violated the personality rights of SC FC Politehnica Timisoara SA. The CAS Panel mainly ordered FCU Politehnica Timisoara to continue to use its earlier name CS FC Politehnica AEK Timişoara or to adopt another name, approved by the Romanian Football Federation, that does not include the risk of confusion with the name of SC FC and to pay a compensation to SC FC Politehnica Timisoara SA for each official match played from 5 December 2006, until it effects a name change. In addition, FCU Politehnica Timisoara was interdicted to imitate the colours, or use the track record, history and logo of SC FC Politehnica Timisoara SA and was ordered to pay a compensation for violation with regard to the use of the name, colours, track record, history and logo of SCS FC Politehnica Timisoara SA between 13 June 2006 and 4 December 2006 inclusive.

Since the Appellant did not comply with this award SC FC Politehnica Timişoara SA initiated proceedings before FIFA against the Appellant. FIFA, however, "closed the case" in a letter dated 26 July 2007. SC FC Politehnica Timişoara SA appealed against this decision to the CAS. On April 25, 2008, CAS issued another award in the proceedings CAS 2007/A/1355 between FC Politehnica Timisoara SA, on one side, and FIFA, the RFF and the Appellant on the other side.

In this second award the CAS ruled in application of Art. 71 paragraph 1 of the FIFA Disciplinary Code (FDC) notably that SC Politehnica 1921 Stiinta Timisoara Invest SA shall no later than 30 June 2008 change its name to a name which does not include the risk of confusion with the name of FC Politehnica Timisoara SA and change its club colours so that they no longer include violet. If SC Politehnica 1921 Stiinta Timisoara Invest SA fails to comply the above requirements by 30 June 2008 6 points will be deducted.

On June 25, 2008, the Appellant, now acting under the name of Fotbal Club Timisoara SA, informed the company SSD Sport System Development S.R.L. ("SSD") in Bucharest, of its obligations according to the CAS award CAS 2007/A/1355 and requested from SSD the delivery of new T-shirts, shorts and socks ("kit") with the new colours of the Club, namely Mauve – White – Black. This information was made in writing by the Appellant on a letterhead still referring to "*Polithenica 1921 Stiinta Timisoara*".

Still on 25 June 2008, the Appellant informed the company De Reinhart, which is in charge of the management of its official website, that CAS ordered the Appellant to change the name and the colours of the Club and instructed this company to use only the

new colours, namely mauve, white and black and the new firm name, namely Fotbal Club Timisoara S.A. De Reinhart took note of the changes on 27 June 2008 and confirmed the change of the dominant colour on the Appellant's official website in line with the new colour code adopted by the Appellant.

An extraordinary general meeting of the Appellant's shareholders took place on 30 June 2008. According to the minutes of such general meeting, the change of name of the trade company from "Politehnica 1921 Stiinta Timisoara & Invest S.A". to "Fotbal Club Timisoara SA" and the change of coulours which shall be mauve, white and black was decided.

On 5 July 2008, the RFF executive committee took a decision where it confirmed that it had taken good note of the change of the name and of colours of SC Politehnica 1921 Stiinta Timisoara & Invest SA in SC Fotbal Club Timisoara.

On 10 July 2008, FIFA, acting through its deputy secretary to the Disciplinary Committee, Mr. Volker Hesse, sent a letter to the Appellant and explained that it had been informed by FC Politehnica Timisoara SA that the Appellant had not complied with the CAS ruling and granted the Appellant a deadline until 15 July 2008 in order to produce "*any kind of proof that Politehnica Stintia 1921 Timisoara Invest SA* [read: the Appellant] *respected the CAS-award (CAS 2007/A/1355)"*. FIFA further reminded the Appellant that "*in case of non-compliance 6 points will be deducted from Politehnica Stintia 1921 Timisoara Invest SA*".

By fax letter dated 11 July 2008, Mr. Prunea of the RFF provided CAS, FIFA and UEFA with a copy of the RFF executive committee's decision dated 5 July 2008 and confirmed on the cover letter to this decision that the Appellant had changed its name to SC Fotbal Club Timisoara and had adopted new colours.

On 18 July 2008, the Appellant sent a fax letter to FIFA, to the attention of Mr. Volker Hesse. This fax letter was dated 15 July 2008 and was printed on the Appellant's new letterhead. However, this fax letter bore the Appellant's old stamp with "Politehnica 1921 Stiinta" on it and the Appellant's old fax header indicating *"from: Poli 1921 Stiinta"*. In this fax letter, the Appellant confirmed to FIFA that it had complied with the CAS award 2007/A/1355 dated 25 April 2008.

FIFA, still acting through its deputy secretary to the Disciplinary Committee, Mr. Volker Hesse, issued a letter dated 3 September 2008 to the attention of RFF which recognize – inter alia – that the Club had change his name on 5 July 2008 in compliance with point 1 of the mentioned CAS award. As the change of the name has been effectuated on 5 July 2008, a compensation of EUR 5,000 shall be paid by FC Timisoara for each official match played from 5 December 2006 until 5 July 2008, as provided for in the mentioned CAS award and in the award CAS 20061A/1109. However point 3 of the CAS award (CAS 2007/A/ 1355), that is the colors of the uniforms used by FC Timisoara in the season 2008/2009 and the official homepage of FC Timisoara has not been respected by FC Timisoara. The dominant colour of the club is still violet. Therefore, the Romanian Football Federation was asked to immediately implement point 3 of the CAS award (CAS 2007/A/1355) and consequently to deduct 6 six points from FC Timisoara's first team.

As a consequence of FIFA's letter, the RFF executive committee issued a new decision, namely decision nr 9 of 4 September 2008, which implemented, as requested by FIFA, the six points deduction from the Appellant's first team.

On 10 September 2008, the Appellant sent a fax letter to FIFA's Appeal Committee on its new letterhead and this time with its new stamp but still with a fax header indicating "From: Poli 1921 Stiinta" whereby it informed the latter of its firm and unequivocal intention to appeal the decision rendered by Deputy Secretary to the Disciplinary Committee, Mr. Volker Hesse on September 3rd 2008, ref. no. 070076, compelling the Romanian Football Federation to impose sanctions upon SC FC Timisoara SA. consisting of a deduction of 6 points from SC FC Timisoara SA's first team.

On 23 September 2008, the RFF sent to FIFA a letter from the Appellant which indicated that the Appellant had changed its kit colours. The RFF sent samples of the Appellant's new kits to FIFA by separate post.

The FIFA appeal committee passed a decision on 9 February 2009 rejecting that appeal as it considered that it had been filed outside the time limit provided by the FIFA disciplinary code (FDC) and as it noted that the appeal fee, which was due notably according to Art. 123 par. 1 and 2 FDC had not been paid by the Appellant.

The Appellant sent a letter to CAS on 10 September 2008 where it declared its intention to lodge a statement of appeal against [the] decision passed by [the] Deputy Secretary to the Disciplinary Committee, Mr. Volker Hesse on September 3rd 2008, FIFA re. no. 070076 and against the decision no. 9/04.09.2008 rendered by the Executive Committee

of the Romanian Football Federation.

Further to its appeal brief, the Appellant filed on 17 October 2008, an application to stay the execution of the challenged decisions.

On 29 October 2008, FIFA informed CAS that the Appellant had lodged an appeal with the FIFA Appeal Committee and that the proceedings before the FIFA Appeal Committee were still pending and that therefore "*the formal prerequisite of the "finality" of the "decision" is not fulfilled, as the proceedings instigated by S.C. F.C. Timisoara S.A. with the FIFA Appeal Committee are still pending. Therefore the appeal filed by S.C. F.C. Timisoara S.A. with the Court of Arbitration for Sport is premature and the CAS has no jurisdiction to hear the present appeal and the attached application for the stay of the execution. With a view to the efficiency of the proceedings, we request that this Panel take an "interim decision" on the question of jurisdiction".*

Extracts from the legal findings

1. CAS jurisdiction regarding the appeal against the FIFA Decision

The Appellant filed its appeal before CAS against two decisions. The first appealed decision is the "*decision rendered by the Deputy Secretary to the Disciplinary Committee, Mr. Volker Hesse on September 3rd, 2008*" as quoted from the Appellant's statement of Appeal, ("the FIFA Decision"). The second appealed decision is the "*decision n° 9/04.09.2008 rendered by the Executive Committee of the Romanian Football Federation*" ("the RFF Decision"). CAS jurisdiction regarding the appeal must be examined for each decision separately.

CAS jurisdiction relating to the appeal against the FIFA Decision is disputed by FIFA and the RFF. The parties did not conclude a specific arbitration agreement. As the Appeal was filed against a decision of a FIFA body, the Panel, in accordance with article R47 of the Code, must thus refer to FIFA Statutes or regulations in order to decide on CAS jurisdiction.

Article 63 of the FIFA Statutes provides that "*appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question*" (par.1). "*Recourse may only be made to CAS after all other internal channels have been exhausted*" (par.2). "*CAS, however, does not deal with appeals arising from: (a) violations of the Laws of the Game; (b) suspensions of up to four matches or up to three months (with the exception of doping decisions); (c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an Association or Confederation may be made".* (par.3).

None of the exceptions provided under article 63 paragraph 3 are applicable in the present case. Therefore, CAS has jurisdiction if the letter by FIFA dated 3 September 2008 meets the following requirements:

a) Qualification of the FIFA Decision as a formal decision

The first question to be addressed by the Panel is whether FIFA indeed issued a decision according to article R47 of the Code and article 63 of the FIFA Statutes.

In light of CAS 2005/A/899 (published in Digest of CAS awards 1986-1998, p. 539), the Panel is of the view that the purpose of the letter by Mr. Volker Hesse which is *"to resolve a legal situation in an obligatory and constraining manner"* must be qualified as a decision since the letter contains a ruling and affects the parties' legal positions. The letter of Mr. Volker Hesse did not only contain a ruling on the question whether or not the Appellant complied with the operative part of the award in CAS 2007/A/1355 but also established that the *"FIFA Disciplinary Committee will pronounce an appropriate sanction against the Romanian Football Federation"* if RFF would fail to act according to the contents of the letter. As stated in the above mentioned CAS precedent, the form of the communication has no relevance to determine whether the document is a decision or not. The Panel refers further to CAS 2007/A/1251 as well as to CAS 2007/A/1355, whose enforcement led to the FIFA Decision, where CAS considered that letters from FIFA were to be considered as formal decisions as they contained a ruling and affected the parties' legal positions.

b) Decision of a FIFA Body

On one side, the Panel noted that FIFA confirmed that there were no minutes of the meeting held by the Disciplinary Committee in Beijing and that the communication made by Mr. Volker Hesse did not even refer to a meeting of the Disciplinary Committee and to the decision taken by it. The communication addressed to the RFF is however made under FIFA letterhead and is signed by FIFA as Mr. Volker Hesse signed the document on behalf of FIFA and in his capacity as Deputy Secretary to the Disciplinary Committee, as provided under article 123 paragraph 2 FDC (version of September 2007). Eventually, the RFF seemed to have had no doubt on the binding nature of the communication and issued its decision accordingly. The FIFA Decision was thus taken by a FIFA body in the sense of article 63 of the FIFA Statutes.

c) Final decision

According to article 86 FDC, "*the Appeal Committee is responsible for deciding appeals against any of the Disciplinary Committee's decisions that FIFA regulations do not declare as final or referable to another body*". Based on article 71 FDC para. 5 which provides that "*any appeal against a decision passed in accordance with this article shall immediately be lodged with CAS" and* on article 125 FDC which provides that "*an appeal may be lodged to the Appeal Committee against any decision passed by the Disciplinary Committee, unless the sanction pronounced is (…) decisions passed in compliance with art. 71 of this code*", the Panel considers that any decision of the FIFA Disciplinary Committee taken on the basis of article 71 FDC is indeed final within FIFA and can be directly appealed before CAS.

FIFA submits however that CAS has no jurisdiction as the Appellant had previously lodged an appeal before its Appeal Committee on 10 September 2008, which leads FIFA to conclude that, by doing so, the Appellant admitted that the FIFA Decision could be appealed before its Appeal Committee. The Panel however notes that, in principle, if a party files an appeal before the wrong jurisdictional body, this cannot create a valid appeal procedure before this body. A statement of appeal must of course be supported by a valid procedural rule.

The RFF did not raise during the proceedings any objection on CAS jurisdiction or on the admissibility of the Appeal against its decision. Although the order of procedure signed by the parties provides that *"the jurisdiction of CAS in the present case is disputed"*, the Panel concludes from the legal arguments brought by all parties and from the FIFA and RFF regulations at hand, that CAS jurisdiction on the appeal directed against the RFF Decision, is not disputed and is given.

2. Admissibility

The RFF claims in its answer that the appeal lodged by the Appellant to CAS against the FIFA decision was late for the reason that article 71 paragraph 5 FDC provides that *"any appeal against a decision passed in accordance with this article shall immediately (red.) be lodged with CAS"*. The Panel notes that the term "immediately" has clearly not the meaning which the RFF wants to give to it. In the German version of this article, the term used is "sofort" which can mean without delay but also "directly". What is meant is therefore that any decision taken under article 71 FDC can be lodged before CAS "directly" or "immediately" in its literal meaning, which is *"without means of internal recourse"*.

The Panel thus decides that the standard time limit of 21 days provided under article 63 paragraph 1 of the FIFA Statutes is applicable. The Appellant heard of the FIFA Decision on 4 September 2008 at the earliest and the Appellant lodged its statement of appeal on 17 September 2008, which is not disputed. The appeal was therefore lodged within the statutory time limit set forth by the 2008 FIFA Statutes.

The Panel notes further that the Appeal against the RFF Decision was filed within 21 days after the notification of the RFF Decision. The Panel thus concludes that the Appeal against the RFF Decision is filed in time, which is as well not disputed.

3. Standing to appeal

The RFF Decision was notified to the Appellant, which is directly affected by it, as a result of a 6 points deduction being imposed on its first team through this Decision. The Panel finds that there is no doubt that the Appellant has a standing to file an appeal with CAS against the RFF Decision. This is actually undisputed.

Although the issue was not raised by the parties, the Panel must now consider whether the Appellant also has a standing to file an appeal with CAS against the FIFA Decision. The Appellant is indeed not the addressee of the FIFA Decision which was only notified to the RFF and not to the Appellant. However, it follows from the contents of the letter that the Appellant is materially affected in case the addressee of the FIFA letter, i.e. the RFF would execute the FIFA order.

The FIFA rules do not provide a specific provision as to who is entitled to lodge an appeal against decisions by FIFA to the CAS. However, there is a provision regulating who is entitled to file an internal appeal within the instances of FIFA. Article 126 FDC provides in this respect that "*anyone who is affected and has an interest justifying amendment or cancellation of the decision may submit it to the Appeal Committee*". In principle, there is a presumption that the question of the standing to appeal is regulated in a uniform manner throughout all internal and external channels of review. Since the Appellant is at least indirectly affected by the decision of FIFA this would speak in favour of accepting a standing to appeal to the benefit of the Appellant.

The foregoing is all the more true as no independent evaluation and assessment of the facts is made at the RFF level. In this respect the Panel refers to article 3 paragraph 4 of the RFF enforcement procedure of a CAS award, which provides that "*the decision on the*

enforcement of an award passed by the Court of Arbitration for Sport shall be considered as automatically adopted by consensus of the members of the Executive Committee, voting non longer being required". In light of the foregoing it would be overly formalistic to accept that only the RFF is affected by the FIFA decision and, thus, is accorded standing to appeal.

Based on the foregoing, the Panel stresses that the fate of the RFF Decision is linked to the FIFA Decision. In requesting from the RFF that it deducts 6 points from the Appellant's first team, the FIFA Disciplinary Committee did not only dispose in its decision of the RFF rights with regard to the classification of a Romanian club, namely the Appellant, in the Romanian Liga 1 but obviously also of those of the Appellant, which saw six points deducted by the RFF from its first team. The Appellant is thus directly affected with the consequence that the Appellant must have a right of appeal against the FIFA Decision. In this respect, the Panel finds that article 126 FDC is applicable per analogy to appeals before CAS. FIFA did obviously not intend to have two different groups of persons with standing to appeal, one larger when it comes to appeals lodged before the FIFA Appeal Committee, one smaller when appeals can be directly lodged before CAS. Moreover, the Panel refers to CAS jurisprudence and to the jurisprudence of the Swiss Federal Court on the standing to appeal against decisions passed by an organ of an association or on resolutions (see the developments on this subject in CAS 2008/A/1583 ad 9.1 *et seq.*).

The Panel therefore finds that the Appellant has the standing to file an appeal before CAS against the FIFA Decision.

4. Validity of the FIFA decision asking the national federation to implement the sanction

The FIFA decision is to be set aside if it either violates the formal or the material prerequisites of the applicable FIFA rules. In order to know what these requirements are the Panel has to determine in a first step the legal basis for the FIFA decision. The Second Respondent claims in that respect that Art. 71 FDC forms the legal basis of its decision to ask the RFF to deduct 6 points from the Appellant.

Article 71 provides for a two-stage procedure to enforce decisions by FIFA or CAS. In a first step according to article 71 paragraph 1 FDC a standard fine in the amount of CHF 5,000 is imposed on the party that failed to comply with the respective decision. In addition the debtor is granted a final deadline to comply with the decision. Furthermore the party is threatened with a specific sanction (deduction of point, demotion to a lower division or transfer ban) in case of non-compliance with the deadline. If the deadline has elapsed and the party has failed to comply with the decision to be enforced the enforcement procedure arrives at the second stage. In such case article 71 paragraph 2 FDC provides that the relevant association will be "requested" to implement the sanctions which were threatened on the basis of article 71 paragraph 1 FDC.

In the case at hand FIFA advised the RFF in its letter dated 3 September 2008 to deduct 6 points from the Appellant. Hence, the appealed decision by FIFA is obviously based upon article 71 paragraph 2 FDC and, therefore, relates to the second enforcement step.

a) Did the competent body decide according to Art. 71 paragraph 2 FDC?

Article 71 paragraph 2 FDC does not state which FIFA organ is competent to ask the national federation to implement the sanction. Article 83 FDC, however, provides that the FIFA Disciplinary Committee is authorized to sanction any breach of FIFA regulations which does not come under the jurisdiction of another body. Even though – literally speaking – a decision according to article 71 paragraph 2 is not about issuing a sanction (but rather requests someone else to implement a sanction) the matter is so closely related to article 83 FDC that this provision should apply also in these instances. Furthermore, none of the parties claimed that another body than the FIFA Disciplinary Committee had the competence to take the FIFA Decision, which is based on article 71 paragraph 2 FDC. The Appellant itself admits that *"it is the exclusive prerogative of the Disciplinary Committee to render decisions on the matter of imposing any sanctions upon a party"*. Article 125 FDC confirms indirectly that the FIFA Disciplinary Committee is competent to pass decisions in compliance with article 71 FDC, as it expressly provides that for such decisions the Appeal Committee cannot decide on an appeal lodged *"against any decision passed by the Disciplinary Committee"*.

Based on all the above, the Panel decides that the FIFA Disciplinary Committee had the competence to pass the FIFA Decision.

b) Did the decision comply with the formal requirements?

The FIFA Decision consisted in a simple letter signed by the deputy secretary of the FIFA Disciplinary Committee. However, decisions by the Disciplinary Committee that are issued on the basis of the FDC

must comply with certain formal requirements that are enumerated in Art. 123. Some of the prerequisites are met in the case at hand. For example, according to article 123 paragraph 2 FDC the decision has to be signed by the committee Secretary of the Disciplinary Committee. Other conditions of said provision, however, have not been met. According to article 123 paragraph 1 FDC, a decision of the Disciplinary Committee must contain information on the composition of the committee and the notice of the channels of appeal. Both of these conditions were missing from the FIFA decision in the case at hand. However, the letter contained all the material grounds of the decision. As to the exercise of its right to be heard, the Appellant had the opportunity to provide FIFA with the necessary information during the investigation procedure which started in July 2008. Proceedings before FIFA are in general conducted in writing, as provided under article 119 paragraph 1 FDC, and, in any case, the Appellant did not ask for a hearing, although article 119 paragraph 2 FDC granted the Appellant the right to request for it.

Based on CAS jurisprudence and on the jurisprudence of the Swiss Federal Supreme Court (ATF 106 Ib, p. 179), the above mentioned formal mistakes are not of such nature to render the FIFA decision null and void. Whether the formal mistakes are of such weight to render the decision of FIFA annullable is irrelevant, because, even if this were the case, the mission of this Panel according to article R57 of the Code and in view of the requests and submissions by the parties would be broad enough to issue a decision on the basis of the applicable rules in lieu of FIFA.

c) Is there an enforceable decision?

Article 71 paragraph 1 FDC stipulates that decisions by *"a body, a committee or an instance of FIFA or CAS"* are enforceable under the provision. In the case at hand FIFA sought to enforce the CAS award CAS 2006/A/1109. In the operative part of the award CAS 2006/A/1109, the association CS FCU Politehnica Timisoara which is identical to the Appellant was – inter alia – ordered to change name and not to imitate the colours, track record and logo of SC FC Politehnica Timisoara SA. Hence, looking at the language of article 71 paragraph 1 FDC the prerequisite that there must be an enforceable decision is fulfilled.

The Appellant claims, however, that article 71 paragraph 1 FDC has to be construed narrowly. The provision does – according to the Appellant – not grant FIFA any competence to enforce other CAS awards than the ones which were issued after proceedings involving FIFA jurisdictional bodies. FIFA and the RFF answer that article 71 FDC makes no distinction between CAS awards passed after an appeal was lodged against decisions of FIFA bodies or after an appeal was lodged against decisions of national bodies. The question therefore arises whether or not the Appellant is precluded in raising his objection at this stage of the enforcement procedure. The Panel answers this in the affirmative. All the parties to the present procedure have been a party to the CAS procedure CAS 2007/A/1355. This Panel is, therefore, bound by this previous CAS decision according to which the award CAS 2006/A/1109 constitutes an enforceable decision under article 71 FDC.

Subsidiarily, the Panel would like to point out that – as rightly mentioned by FIFA and the RFF – article 71 FDC does not in its wording make any distinction between CAS awards delivered in relation with a decision issued by FIFA or with a decision passed by a national federation. It is well known that the purpose of the jurisdiction of CAS provided in the FIFA Statutes is to ensure a coherent jurisprudence in the matter of football both at national and international level. Article 62 of the FIFA Statutes thus provides for a wide jurisdiction clause in favour of CAS in order "*to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials, and licensed match agents and players agents"*. As to article 63 of the FIFA Statutes, the Appellant omits to quote in its appeal brief, the part which provides that not only final decisions passed by FIFA but as well "*decisions passed by Confederations, Members or Leagues shall be lodged with CAS*". The Panel does not see how the Appellant can deduct from the reference under article 63 paragraph 2 of the FIFA Statutes to "*all other internal channels*" that CAS can only examine a previous decision of a FIFA body. With reference to article 63 paragraph 1 of the FIFA Statutes it is indeed clear that article 63 paragraph 2 of the FIFA Statutes refers as well to "*internal channels*" of Confederations, national federations or leagues.

Article 64 paragraph 1 of the FIFA Statutes provides further that "*the Confederations, Members and Leagues shall agree to recognise CAS as an independent judicial authority and to ensure that their members, affiliated Players and Officials comply with the decisions passed by CAS"*. It is the Panel's view that this recognition by FIFA of CAS competence to resolve disputes at all levels of the family of football and the obligation to comply with CAS decisions is not only anchored in the FIFA Statutes but also in article 71 FDC. Through this article, FIFA recognises that all CAS awards issued in favour or against members of the family of football should be enforced and that FIFA will make use of its competences as the international association for football to reach this objective. Therefore not only

a literal construction of article 71 FDC but as well a systematic construction of this article leads to the conclusion that FIFA has indeed a general competence to enforce CAS awards within the family of football. The Panel consequently does not see any ambiguity with this construction, which is coherent with the FIFA disciplinary system and does thus not violate the principle of good faith and loyalty applicable to the FIFA regulations.

The Appellant is wrong when it draws the conclusion from the FIFA Circular n° 1080 dated February 13, 2007 and the related jurisprudence of the Swiss Federal Court that FIFA and the Swiss supreme court acknowledge the authority of FIFA to impose sanctions based on article 71 FDC only when there has been previously to the CAS award a decision of a FIFA body. To support its opinion, the Appellant indeed uses precedents where FIFA and the Swiss Federal Court dealt with enforcement of CAS awards related to FIFA decisions. The Swiss Federal Court did not have to decide on FIFA competence to enforce a CAS award which was not related to a FIFA decision. The statements of the Swiss Federal Court are thus limited by the nature of the case it had to deal with. The Appellant cannot have the Swiss Federal Court decide on something that it was not asked to decide on. As correctly mentioned by the Appellant at page 16 of its appeal brief, "*in the present dispute, the situation is completely different*".

Based on the foregoing, the Panel decides that in the present case there is an enforceable decision according to article 71 FDC.

d) Was the Appellant threatened with the deduction of 6 points?

Before requesting the national federation to implement a sanction according to article 71 paragraph 2 FDC the respective party must be threatened with said sanction in case it does not comply with its obligations within a certain deadline according to article 71 paragraph 1 FDC. In the case at hand the Appellant was threatened in the CAS award CAS 2007/A/1355 that "[i]*f SC Politehnica 1921 Stiinta Timisoara Invest SA* (this is the former name of the Appellant) *fails to comply with the paragraphs 1 to 3 above or any of them by 30 June 2008 6 points will be deducted*". Hence, also this requirement is complied with.

e) Did the Appellant comply with its obligation in time?

According to the letter of FIFA dated 3 September 2008 the Appellant has failed to comply with its obligation to "*change its club colours so that they no longer include violet*" since –according to the Second Respondent– the dominant colours of the club on the uniforms of the Appellant and on the Appellant's homepage were still violet after the deadline.

In order to determine whether or not the Appellant complied with his obligation the exact contents of the latter has to be determined. The Panel notes in this respect that there is a certain discrepancy between the obligation of the Appellant stipulated in the enforceable decision (CAS award 2006/A/1109) and in the CAS award 2007/A/1355 implementing the first step of the enforcement procedure according to article 71 paragraph 1 FDC. While the CAS award CAS 2006/A/1109 interdicts *"to imitate the colours of SC FC Politehnica Timisoara SA"* the CAS award 2007/A/1355 obliges the Appellant *"to change its club colours so that they no longer include violet"*. The majority of the Panel holds that in view of the severity of the sanction in question and in view of the necessity of legal certainty the Appellant can only be expected to comply with the obligation stipulated in CAS 2007/A/1355 and that the obligation contained therein cannot be interpreted in the light of the decision to be enforced. Hence, in order to determine whether or not the Appellant complied with its obligations it is not decisive whether the Appellant "imitated" the colour violet, but whether he changed the colour *"so that it no longer includes violet"*. The Panel holds that the change of colours applies to such objects that serve to identify the club in the public.

The uniforms used by a club during matches is a very important means of identification for a club. Hence, there is no doubt that the obligation in no. 3 of the operative part of the CAS award CAS 2007/A/1355 *"change its club colours so that they no longer include violet"* applies to the uniforms used by the Appellant.

The Panel notes that the Appellant ordered new kits to the company SSD on 26 June 2008 and obviously never played since then in violet. Until 4 August 2008 when the new kit was delivered to the Appellant and filed with the RFF and the UEFA, the Appellant played friendly games in black and yellow. The First Respondent submitted, however, that the Appellant still played with a violet kit in other matches prior to 4 August 2008. However, the Panel comes to the conclusion that the Second Respondent failed to prove, that the Appellant played in violet after the expiration of the deadline on 30 June 2008.

As to the change of colours on the Appellant's websites, the Panel notes that the Appellant addressed a letter on 25 June 25 2008 to the website manager informing him of the change of the club's colours and of the need to adapt the website immediately due

to the sanctions threatened by CAS. It appears that the websites colours were still in violet in September when FIFA passed its decision but that they have since been changed. In this respect, the Panel agrees with FIFA and the RFF that the website colours must be changed and not contain violet. Apparently this was the official website of the club and its internet address is even indicated on the Appellant's letter head. Furthermore, there is no doubt that the name and the colours of the club belong to the Appellant, which should be in a position to impose the change of its colours on its official website. However, it remains that the Appellant did ask for the change of the website colours before end of June, 2008 and it had received a positive answer from the website manager within the deadline set by CAS. As the official website was eventually modified and adapted to the new colours of the club, the Panel sees here again that a deduction of 6 points cannot be decided only for the reason that the colours of the website were effectively changed by the website manager, a third party to the Appellant, only shortly after 30 June 2008.

There is no question that the colours "violet" and "mauve" are close. The question, therefore, arises whether the Appellant breaches its duty of "changing its colours so that they no longer include violet" by changing his colours from "violet to "mauve". Technically the colour "mauve" is a different colour from "violet", as confirmed in a report from the Dean of the Faculty of Arts and Design of the west University of Timisoara. Furthermore this change of the Appellant's colours was recognised by the RFF on 5 July 2008 and the RFF Executive Committee requested two of its legal representatives to inform FIFA that the Appellant had complied with the CAS award 2007/A/1355. To sum up, therefore, the Panel comes to the conclusion that also in this respect there was no breach by the Appellant.

To sum up, therefore, the Panel comes to the conclusion that the Appellant did not breach its obligation *"not to include violet in its club colours"* and that therefore the decision of FIFA is erroneous.

f) Can the decision of FIFA be upheld on other grounds?

It is true that the threatening to deduct 6 points in the CAS award 2007/A/1355 does not only refer to the obligation to change the colours but also to the obligation to change its name.

The Panel deems that the Appellant's change of name was made within the deadline fixed by the CAS award 2007/A/1355. This is not only confirmed by the RFF decision passed on 5 July 2008 where the RFF clearly indicates that the Appellant's change of name was validly done, but also by the FIFA Decision where the FIFA Disciplinary Committee decided that "*point 1* [red: the point related to the change of name] *of the mentioned CAS award has been respected*". The RFF Decision does thus logically not refer to the question of the Appellant's change of name but only sanctions the Appellant on the basis of its alleged late change of colours.

The question arises whether the lack of adaptation to the new name in the correspondence in the days following the Appellant's change of name on its letterhead and stamps constitutes a violation of the Appellant's obligations according to the CAS award CAS 2007/A/1355. The latter obliges the Appellant to "change its name". It is not without hesitation that the Panel comes to the conclusion that the obligation in the CAS award CAS 2997/A/1355 has to be construed and interpreted narrowly. The occasional or sporadic use of the Appellant's old name or logo shortly after the formal change of name does, therefore, not constitute a – at least substantial – breach of the duties embedded in the CAS award CAS 2007/A/1355. To sum up, therefore, the Panel comes to the conclusion that the FIFA Decision cannot be upheld on other grounds and, hence, must be set aside.

5. Validity of the RFF Decision implementing the FIFA decision

Since the FIFA decision has to be set aside this also infects the RFF decision which is designed to give the FIFA decision effect in Romania and therefore has to be set aside as well.

6. Summary

Based on all the above the Panel decides that the appeal must be upheld insofar as it is directed against the validity of the FIFA Decision and the RFF Decision. However, all other prayers for relief of the Appellant are rejected.

Arbitration CAS 2008/A/1691
Wisla Kraków v. Fédération Internationale de Football Association (FIFA) & Empoli FC S.p.A & K.
3 July 2009

Football; contract of employment between a player and a club; termination of contract by the player; CAS Jurisdiction; standing to file a petition with FIFA to provisionally register a player with a national football association; validity of the provisional measures ordered by FIFA; condition of admissibility of a counterclaim

Panel:
Mr. Lars Hilliger (Denmark), Sole arbitrator

Relevant facts

Wisla Kraków is a football club with its registered office in Kraków, Poland (the "Appellant"). It is a member of the Polish Football Association ("PZPN"), which has been affiliated to the Fédération Internationale de Football Association (FIFA) the world governing body of Football since 1923.

Empoli Football Club S.p.A. is a football club with its registered office in Empoli, Italy. It is a member of the Italian National Football Association (Federazione Italiana Giuoco Calcio – FIGC), itself affiliated to the FIFA since 1905.

K. (the "Player") is a professional football player. He is of Polish nationality. He currently plays with the club Empoli Football Club S.p.A. on the basis of a professional contract.

On 27 July 2005, a professional contract was entered into between the Appellant and the Player. It was a fixed-term agreement for five years, effective from 1 July 2005 until 30 June 2010.

On 22 May 2008, the Player notified in writing the Appellant, the FIFA and the PZPN of the fact that he was unilaterally terminating with immediate effect his contractual relationship with the Polish club in accordance with article 17 of the FIFA Regulations for the Status and Transfer of Players (RSTP) In particular, he indicated that the notification was served within 15 days following the last game of the season of the Polish league and at the end of the so-called protected period.

On 15 June 2008, Mr Marek Wilczek, chairman of the management board of the Appellant, acknowledged receipt of the Player's letter but contested the valid termination of the contract dated 27 July 2005. He drew the Player's attention to the fact that his contractual obligations had not expired and that he was still a member of the Appellant's team. As such, he was expected to attend the training sessions organised on behalf of the club.

On 10 July 2008, Mr Marek Wilczek sent to the Player a letter confirming that the contract signed on 27 July 2005 was still in force. He warned the Player that his failure to appear during team practise or his eventual involvement with another club was in breach of his contractual obligations.

On 4 August 2008, the Appellant called the Player to appear at a disciplinary hearing to be held before its management board on 19 August 2008.

In a letter dated 23 September 2008 and addressed to the PZPN, the Appellant confirmed that the disciplinary proceeding was still pending.

At the hearing held on 12 May 2009 before the Court of Arbitration for Sport (CAS), the Appellant confirmed that it had not yet initiated proceedings before the FIFA or another tribunal to obtain a ruling with respect to the consequences of the alleged breach/termination of the contract dated 27 July 2005 by the Player. Likewise, on the same occasion, the Respondents told the Sole Arbitrator that they were not aware of any claim lodged with regard to the said contract.

On 30 July 2008, the Player signed an employment agreement with the club Empoli Football Club S.p.A. valid from 1 August 2008 until 30 June 2013.

On 5 September 2008, the FIGC formally required from the FIFA to be authorized to provisionally register the Player with its affiliated club Empoli Football Club S.p.A. This request was granted with immediate effect by decision passed on 10 October

2008 by the FIFA Single Judge of the Players' Status Committee. The latter reached this conclusion principally because he found that the Appellant "*does not appear to be genuinely interested in the services of the player anymore, but rather in financial compensation*" and that "*by means of a notice of termination dated 22 May 2008 addressed to the Polish club, the PZPN and FIFA, the player had clearly expressed his wish to render his services to another club than Wisla Kraków*".

On 4 November 2008, the Appellant filed a statement of appeal and an appeal brief with the Court of Arbitration for Sport (CAS) challenging the decision of the FIFA Single Judge of the Players' Status Committee.

In his appeal before the CAS, the Appellant chose to name only the FIFA as Respondent. On 27 November 2008, the latter requested Empoli Football Club S.p.A. and the Player to participate to the present arbitration proceedings.

On 1 December 2008 and pursuant to article R54 and R41.2 of the Code of Sports-related Arbitration ("Code"), the CAS Court office invited the Appellant as well as the Italian club and the Player to express their position on the request of the FIFA. Whereas the Appellant has not filed any submission with this regard, Empoli Football Club S.p.A. and the Player confirmed in a timely manner that they agreed to participate in and join the procedure at hand.

On 16 March 2009, the CAS Court Office informed the parties that, *"taking into account the Respondent's request for the joinder of Empoli FC SpA and K., the agreement of the two third parties thereto and the absence of any comments from the Appellant within the time limit granted, pursuant to Article R41.4 of the Code of Sports-related Arbitration (the "Code"), the parties are advised that the Sole Arbitrator has decided that the two third parties may be joined to these proceedings".*

Extracts from the legal findings

1. CAS jurisdiction

The jurisdiction of CAS derives in the case at hand from articles 62 ff. of the FIFA Statutes and article R47 of the Code, the latter which reads as follows: *"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body. An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance".*

In the present proceedings, FIFA is of the opinion that all internal procedures and remedies have not been exhausted and that the decision of the Single Judge of its Players' Status Committee is not final.

Having evaluated FIFA's arguments, the Sole Arbitrator has considered that he has jurisdiction to decide over the present dispute, and thus over the appeal against the provisional measures because (i) the appealed decision was rendered by the FIFA Single Judge of the Players' Status Committee, and article 23 par. 3 in fine of the FIFA Regulations for Status and Transfer of Players provides that "*(...) Decisions reached by the single judge or the Players' Status Committee may be appealed before the Court of Arbitration for Sport (CAS)" and* (ii) moreover, the Sole Arbitrator considers that the decision from the Single Judge of the Players' Status Committee is indeed a final decision, according to the meaning of article R47 of the Code. The provisional nature of the object of the decision (i.e. the issuance of the provisional ITC) does not affect, and in any case cannot affect, the nature of the decision itself which is final and definitive regarding the said object. In other words, even though the requested ITC has a provisional nature, the decision which grants its issue is a final decision.

It follows that the requirements of article R47 of the Code are met and that the CAS has jurisdiction to decide on the present dispute.

2. Standing to file a petition with FIFA to provisionally register a player with a national football association

The Appellant submitted that, based on article 2 par. 6 of annex 3 to the FIFA Regulations, the FIGC was not entitled to request from FIFA an authorization to provisionally register the Player with its affiliate. In light of the said provision, the Appellant claimed that such a petition could have been filed exclusively by the Player or by his new club.

Article 2 par. 6 of annex 3 to the FIFA Regulations reads as follows: "*The former association shall not issue an ITC if a contractual dispute has arisen between the former club and the professional. In such a case, the professional, the former club and/or the new club are entitled to lodge a claim with FIFA in accordance with article 22. FIFA shall then decide on the issue of the ITC and on sporting sanctions within 60 days. In any case, the decision on sporting sanctions shall be taken before the issue of the ITC. The issue of the ITC shall be without prejudice to compensation for breach of contract. FIFA may take provisional measures in exceptional circumstances".*

The Sole arbitrator noted that the provision does not specify who is entitled to ask for provisional measures or what triggers FIFA's intervention.

In view of their crucial role with regard to the ITC, it would be illogical to exclude the associations from the process of applying for provisional registration. As a matter of fact, a player must be registered with an association to play for a club as either a professional or an amateur (see article 5 par.1 of the FIFA Regulations). A precondition for registering a player is that his ITC has been validly transferred from the association of his old club to the association of his new club (see article 9 of the FIFA Regulations and article 1 par. 1 of their annex 3). All applications to register a professional must be submitted by the new club to the new association during one of the registration periods established by that association (article 2 par. 1 annex 3 to the FIFA Regulations). Upon receipt of the application, the new association shall immediately request the former association to issue an ITC for the professional (article 2 par. 2 annex 3 of the FIFA Regulations). As a result, the participation of associations in the registration of players is inevitable a) as they are the competent bodies for the management of the ITC and b) as they will not file a request for provisional measures by the FIFA if not required to do so by the player and/or by its affiliate. The new association has therefore a legitimate interest to intervene when its opinion is diverging from the views of the former association. One might actually expect the new association to support by all means the correct application of the regulations, especially when its affiliates' rights are at stake.

The fact that only associations are competent to file a petition to provisionally register a player with its affiliate is also consistent with the position expressed by the FIFA to K. With this regard, the principle of good faith protects the interested person in the trust he/she placed in the assurances he/she received from the competent authority (ATF 131 II 636; ATF 129 I 170; 128 II 125; 126 II 387). On 3 September 2008, the Player asked for the assistance of the FIFA in receiving the ITC from the PZPN. The following day, FIFA explained that *"should our intervention be needed, you are kindly invited to inform the Federazione Italiana Giuoco Calcio to contact our services in order to ask for our assistance with the request for the issuance of the relevant ITC by the Polish Football Association"*. At the hearing, the FIFA confirmed to the Sole Arbitrator that this was in line with its constant practice. As already exposed here above, article 2 par. 6 of annex 3 of the FIFA Regulations does not specify who is entitled to ask for provisional measures. Hence, in the absence of a clear written rule to the contrary, the Sole Arbitrator does not see a superior interest that could justify the breach of the assurance given by the FIFA to the Player on 4 September 2008.

In view of the foregoing determination, the FIGC had standing to file a petition with FIFA to provisionally register the Player.

3. Validity of the provisional measures ordered by the FIFA Single Judge of the Players' Status Committee

The Appellant alleges that, in the present proceedings, there are no exceptional circumstances that could justify the provisional measures taken by the FIFA Single Judge of the Players' Status Committee. Fundamentally, the Appellant claims that as long as it has not agreed to the termination of the contract, the Player remains committed to it until 30 June 2010. This allegation must be disregarded.

If the Appellant's position was to be followed, it would indisputably create an inequality of bargaining power between the player and the club and place the latter in the favorable position of deciding the terms and the conditions under which it would give its consent to the *"mutually agreed termination of the contract"*. Had the player not signed a new contract with a new employer, the former club could simply prevent him from working by deciding not to give him its acceptation to the termination of the contract during the transfer window.

All the above considerations establish that the position of the Appellant is inconsistent with the FIFA Regulations, which are designed to find a reasonable balance between the needs of contractual stability, on the one hand, and the needs of free movement of players, on the other hand, i.e. to find solutions that foster the good of football by reconciling in a fair manner the various and sometimes contradictory interests of clubs and players (CAS 2007/A/1298, 1299, 1300, CAS 2008/A/1519, 1520).

In the view of the above, the Sole Arbitrator does not see any reason to depart from the position expressed in the constant jurisprudence of the CAS (CAS 2006/A/1100): *"(…) the Panel is of the opinion that a player cannot be compelled to remain in the employment of a particular employer. If a player terminates his employment contract without valid reason, then the latter is not withstanding the possibility of sporting sanctions - obliged to compensate for damages, if any, but is not obliged to remain with the employer or to render his services there against his will"*.

The fact that the Player notified the Appellant that he unilaterally terminated their contractual relationship

with immediate effect is, *per se*, not exceptional.

The Sole arbitrator considers that the provisional measures ordered by the FIFA Single Judge of the Players' Status Committee were the only means available to protect the Player and his right to work from an irreparable harm if between the moment the termination of the contract was notified by the Player and the moment the FIFA was requested to accept the provisional registration of the Player, several months passed by and that during this period, the Player's former Club (the Appellant) had not initiated proceedings to examine the consequences of the said termination and/or to deny its validity. Only a disciplinary investigation was allegedly undertaken at the Polish club level which was still pending on 23 September 2008. With this regard, the Appellant has not tried to explain to the Sole Arbitrator if the internal procedure had been carried out completely and whether a sanction had been imposed upon the Player. Those circumstances make the situation truly exceptional and justify the provisional measures.

4. Condition of admissibility of a counterclaim

Empoli Football Club S.p.A. requested the Sole Arbitrator to order the payment in its favour of an indemnity amounting to Euro 39,435.30. It is of the opinion that the proceedings initiated because of the refusal of the PZPN to issue the ITC prevented Empoli Football Club S.p.A. to field the Player or benefit from his services for more than two months.

The Sole arbitrator observes that in the particular context, the purpose of a counterclaim which is related to compensation for damages derives from the contractual dispute between the parties whereas the purpose of the appeal is related to the validity of the provisional measures ordered by the FIFA Single Judge from the Players' Status Committee. Such contractual dispute could/should be the object of a distinct procedure. It is obvious that the counterclaim is entangled with the Appellant's own eventual claim for compensation for the alleged premature, unjustified termination of the professional contract by the Player.

In any event, the Sole Arbitrator notes that, as regards the burden of proof, it is the duty of Empoli Football Club S.p.A. to objectively demonstrate the existence of its rights (Article 8 of the Swiss Civil Code, ATF 123 III 60 consid. 3a) ATF 130 III 417 consid. 3.1.). It is not sufficient for it to simply assert the mere existence of a violation of its interests for a tribunal to consider the matter without further substantiating its claim (CAS 2005/A/896). In the case at hand, Empoli Football Club S.p.A. has not proven nor made plausible the existence of the alleged damage it suffered. In particular it has not established that it paid the Player, that the latter has not provided any services nor trained at all with its team duntil 14 October 2008 and that it is the Appellant which is solely responsible for the alleged damage and not the PZPN.

For all those reasons, Empoli Football Club S.p.A. cannot as a part of this case be awarded the requested compensation.

Arbitration CAS 2008/A/1705
Neue Grasshopper Fussball AG Zurich v. Club Alianza de Lima
18 June 2009

Football; compensation for training; non motivated decision as a "decision" subject to appeal to the CAS; referral to Swiss law in the FIFA Statutes; Art. 15 of the DRC Rules; hierarchy of norms in the provisions of a Sports federation; deadline to appeal a decision; purpose of Article 75 of the Swiss Civil Code

Panel:
Prof. Ulrich Haas (Germany), President
Mr. Michele Bernasconi (Switzerland)
Mr. Pedro Tomás Marqués (Spain)

Relevant facts

Neue Grasshopper Fussball AG Zurich ("Grasshopper" or "the Appellant") is a professional football club with its seat in Niederhasli, Switzerland. It is affiliated to the Swiss Football Association (SFV or "the Swiss FA"), a federation in turn affiliated to the Fédération Internationale de Football Association, the world governing body of football (FIFA).

Club Alianza de Lima ("Alianza" or "the Respondent") is a professional football club with its seat in Lima, Peru. It is affiliated to the Federación Peruana de Fútbol (FPF or the "Peruvian FA"), an association in turn affiliated to FIFA.

The Peruvian player D. ("the Player") was registered with the Respondent on 25 July 2000. On 1 November 2002, the Respondent and the Player signed an employment contract valid until 31 December 2006. The Player was born on 21 September 1984. The salary agreed upon by the parties was of USD 250 per month.

The Player regularly performed with the youth national team of Peru and was called up for the national "A" team in August 2003.

The contractual relationship between the Respondent and the Player came to an end upon the expiry of the employment contract, which was not renewed. In January 2007, i.e. before his 23rd birthday, the Player signed an employment contract as a professional with the Appellant and was registered by it.

On 31 July 2008, the FIFA Dispute Resolution Chamber (DRC) rendered a decision on the amount of training compensation payable by the Appellant to the Respondent. The decision outlined the findings of the DRC only, but does not contain any reasons. It was notified to the parties on 17 October 2008.

By letter dated 7 November 2008, the Appellant, without having filed with FIFA a request for the grounds of the decision, filed its Statement of Appeal with the Court of Arbitration for Sport (CAS) against the decision rendered by the DRC, whereas on 17 November 2008, the Appellant filed its Appeal Brief with the CAS.

Extracts from the legal findings

1. Decision by a federation

CAS Panels tend to interpret the term "decision" within the meaning of Art. R47 of the Code broadly (cf CAS 2008/A/1583 & 1584, no. 5.2.1).

Although FIFA's letter sent to the parties on 31 July 2008 does not address the grounds on which the decision was passed, it clearly shows all formal and material characteristics of a "decision" in the sense of Art. R47 of the Code. On a material level it states the outcome of the deliberations regarding the issue of the training compensation owed for the Player. The content of this letter thus represents a "unilateral act" which aims at affecting the legal situation of the addressees – or at least, in the present case and under the concrete circumstances of this case, could be interpreted as aiming at doing so. On a formal level the letter carries the heading "decision", was passed by an organ of FIFA (the DRC) and was signed by the FIFA General Secretary, who is awarded this competence in Art. 68(3) lit. h of the FIFA Statutes. Furthermore, FIFA's letter of 31 July 2008 contains legal instructions on how to appeal against it, thus bearing all the elements ascribed to a "decision". The fact that the decision is not motivated can, as such, not affect it being a "decision" (cf. CAS 2004/A/748, no. 91).

2. Timeliness of the appeal

According to Art. R49 of the Code the appeal has to be lodged within a certain time limit. According to the deadline provided in Art. 63 (1) of the FIFA Statutes the appeal has to be filed with the CAS within 21 days. Another deadline is contained in Art. 15 of the DRC Procedural Rules. This provision reads as follows:

> *"1. The Players' Status Committee, the DRC, the single judge and the DRC judge may decide not to communicate the grounds of a decision and instead communicate only the findings of the decision. At the same time, the parties shall be informed that they have ten days from the receipt of the findings of the decision to request, in writing, the grounds of the decision, and that failure to do so will result in the decision coming into force.*
>
> *2. If a party requests the grounds of a decision, the motivated decision will be communicated to the parties in full, written form. The time limit to lodge an appeal begins upon receipt of this motivated decision.*
>
> *3. It the parties do not request the grounds of a decision. a short explanation of the decision shall be recorded in the case files …".*

a) The deadline in Art. 15 of the DRC Rules

It is undisputed between the parties that the Appellant has not requested the grounds for the decision by the DRC. Art. 15(1) of the DRC Procedural Rules provides that in such a case the decision is coming into force.

aa) The nature of the deadline

If the parties agree on deadlines for submitting a dispute to arbitration these deadlines may serve different purposes (cf Kaufmann-Kohler/Rigozzi, Arbitrage international, 2006, marg. no. 275; Schwab/Walter, Schiedsgerichtsbarkeit, 7th ed, 2005, Chap. 6 marg. no. 6). The parties may have intended to limit the mission of the arbitral tribunal as to time. The time limit under those circumstances is directed to the powers of the arbitral tribunal. Once the time limit has elapsed the arbitral tribunal is no longer competent to decide the matter in dispute. The arbitral tribunal has no jurisdiction with the consequence that the appeal is (no longer) admissible. The time limit may also serve, however, another purpose. It could be directed as to the merits of the case, i.e. at the claim itself. If in such a case the time limit elapses the arbitral tribunal remains competent to decide the dispute. However, the appellant has lost the possibility to avail himself of his specific right with the consequence that the claim has to be dismissed. Whether a time limit serves one or the other purpose may be difficult to answer in a specific case. The decisive criterion is – as Paulsson has pointed out– whether the objecting party is taking aim at the tribunal or at the claim (Paulsson J., in Liber amicorum Robert Briner, 2005, p. 616).

There is little CAS jurisprudence on the nature of the deadline to file an appeal. There is a certain tendency, however, to qualify the deadline as a procedural issue. An example for this may be found in CAS 2004/A/674, no. 47:

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

Whether or not the time limit to file an appeal is a procedural issue or an issue of the merits follows from the interpretation of the provision in question. In particular consideration must be given to the intent of the parties. The purpose of Art. 15 of the DRC Procedural Rules is fostering legal stability and certainty. After the elapse of the time limit the decision by the federation should no longer be put in question by anyone entitled to appeal. This purpose, however, is poorly served when interpreting the time limit as a procedural issue. The decision of the federation could not be challenged before the CAS but it could possibly be challenged before another forum, e.g. a state court (cf Rigozzi A., L'arbitrage international en matière de sport, 2005, marg. no. 1039). If however, the time limit aims at the claim itself the action would have to be dismissed irrespective of the forum chosen by the appellant to decide the matter in dispute. Thus, the intent of the parties clearly speaks in favour of construing the time limit as an issue of merits. The Panel feels itself comforted in its view by looking on Art. 75 CC which rules on the possibility for a member of a (Swiss) association to appeal against a decision of that association. The provision reads:

"Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month from the day on which he became cognizant of such resolution".

The purpose of Art. 75 CC is to safeguard the individual's membership rights from unlawful infringements by the association (cf. ATF 108 II 15, 18). With this legislative purpose in mind, Art. 75 CC is interpreted in a broad sense (cf ATF 118 II 12, 17 *seq.*; 108 II 15, 18 *seq.*; Handkommentar zum Schweizer Recht/Niggli, 2007, Art. 75 ZGB marg. no. 6 *seq.*; Heini/Portmann, Das Schweizer Vereinsrecht, Schweizerisches Privatrecht II/5, 2005, marg. no. 278; Basler Kommentar ZGB/Heini/Scherrer, 3rd ed. 2006, Art. 75 marg. no. 3 *et seq.*; Berner Kommentar zum schweizerischen Privatrecht/Riemer, 1990, Art. 75 marg. no. 7 *et seq.*, 17 *et seq.*). In particular, the term "decision" in Art. 75 CC encompasses not only resolutions passed by the assembly of an association but, also, any (final and binding) decision of any other organ of the association, irrespective of the nature of such decision (disciplinary, administrative, etc.) and the composition of said organ (one or several persons).

The objective of Art. 75 CC lies in enabling all parties concerned (the association itself, the members and third interested parties) to obtain clarity about the binding effect of an association's decision with a reasonable deadline. The short appeal deadline thus serves the interests of legal certainty and security. In view of this objective it is unanimously held that the time limit in Art. 75 CC is a matter of merits, i.e. that the appellant once the time limit has elapsed forfeits his (member) right to challenge the decision of the association with the consequence that the appeal is admissible but unfounded on the merits (Berner Kommentar zum schweizerischen Privatrecht/ Riemer, 1990, Art. 75 marg. no. 62; Fenners H., Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport, 2006, marg. no. 353; ATF 85 II 525, 536).

bb) Compatibility with Art. 75 CC

The wording of Art. 75 CC leaves no doubt as to the mandatory character of this provision. The term *"entitled by law"* signifies that this provision cannot be amended by the statutes of an association (cf Berner Kommentar zum schweizerischen Privatrecht/ Riemer, 1990, Art 63 marg. no. 13; Nater H. SpuRt 2006, 139; Fenners H., Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport, 2006, marg. no. 98, 248; Zen-Ruffinen P., Causa Sport 2007, 67, 71). It goes beyond question that at first sight the deadline contained in Art. 15(1) of the DRC Procedural Rules, i.e. to solicit the grounds of the decision with a deadline of 10 days in order to preserve ones right of appeal deviates from Art. 75 CC. However, it does not follow from this that the provision contained in the DRC Procedural Rules are null and void.

It has been stated before that Swiss Law only applies subsidiarily to the merits of this case, i.e. if the rules and regulation of FIFA contain lacunae. If, however, a certain issue is dealt with by the rules and regulations of FIFA then Swiss law does not apply. This is –as stated above– even true if the otherwise applicable provision of Swiss law is mandatory. Hence, in the case at hand it is irrelevant whether or not there is a contradiction between the time limits in the rules and regulations of FIFA and Art. 75 CC since the latter provision is –in the context of arbitrations conducted according to the Code– superseded by the relevant provisions in the statutes and regulations of FIFA (cf. also Bernasconi/Huber, SpuRt 204, 268, 270; Nater H., SpuRt 2006, 139, 143 f; Rigozzi A., L'arbitrage international en matière de sport, 2005, marg. no. 1041).

FIFA's autonomy to deviate from (mandatory) provisions of Swiss substantive law is limited, however, by the (transnational) ordre public. The question to be raised, therefore, is whether or not the provisions in Art. 15 of the DRC Procedural Rules is in breach with fundamental legal principles. The Panel is of the view that this is not the case. The duty to solicit a reasoned decision within 10 days of its notification in order to be able to appeal it before CAS may be seen as affecting the Appellant's access to the courts and legal protection. The Panel holds, however, that this limitation is not disproportionate. It is true that the time limit of ten days is short. However, little is required from an appellant within this time frame. He doesn't need to file a full brief that outlines his legal position. He is not even required to file specific motions or requests. The only thing he has to do in order to preserve his right of appeal is to solicit (in writing) a reasoned decision. In addition, the provision applies to all appellants and, thus, guarantees equal treatment among all (indirect) members of FIFA. Additionally, the 10 days-deadline of Art. 15(1) of the DRC Procedural Rules does not shorten the deadline which is applicable for filing an appeal, once the grounds of the decision are served to the parties. Indeed, the relevant 21 days-deadline remains untouched by Art. 15(1) of the DRC Procedural Rules. Furthermore, the provision serves a legitimate purpose, i.e. to cope with the heavy caseload of FIFA and contributes to the goal of an efficient administration of justice. Even the

European Court of Human Rights has all along allowed the right of access to the courts to be limited "*in the interests of the good administration of justice*" (cf. Briner R., von Schlabrendorff, in: Liber amicorum Böckstiegel, 2001, p. 89, 91). It does not come as a surprise, therefore, that similar restriction as the one in the DRC Procedural Rules can be found also in relation to the access to state courts. An example of this is sec. 158 of the law governing the organisation of the judiciary of the canton of Zurich, around which Art. 15(1) of the DRC Procedural Rules has evidently been crafted. Sec. 158 of the law governing the organisation of the judiciary of the canton of Zurich reads:

> *"In decisions of first instance relating to civil matters and the enforcement of monetary judgements the courts may renounce to provide the reasons for the decision and communicate the operative part only to the parties. Instead of advising the parties of the appropriate recourse against the decision the court informs the parties that they may ask for the reasons of the decision within 10 days of the notification, failing which the decision becomes final and binding […] Does a party request the reasons of the decision, the full decision is served with the reasons to the parties in writing. The deadlines for filing any appeal or any action to negate the claim shall start to run with such notification of the full decision with the reasons".*

To sum up, therefore, the Panel concludes that Art. 15 of the DRC Procedural Rules is neither incompatible with Art. 75 CC nor with the fundamental legal principles belonging to the *ordre public.*

cc) Compatibility with the hierarchy norms

In principle, sports federations can freely establish their own provisions (cf Zen-Ruffinen, Droit du Sport, 2002, marg. no. 161). However, there are limits to this autonomy. In particular the relevant organs when creating new rules and regulations are bound by the limits imposed on them by higher ranking norms, in particular the association's statutes. This follows from the principle of legality (*"Le principe de la légalité implique l'exigence de la conformité aux statuts des texts réglementaires inférieurs et des decisions des organs sociaux"*, cf. Baddeley M., L'association sportive face au droit, Les limites de son autonomie, 1994, p. 208). According to this principle regulations of a lower level may complement and concretize higher ranking provision, but not amend nor contradict or change them. This principle is also well established in CAS jurisprudence (cf CAS 2006/A/1181, no. 8.2.2; CAS 2006/A/1125, no. 6.18; CAS 2004/A/794, no. 10.4.15).

In the case at hand the RSTP find their legal basis in Art. 5 of the FIFA Statutes. The latter provides that:

> *"The Executive Committee shall regulate the status of Players and the provisions for their transfer in special regulations".*

One aspect arising in the context of the transfers of players is the question of training compensation (Art. 20 RSTP). Hence, the RSTP contains provisions regarding training compensation and regulates questions annexed to it, i.e. which organ within FIFA is competent to deal with the issue in case disputes between clubs should arise (Art. 22 lit. d, 24 RSTP). In Art. 25(7) RSTP reference is made to the DRC Procedural Rules. The provision reads that:

> *"The detailed procedure for the resolution of disputes arising from the application of these regulations shall be further outlined in the FIFA Procedural Rules".*

Formally, the DRC Procedural Rules find a sufficient legal basis in the statutes of FIFA. It is debatable, however, whether Art 15 of the DRC Procedural Rules exceeds the autonomy granted to the FIFA Executive Committee according to Art 5 of the FIFA Statutes. At this point, it is necessary to address the argument put forward by the Respondent following which the 10 days-deadline is merely a formality and does not affect the parties right to appeal, given that the 21 –days-deadline of Art. 63(1) of the FIFA Statutes remains in place. *De facto*, any party failing to request the grounds of a decision within 10 days loses its right to appeal to CAS and, as such, is simply faced with a reduced appeal deadline. However, one may note also that any party asking the grounds of the decision is granted, *de facto*, a longer period of time to decide whether or not to accept the results of the FIFA procedure and the DRC decision. Consequently, the 10 days deadline must be seen and scrutinized in the context of the time limit for appeals to the CAS. The Panel has doubts whether Art. 15 of the DRC Procedural Rules is covered by the legal basis in Art. 5 of the FIFA Statutes because the question of time limits relating to appeals to the CAS are dealt with –exhaustively– in chapter VIII of the FIFA Statutes. In particular the time limit for appeals to CAS is regulated in Art. 62(1) of the FIFA Statutes. The provision reads:

> *"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question".*

No reference is made in chapter VIII of the FIFA Statutes to lower level provisions. No power is granted to specific organs within FIFA to further outline or complement Art 62(1) of the FIFA Statutes. From this it follows, that changes from the provisions dealing with time limits for appeals to the CAS are in the sole competence of the FIFA Congress (Art 26(1) of the FIFA Statutes). It is questionable in the case at hand whether Art. 15 of the DRC Procedural Rules materially changes Art. 63(1) of the FIFA Statutes. If that were the case this would amount to a failure to uphold the principle of legality that calls for inferior rules and regulations to be in conformity with the statutes. This would result in Art. 15(1) of the DRC Rules being inapplicable.

However, whether or not Art 15 of the DRC Procedural Rules complies with the hierarchy of norms can be left undecided in the case at hand. Because even if the latter is answered in the affirmative because of the particularities of the case at hand the provision cannot be held against the Appellant. In the present matter, the notice relating to the possibility to appeal the DRC decision to the CAS is confusing. While no. 6 of the DRC decision explicitly states that "*this decision may be appealed against before the … CAS*", it follows from no. 7 of the DRC decision that no. 6 apparently is only intended to apply if the party has requested the grounds of the decision within a certain deadline. In view of the fact that this constitutes a considerable change from the previous procedural situation and in view of the fact that it is constant CAS jurisprudence that a decision does not need to contain grounds in order to be appealable to CAS, one would have expected from FIFA a notice of information on appeals that is much more transparent and consistent. To sum up, therefore, the Panel holds that under the present circumstances, Art. 15 of the DRC Procedural Rules cannot be held against the Appellant. Furthermore, FIFA may consider (i) to integrate Art. 15(1) of the DRC Rules somehow into the FIFA Statutes in order to prevent any possible or alleged conflicts with the hierarchy of norms and (ii) to issue notices to the parties in such a clear way that no doubt can exist on what action a party is requested and entitled to do upon having been informed on the results of a DRC procedure.

b) The deadline in Art. 63(1) of the FIFA Statutes

The final obstacle to the timeliness of the present appeal lies in the argument presented by the Respondent whereby the Appellant failed to meet the 21 days deadline of Art. 63(1) of the FIFA Statutes when filing the appeal.

The findings of the decision passed by the Dispute Resolution Chamber on 31 July 2008 were served on the Appellant on 17 October 2008. The Appellant filed its appeal on 7 November 2008.

According to CAS jurisprudence (CAS 2006/A/1176, no. 7.2; CAS 2008/A/1583 & 1584, no. 7; CAS 2007/A/1364, no 6.1 et seq.; CAS 2006/A/1153, no. 41), Art. R32 of the Code is indeed a general provision which, as per Art. R27 of the Code, applies to both the ordinary and the appeal arbitration proceedings. As such, Art. R32 serves to provide clarity to the respective provisions of both proceedings. Consequently, and in accordance with Art. R32 of the Code, the deadline for appeal commences on the day following the notification of a decision.

The same can be said about the deadline contained in the FIFA Statutes. Art. 63 of the FIFA Statutes does not contain a provision as to how to compute the time limit. However, Art. 62(2) provides that Swiss law shall apply "additionally". The Panel notes that under Swiss law, deadlines fixed per days start to run from the day following the receipt of a decision, with the day of receipt not included (CAS 2007/A/1364, no 6.1 *et seq.*; CAS 2006/A/1153, no. 41). In addition the interpretation given by the Panel is in line with the computation of other time limits provided for in the FIFA regulations. Indeed, Art. 16(7) of the DRC Procedural Rules stipulates that: *"... The day on which a time limit is set and the day on which the payment initiating the time limit is made shall not be counted when calculating the time limit"*.

In the case at hand, the decision of the DRC was notified to the Appellant on 17 October 2008. Hence, the deadline of 21 days expired on 7 November 2008 at 24:00 o'clock with the consequence that the Appellant, with its letter of 7 November 2008, filed its appeal in time. To summarise therefore, the Panel accepts that the Appellant filed the appeal in a timely manner because the additional restrictions imposed by Art. 15 of the DRC Rules cannot be held against him.

Arbitration CAS 2009/A/1781
FK Siad Most v. Clube Esportivo Bento Gonçalves
12 October 2009

Football; training compensation; appealable decision before the CAS; decision without grounds as a "decision" in the meaning of Article R47 of the CAS Code; request for the grounds of the decision and exhaustion of internal remedies; violation of the principle of due process and CAS power of review; criteria for qualifying a player as "professional"

Panel:
Mr. Efraim Barak (Israel), Sole arbitrator

Relevant facts

FK Siad Most ("Siad Most" or "the Appellant") is a professional football club with its seat in Most, Czech Republic. It is affiliated to the Football Association of the Czech Republic (CFA), a federation in turn affiliated to the Fédération Internationale de Football Association, the world governing body of football (FIFA).

Club Esportivo Bento Gonçalves ("Gonçalves" or "the Respondent") is a professional football club with its seat in Bento Gonçalves/RS, Brazil. It is affiliated to the Confederação Brasileira de Futebol (CBF), which in turn is affiliated to FIFA.

The Brazilian player C. ("the Player") was registered as a player with the Respondent from 23 March 2004 to 28 April 2006. According to the Player's Passport issued by the CBF on June 2007, the Player was registered with the CBF as an amateur player while he was playing with the Respondent.

On 28 April 2006, the Player moved from Bento Gonçalves to another Brazilian club, Brusque Futebol Clube ("Brusque"). While playing at Brusque, C. was still registered with the CBF as an amateur.

C. signed an agreement with Brusque called "Private Agreement for the granting of financial aid to a football player" (the "Private Agreement"). The Private Agreement granted C. a monthly payment described in the Private Agreement (according to the English translation provided by the Respondent) as a monthly apprenticeship allowance worth R$620 (Reais) for "*his living costs and as an incentive to the practice of football*".

According to the terms of the Private Agreement, in addition to the aforementioned payment, C. was also entitled to medical, dental and psychological assistance, as well as to the costs related to transportation, food, housing/lodging, school, nutritionist and physical therapy. Furthermore, Brusque arranged life insurance for C. For his part, C. had to attend and participate in games and training sessions scheduled by Brusque and in all other activities connected with the duties of a football player.

On 22 August 2006, C. was transferred from Brusque to the Czech club FK Siad Most and for the first time officially registered as a professional football player within a football association.

On 29 November 2007, the Respondent lodged a complaint with the FIFA Players' Status Committee regarding the non-payment of training compensation.

The DRC rendered a decision on 9 January 2009 accepting the claim of the Respondent and granting it training compensation payable by the Appellant. The decision sets out the findings of the DRC only, but does not contain any reasons. It was notified to the parties on 23 January 2009.

By letter dated 2 February 2009, the Appellant, without having previously filed a request with FIFA asking for the grounds of the decision, filed its Statement of Appeal with the Court of Arbitration for Sport (CAS) against the decision rendered by the DRC, insofar as the decision sentenced the Appellant to pay EUR 62,500 plus 5% p.a. interest as training compensation to the Respondent. In the Statement of Appeal, the Appellant named both the Respondent and FIFA as respondent parties.

In its Appeal Brief dated 23 February 2009 and in its further submissions, the Appellant requested the CAS – *inter alia* – to annul the appealed decision of the DRC and to dismiss the payment request of Bento Gonçalves.

In its Answer to the Appeal and in its further submissions, the Respondent requested the CAS to terminate the arbitration procedure due to manifest lack of competence of the CAS and to dismiss the Appeal and confirm the appealable Decision of the DRC.

Extracts from the legal findings

1. Decision by a federation within the meaning of Article R47 of the CAS Code

CAS Panels have interpreted the term "decision" within the meaning of Article R47 of the Code broadly (cf CAS 2008/A/1583 & 1584, no. 5.2.1).

The Sole Arbitrator is satisfied that, although the Decision of the DRC issued on 9 January 2009 and notified to the parties on 23 January 2009 does not address the grounds on which the decision was passed, it clearly shows all formal and material characteristics of a *"decision"* in the sense of Article R47 of the Code. On a material level, it shows the outcome of the deliberations regarding the issue of the training compensation owed for the Player. Therefore, the content of this text represents a *"unilateral act"* which aims at affecting the legal situation of the addressee. On a formal level, the letter carries the heading *"decision"*, was passed by an organ of FIFA (the DRC) and was signed by the FIFA Deputy General Secretary. The fact that the decision is not motivated can, as such, not affect it being a *"decision"* (cf. CAS 2008/A/1705, para. 5.2.2; cf also CAS 2004/A/748, no. 91).

Furthermore, the fact that the Decision was erroneously issued by FIFA without grounds (by applying the 2008 Rules instead of the 2005 Rules that should have been applied) and without legal instructions on how to challenge it, cannot be construed as depriving the Appellant from his fundamental right to appeal the decision based on Article 63 of the FIFA Statutes.

2. Exhaustion of legal remedies

According to Article R47 of the Code, a decision may be appealed to CAS *"insofar as the Appellant has exhausted the legal remedies available to him in accordance with the statutes and regulations of the said sports-related body"*. Decisions of the DRC cannot be appealed before any other internal legal body of FIFA. What is more, even under the 2008 Rules the right granted to a party to ask for the reasons of the decision cannot be qualified as an "*internal remedy*" within FIFA in the sense of Article R47 of the Code (cf CAS 2008/A/1705, para. 5.2.4). It is even more so in this case, where the decision was granted without reasons based on the erroneous application of the new rules that should not have been applied in this case. Consequently, as there is no other internal legal remedy, the conditions laid down in Article R47 of the Code are met and the CAS has jurisdiction to rule on the present case.

3. While registered with the Club Brusque under the regime of the "Private Agreement", was the player an amateur or a professional under the 2005 RSTP?

According to Article 20 of RSTP 2005 "*training compensation shall be paid to a player's training club(s): (1) when a player signs his first contract as a professional (…)".*

According to Article 2 para. 1 of the RSTP 2005 *"Training compensation is due when: i) a player is registered for the first time as a professional; or ii) a professional is transferred between clubs of two different associations (whether during or at the end of his contract (…)".*

Article 2 para. 2 of the 2005 RSTP defines the meanings of "Professional" and "Amateur" for the purposes of the application of the same regulations on a given dispute and circumstances: *"A Professional is a player who has a written contract with a club and is paid more than the expenses he effectively incurs in return for his footballing activity. All other players are considered as Amateurs".*

It becomes obvious that FIFA identifies only two categories of players, i.e. Professionals and Amateurs. There is no space within the regime of the FIFA regulations for a third category. Thus, there is no space within the FIFA regulations for a third category to which might belong players undertaking training dedicated to the practice of football, but who are at the same time still students with the goal of becoming professional football players, even if such players would not ordinarily be called either amateurs or professionals (cf. CAS 2006/A/1177, no 7.4.3).

Furthermore, the Sole Arbitrator is of the opinion that there is no place for the application of Brazilian law or Brazilian national definitions and criteria in deciding the status of the Player in the case at hand. National Brazilian law, as well as the way the CBF defines the status of a player in Brazil, are no doubt relevant and govern internal transfers within Brazil. Article 1 (2) of RSTP 2005 clearly recognizes the governance of such regulations (and still subject also to mandatory terms imposed by FIFA) in "*The transfer of players between clubs belonging to the same association*". However, the national laws and the internal regulations are not the applicable law in case of a dispute with an international element. Such disputes are solely governed by the terms of the

FIFA RSTP and its definitions. (cf CAS 2007/A/1370 & 1376 (no. 87). In such cases, the 2005 RSTP set down the applicable criteria to establish and decide on the status of a player when a transfer occurs between *"clubs belonging to different associations"* (see Article 1 para. 1 of RSTP 2005).

Moreover, according to Article 1 para. 3 of the 2005 RSTP ("scope"), "*The following provisions are binding at national level and have to be included, without modification, in the Association's regulations: Art. 2 – 8, 10, 11 and 18*". This means that the Brazilian Football Association should transpose – without modification – Article 2 on the "*Status of Players*" which includes the mandatory (and worldwide) definition (for the purposes of the RSTP) of "Professionals" and "Amateurs". Furthermore, in a specific reference to the mandatory requirements of the registration of players with national associations, Article 5 para. 1 of RSTP 2005 is very clear when stating that: "*A player must be registered at an association to play for a club as either professional or an amateur in accordance with the provisions of article 2*". [Emphasis added] FIFA could not choose more specific wording to express its clear intention in this regard.

Therefore, even if in this case there is no need to elaborate on an internal transfer when the definitions of the national association are inconsistent with those of the FIFA RSTP, in a case of a transfer between clubs belonging to different associations as the case at hand, in case of inconsistency between a CBF provision and a FIFA provision, the FIFA provision should prevail. Otherwise, the deference to international sports rules proclaimed in Brazilian legislation and the obligation assumed by CBF in its own Statutes (and accepted by its clubs, players, etc.) to comply with FIFA rules would make no more sense (CAS 2008/A/1370 & 1376, para. 105).

In addition to the extensive explanation made above, and in light of the fact that the 2005 RSTP foresee a single remuneration-related test (see infra), the Sole Arbitrator considers that it is not necessary to have recourse to the application of any national law or to take into account the formal classification of the Player according to the CBF; in CAS 2007/A/1207 (no. 87), the CAS Panel ruled that *"Given the existence of the single remuneration-related test, the Panel considers that it is not necessary to enquire any further on the classification of the agreement between the Player and Fiorenzuola under Italian law and sporting regulations"*.

This ruling is also applicable in the case at hand.

Turning now to Article 2 of RSTP 2005 *"A Professional is a player who has a written contract with a club and is paid more than the expenses he effectively incurs in return for his footballing activity. All other players are considered as Amateurs"*.

The status of the Player while playing for Brusque will be examined in light of this article. The first condition, namely the existence of a "written contract", is undisputedly fulfilled. The Player signed the Private Agreement with Brusque which, *inter alia*, provides the following:

> *"Article 1: Brusque grants the Athlete an apprenticeship allowance in the amount of R$620 for his living costs and as an incentive to the practice of football".*
>
> *"Article 2: Brusque shall provide the Athlete with the free medical, dental and psychological aid, as well as shall cover expenses for transportation, board, accommodation, school lessons, nutritionist and physical therapist".*

What is more, according to Article 4 of the Private Agreement, the Player was entitled to life insurance. However, if one takes into consideration that all these expenses were already covered by the Club Brusque, which expenses should be qualified as "living costs"? In other words: what exactly did the R$620 reflect? The Sole Arbitrator is satisfied that this amount cannot correspond to the *"expenses he effectively incurs in return for his footballing activity"* since medical, dental, psychological aid, physical therapist, nutrition, transportation, board and accommodation and school lessons costs were all provided for by Brusque. The Player also testified that this was *"free money"* since all his expenses were covered, thus allowing him to use this money to support his family.

Furthermore, the minimum monthly salary in Brazil in 2006 was about R$350 and R$380 and the average wage in Brazil in 2006 was R$883. In Brazil, at the relevant time to this case, R$620 was an amount that could be considered a salary. A further argument in favour of this view stems from the Player's testimony during the hearing, according to which, as already mentioned, the Player used to send part of his salary to his family. Under the criteria set out in Article 2 of 2005 RSTP, even if the amount paid in excess of the expenses is relatively small (*quod non*), the decisive criterion is still whether the amount is "more" than the expenses effectively incurred and it is irrelevant whether it is much more or just a little more. Having said this, the Sole Arbitrators is satisfied that the amount that the Player received was in excess of the expenses and costs described in Article 2 of the 2005 RSTP, particularly since the costs related to the practice of football were already taken over by

Brusque (See CAS 2006/A/1177, no. 7.4.6 and 7.4.11; see also CAS 2006/A/1207, no. 90-91).

As established through CAS jurisprudence, the only relevant criterion is whether the player is paid more than the expenses he effectively incurred in return for his football activity (see CAS 2006/A/1177, no 7.4.5).

At this point, the Sole Arbitrator notes that, although CAS 2006/A/1177 used the terms "amateur" and "non-amateur" taken from the 2001 RSTP, the principle of the two categories of football players.

The Sole Arbitrator notes that there is an inconsistency in the wording used in the RSTP. While Art. 20 refers to the *signing* of the first professional agreement as the trigger element for the paying of training compensation, Article 2 para. 1 and Article 3 para. 1 of Annex 4 refer to the *first registration* as a professional as the trigger element for payment. Nevertheless, the articles of Annex 4 are mainly focused on the procedure for payment and therefore refer to *registration*, being an easily identifiable element. However, the principle can be found by reading Article 20 together with Article 5 of the 2005 RSTP. Article 5 requires that the registration will reflect the true status of the player, and thus states clearly that the registration should adhere to the criteria of Article 2. The assumption of the regulations is that a Player will indeed be registered in a manner that complies with the criteria contained in Article 2 and therefore, under this assumption, there can be no distinction between the signing of the first professional contract and the registration for the first time as a professional.

Furthermore, as seen above, according to Article 1 para. 3 of the 2005 RSTP, the CBF, as a national federation, was obliged to literally transpose Article 2 of the 2005 RSTP. Under Article 26 para. 3 of the 2005 RSTP, Article 1 para. 3 should have been implemented in the national regulations from 1 July 2005. The mere fact that the CBF registered the Player in a way inconsistent with the requirements of the FIFA 2005 RSTP should not affect the decision as to the true status of the Player and should not remove the Player from the scope of the FIFA Regulations and the criteria established in Article 2 of the 2005 RSTP (cf CAS 2007/A/1370 & 1376 no. 87).

The Sole Arbitrator therefore concludes that the status of the Player at the time he was playing and registered with Brusque was that of a professional player.

In light of all of the above, the Sole Arbitrator concludes that the Decision of the DRC of 9 January 2009 should be set aside and the Appeal should be upheld.

Arbitration CAS 2009/A/1782
Filippo Volandri v. International Tennis Federation (ITF)
12 May 2009

Tennis; doping/Salbutanol; CAS Scope of review; burden of proof; sanction/ degree of fault

Panel:

Mr. Efraim Barak (Israel), President
Prof. Luigi Fumagalli (Italy)
Prof. Ulrich Haas (Germany)

Relevant facts

Mr Filippo Volandri, born on 5 September 1981, is a professional tennis player of Italian nationality (the "Player").

The International Tennis Federation (ITF) is the international governing body for sports related to tennis worldwide. It has its registered seat in London, England.

Since his early childhood, Mr Filippo Volandri has suffered from asthma. His treating physician was then Dr Fabrizio Gadducci, presently director of the Bronchopneumology and Respiratory Allergology Section of the Livorno Hospital, Italy.

Over the years, the Player's condition worsened and required notably a treatment in the form of inhalation of Ventolin, a salbutamol-based asthma medicine, achieved through a metered-dose inhaler. Salbutamol is included in the list of prohibited substances under the World Anti-Doping Code (WADC), which is incorporated in the ITF Tennis Anti-Doping Programme (the "ITF Programme"). The authorisation to take this substance for a legitimate medical need is treated differently depending on whether the 2008 or the 2009 ITF Programme is applicable. In the first case, the administration of salbutamol by inhalation requires an application for an abbreviated Therapeutic Use Exemption (TUE) whereas in the second case, the submission for a standard Therapeutic Use Exemption is needed. Also, in the first case, salbutamol in a concentration greater than 1,000 ng/mL is a prohibited substance and not a specified substance, whereas in the second case, salbutamol, even in a concentration greater than 1,000 ng/mL, is qualified as a specified substance. However, both the 2008 and 2009 ITF Programmes provide that despite the granting of a TUE, the presence of salbutamol in urine in excess of 1,000 ng/mL will be considered an adverse analytical finding unless the Athlete proves that the abnormal result was the consequence "*of the therapeutic use of inhaled salbutamol*" or "*of the use of a therapeutic dose of inhaled salbutamol*".

In respect of his use of salbutamol, Mr Filippo Volandri was granted his first TUE in 2003. Since then he applied for TUEs every year.

On 21 November 2007, Mr Filippo Volandri and Dr Fabrizio Gadducci signed a TUE application form for the year 2008. The prohibited substances concerned were formoterol and albuterol, which is another name for salbutamol. Regarding this last drug, the treatment foreseen consisted in two puffs of 100 mcg to be administered by inhalation twice daily. On the application form, the box marked "*once only*" and the box marked "*emergency*" were also ticked and the space provided to "*indicate all relevant information to explain the emergency or the insufficient time to submit the TUE application*" was filled in with the words "*2 puffs if necessary*".

It is accepted by the parties as well as by the lower instance that the present case must be examined in the light of the content of the TUE application form signed by the Player on 21 November 2007 (the "TUE of November 2007"). It is undisputed that the subsequent management of this document by the IDTM is irrelevant.

On 19 November 2008, Mr Filippo Volandri signed a TUE, seeking permission to take montelukast, budesonide and salbutamol. With regard to the last substance, the indicated dosage strength was 2 puffs of 100 mcg to be administered by inhalation. The box related to the "*frequency*" of administration was filled with the words "*Rescue*" and "*al bisogno*". On 24 November 2008 Mr Filippo Volandri received from

the IDTM an approval for the therapeutic use of budesonide and salbutamol for two years, effective from 21 November 2008 to 22 November 2010 and allows the Player to use salbutamol in a dosage of 200 mcg by inhalation, "*as needed*". It is also stipulated that the dose, method and frequency of administration as notified have to be followed meticulously.

At the end of the year 2008, Mr Filippo Volandri was referred to an asthma specialist, Mr Pierluigi Paggiaro, Professor in Respiratory Medicine, at the University of Pisa, Italy, and member of the executive committee of the Global Initiative for Asthma. In a written statement made on 8 December 2008, Professor Pierluigi Paggiaro confirmed among other things that "*In the last months, symptoms are present every day (2-3 times daily use of rescue medication) particularly during physical activity. (…) Therefore, we conclude for "Bronchial asthma with severe bronchial hyperresponsiveness" and we recommended the following therapeutic regimen: Budesonide. Viatris 400 mcg, one inhalation in the morning and in the evening. Montelukast 10 mg, one tablet in the evening. Rescue salbutamol, 2 puffs when needed. Periodic evaluations of pulmonary function are recommended".*

In March 2008, Mr Filippo Volandri was participating in an ATP Tour tournament, which took place in Indian Wells, California, United-States.

In the morning of 13 March 2008, at about 2:30, Mr Filippo Volandri was awakened by what he says to be the most serious asthma attack of his life. This happened just a few hours before his first match in the tournament, which was scheduled for the early afternoon of the same day.

On 13 March 2008, just after the loss of his first game in two straight sets, Mr Filippo Volandri was subject to in-competition doping testing. On the doping control form, the Player indicated the correct number of his TUE as well as the use of Ventolin.

It is undisputed that the WADA-accredited laboratory in Montreal, Canada, was instructed to conduct the analysis of Mr Filippo Volandri's urine sample and that, on 9 April 2008, it identified in the Player's A sample the presence of salbutamol in a concentration of 1,167 ng/mL.

It is only on 25 July 2008 (three and a half months after the finding on the A sample and four and a half months after the doping test), that Mr Stuart Miller, the ITF technical manager, notified in writing the Player of the result of the A sample analysis and asked him documented explanations with regard to the said concentration of 1,167 ng/mL.

It then took the ITF another almost two months to refer to the Player's answer. By courier dated 18 September 2008, Mr Stuart Miller acknowledged receipt of the Player's e-mail and explained that his clarifications were insufficient. On this letter, that was sent six months after the event, Mr Miller requested Mr Filippo Volandri to provide details on a) the time at which he last urinated prior to providing sample on 13 March 2008, b) the time(s) at which he used his inhaler on 13 March 2008 and c) the number of puffs he took on each of those occasions.

On 22 September 2008, the Player answered to Mr Stuart Miller by e-mail, referring to his TUE and confirming notably that he couldn't remember what was asked to him except that he had to use the inhaler several times in those days because of the temperature at day time and because of the dust of the carpet in his room at night.

The analysis of the Player's B sample corroborated the presence of salbutamol in a concentration of 1,192 ng/mL.

By letter dated 13 November 2008, Mr Stuart Miller notified Mr Filippo Volandri that he was charged with commission of a doping offence within the meaning of article C.1 of the ITF Programme.

On 15 January 2009, the ITF Tribunal passed a decision (the "Appealed Decision"), in which it concluded that the ITF had sufficiently established the objective elements of a violation of the applicable ITF Programme, *i.e.* the presence of salbutamol in the Player's A sample in a concentration of 1,167 ng/mL, which amounts to an adverse analytical finding.

The ITF Tribunal accepted that Mr Filippo Volandri inhaled salbutamol and did not ingest it in any other way. However, it held that the Player did not meet his burden of proof that his use of salbutamol on 13 March 2008 was therapeutic or in compliance with the TUE of November 2007, according to which salbutamol was to be administered daily with 2 times two puffs of 100 mcg, plus "*2 puffs if necessary*". The ITF Tribunal found that the reference to inhalation of salbutamol "*if necessary*" must be interpreted in line with an objective approach, which requires treating as therapeutic only doses of salbutamol which do not exceed what is regarded as necessary and appropriate treatment, according to accepted medical opinion. The ITF Tribunal held that the appropriate treatment is to be found in the guidelines issued by the Global Initiative for Asthma, as revised in 2007, known as the "GINA guidelines". In the view of the circumstances and in the presence of a severe asthma attack qualified by the Player himself as life

threatening, the ITF Tribunal was of the opinion that the GINA guidelines commended the Player to seek care in a clinic or a hospital.

With regard to the sanction imposed upon Mr Filippo Volandri, according to the 2009 ITF Programme, the ITF Tribunal, applying the *lex mitior* principle, accepted that salbutamol is a specified substance and that it had not been used to enhance sport performance or to mask the use of a performance enhancing substance. It held notably that the Player was at fault for inhaling too much salbutamol, that the player's individual result must be disqualified in respect of the Indian Wells tournament, and that the player shall be ineligible for a period of three months.

Extracts from the legal findings

1. Applicable law

Article R58 of the CAS Code provides the following:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

In the present case, it results from their respective submissions that the parties agree that the matter under appeal is governed by the rules and regulations of the ITF.

It appears that the 2009 ITF Programme contains an express transitional provision, which clearly indicates that the 2008 ITF Programme remains applicable in the present proceedings because Mr Filippo Volandri's case was pending before the 2009 ITF Programme came into force on 1 January 2009. However, article A.6 of the 2009 ITF Programme allows the ITF Independent Anti-Doping Tribunal as well as the CAS Panel to apply the *lex mitior* principle, *i.e.* the principle whereby a disciplinary regulation applies as soon as it comes into force if it is more favourable to the accused. This is a fundamental principle of law applicable and accepted by most legal regimes and which applies by analogy to anti-doping regulations in view of the quasi penal or at the very least disciplinary nature of the penalties that they allow to be imposed (CAS 2005/C/841, page 14; CAS 94/128, Digest of CAS Awards (1986-1998), p. 477 at 491).

It follows that the ITF regulations, in particular the 2008 ITF Programme (subject to more favourable provisions to Mr Filippo Volandri under the 2009 ITF Programme) are applicable.

Article A.10 of the 2008 ITF Programme provides that it is governed by and shall be construed in accordance with English law, subject to article A.8, which requires the ITF Programme to be interpreted in a manner that is consistent with the WADC. The WADC prevails in the event of a conflict between its provisions and those of the ITF Programme.

The application of the (rules of) law chosen by the parties has its confines in the *ordre public* (Zürcher Kommentar zum IPRG/*Heini*, 2nd edition 2004, Art. 187 marg. no. 18; see also *Kaufmann-Kohler/Rigozzi*, Arbitrage International, 2006, marg. no. 657). Usually, the term *ordre public* is thereby divested of its purely Swiss character and is understood in the sense of a universal, international or transnational sense (*Kaufmann-Kohler/Rigozzi*, Arbitrage International, 2006, margin no. 666; Zürcher Kommentar zum IPRG/*Heini*, 2nd edition 2004, Art. 187 margin no. 18; cf. also *Portmann* causa sport 2/2006 pp. 200, 203 and 205). The *ordre public* proviso is meant to prevent a decision conflicting with basic legal or moral principles that apply supranationally. This, in turn, is to be assumed if the application of the rules of law agreed by the parties were to breach fundamental legal doctrines or were simply incompatible with the system of law and values (TF 8.3.2006, 4P.278/2005 marg. no. 2.2.2; Zürcher Kommentar zum IPRG/*Heini*, 2nd edition 2004, Art. 190 margin no. 44; CAS 2006/A/1180, no. 7.4; CAS 2005/A/983 & 984, no. 70).

2. Procedural motions – scope of review of the CAS

Article R57 of the CAS Code provides that "*the Panel shall have full power to review the facts and the law*". Under this provision, the Panel's scope of review is basically unrestricted. It has the full power to review the facts and the law and may even request the production of further evidence. In other words, the Panel not only has the power to establish whether the decision of a disciplinary body being challenged was lawful or not, but also to issue an independent decision (CAS 2004/A/607; CAS 2004/A/633; CAS 2005/A/1001; CAS 2006/A/1153).

The CAS Code contemplates a full hearing *de novo* of the original matter.

However, in the present case, the ITF submits a) that the power of review of the CAS Panel is limited by the

applicable ITF regulations and b) that article R57 of the CAS Code applies only to the extent agreed by the parties, which did not accept the rules of arbitration fixed by the CAS Code in whole. The ITF alleges that the scope of review of the CAS is restricted to determining whether the Player has established that the ITF Tribunal's findings were erroneous based on all of the evidence before it at first instance.

To support its opinion, the ITF refers to article O.5.1 of the 2008 ITF Programme.

a) The apparent conflict between the 2008 ITF Programme articles

Pursuant to article O.2.1 of the 2008 ITF Programme *"A decision that a Doping Offence has been committed, a decision imposing Consequences for a Doping Offence, a decision that no Doping Offence has been committed, a decision by the Review Board that there is no case to answer in a particular matter, a decision that the ITF lacks jurisdiction to rule on an alleged Doping Offence or its Consequences, may be appealed by any of the following parties exclusively to CAS, in accordance with CAS's Procedural Rules for Appeal Arbitration Procedures (…)".*

Article O.2.1 of the 2008 ITF Programme refers to the CAS Code without any restrictions or limitations, whereas article O.5.1 of the same Programme seems to limit, in certain circumstances, the CAS Panel's scope of review. At a first glance, the 2008 ITF Programme seems to offer no indication as to which of those two provisions should prevail or as to how they should co-exist. However, as will be further explained, this question is indeed solved within the framework of the 2008 ITF Programme itself. This possible confusion was obviously noticed by the ITF which amended its 2009 ITF Programme by suppressing the reference to the "*CAS's Procedural Rules for Appeal Arbitration Procedures*" in its new article O.2.1.

Moreover, the ITF is a signatory to the WADC. Its 2008 Programme was adopted and implemented pursuant to the mandatory provisions of the WADC (Article A.2 of the 2008 ITF Programme). According to article A.8 of the 2008 ITF Programme, *"The Programme shall be interpreted in a manner that is consistent with the [WADC] (…). In the case of a conflict between the Programme on the one hand and the mandatory provisions of the [WADC] (as referenced in the Introduction to the [WADC]) on the other hand, the mandatory provisions of the [WADC] shall prevail*".

In its Part One, the applicable WADC (the version approved in 2003 and effective 1 January 2004 to 31 December 2008) reads as follows where relevant:

"While some provisions of Part One of the [WADC] must be incorporated essentially verbatim by each Anti-Doping Organization in its own anti-doping rules, other provisions of Part One establish mandatory guiding principles that allow flexibility in the formulation of rules by each Anti-Doping Organization or establish requirements that must be followed by each Anti-Doping Organization but need not be repeated in its own anti-doping rules. The following Articles, as applicable to the scope of anti-doping activity which the Anti-Doping Organization performs, must be incorporated into the rules of each Anti-Doping Organization without any substantive changes (allowing for necessary non-substantive editing changes to the language in order to refer to the organization's name, sport, section numbers, etc.); Articles 1 (Definition of Doping), 2 (Anti-Doping Rule Violations), 3 (Proof of Doping), 9 (Automatic Disqualification of individual Results), 10 (Sanctions on Individuals), 11 (Consequences to Teams), 13 (Appeals) with the exception of 13.2.2, 17 (Statute of Limitations) and Definitions".

Article 13 of the WADC sets forth the appeal process applicable in case of decisions made under the WADC or rules adopted pursuant to the WADC. It specifies in great detail which decisions may be subject to appeal, and who is entitled to file an appeal. Pursuant to article 13.2.1 of the WADC, *"In cases arising from competitions in an international Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provisions applicable before such court".* [Emphasis added]

It is therefore the view of the CAS Panel that Art. A.8 of the 2008 ITF Programme, by adopting and implementing the principle of consistency with the WADAC and the ITF's commitment hereunder to *"incorporate (…) without any substantive changes*", inter alia, article 13 (Appeals) of that Code, actually solves by itself the question of the co-existence of these two articles and establishes the supremacy of Art. O.2.1. over Art. O.5.1.

b) The ambiguous wording of article O.5.1 of the 2008 ITF Programme

The wording of article O.5.1 of the 2008 ITF Programme is ambiguous and leaves the Panel in a state of perplexity:

- on the one hand, the said provision allows the CAS to review the appeal in the form of a *de novo* hearing only "*where required in order to do justice*".

- on the other hand, in all the other cases (*i.e.* where *not* required in order to do justice), the CAS must limit its scope of review to a "*consideration of whether the decision being appealed was erroneous*".

The concept of "*in order to do justice"* is illustrated in the Programme with just one example (*i.e.* "*for example to cure procedural errors at first instance hearing"),* which does not help to understand why the CAS Panel does not "*justice"* when/if it considers that the "*decision being appealed was erroneous*".

However, the Panel is a fortiori allowed to review the Appealed Decision if it is arbitrary, *i.e.* if it severely fails to consider fixed rules, a clear and undisputed legal principle or breaches a fundamental principle. A decision may be considered arbitrary also if it harms in a deplorable way a feeling of justice or of fairness or if it is based on improper considerations or lacks a plausible explanation of the connection between the facts found and the decision issued. Likewise, the Panel is of the opinion that it must be able to review the Appealed Decision with regard to the fundamental rights of the Player. Any other interpretation would lead to possible abuse of process and of authority, which would be absolutely unacceptable and would represent a substantial and specific danger to sporting spirit. Furthermore, any agreement between the parties to restrict the powers of this Panel would have to be viewed critically in the light of the limitations imposed by the Swiss ordre public. Agreements between athletes and international federations are – in general terms – not concluded voluntarily on the part of the athletes but rather imposed upon them unilaterally by the federation (ATF 133 III 235, 242 *et seq.*). There is, therefore, a danger that a federation acts in excess of its powers unless the contents of the agreement does take sufficiently into account also the interests of the athlete. The Panel has some doubts whether a provision that restricts the Panel's power to amend a wrong decision of a federation to the benefit of the athlete balances the interests of both parties in a proportionate manner.

In order to exercise such a review (as apparently allowed by the 2008 ITF Programme), the CAS must be able to examine the formal aspects of the appealed decisions but also, above all, to evaluate – sometimes even *de novo* – all facts and legal issues involved in the dispute.

The Panel wonders if the purpose of article O.5.1 of the 2008 ITF Programme is to prohibit the parties to bring before the CAS Panel new evidence which has not been presented to the ITF Tribunal. In this respect, the Panel observes that all the parties – including ITF – have filed various submissions and evidence after the hearing before the ITF Tribunal. Moreover, in the case at hand, there was no "evidential ambush" which might have given unfair advantages to one or the other party.

In the view of all the above and under the circumstances of the case and the findings of the Panel as explained hereunder, the unrestricted scope of review of the CAS Panel as provided under R57 of the CAS Code does not seem to be limited by article O.5.1 of the 2008 ITF Programme. Furthermore, at the present case, it is the view of the Panel that there are sufficient grounds to resolve the issue at stake (*i.e.* its scope of review) even within the framework of article O.5.1.

3. Merits

a) Has a doping offence been committed?

In the present case, Mr Filippo Volandri has established, on the balance of probabilities, how the specified substance entered his body. It is not contested that the positive findings are the result of the inhalation of salbutamol between 12 and 13 March 2008. It is also not challenged that the Player established, to the comfortable satisfaction of the hearing body, that his ingestion of the specified substance was not intended to enhance his sporting performance or to mask the use of another prohibited substance. However, those accepted facts only allow the Player to benefit from the possible elimination or reduction of the period of suspension (See article M.4 of the 2009 ITF Programme) but are irrelevant with regard to the occurrence or non occurrence of the adverse analytical finding.

In sum, the only question that arises is whether the concentration of salbutamol found in Mr Filippo Volandri's samples is consistent with the inhalation of the substance in accordance with the GINA guidelines.

The ITF has successfully established that the presence of salbutamol in Mr Filippo Volandri's samples was in a higher concentration than 1,000 ng/mL. Under the 2008 and 2009 ITF Programmes, the burden of adducing exculpatory circumstances is on Mr Filippo Volandri, who must prove that the abnormal result was the consequence "*of the therapeutic use of inhaled salbutamol*" (Para. S3, appendix 2 to the 2008 ITF Programme) or "*of the use of a therapeutic dose of inhaled salbutamol*".

The ITF Tribunal held that the asthma attack on 13 March 2008 was severe as it was potentially life threatening. It held that Mr Filippo Volandri a) took too much salbutamol and b) should have sought medical help as the Player's condition did not improve one hour after the beginning of the asthma attack. In particular, the patient should have gone to the hospital. The ITF Tribunal concluded that by

not complying with those requirements, the Player did not respect the GINA guidelines and the use of salbutamol was therefore not "*therapeutic*".

It is Mr Filippo Volandri's burden to explain that the presence of salbutamol in a concentration of 1,167 ng/mL is consistent with the "therapeutic" use of the concerned specified substance. With this respect, Mr Filippo Volandri simply affirmed that, between 12 and 13 March 2008, he only took the amount of salbutamol recommended by the GINA guidelines. Based on the Pocket Guide for Asthma Management and Prevention revised in 2007 by the GINA, the Player submitted that there was an authorized intake of approximately 32 puffs of salbutamol in the 8-18 hours before the providing of his sample on 13 March 2008. The Player alleged that the concentration of salbutamol greater than the 1,000 ng/mL is the inevitable consequence of those puffs. However, he did not offer any scientific evidence whatsoever to support this position. In order to corroborate his allegations, he exclusively produced an "expert opinion" issued on 9 February 2009 by Prof. Franco Lodi, professor of forensic toxicology, at the institute of forensic medicine in Milan, Italy. This document contains no reference to any scientific literature, no technical data, no indication with regard to Prof. Franco Lodi's field of expertise or qualifications. The CAS Panel may take into consideration the declarations of Prof. Franco Lodi as mere personal statements, with no additional evidentiary value. This is particularly true as Prof. Franco Lodi was not present at the hearing. The Player chose, although he had the right to bring any witness before the Panel, not to invite him to the hearing, and, therefore, Prof. Lodi was not exposed to any cross-examination on his opinion by Counsel for the ITF, which should have been a minimum requirement in order to add some weight to his opinion which, as already mentioned, was not supported by any scientific literature, nor any technical data.

The CAS Panel considers that Mr Filippo Volandri did not offer any persuasive evidence of how the concentration of 1,167 ng/mL found in his urine could be the result of the therapeutic use of salbutamol. Based upon the evaluation of the foregoing facts, the Player has not succeeded in discharging the onus on him and, hence, must be considered as having committed a doping offence.

b) Are the sanctions imposed by the ITF Tribunal upon the Player appropriate?

The CAS Panel considers the Appealed Decision of the ITF Tribunal as arbitrary, because it harms a feeling of justice and of fairness and because it lacks a plausible explanation of the connection between the facts found and the decision issued.

As a matter of fact, the first instance held that because Mr Filippo Volandri took between 10 to 20 puffs of salbutamol, he is "*at fault for inhaling too much salbutamol*". This is inconsistent with the ITF Tribunal own findings according to which the GINA guidelines determine the appropriate treatment objectively admissible in terms of "therapeutic" use of salbutamol. Based on the said guidelines, Mr Filippo Volandri was allowed to take, during the relevant period of time, much more puffs than "*between 10 to 20 overall*" as accepted by the ITF Tribunal.

The Player could have taken up to 32 puffs during the 8-18 hours before the providing of his samples. There is a considerable difference between the figures in accordance with the GINA guidelines and the figures taken into consideration by the ITF Tribunal. Thus, the lower instance has not ascertained objectively how the Player's degree of fault has been calculated or on what basis it was founded.

The ITF Tribunal held that Mr Filippo Volandri should have sought medical help as the asthma attack was life threatening. It was of the opinion that by not going to the hospital, the Player did not follow the GINA guidelines. Further, it found that *" the player felt able to regain control of his breathing by using the inhaler, without calling for medical help, and that he used his inhaler to the extent needed to regain control of his breathing*".

Again, if "*the extent needed to regain control of his breathing"* amounts to 10-20 puffs, then the Player was within the limits set in the GINA guidelines.

Moreover, the life-threatening emergency justifying clinical assistance seems very difficult to assess as Mr Filippo Volandri was by himself when the asthma attack occurred. Under those circumstances, the CAS Panel does not see how the ITF Tribunal is in a better position than the Player to decide what is right for him. It is accepted by the Player that he called his coach and asked the latter to come to his room. This validates the fact that the situation was somehow out of ordinary. It is also agreed that it was the worse asthma attack the Player has ever dealt with and that the coach suggested to go to the hospital. In contrast, Mr Filippo Volandri obviously decided that he was able to take care of the problem. This is also in accordance with the GINA guidelines which seek to encourage self-management, that is, to give people with asthma the ability to control their own condition. It appears that after a couple hours, the situation went back to normal.

ITF submitted that after an hour following the beginning of the attack, the breathing of Mr Filippo Volandri did not improve. In order to corroborate this allegation, it refers to the Player's own brief according to which the coach found the latter "*gasping for breath*". Here too, the only witnesses are the Player himself and his coach. At what precise time did the coach arrive? What does *"gasping for breath"* actually mean? Does it mean that the respiratory distress was greater than the one usually observed by asthmatic people under asthma attack? Was the coach impressed by a situation he is not familiar with? How much longer was the Player "*gasping for breath*" after the arrival of his coach? How many puffs did the Player take on the arrival of his coach? How is the life-threatening situation compatible with the fact that the only testimony on the event is the one of the Player who described it during his cross-examination in front of the ITF Tribunal in the words: "*I was a little concerned about the situation?*", and how is the life-threatening situation compatible with the fact that the Player was able to play his match 8 hours later, and, most of all, with the fact that the coach left just an hour after he joined the Player in his room, *i.e.* less than two hours following the beginning of the asthma attack? Under such circumstances, how can the ITF Tribunal qualify the asthma attack as "*severe"* and not just "*mild*"? With this regard, and according to the GINA guidelines, milder exacerbations are defined by a reduction in peak flow of less than 20% and nocturnal awakening. Why does this definition not fit the events of the 13 March 2008?

The fact that the above questions, that could lead to a better understanding of the circumstances and the facts and to a more accurate assessment of the severance of the event, did not find an answer cannot be blamed on Mr Filippo Volandri as he was informed of the positive findings only on 25 July 2008, that is more than 4 month after the sample collection. Despite of the facts that those questions remain unanswered, the ITF Tribunal felt comfortable to come to the conclusion that Mr Filippo Volandri violated the GINA guidelines by not going to a hospital. It is obvious to the CAS Panel that the lower instance has assumed that the Player was at high risk of asthma-related death, which is arbitrary and purely speculative.

Furthermore, the ITF Tribunal has not explained how or why Mr Filippo Volandri did not respect the GINA guidelines when "*he probably took between 10 and 20 puffs overall"* nor has it established that the Player had to get medical help. Under such circumstances, the CAS Panel does not see on what basis the ITF Tribunal imposed such harsh sanctions upon the Player.

As a result, the CAS Panel considers that it has no duty of deference towards the holdings of the ITF Tribunal.

The CAS Panel observes that Mr Filippo Volandri was indeed at fault, as he has not been able to prove that the presence of salbutamol in his sample in excess of 1,000 ng/mL was the consequence "*of the therapeutic use of inhaled salbutamol"*. However, the degree of his fault is minor as the threshold of 1,000 ng/mL was just exceeded. If, as ascertained by the ITF Tribunal itself, one puff corresponds to 100 mcg of salbutamol, the litigious excess represents less than a couple of puffs. Furthermore, the CAS Panel cannot ignore the fact that the Player traveled all the way to California to take part in a tournament, that he was far from home, a few hours away from a match, in the very early morning. After having put all that effort into coming to play, it is understandable that Mr Filippo Volandri decided not to go to the hospital as it would probably have kept him from playing.

However, in assessing the appropriate sanction, the CAS Panel also took the following factors into account. First, Mr Filippo Volandri has never previously been found guilty of an anti-doping rule violation. This, of itself, is of comparatively little weight: the same point can be made for any first-time offender. Secondly, however, and more importantly, the CAS Panel has been concerned that the procedures before the ITF were slow and suffered from inconsistencies, with the result that the Player was left in a state of uncertainty of over 8 months, which is very long in sporting matters. As a matter of fact, it is only on 13 November 2008 that the Player was formally charged with a doping offence. Before then, Mr Filippo Volandri received information from the ITF which is to some extent contradictory and may also be confusing:

- The litigious samples collection occurred on 13 March 2008; the positive findings were known on 9 April 2008 but communicated to the Player on 25 July 2008. Between the sampling and the communication of its results, the Player was able to take part in 12 tournaments and to undergo 3 anti-doping tests (which were all negative).

- On 25 July 2005, the Player was requested by the ITF to explain the presence of the important concentration of salbutamol found in his urine in March 2008. The same day, Mr Filippo Volandri wrote to the ITF to give his version of the facts. It is only on 18 September 2008 that the ITF reacted to the Player's mail. Between those two dates, the Player took part in at least four more tournaments.

- On 8 October 2008, the Anti-Doping Programme Administrator of the ITF Programme wrote to the Player a letter with very ambiguous terms, which could easily be misleading: "*For the avoidance of any doubt, (1) you have not yet been formally charged with the commission of a Doping Offence; and (2) unless and until you are charged and you have formally admitted committing a Doping Offence, or you have been found by Anti-Doping Tribunal to have committed a Doping Offence, you will not be deemed to have committed such an offence. Nor will any provisional period of ineligibility be imposed upon you and you will remain free to compete. (See Article J.4.1 of the Programme)".* [Emphasis added]

- Finally a notice of charge was addressed to Mr Filippo Volandri on 13 November 2008. Between 18 September and 13 November 2008, the latter played in three more tournaments.

Although the ITF knew of the adverse analytical findings, it chose not to inform Mr Filippo Volandri and to let the latter take part in 19 tournaments before formally charging him with a doping offence. Such a long period is unacceptable and incompatible with the intention of the anti-doping regime that matters should be dealt with speedily. The Panel was taken aback when it saw that on 18 September 2008 (more than 6 months after the sampling collection) the ITF requested Mr Filippo Volandri to provide details on a) the time at which he last urinated prior to providing sample on 13 March 2008, b) the time(s) at which he used his inhaler on 13 March 2008 and c) the number of puffs he took on each of those occasions. It is obvious that the Player was not in the position to answer to such questions precisely, because of ITF's fault and was therefore deprived of the right to fair evidence proceedings, which emerges from the right to be heard, the right to a fair trial and the principle of equal treatment, which are fundamental and which were disregarded in the present case.

Based on the above considerations, the Panel is of the opinion that fairness requires that a) a reprimand is imposed upon Mr Filippo Volandri, b) that no period of ineligibility is imposed on the Player and c) that his individual result in respect of the 2008 Indian Wells tournament only is disqualified, and in consequence, the prize money and ranking points obtained by him through his participation in that event are forfeited.

Arbitration CAS 2009/A/1788
Ekaterinburg v. FIBA Europe e. V
29 October 2009

Basketball (women); application of non-discrimination EC law principles to Russian Cases involving economic activities in the EU; difference between the original request and the request to the CAS; limited applicability of EC law to sports issues of non-economic interests; power of self-regulation of sports authorities for questions related to sport; justification for cases of actual or indirect discrimination

Panel:
Mr. Mark Hovell (United Kingdom), President
Mr. Michele Bernasconi (Switzerland)
Mr. Martin Schimke (Germany)

Relevant facts

Basketball Club UMMC Ekaterinburg ("the Appellant") is a Russian women's basketball club in the Sverdlovsk region of Russia.

Spartak Moscow Region is a Russian basketball club in the Moscow region of Russia.

FIBA Europe e. V. ("the Respondent" or "FIBA Europe") is the association, based in Munich, Germany, responsible for, *inter alia*, organising and running the Euro League Women basketball tournament (ELW).

In the 2007/8 basketball season, the Appellants took part in the ELW.

The ELW is governed by the Respondent in accordance with the FIBA Europe Regulations Governing the ELW ("the ELW Regulations").

The ELW Regulations for that season contained certain rules (Art 17.1, Note 1 and Art 18.3) which are designed to ensure that the final of the ELW will be played between clubs from two different countries (the Elimination Rules").

The Elimination Rules provide for the elimination of clubs in the quarter final play offs and in the final 4, as follows:

- According to Art. 17.1, Note 1 of the ELW Regulations, if there are 3 or 4 clubs of the same nation in the quarter final play offs and they are not scheduled to play each other according to the regular playing mode, they are forced to play each other in order to eliminate each other.

- Furthermore, according to Art. 18.3, if two clubs from the same nation qualify for the final four, those two clubs are forced to play each other in the semi final in order to eliminate each other.

The Appellants appealed to the Respondent's Appeals Commission inviting it "*to suggest to the Competition Commission of FIBA Europe as soon as possible and in any event not later than January 31 2009, to delete or at least not to apply the provisions 17.1 Note 1 and 18.3 Note 2 of the Euro League Women Regulations 2008*".

The Respondent's Appeals Commission by judgment dated 5 February 2009 adjudicated that "*… Art. 17.1 Note 1 and 18.3 Note 2 of the Euro League Women Regulations 2008 of FIBA Europe, concerning the method to decide about the pairings for the quarter final of Euro League Women is not discriminatory and do not violate the Olympic Charter, so the appeal has to be dismissed*".

In addition, the Appeals Commission of the Respondent concluded its judgment of 5 February 2009 by deciding that the ELW Regulations were valid and ordering the Appellants to pay the costs of that proceeding ("the Decision"). The Decision was notified to the Appellants on 6 February 2009.

On 20 February 2009, the Appellants jointly appealed against the Decision before the Court of Arbitration for Sport (CAS). They challenged the Decision, and requested, *inter alia*, that the Decision of February 5, 2009 be annulled and Respondent be ordered not to apply Elimination Rules in the future Euro League Competition.

Extracts from the legal findings

1. Application of EC law to Russian cases in the EU

The Panel finds that EC Law is applicable to economic activities carried out in whole or in part within the European Union and is relevant to consider the issues

to be determined in this matter. The Panel also notes that there is some case law of the European Court of Justice (in particular, case *C-265/03 Simutenkov*) where it was held that the non-discrimination clause in the Communities – Russia Partnership Agreement meant that a sporting regulation imposing a quota on non-EU players could not be applied to Russian nationals legally employed in the EU. This case is authority that non-discrimination EC Law principles may also apply to Russian Cases involving economic activities in the European Union and in the circumstances, the Panel holds it appropriate within the meaning of R58 of the Code to apply EC Law in the present matter, if needed, in particular Art. 81 and 82 EC Treaty.

2. Discrimination with regard to EC Law

Art. 12 EC Treaty forbids any discrimination whatsoever based on nationality. This specific expression of the general principle of equality has also been described as one of the guiding themes of the whole Treaty (cf. Lenz/Borchhardt (Hrsg.), EU- und EG-Vertrag, 2006, Art.12 EGV, Rn 1). At the same time, however, it has been held that the prohibition on discrimination does not affect "*the composition of sports teams, in particular national teams*" (Case 36/74 Walrave v. Union Cycliste Internationale [1974] ECR 1405) and will not apply where the rule in question is motivated "*for reasons which are not of an economic nature, which related to the particular nature and context of such matches and are thus of sporting interest only*" (Case 13/76 Donà v. Mantero [1076] ECR 1333).

In light of the above, the Panel considers that the main question before it is whether there has been any unjustified discrimination, either under EC law or the General Regulations.

Despite the different wording of the FIBA Statutes and Regulations with regards to the provisions on discrimination ("*otherwise*" and "*other grounds*") the Panel assumes that the FIBA did not intend to grant a broader protection than national or EC provisions on discrimination.

In this respect, the Panel has noted that sports bodies enjoy a wide margin of discretion with regard to the design of sporting formats for the competitions that they organise and, in particular, to ensure that international competitions retain an international character. A pertinent example was seen in the *Mouscron* case (*Mouscron* case, Commission Decision adopted on 3 December 1997) concerning the core organisational format of a sporting competition ("home and away" rule, in the case of international club competitions). In that case, the European Commission confirmed that matters relating to sports competition formats fall outside the scope of EU Law.

This was because the "home and away" rule was part of the national geographical organisation of football in Europe which is not called into question by European Community law and therefore fell within the legitimate scope of discretion of the sports governing body. In that case, requiring a club to play its "home" fixture at a ground located within the territorial boundary of its own national association could not be considered an abuse of UEFA's regulatory powers (Commission press release IP/99/965 of 09/12/1999). In the same case, it was pointed out that EU Law did not put into question the power of self-management or self-regulation of sports authorities for questions related to the specific nature of sport (*Mouscron*, *cit.* para. 17). Reference was made to the Opinion of Advocate General Cosmas in the *Deliège* case (C-51-96 & C-19/97 (2009) ECR-I-2549), where he had stated that "*the right of self regulation in sport is [...] protected by Community law*" (*Deliège*, *cit.*, opinion of AG Cosmas, para. 87). It was held that, when adopting the rule, the sports governing body had exercised its legitimate right of self-regulation and even if the rule did have certain economic consequences this was not sufficient to call it into question under EC Law (*Mouscron*, *cit.* para. 20).

It also follows that the European Court of Justice ("the ECJ") allows, within the scope of application of the EC Treaty, a justification in the case of actual or indirect discrimination (see Astrid E., *in:* Calliess/Ruffert, Das Verfassungsrecht der Europäischen Union, 2007, Art. 12, Rn. 38). This must be allowed even more so in the case of assessments made pursuant to the rules of associations. This arises primarily from the freedom and wide margin of autonomy of associations to establish their own rules and structures, a right which in many legal traditions derives from respective national constitutions and was largely upheld by the ECJ for this reason (see judgement of the Court of First Instance in case T-313/02 Meca-Medina/Majcen with references to case law of the ECJ). In this respect, reference may also be made, again, to the *Deliège* case, in which the ECJ confirmed that selection rules applied by a judoka federation to authorise the participation of professional or semi-professional athletes in an international sport competition inevitably limit the number of participants. The ECJ found that such a limitation does not in itself restrict the freedom to provide services, if it derives from an inherent need in the organisation of the event in question and is not discriminatory (*Deliège*, supra, para. 62, 64 and 69). Moreover, while the ECJ in *Deliège* did not apply Art. 81 and 82 EC Treaty, it is likely that the

rule in question would also meet the *Meca Medina* test for Art. 81(1) and 82 EC Treaty as its effects would be inherent in the pursuance of a legitimate objective (proper organisation of the sport event according to certain selection rules) and would not be disproportionate (see discussion further below). It is therefore necessary to ask what are the objectives, the alternatives, the context and the necessity, of the FIBA Rules.

3. Alternatives to the ELW elimination rules

The Panel accepts that men's football and women's basketball (and in particular the respective sportive competitions) are not comparable and agrees that the alternatives suggested could lead to further distortion, in aiming to achieve the stated objective.

4. The context behind the ELW elimination rules

The Panel notes in particular:

- These rules have been in existence for many years, at least since the Respondent has existed and copies of the rules since 2004/5 season were exhibited to the answer;

- All rule changes go through the General Assembly, the Competitions Committee and the Board of the Respondent;

- The National Federations affiliated to the Respondent can put forward their representatives to these different bodies and seek to influence the rule making;

- The Russian Federation, which represents the interests of the Appellant, proposed changes to the ELW Competition in 2006/7 season to allow countries to enter up to 4, not 3, clubs to the ELW Competition;

- Those changes were properly considered and part of the consideration was the extension of the Elimination Rules, to maintain the stated objective;

- Since then other motions proposed by the Russian Federation to remove the Elimination Rules have been properly debated and considered by the Respondent;

- The Respondent has stated the objective results in more teams from more different National Federations participating in the Competition;

- The stated objective stops the Competition becoming an extension of one country's own league; and

- The Respondent claims that this objective works for its sport and has also achieved greater interest from spectators.

The Appellant has advanced a mathematical argument which it believes demonstrates the Elimination Rules reduce the "internationality" of the Competition, as opposed to increase it. The Panel, however, notes the stated objective is to ensure teams from different countries contest the final. As such, forcing teams from the same country to play each other will reduce the number of international matches.

5. Is the affect proportionate to attaining the stated objectives?

The Panel notes the context behind the Elimination Rules and how the pursuit of the stated objective is clearly desired by all other National Federations (as when FIBA Europe considered the Russian Federation's latest motion, it was rejected by all but Russia) and for this sport, believes the affects are proportionate to the achievement of the stated objective.

6. Are the elimination rules necessary?

Taking all the above into consideration and the particular nature of a sport that is striving to increase participation and support internationality, the Panel determines that the Elimination Rules are also necessary, which, finally, means that even if the rules in dispute were indirectly discriminatory, they are, in any case, justified.

7. Competition law

The European competition legislation does not allow for an unlimited, general or specific exception in the case of the entire area of sports (see *Meca-Medina* Judgement *Rn. 27 f.*)

Rather, what also must be clarified is whether the factual requirements of the relevant Art. 81/82 EC Treaty are fulfilled.

Art. 81 and/or 82 EC Treaty:

Art. 81(1) EC Treaty prohibits "*all 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 common market…".

Art. 82 EC Treaty prohibits "*any abuse by one or more undertaking of a dominant position within the common market or in a substantial part of it…*".

Is the Respondent "*an Undertaking*"? Whilst the Respondent states in its answer that "*FIBA Europe cannot be considered as an undertaking or a group of undertakings*", it does not go any further with its arguments here.

Under EC Law an "*Undertaking*" is not actually defined, but in the ECJ judgement in Klaus Hofner and Fritz Elser v Macroton GmbH (case C-41/90, page I-01979) it is stated "*It must be observed, in the context of competition law, first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way it is financed…*".

8. Is the Respondent carrying out an "economic activity"?

In EC Law there is no definition of an "*Economic Activity*" however, ECJ judgement in Firma Ambulanz Glockner v Landkreis Sudwestpfalz (case C-475/99, page I-8089) it is stated "*Any activity consisting in offering goods or services on a given market is an economic activity*".

The Panel notes that following the ECJ's decision in the above cases and in the Meca-Medina Judgement, it is clear that bodies such as the Respondent are normally now deemed undertakings and seen to be carrying out economic activities and as such, their rules and regulations are subject to examination under EC Law.

Art. 81 EC Treaty is aimed at prohibiting collusive, anti-competitive agreements or decisions between or affecting more than one undertaking and Art. 82 EC Treaty more at prohibiting monopolistic behaviour by one undertaking.

The Panel believes that the Elimination Rules could be seen to affect other undertakings and to distort the ELW competition and competition between these undertakings. Whilst the number of games may be the same, each club's aim is to win the ELW Competition, and to alter the draw at the late stages can lead to distortion. The Panel also feels the Respondent is in a position to set the ELW Regulations, which the participating clubs have to follow. Whilst the Respondent's decision making committees are elected from the National Federations it represents, once constituted they are in a dominant position to the clubs participating in the ELW. Further, whilst there are other competitions, this appears to be the main one on the European stage. The Article does not prohibit an undertaking being in a dominant position, only the abuse of that position. The Panel notes that the Respondent should not allow its rules to impair genuine undistorted competition in the common market, which it feels the Elimination Regulations could be seen to do. As such, the Panel believe Art. 81 and 82 EC Treaty are relevant to this matter.

a) Art. 81 EC Treaty

The Panel notes that, according to the *Meca-Medina* Judgment, a sports organizational rule may be subject to the following test, namely: *"the compatibility of rules with the Community rules cannot be assessed in abstract. Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Art. 81(1) EC. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives …and proportionate to them"*.

The context in which the decision of the Respondent was taken or produces its effects and in particular its objectives were held by the Panel in detail already above. Reference is made to the Panel's findings. Furthermore, in the context of Art. 81 (1) EC Treaty the Panel emphasizes that a certain restriction on competition is inherent in the pursuit of internationality of women's basketball, because internationality can only be preserved, if the supremacy of one nation can be avoided. However, as discussed in detail above, these restrictive effects must be considered as proportionate in the light of Respondent's stated objective.

Apart from these findings, the Panel considers the neutrality of the restriction at hand with regard to competition. The ECJ held agreements to be neutral in the light of Art. 81 (1) EC Treaty, which do contain mere side-arrangements required for the achievement of a main purpose, which is neutral in the context of competition. (Summerer Th., in: Praxishandbuch Sportrecht, S.632, Rn. 188). Again, this exception requires a proportionate measure in comparison to its effect. (Schwarze J./Hetzel Ph.: Der Sport im Lichte des europäischen Wettbewerbsrechts, EuR 2005 Heft 5). The proportionateness of the Elimination Rules has been addressed by the Panel

above. Furthermore, the main purpose of the ELW rules is the provision of an orderly framework for the European Women's Basketball organised by the Respondent. This main purpose includes as a matter of fact the safeguarding of Respondent's economic interests, which is required for the survival of European Women's Basketball organised by Respondent and for the fulfillment of its objectives. Thus, the ELW rule in question which aims at preserving internationality in the sport serves as an auxiliary measure for the pursuit of the main purpose, which is neutral with regard to competition.

Finally, when weighing the interests of Appellant and Respondent the Panel notes that preserving the internationality of the tournament serves as an advantage for the Appellant as well, which benefits from the attractiveness of the tournament and the sport in general resulting in financial profits.

The applicability of this exception in the case in question, however, does not have to be decided by the Panel. In any case, the possible restriction on competition is justified under Art. 81 (3) EC Treaty. It provides that the restrictions of Art. 81 (1) EC Treaty are not applicable to resolutions of associations of undertakings, which contribute to the promotion of the economic progress, while allowing consumers a fair share of the resulting benefit and without imposing restrictions on the partaking undertakings which are not essential for the realisation of these aims.

The possible restriction, as outlined in detail above, aims at preserving the character of competition and provides for this purpose a measure which is adequate, required and proportionate.

b) Art. 82 EC Treaty

Art. 82 EC Treaty requires the abuse of a monopolistic position. Whether an abuse can be held in the case in question, must not be decided, because again, a possible abuse can be justified by objective reasons including the particularities of sports to the extent the measure taken is adequate, required and proportionate (Heermann P.W., Anwendung des europäischen Kartellrechts im Bereich des Sports in WuW 2009, 489, 497).

Finally, also the opinion has been expressed amongst legal scholars to apply the above-mentioned test taken from the *Meca-Medina* Judgment in relation to Art. 81 (1) EC-Treaty to Art. 82 EC-Treaty as well (Heermann P.W., Anwendung des europäischen Kartellrechts im Bereich des Sports in WuW 2009, 489, 498). This test, however, has been applied by the Panel in the context of Art. 81 (1) EC Treaty and decided in favour of Respondent.

In conclusion, the Panel dismisses the Appellant's appeal.

Arbitration CAS ad hoc division (OG Vancouver) 2010/001
Australian Olympic Committee (AOC) v. Fédération Internationale de Bobsleigh et de Tobogganing (FIBT)

9 February 2010

Bobsleigh; Winter Olympic Games; interpretation of the Continental representation rule in the qualification system; allocation or re-allocation of places in the women's bob event

Panel:
Prof. Michael Geistlinger (Austria), President
Mr. Henri Alvarez (Canada)
Prof. Ulrich Haas (Germany)

Relevant facts

The Applicant is the National Olympic Committee of Australia (the Australian Olympic Committee (AOC)). The Respondent is the Fédération Internationale de Bobsleigh et de Tobboganing (FIBT) which opposes the AOC's appeal.

The AOC appeals against the FIBT's decision dated 26 January 2010 ("the challenged decision"), subsequently confirmed on 2 February 2010, to not allocate a continental representation quota place to the AOC in the Women's 2-man Bobsleigh event ("Women's Bob Event") in the 2010 Winter Olympic Games in Vancouver.

The challenged decision allocates to the German and US NOC three teams in the Women's Bob Event, to the Canadian, Suisse, British and Russian NOCs two teams each and to each of the Dutch, Italian, Belgium, Roumanian, Irish and Japanese NOC one team, respectively.

The FIBT's Qualification System for XXI Winter Olympic Games, Vancouver 2010, is set out in a document (the "Qualification System") established in collaboration by the FIBT and the International Olympic Committee (IOC); issued in November 2008, pursuant to chapter 4.1 FIBT International Rules Bobsleigh 2008, which states in relevant part as follows:

> *"Olympic Winter Games*
> *The criteria for the right to participate in the Olympic Winter Games are determined by the I.O.C. The qualification rules are determined by the I.O.C. in collaboration with the F.I.B.T. The qualification rules are communicated directly by the I.O.C. to all National Olympic Committees".*

The Qualification System provides for the allocation of 170 athletes for participation in the discipline of bobsleigh at the 2010 Winter Olympic Games, including 130 men and 40 women. Qualification is achieved by the "pilot's" results, which are the basis for obtaining a qualification place for the pilots' respective National Olympic Committee (NOC). The general principles of the Qualification System provide guarantees of participation in the Winter Olympic Games for the best bob teams, the host nation and non-represented continents, provided that in each case the athletes are ranked among the top 50 men or top 40 women in the FIBT Ranking 2009/10 by the deadline of 17 January 2010.

The Qualification System reads in the relevant parts as follows:

> *"…*
> *CONTINENTAL REPRESENTATION*
>
> *Male and female pilots belonging to NOCs of non-represented continents may also take part in the Olympic Winter Games. Maximum of one 2-man bob team or one 4-man bob team and one women's bob team per continent, provided that the pilots of these teams have taken part and were ranked in at least five international FIBT competitions on three different tracks during the 2008/09 and/or 2009/10 competition seasons, and ranked among the top 50 men or top 40 women in the FIBT Ranking.*
>
> *The selection of the pilots will be based on FIBT Ranking of the 2009/10 season set up during the qualification period.*
>
> *If no pilot can achieve this condition, that continent will have no representative.*
> *…".*

On 2 February 2010 the AOC filed its application with the Court of Arbitration ad hoc Division (CAS).

By email of 5 February 2010, the President of the Brazilian Ice Sport Confederation ("CBDG") approached the CAS in the context of the present case and pointed to the fact that the Brazilian Women's Bobsled team is ahead of Australia in the FIBT Rankings of 17 January 2010. Furthermore, the CBDG submitted that the way "*Ireland Women Bobsleigh Team got to qualify for the Olympics was irregular*".

By letter dated 6 February 2010 the Respondent submitted its response.

By e-mail dated 6 February 2010 the Panel invited the CBDG to participate as an Interested Party at the hearing. The Respondent objected to this. The President of the Panel informed the Respondent that the Panel would decide upon this objection in the context of all other procedural issues at the outset of the hearing.

During the morning of 8 February 2010, the CBDG formally filed an application before CAS, the FIBT being designated as the Respondent and Ireland and Australia as Interested Parties.

On 8 February 2010, the Respondent submitted its "*response regarding the Brazilian matter*" before the CAS.

The Panel decided to separate the hearing in the case CAS arbitration N° OG 10/02 CBDG v. FIBT and to postpone it to a later date. On the other hand, the Panel confirmed its decision to allow the CBDG to participate in the case initiated by the AOC (CAS arbitration N°OG10/01 AOC v. FIBT) as Interested Party because the decision on the interpretation and the relevance of the provisions on the continental representation in the Qualification System ("Continental Representation rule") may affect the legal interests of the CBDG, since both the AOC and the CBDG are seeking the place of the Olympic Council of Ireland in the Women's Bob Event.

Extracts from the legal findings

1. Applicable law

These proceedings are governed by the CAS Arbitration Rules for the Olympic Games (the "CAS ad hoc Rules") enacted by the International Council of Arbitration for Sport (ICAS) on 14 October 2003. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 ("PIL Act"). The PIL Act applies to this arbitration as a result of the location of the seat of the CAS ad hoc Division in Lausanne, Switzerland, pursuant to art. 7 of the CAS ad hoc Rules.

The jurisdiction of the CAS ad hoc Division arises out of Rule 59 of the Olympic Charter. Furthermore, in the case at hand none of the Parties or the Interested Parties disputed the CAS jurisdiction in their submissions at the hearing.

Under art. 17 of the CAS ad hoc Rules, the Panel must decide the dispute "*pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate*".

According to art. 16 of the CAS ad hoc Rules, the Panel has "*full power to establish the facts on which the application is based*".

2. Interpretation of the continental representation rule

Having listened to all arguments of the Parties and seen the documents submitted by them, the Panel finds that the Qualification System first of all must be seen as a legal document. It contains the provisions concerning the requirements that must be fulfilled in order to allow athletes to compete at the Winter Olympic Games. As a legal document the Qualification System is to be understood according to general rules of interpretation. The interpretation has to start from the ordinary meaning of the words used in this context and the reasonable understanding of the addressees of such rules.

The parties disagree on the interpretation of the Continental Representation rule in the Qualification System and whether it is applicable to the allocation and/or re-allocation of places in the Women's Bob Event. The document refers to this rule in three different places:

a) In the chapter "Qualification System" – "General Principles";
b) In the chapter "Continental Representation";
c) In the chapter "Reallocation of Unused Quota Positions".

The concept of "Continental Representation' is not commonly defined, nor is it defined in the Qualification System. The question is whether the concept applies to the sport of Bobsleigh as such, to the Men and Women Events or to individual events in this sport. The contents of the term "Continental Representation' has to be derived by interpretation of the Qualification System. In the Panel's view the document provides for qualification on three bases, participation of the best bob teams, representation

of the host nation, and participation of athletes from non-represented continents. Each of these is referred to as being "*guaranteed*". This is clear language that must be respected and given meaning.

The chapter on Continental Representation commences by giving a right to male and female pilots belonging to NOCs from non-represented continents to take part in the Winter Olympic Games, provided they are ranked among the top 50 men or top 40 women in the FIBT Ranking. This right is limited to a "*maximum of one 2-man bob team or one 4-man bob team and one woman's bob team per continent*". [Emphasis added]

The use of the word "*and*" attracted much of the parties' attention in their written submissions and at the hearing. The Olympic Council of Ireland argued that the word should be used conjunctively and that, as a result, the maximum that the NOC of a non-represented continent could receive would be one 2-man bob team, one 4-man bob team or one women's bob team. However, this would require a change in the actual language of the sentence and is contrary to its plain meaning. In the Panel's view the maximum entitlement is a representation of one man's bob team (a 2-man bob team or a 4-man bob team) and one women's bob team. In the context of this sentence, the use of the word "*and*" clearly reflects the intention of representation by one men's bob team and one women's bob team. In other words, "*and*" is used in the sense of "*in addition*" or "also". In order for the Olympic Council of Ireland's and the FIBT's interpretation the word "*and*" would have to be substituted by "*or*". [Emphasis added]

The Panel's interpretation is consistent with the distinction between men's bobsleigh teams and women's bobsleigh teams in a number of places in the document. A review of the Qualification System reveals that from the outset men's and women's bobsleigh teams are treated separately and differently. The men's category has two events, more teams and more athletes than the women's category which has only one event, fewer teams and fewer athletes. Each of the men's and women's categories has a separate detailed system ("System in Detail for Men's Bobsleigh" and "System in Detail for Women's Bobsleigh").

The Olympic Council of Ireland also argued that the use of the word "*may*" in the first sentence of the chapter on Continental Representation gave the FIBT a discretion to decide whether to permit representation by a men's bob team or a women's bob team. In the Panel's view this is inconsistent with the guarantee of continental representation by a men's team and a women's team. Rather the use of the word "*may*" simply grants the entitlement to qualified teams belonging to NOCs of non-represented continents to take part in the Winter Olympic Games. This is consistent with the use of the word "maximum" in the next sentence.

The FIBT argued that its intention and that of the IOC was to give athletes of NOCs whose continents were not represented in any FIBT events an opportunity to be represented. Further, according to the FIBT, it was not contemplated that the Continental Representation rule could be used in order to guarantee NOCs from non-represented continents representation in all events. However, this intention is not reflected in the clear language of the text. Rather the language in the document reflects the intention to provide representation of one men's 2-man bob or one men's 4-man bob and one women's bob team per continent. With respect to men's teams this clearly sets a maximum of representation in one event. With respect to women's teams it means representation in the only women's event.

The Olympic Council of Ireland also sought to support its interpretation on a comparison of the language used in the Host Nation Qualification rule and the Continental Representation rule. It noted that the former provided for participation of the Host Nation NOCs *"… with one 2-man bob team, one 4-man bob team and one women's bob team, respectively"*. On the other hand, the Continental Representation rule does not use the word "*respectively*", but simply provides for a "*maximum*" of one 2-man bob team or one 4-man bob team and one women's bob team per continent. In the Panel's view this difference in language in the two rules is of no significance. The rights of representation granted to the Host Nation are different from those granted to NOCs from non-represented continents. The NOC of the Host Nation is given the right to take part in the Winter Olympic Games in each of the events for 2-man bob teams, 4-man bob teams and women's bob teams. On the other hand, NOCs of non-represented continents have the right to take part in the Winter Olympic Games with only one team in the men's events and one team in the women's event. Thus, the use of the word "*respectively*" makes sense in the context of the Host Nation Qualification rule, but is not required in the context of the Continental Representation rule.

At the hearing the Olympic Council of Ireland submitted a new document in support of the position that the Continental Representation rule applied only at the re-allocation stage. The new document submitted was a previous draft of the Qualification System discussed between the IOC and the FIBT.

In the Panel's view the draft document submitted by the Olympic Council of Ireland is of no assistance. It is clearly a draft which was the subject of internal discussions between the IOC and the FIBT. There was no indication that the draft, or the discussion between the IOC and the FIBT, were provided or made known to the FIBT's members or the various NOCs or athletes. Further, a review of the draft reveals that there are a number of other differences between it and the final version of the Qualification System. These were not addressed or explained by the FIBT, the IOC or the Olympic Council of Ireland and there was no explanation of the nature and content of the discussion relating to the draft and the preparation of the final document. In these circumstances, the Panel is not prepared to draw any inferences, or draw any conclusions on the basis of the different versions of the Qualification System. It must base its decision on the final, published document.

3. Stage at which the continental representation is to be applied

It is disputed between the Parties whether the Continental Representation rule is applicable to the re-allocation of places only, or also to the initial allocation stage. The Qualification System is not self-evident as to this point and requires interpretation. The FIBT supported its interpretation of the Continental Representation rule on the basis of the language of the re-allocation of unused quota positions. The FIBT says that if continental representation were required to be taken into account in the initial allocation of quota, then there would be no need to reallocate positions not taken up to NOCs of non-represented continents.

The AOC says that this argument is misplaced. In the AOC's view, the FIBT's argument based on a possible inconsistency or error in the re-allocation rule does not overcome the express language set out in the "General Principles' chapter of the document which guarantees representation of non-represented continents. In the Panel's view this is correct. The guarantee of continental representation is a fundamental principle of the Qualification System and according to the structure of the document is independent of the re-allocation rule. Further, at the hearing in response to questions from the Panel, both the FIBT and the AOC recognized that, although unusual, it was possible for a non-represented NOC that had received its place through re-allocation to withdraw and have its place re-allocated. This would provide an example of the need to re-allocate a place to the NOC of a non-represented continent under the re-allocation rule. The Panel accepts that this would be an unusual case and that there may be difficulties in the application of the Re-allocation rule as drafted. However, this does not outweigh the other previously mentioned elements that clearly favor the Applicant's interpretation. In conclusion, the Panel finds that the better arguments speak in favor of not limiting the Continental Representation rule to the stage of re-allocation.

Given that the non-allocation of a place in the Women's Bob Event to the AOC is incompatible with the Qualification System and given that the overall number of places is limited to 20, the Panel has no other possibility than to set aside the FIBT's decision dated 26 January 2010 in as much as it allocates a place in the Women's Bob Event to the Olympic Council of Ireland.

4. Recommendation

Taking into consideration that in the case at hand several NOCs are competing for the same place in the Women's Bob Event and that allocating the spot to one team will always be to the detriment of the others and that the dispute in question has its origin in regulations that are not entirely clear, the Panel suggests to add a further 21st place to the Women's Bob Event.

The Panel is of the view that adding an extra place to an event is not impossible from the outset and has been recommended by previous CAS Panels in the past (CAS OG 04/001). Furthermore, the Panel notes that the FIBT Secretary General has requested additional places in events to the IOC Sport Director in the past.

The mission of the CAS Panel was to decide which interpretation of the FIBT Rules was correct and to determine whether the AOC's application should be upheld or dismissed. It has ruled that the AOC should prevail in this arbitration. Furthermore, the CAS cannot issue any order as to the inclusion of a 21st team in the 2-man women's bobsleigh event which might require a change in the competition format of the Olympic Games and would require the agreement of the IOC and VANOC. However, the Panel wishes to express the view that, in case the IOC and VANOC are in the position to allocate the non-used 30th place in Men's Skeleton as the additional (21th) place for the 2-man Women's Bob Event, it would find such action just and equitable.

Arbitration CAS ad hoc division (OG Vancouver) 2010/002 Confederaçao Brasiliera de Desporto no Gelo (CBDG) v. Fédération Internationale de Bobsleigh et de Tobogganing (FIBT)

12 February 2010

Bobsleigh; Winter Olympic Games; allocation of quota places to NOCs; CAS jurisdiction; CAS scope of review; scope of power of an International Federation Executive Committee

Panel:

Prof. Michael Geistlinger (Austria), President
Mr. Henri Alvarez (Canada)
Prof. Ulrich Haas (Germany)

Relevant facts

The Applicant is the Confederaçao Brasiliera de Desporto no Gelo (the Brazilian Ice Sports Federation, CBDG). The Respondent is the Fédération Internationale de Bobsleigh et de Tobogganing (FIBT) which opposes the CBDG's appeal.

The CBDG appeals against the FIBT's decision dated 26 January 2010 ("the challenged decision") to not allocate a quota place to the Brazilian NOC in the interests of the CBDG in the Women's 2-man Bobsleigh event ("Women's Bob Event") in the 2010 Winter Olympic Games in Vancouver, Canada.

The challenged decision allocates to the German and US NOCs, three teams in the Women's Bob Event; to the Canadian, Swiss, British and Russian NOCs, two teams; and to the Dutch, Italian, Belgian, Roumanian, Irish and Japanese NOCs, one team, respectively.

The challenged decision was already the subject of another case, i.e. CAS arbitration N° OG 10/01 (the "AOC v. FIBT Case") and was partly set aside by a CAS award dated 9 February 2010, which ordered that the Irish team be replaced by the Australian team through application of the continental representation rule. In these first proceedings, the CBDG participated as an Interested Party. The CBDG's position in this procedure was that it agreed with the AOC's interpretation of the Rules, which was accepted by the Panel. Following a recommendation by the Panel, the IOC Executive Board decided on 10 February 2010, to "*include one more team in the Women's Bobsleigh competition in order to allow the Irish team to participate in the 2010 Vancouver Olympic Winter Games*".

The FIBT's Qualification System for the XXI Winter Olympic Games, Vancouver 2010, is set out in a document ("the Qualification System") established in collaboration between the FIBT and International Olympic Committee (IOC) and issued in November 2008 based on chapter 4.1 of the FIBT International Rules Bobsleigh 2008, which states in relevant part as follows:

> *"Olympic Winter Games*
>
> *The criteria for the right to participate in the Olympic Winter Games are determined by the I.O.C. The qualification rules are determined by the I.O.C. in collaboration with the F.I.B.T. The qualification rules are communicated directly by the I.O.C. to all National Olympic Committees".*

The Qualification System provides for the allocation of 170 athletes for participation in the discipline of Bobsleigh at the 2010 Winter Olympic Games, including 130 men and 40 women. Qualification is achieved by the pilots' results, which are the basis for obtaining a qualification place for the pilots' respective National Olympic Committee (NOC). The system provides guarantees of participation in the Winter Olympic Games for the best bob teams, the host country and non-represented continents, provided that in each case the athletes are ranked among the top 50 men or top 40 women in the FIBT Ranking 2009/10 by the deadline of 17 January 2010.

According to the FIBT Ranking, the Irish team achieved 488 points and the Brazilian team 356. Points can be acquired in World Cup competitions and other competitions. Teams which are allowed to compete in the World Cup may achieve considerably more points than those teams that are not admitted to the World Cup. While the Brazilian team was not eligible for the World Cup, the Irish team was admitted to it by a decision of the FIBT Executive

Committee dated 26 November 2009 after the withdrawal of the French team.

The decision of the FIBT Executive Committee of 26 November 2009 was communicated by email from the FIBT Secretary General to the Irish Member Federation and to FIBT officials at the Cesana World Cup competition on the same day.

The CBDG learned of the decision to admit the Irish team to the World Cup by 10 December 2009 when it saw the list of the teams starting at the World Cup in Winterberg, which included the Irish team.

On 11 December 2009, the President of the CBDG wrote to the Executive Committee of the FIBT to inquire whether the listing of the Irish team was a mistake, and sought official confirmation of the situation. It complained that the Irish team was not qualified to compete at the World Cup competitions this season.

Later that day, the President of the CBDG again wrote to the Executive Committee of the FIBT noting that all nations qualified to compete in the World Cup needed to confirm their participation by the deadline of 1 October 2009. According to the CBDG, since the Irish team could not confirm its participation by this deadline, it was not eligible to replace the French team, which withdrew after this deadline.

On 16 December 2009, the FIBT Secretary General advised the CBDG that the FIBT's International Regulations do not impose any limit within which a given team must confirm or cancel its participation in the World Cup, that Ireland was first among the countries not qualified for the World Cup and was therefore admitted to replace the French team upon its withdrawal.

After this exchange between the Parties, some attempts were made to resolve the dispute without resort to formal dispute resolution. On 8 January 2010, the CBDG submitted a request to the FIBT Court of Arbitration in which it requested an interim injunction.

On 15 January 2010, the FIBT Court of Arbitration issued a signed statement by its President, which rules, inter alia, that:

> *"1. The Request for Arbitration is to be rejected. The FIBT Court of Arbitration is not competent for the present case. Neither the Court of Arbitration has to issue further statements with regard to the decisions taken or implemented by the FIBT's bodies".*

The Parties confirmed that this statement was the final decision of the FIBT Court of Arbitration with respect to this matter. In particular, on 6 February 2010, the President of the CBDG informed the CAS: "*that [the CBDG] ha[s] exhausted [its] case with FIBT CoA on January 15th, 2010".*

The Irish team participated in the World Cup commencing with the Winterberg event and the FIBT ranking of 17 January 2010 reflects the points acquired in these races.

On 8 February 2010, the CBDG filed its application with the Court of Arbitration ad hoc Division (CAS).

In its original application, the CBDG did not refer to the challenged decision, nor did it refer to an arbitration clause or identify the applicable rules/regulations, but it did refer to its previous correspondence in connection with the AOC v. FIBT Case.

On 8 February 2010, the Respondent submitted its "*response regarding the Brazilian matter*" before the CAS, including its submissions on jurisdiction and the merits.

The hearing took place on Thursday, 11 February 2010, at 1.30 pm, at the CAS Ad Hoc Division Premises in Vancouver.

Extracts from the legal findings

1. CAS jurisdiction

These proceedings are governed by the CAS Arbitration Rules for the Olympic Games (the "CAS ad hoc Rules") enacted by the International Council of Arbitration for Sport (ICAS) on 14 October 2003. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 ("PIL Act"). The PIL Act applies to this arbitration as a result of the location of the seat of the CAS ad hoc Division in Lausanne, Switzerland, pursuant to Art. 7 of the CAS ad hoc Rules.

The jurisdiction of the CAS ad hoc Division arises out of Rule 59 of the Olympic Charter. The provision provides:

> *"Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration".*

The wording "arising on" or "in connection with" is broad wording reflecting the IOC's intention that

all disputes falling within this scope be submitted to arbitration and not to the jurisdiction of national courts. In the present case, the matter in dispute is whether or not the Brazilian NOC, on behalf of the CBDG, has the right to be allocated a quota place in the Women's Bob Event in the Winter Olympic Games. This is a dispute which is covered by the arbitration clause in Art. 59 of the Olympic Charter.

Art. 59 of the Olympic Charter does not specify which Division within CAS is competent to deal with the matter. However, Art. 1 (1) of the ad hoc Rules specifies as follows:

> *"The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 59 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games".*

Whether or not the ad hoc Division is competent to decide the matter depends on the question at what point in time "a dispute arises". This question has been considered by a previous CAS panel, which held that a dispute arises when the appeal is filed (see CAS OG 06/002 marg. No. 13 seq). The Panel concurs with this jurisprudence. In the case at hand the appeal was filed on 8 February 2010 and, thus, falls within the 10 day period preceding the Opening Ceremony, which is scheduled for 12 February 2010. Consequently, the Panel finds that it has jurisdiction with respect to the CBDG's appeal of the FIBT's allocation of 26 January 2010 for the Women's Bob Event.

2. Deadlines and internal remedies

In the case at hand, the decision challenged is the decision by the FIBT Executive Committee dated 26 January 2010 allocating to various NOCs places in the Women's Bob Event. It is undisputed among the Parties that provisions in the FIBT Statutes (Art. 18) do not provide for an internal remedy against this type of decision of the Executive Committee. Thus, the requirements listed in Art. 1 (2) (exhaustion of internal remedies) of the ad hoc Rules are also fulfilled.

3. Applicable law

Under Art. 17 of the CAS ad hoc Rules, the Panel must decide the dispute *"pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate".*

4. Scope of review and merits

Art. 16 of the ad hoc Rules describes the Panel's power to review the case at hand. The provision reads as follows:

> *"The Panel shall have full power to establish the facts on which the application is based".*

In the case at hand it is not entirely clear how to interpret the CBDG's application. No specific request has been filed by the CBDG in their application filed 8 February 2010. Counsel for the Applicant submitted at the hearing that the CBDG requested to be allocated a place in the Women's Bob Event and, thus, that its application is directed against the FIBT decision dated 26 January 2010 and aimed at the additional place allocated for the Women's Bob Event by the IOC.

The question arises, however, to what extent this Panel is allowed to review said decision by the FIBT. In the Panel's view, limits to the scope of review may derive from the nature of the decision in dispute. The decision by the FIBT dated 26 January 2010 to allocate places in the Women Bob Event to certain NOCs is a complex one. In essence, the allocation of a certain place in the Olympic competition is not based on a single decision, but on a whole series of decisions which built one upon another.

In a first step, the FIBT has to decide which teams are allowed to enter or participate in the World Cup and other competitions for the purpose of qualification. In a further step, points have to be allocated to the various athletes in the competitions according to the nature of the competition and the competition results obtained by the athletes. Then, at the end of the qualification period, a ranking is compiled on the basis of the competition results. Finally, the Qualification System has to be applied to the FIBT ranking as it stands at the end of the qualification period.

It is disputed between the Parties whether when appealing the last (and final) step of the qualification process the Panel's scope of review extends to all preceding steps or decisions. It is the Panel's view that this is not the case if – as in the present case – the previous stages of the qualification process have become binding upon the Parties. This is true – in particular – when earlier steps in the qualification process are separately reviewable and have not been challenged or appealed. The Panel is supported in this view by the CAS jurisprudence (TAS 2008/A/1740, no. 128 *et seq.*).

It is undisputed between the Parties that the decision by the Executive Committee of the FIBT to award to the Irish team the place in the World Cup previously held by the French team was appealable. It is also undisputed between the Parties that the CBDG did not file an appeal or otherwise seek to set aside or annul the decision by the Executive Committee of the FIBT. The CBDG only filed a "request for interim injunction". At no point in time did the CBDG seek to set aside or void the decision of the Executive Committee of the FIBT to replace the French team in the World Cup by the Irish team.

In addition, the competent body to appeal the decision of the FIBT to replace the French team with the Irish team in the World Cup is, according to the Respondent, the Court of Arbitration (CAS) in Lausanne. The Respondent submits that this follows from the wording in Art. 18.1.2 of the FIBT Statutes. In the Panel's view this appears to be correct.

Art. 18.3.3 of the FIBT Statutes provides that the time limit for submitting an appeal to the CAS from a decision of the FIBT Court of Arbitration is 21 days after receipt of the decision in question. Art. R49 of the Code of Sports-related Arbitration provides that the time limit to appeal all other decisions to the CAS is 21 days after receipt of the relevant decision. The CBDG acknowledged that it was aware of the decision to replace the French team by the Irish team by 10 December 2009 and requested further information from the FIBT in this respect.

The FIBT communicated to the CBDG its decision to admit the Irish team to the World Cup on 16 December 2009. At the hearing, the Parties confirmed that they tried to settle their dispute amicably and had negotiations which extended until early January. On 8 January 2010, the CBDG filed its request for an interim injunction with the FIBT Court of Arbitration.

The CBDG did not file any appeal at all. Instead, it filed only a request for interim relief and only with the FIBT Court of Arbitration. The CBDG filed its appeal with the CAS ad hoc Division in respect of the 26 January 2010 decision.

In the Panel's view, the source and the gravamen of the dispute between the Parties is the FIBT's decision on 26 November 2009 to admit the Irish women's Bobsleigh team to the World Cup to replace the French women's team. This was the key decision which affected the rest of the competition, the entire qualification process and the allocation decision. Although the Panel has jurisdiction to review the FIBT's allocation decision of 26 January 2010, it finds that the decision truly in dispute between the Parties is the previous decision of 26 November 2009. It was open to the CBDG to appeal that decision, but it did not. In these circumstances, the Panel believes that its scope of review does not extend to the decision of the FIBT's Executive Committee of 26 November 2009 and that it would be inappropriate to review the FIBT's allocation decision of 26 January 2010 on the basis of alleged errors in that first decision.

Further, and in any event, the Panel finds that, on the merits, the decision of 26 November 2009 was within the power of the Executive Committee of the FIBT and that it was neither unreasonable nor arbitrary to replace the withdrawing French team with the next ranked Irish team.

The Parties agreed that there is no provision in the International Rules Bobsleigh 2008 (the "Rules") for replacement of a World Cup team that withdraws. When there are no specific provisions in the Rules, Art. 21.1 of the FIBT Statutes gives the Executive Committee competence to take any decision not foreseen in the Statutes. This article, read together with Art. 12.2 of the Rules, which authorizes the FIBT Executive Committee to determine modifications to the Rules, gives the Executive Committee broad power to interpret, modify and fill gaps in the Rules. In fact, the FIBT had previously made decisions regarding the replacement of a withdrawing team from the World Cup without objection by any of its members. Thus, both the Statutes and past practice support the conclusion that the Executive Committee had the power to decide whether to replace and, if so, which team should replace the French team when it withdrew after the commencement of the season.

Although the Parties disagreed as to the exact ranking of the teams as of 26 November 2009, there was no doubt that the overall sporting performance of the Irish team in the 2008/2009 season was better than that of the Brazilian team. At the conclusion of the 2008/2009 season, the Irish team was ranked 14th, immediately behind the French team, which was the last team admitted to the World Cup. In addition, when the Irish and Brazilian teams competed at the same events, the Irish team finished ahead of the Brazilian team. Therefore, in the Panel's view, it was reasonable and appropriate for the FIBT to allocate the French team's place in the World Cup to the Irish women's team. On the basis of the evidence and arguments presented, there is no basis to disturb that decision.

With respect to CBDG's request that the Panel direct the IOC to offer an additional place in the Women's Bob Event, the Panel finds that this would not be

appropriate. First of all, the Panel's power is limited to making a recommendation to the IOC, which should be exercised only in exceptional circumstances. The Panel has no authority to direct that the IOC create an additional place in the competition. Furthermore, the circumstances in this case are different from those in the AOC v. FIBT case and the same expectations do not arise.

Accordingly, for the reasons set out above, the CBDG's application must fail.

Arbitration CAS ad hoc division (OG Vancouver) 2010/003
Virgin Islands Olympic Committee (VIOC) v. International Olympic Committee (IOC)

12 February 2010

Skeleton; Winter Olympic Games; reallocation of unused quota position; interpretation of the qualification system

Panel:
Mr. David Grace QC (Australia), President
Mr. Chi Liu (China)
Mr. José-Juan Pintó (Spain)

Relevant facts

The Applicant is the Virgin Islands Olympic Committee. The Respondent is the International Olympic Committee (IOC).

The Applicant challenges the decision of the IOC, the Respondent, given on 3 February 2010, to refuse to re-allocate a men's skeleton quota position to the Applicant to allow an additional women's skeleton competitor to participate in the XXI Olympic Winter Games Vancouver 2010. On 27 January 2010 the Applicant formally petitioned the FIBT to reallocate the unused men's quota position to it for the women's competition. The Applicant's petition relied on the FIBT Qualification System for the XXI Olympic Winter Games Vancouver 2010 issued in November 2008 and a precedent established at the XX Olympic Winter Games Torino 2006 where a men's unfilled quota position was transferred to a woman in the sport of luge. The Applicant's petition was forwarded by the FIBT to the IOC, who, by its determination dated 3 February 2010, refused the Applicant the relief it sought.

The Qualification System for the XXI Winter Olympic Games, Vancouver 2010 issued by the FIBT for skeleton refers to two events: Men's skeleton competition and Women's skeleton competition. There is a total of 50 athletes specified, comprising 30 men and 20 women.

The Applicant's claim is based on the simple fact that as only 28 positions out of a possible 30 positions have been filled in the Men's skeleton competition, the Women's competition should have its number of positions increased to 21 positions. If that occurred, as Ms Putnam is the next (and only) ranked eligible competitor, the Applicant should fill the vacant position.

The FIBT's Qualification System for XXI Winter Olympic Games, Vancouver 2010, is set out in a document (the "Qualification System") established in collaboration by the FIBT and the International Olympic Committee (IOC). It was issued in November 2008.

The relevant parts of the Qualification System for skeleton are set out as follows:

"EVENTS

- *Men's Skeleton Competition*
- *Women's Skeleton Competition*

ATHLETE / NOC QUOTA

ATHLETES QUOTA: 50 athletes

- *30 Men including host nation*
- *20 Women including host nation*

...

QUALIFICATION SYSTEM

GENERAL PRINCIPLES

Participation on the Olympic Winter Games is guaranteed for the best athletes. Representation of the host country and non-represented continents is also guaranteed, provided that athletes are ranked among the top 60 men or top 45 women in the FIBT Ranking.

…

SYSTEM IN DETAIL FOR WOMEN'S SKELETON

The participation in the Olympic Winter Games is limited to:

- *2 NOCs with 3 athletes*
- *4 NOCs with 2 athletes*
- *6 NOCs with 1 athlete*

The chosen athletes must be ranked among the top 45 athletes of the 2009/10 FIBT ranking of the 2009/10 season during the qualification period.

REALLOCATION OF UNUSED QUOTA POSITIONS

Places earned and not taken up are reallocated until all 30 places (Men) or 20 places (Women) are filled, in the following order of priority:
..."

On 11 February 2010 the Applicant filed its application with the Court of Arbitration ad hoc Division (CAS).

The hearing took place on 12 February 2010 at the CAS Hearing Room, 3rd Floor, Renaissance Hotel, West Hastings Street, Vancouver, British Colombia, Canada.

Extracts from the legal findings

1. Applicable law

These proceedings are governed by the CAS Arbitration Rules for the Olympic Games (the "CAS ad hoc Rules") enacted by the International Council of Arbitration for Sport (ICAS) on 14 October 2003. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 ("PIL Act"). The PIL Act applies to this arbitration as a result of the location of the seat of the CAS ad hoc Division in Lausanne, Switzerland, pursuant to art. 7 of the CAS ad hoc Rules.

The jurisdiction of the CAS ad hoc Division arises out of Rule 59 of the Olympic Charter. Furthermore, none of the Parties or the Interested Party disputed the CAS jurisdiction in their submissions at the hearing.

Under art. 17 of the CAS ad hoc Rules, the Panel must decide the dispute "*pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate*".

According to art. 16 of the CAS ad hoc Rules, the Panel has "*full power to establish the facts on which the application is based*".

2. Merits

The Panel has carefully considered the submissions of the parties and the documents submitted by them. The Qualification System is a legal document. It contains the provisions concerning the requirements that must be fulfilled in order to allow athletes to compete at the XXI Winter Olympic Games, Vancouver 2010. General rules of interpretation must be applied. The ordinary meaning of the words used must be considered in the context of the document under consideration, the document being considered as a whole.

The principal question to be determined is whether the Qualification System allows the transfer of any unused quota positions in the Men's Competition to the Women's competition. The words of the document must be given the closest scrutiny.

The starting point is the fact that there are two competitions in skeleton, men's and women's. This was accepted by all parties. Furthermore, although the document specifies an athlete's quota of 50 athletes, this provision is clearly qualified in the document. Firstly, the quota of 50 athletes is divided into 30 men and 20 women. Secondly, when describing the qualification system in detail for either men's or women's skeleton, clear words were used limiting the number of athletes in relation to Women's skeleton: *"The participation in the Winter Olympic Games is limited to"* (see above).

This provision clearly indicates by simple calculation that the limit of athletes for women's skeleton is 20, provided that each of those athletes is ranked among the top 45 athletes in the 2009/2010 FIBT ranking list.

The reallocation provisions, in our opinion, clearly differentiates between the men's and women's competitions. The words used *"places earned and not taken up are reallocated until all 30 places (Men) or 20 places (women) are filled…"* clearly indicate that there can be no transfer of unallocated quota positions in one event to another. If that had been the intention of the Respondent, the provision would have read as follows: *"places earned and not taken up are reallocated until all 50 places are filled"*.

The Panel is of the opinion that the Qualification System introduced for the XXI Olympic Winter Games, Vancouver 2010 reveals the clear intention that each quota for the Men's and Women's competitions be filled separately and that the quotas cannot be bundled together. The Applicant's submission that there was no express provision preventing the

transfer of the unused quotas from Men's to Women's competition does not affect our conclusion. Our role is to interpret the Qualification System document and in our opinion the interpretation is clear, as explained above.

There is no basis upon which reliance can be maintained on the suggested "precedent" that occurred at the XX Winter Olympic Games, Torino 2006, in the sport of luge. Firstly, the rules under consideration for those Games were different to those considered by this Panel. Secondly, the Panel cannot legislate on behalf of the Respondent.

There is force in the Respondent's submission that the qualification system ought not be interpreted in a way that permits arbitrary transfer of unused quota positions from one competition to another.

It was within the province and jurisdiction of the Respondent to accede to the request of the Applicant communicated through FIBT to amend the Qualification System to allow for the transfer of unused quota positions from the Men's competition to the Women's competition. It declined to do so as was its entitlement.

Arbitration CAS ad hoc division (OG Vancouver) 2010/004
Claudia Pechstein v. Deutscher Olympischer Sportbund (DOSB) & International Olympic Committee (IOC)

18 February 2010

Skating; Winter Olympic Games; CAS jurisdiction

Panel:
Mr. Yves Fortier QC (Canada), President
Mr. Olivier Carrard (Switzerland)
Mr. José-Juan Pintó (Spain)

Relevant facts

The Applicant, Ms Claudia Pechstein, is a German speed skater who has belonged to the World Elite of speed skating since 1988.

The First Respondent is the Deutscher Olympischer Sportbund (DOSB), the German National Olympic Committee.

The Second Respondent is the International Olympic Committee (IOC).

The First Interested Party is the Deutsche Eisschnelllauf-Gemeinschaft e.V. (DESG), the German Speed Skating Association.

The Second Interested Party is the International Skating Union (ISU).

The Applicant, in her Application of 15 February 2010, requests the DOSB, the first Respondent:

> *"to nominate the Applicant for the participation in the competitions of the female speed skaters during the Olympic Winter Games in Vancouver 2010".*

and the IOC, the Second Respondent:

> *"to allow the participation of the Applicant in those competitions mentioned above".*

In order to understand the context in which the present Application has been filed, it is essential for the Panel to set out the following relevant facts:

- On 5 March 2009, the Second Interested Party, the ISU, filed a Statement of Complaint with the ISU Disciplinary Commission accusing the Applicant of having used a prohibited substance and/or a prohibited method which constituted an anti-doping rule violation under Article 2.2 of the ISU Anti-Doping Rules.

- On 1 July 2009, following a hearing, the ISU Disciplinary Commission issued a decision ruling, in part, as follows:

  "1. Claudia Pechstein is declared responsible for an Anti-Doping violation under Article 2.2 of the ISU ADR by using the prohibited method of blood doping.

  2. The results obtained by Claudia Pechstein in the 500m and 3000m races at the World Allround Speed Skating Championships on February 7, 2009, are disqualified and her points, pri[z]es and medals forfeited.

  3. A two years' ineligibility, beginning on February 9, 2009, is imposed on Claudia Pechstein."

- On 21 July 2009, the Applicant and the First Interested Party, the DESG, filed with the Court of Arbitration for Sport (CAS) an appeal against the decision of the ISU Disciplinary Commission.

- On 25 November 2009, following a hearing, the CAS dismissed the appeals.

The Applicant, on 7 December 2009, filed an appeal ("recours") with the Swiss Federal Tribunal against the CAS Award of 25 November 2009.

On 10 February 2010, the Swiss Federal Tribunal dismissed the appeal of the Applicant.
The Panel notes that, as one of the consequences of that decision of the Swiss Federal Tribunal, the

Applicant, to the present day, remains ineligible to compete in any speed skating competition.

On 12 February 2010, the Applicant wrote to the First Respondent, the DOSB. The Applicant alledged that, "*after the CAS hearing*" she had obtained *"new medical evidence"*. She concluded as follows: *"I demand the DOSG to make sure that I'm allowed by the DOSB and the IOC to participate in the Olympic Team race in speed skating on 26 and 27 February 2010 in Vancouver. I expect your confirmation of my nomination and my right to start until Monday, 15 February 2010, 12 h CET"*.

There was no reply from the DOSB by 12 h CET on 15 February 2010. In her Application of 15 February 2010 (see above), the Applicant asserts that since there had been no reply from the DOSB *"within the time limit, it must be assumed that the Respondent (DOSB) will deny the Applicant's demand for nomination at the current Olympic Games"*.

The Applicant also argues in her Application that the Panel is not bound by the CAS Award of 25 November 20009 since *"the proceedings were filed only against the ISU and the Respondents, the DOSB and IOC, were not involved at all. Thus, the ad hoc panel will act as first instance"*.

Finally, the Applicant avers that the jurisdiction of the CAS follows from the fact that the conflict concerned happened *"in the preparation for the Olympic Winter Games"*.

The First Respondent, DOSB, on 17 February 2010, filed its Answer to the Application requesting that the Application be rejected.

The Second Respondent, the IOC, also submitted its Answer on 17 Februar.

At 16:24 on 17 February 2010, the Applicant filed "additional explanations". She represented, in part, as follows:

> *"1. The decision which is appealed is not the CAS award of 25 November 2009, but the decision of DOSB of 29 January 2010, not to nominate the Applicant for the Olympic Winter Games, although the Deutsche Eisschnelllauf - Gemeinschaft (DESG) had proposed her nomination to DOSB on 15.12.2009.*
>
> *The DOSB had already taken another decision on 22 January 2010 not to nominate the Applicant. Such a decision can be appealed by the athlete who was not nominated (see CAS OG 10/02).*
>
> *I emphasize that the Respondents IOC and DOSB accept the jurisdiction of CAS.* [Emphasis added by the Panel]
>
> *2. The application was filed on 15 January 2010, that means after the opening ceremony of the Winter Games. This is the relevant date when the dispute arose (CAS OG 06/002 and CAS OG 10/02).*
> *…"*

At 19.30 on 17 February 2010, the Applicant submitted additional remarks. In the view of the Panel, these remarks from the Applicant because of their importance to its decision should be reproduced in full. She wrote:

> *"The applicant appeals all the decisions of DOSB concerning the nomination of athletes to IOC, mentioned earlier*. [Emphasis added by the Panel]
>
> *The Applicant agrees on the conclusion of an agreement about the jurisdiction of CAS, in case the CAS should not have jurisdiction provided for in the statutes and regulations of the Respondents"*.

Extracts from the legal findings

The Panel's analysis must commence, and in the present instance end, with Article 1 of the CAS Arbitration Rules for the Olympic Games (the "ad hoc Rules") which is abundantly clear. It provides, in part, that the dispute to be resolved by arbitration must arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games and must be against *"a decision pronounced by the IOC, and NOC, an International Federation or an Organizing Committee for the Olympic Games"*. [Emphasis added by the Panel]

Quite logically, Article 10 of the CAS ad hoc Rules then stipulates that any individual wishing to bring before the ad hoc Division of the CAS *"a dispute within the meaning of Article 1 of the present Rules shall file a written application with the Court Office"* and that the application shall include:

- a copy of the decision being challenged … [Emphasis added by the Panel]

In the present case, as seen above, the file reveals one key decision which is binding on the Applicant. That is the Award of the CAS Panel of 25 November 2009 which upheld the earlier decision of the Disciplinary Commission of the ISU and declared the Applicant,

Ms Claudia Pechstein, *"ineligible for two years as of 8 February 2009"* to wit until 7 February 2011. The effect of the ruling on 10 February 2010 of the Swiss Federal Tribunal is that the Applicant is ineligible to participate in the XXI Olympic Winter Games in Vancouver.

The Panel notes that the Applicant admits that it is not appealing the CAS award of 25 November 2009. Indeed, it could not do so.

In her Application, the Applicant, seeking to identify a "decision" which she could appeal stated that since the DSOB did not "*nominate her as an athlete participating in the current Winter Games after having noted the judgment of the Swiss Federal Court (sic) from 10 February 2010*" it must be assumed that the Respondent (DOSB) shall deny the Applicant's demand for nomination at the current Olympic Games. [Emphasis added by the Panel]

In the Panel's view, such an assumption by the Applicant cannot, on any reading, rise to the level of a "decision" which may be appealed to the ad hoc Division. The Panel recalls again that the Applicant was then and remains today ineligible to compete in the present Olympic Games.

When asked by the Panel to identify with precision the "decision" which she was appealing, the Applicant then stated that it was *"the decision of DOSB of 29 January 2010, not to nominate her for the Olympic Winter Games although the DESG had proposed her nomination to DOSB on 15 December 2009"*.

The Panel has reviewed the letter of the DESG to the DOSB of 15 December 2009. Simply put, the Panel finds that this letter, contrary to the Applicant's assertion, is not a proposal by DESG to nominate her. In that letter, DESG states very clearly: *"Claudia Pechstein Nominierung u.a. abhängig v. Entscheid Schweizer Bundesgericht"* which can be translated roughly as *"Nomination depending inter alia on the decision of the Swiss Federal Tribunal"*. As noted above, on 10 February 2010, the Swiss Federal Tribunal rejected the Applicant's appeal.

It follows that what the Applicant characterizes as *"a decision of the DOSB not to nominate her"* cannot, on any reading, be equated with a decision which can form the basis of an appeal before the ad hoc Division.

Finally, in what the Panel can only label as a desperate attempt by the Applicant to convince the Panel to hear her case, she submitted that she *"appeals all the decisions of DOSB concerning the nomination of athletes to IOC mentioned earlier"*. [Emphasis added]

Out of deference to the Applicant and her lawyer, the Panel will refrain from stating more than the following at this point: the Applicant has not identified any specific decision by the IOC, an NOC, and International Federation or an Organising Committee for the Olympic Games which has arisen during the Vancouver Olympic Games or during a period of ten days preceding the Opening Ceremony of the Games on 12 February 2010 which could be the subject of an appeal to the ad hoc Division. The Panel has, on its own, searched the record and found no such decision.

Therefore, the Panel finds that it lacks jurisdiction to hear the present matter and it so rules.

Before closing and in order to determine another preliminary issue which is before the Panel, the Panel adds that even if, ex hypothesis, it had jurisdiction to hear the Applicant's appeal, it does not have the authority to lift her binding ineligibility and thus allow her to participate in the present Winter Games. If the Applicant was minded to request the suspension of her ineligibility, she must address herself to a competent tribunal which is not the ad hoc Division of the Court of Arbitration for Sport.

4A_460/2008*
Judgment of 9 January 2009
1st Civil Division

Composition	Federal Tribunal Judge Klett, President Federal Tribunal Judge Corboz Federal Tribunal Judge Kiss Court Reporter: Mr Widmer
Parties	A._____, Appellant, represented by the attorneys-at-law Dr. Hansjörg Stutzer and Arlette Pfister, **versus** Fédération Internationale de Football Association (FIFA), Respondent, represented by the attorney-at-law Christian Jenny & World Anti-Doping Agency (WADA), Respondent, represented by the attorneys-at-law Francois Kaiser and Claude Ramoni.
Subject Matter	International arbitration court, Appeal (Beschwerde) against the arbitral decision by the Court of Arbitration for Sport (CAS) of 11th September 2008.

* Translation (Original: German)

Facts

A.
A._____ (Appellant), who is domiciled in Rio de Janeiro, Brazil, is a professional football player and is a member of the Brazilian football association (Confederaçào Brasileira de Futebol; CBF). In 2007 he played for the club B._____ and in 2008 he played for the club C._____. He took part in the international club competition "Copa Libertadores de América" several times. He played for the Brazilian national team five times.

The Fédération Internationale de Football Association (FIFA, First Respondent) is the world organisation for football and has its registered office (seat) in Zurich. Its objectives are to control football globally through the national football associations affiliated to it. For this purpose it lays down rules and provisions and ensures that they are enforced.

The World Anti-Doping Agency (WADA; Second Respondent) is a foundation under Swiss law. It has its headquarters in Montreal, Canada. The object of the Second Respondent is the global fight against doping in sport in all of its forms.

The Appellant underwent a doping control on 14th June 2007 at a match between B._____ and D._____. This resulted in a positive doping finding.

The Superior Tribunal de Justiça Desportiva do Futebol (STJD) provisionally suspended the Appellant on 9th July 2007 for 30 days.

On 24th July 2007 the Disciplinary Commission of the CBF imposed a suspension of 120 days on the Appellant.

The Appellant appealed against this to the STJD, which set aside the decision by the Disciplinary Commission on 2nd August 2007. It followed

the Appellant's argument that he had been the innocent victim of contamination and had not acted negligently. It therefore terminated the Appellant's provisional suspension.

B.
Both Respondents filed an appeal against the decision by the STJD with the Court of Arbitration for Sport (CAS) on 6th and 11th September 2007 respectively and demanded a two-year suspension of the Appellant.

The CAS comprised the arbitrators appointed by the parties, Peter Leaver and José Juan Pintó, and Prof. Massimo Coccia as the Chairman.

By letter of 6th December 2007 the parties were advised that the CAS considered it had jurisdiction to decide the appeal and that the reasons for this would be delivered in the final decision.

By arbitral decision of 11th September 2008 the CAS affirmed that it had jurisdiction to decide the appeals by the Respondents to the extent that they were aimed against the CBF and the Appellant. In affirming the appeals it set aside the decision by the STJD of 2nd August 2007 and suspended the Appellant from 6th December 2007 until 7th November 2009.

C.
With an appeal in civil matters, the Appellant is requesting that the arbitral decision by the CAS of 11th September 2008 be set aside in full and that it be declared that the CAS does not have jurisdiction to hear this matter.

The Respondents are requesting that the appeal be dismissed. The CAS refers to its arbitral decision of 11th September 2008.

Considerations

1.
The appeal *(Beschwerde)* was super-provisionally given suspensive effect. Said order ceases to apply and the Appellant's application that the appeal *(Beschwerde)* be given suspensive effect is disposed of with today's decision on the merits.

2.
The arbitral award being appealed against has been worded in English. In the proceedings before the Swiss Federal Tribunal *(Bundesgericht)* the Appellant is using the German language and the Respondents are using German and French respectively. Since the language of the decision being appealed against is not an official language, the judgment by the Swiss Federal Tribunal shall, in accordance with general practice, be rendered in the language of the appeal *(Beschwerde)* (cf. Art. 54(1) Federal Act on the Swiss Federal Tribunal *(BGG)*).

3.
An appeal *(Beschwerde)* in civil matters against decisions by arbitration courts is admissible under the conditions of Art. 190-192 Switzerland's Federal Code on Private International Law *(IPRG)* (Art. 77(1) Federal Act on the Swiss Federal Tribunal *(BGG)*).

Under Art. 77(3) Federal Act on the Swiss Federal Tribunal *(BGG)* the Swiss Federal Tribunal will only review complaints, which were lodged and for which reasons were given in the appeal *(Beschwerde)*. The strict requirements that have to be met by the reasons, which the Swiss Federal Tribunal *(Bundesgericht*) required under the rule of Art. 90(1) (b) Swiss Federal Statute on the Organisation of the Judiciary *(OG)* (cf. BGE [Decisions of the Swiss Federal Tribunal] 128 III 50 E. 1c p. 53) still apply in that connection because the Federal Act on the Swiss Federal Tribunal *(BGG)* did not wish to make any changes in that regard (BGE [Decisions of the Swiss Federal Tribunal] 134 III 186 E. 5).

In the present case the arbitration court has its registered office (seat) in Lausanne. The Appellant and the Second Respondent do not have their domicile or registered office (seat) respectively in Switzerland. Since the parties have not excluded the application of the provisions of Chapter 12 of Switzerland's Federal Code on Private International Law *(IPRG)* in writing, said provisions apply (Art. 176(1) and (2) Switzerland's Federal Code on Private International Law *(IPRG)*.

4.
The appeal *(Beschwerde)* against independently instituted preliminary and interim decisions on jurisdiction is admissible. Such decisions cannot be appealed against later any more (Art. 92 Federal Act on the Swiss Federal Tribunal *(BGG)*).

The letter by the CAS's Secretary of 6th December 2007, whereby the parties were advised that the CAS considered it had jurisdiction to decide the case and that the reasons for this would be delivered in the final decision, cannot be considered to be a formal decision on jurisdiction. Rather, this is to be seen much more as guidance to the parties that the CAS wanted to take up the case. It cannot therefore be held against the Appellant that he should have demanded the reasons following the letter of 6th December 2007 and that in the absence of any such action his appeal against the affirmation of the jurisdiction was excluded. The only deciding factor for the

admissibility of the appeal *(Beschwerde)* is that in the present case the CAS did not decide on its jurisdiction in a separately instituted preliminary decision within the meaning of Art. 186(3) Switzerland's Federal Code on Private International Law *(IPRG)*, rather it dealt with the question of jurisdiction in the final decision. Accordingly the appeal must be heard.

5.
Based on Art. 190(2)(b) Switzerland's Federal Code on Private International Law *(IPRG)* the Appellant is disputing the CAS's jurisdiction.

5.1 The Swiss Federal Tribunal *(Bundesgericht)* is free to review the legal aspects of the complaint about jurisdiction in accordance with Art. 190(2)(b) Switzerland's Federal Code on Private International Law *(IPRG)*, including preliminary questions of substantive law, upon which jurisdiction depends. However, the Swiss Federal Tribunal *(Bundesgericht)* reviews factual findings made in the arbitral decision being appealed against, including the findings in connection with the complaint about jurisdiction, only if the complaints lodged against said factual findings are admissible complaints within the meaning of Art. 190(2) Switzerland's Federal Code on Private International Law *(IPRG)* or if, as an exception, new facts or evidence are taken into account (BGE [Decisions of the Swiss Federal Tribunal] 134 III 565 E. 3.1; 133 III 139 E. 5 p. 141; 129 III 727 E. 5.2.2 with notes).

5.2 The CAS affirmed its jurisdiction giving as its reason that the CBF was a member of FIFA and was therefore bound by its statutes. Accordingly Art. 1(2) and Art. 5 of the CBF Statutes stated that the statutes, rules, guidelines, decisions and the ethical rules of FIFA had to be respected. As a professional footballer the Appellant was a member of the Brazilian Football Association. He was therefore subject to its rules, which he furthermore acknowledged in his employment contract of 16th January 2007, thereby also acknowledging the rules of FIFA. Pursuant to Art. 61 of the FIFA Statutes, FIFA and WADA are entitled to appeal to the CAS against final (last-instance) doping-related decisions by members. The CAS thereby came to the conclusion that the STJD - even though it is independent when dispensing justice - is an organ of the CBF, which is why FIFA and WADA are entitled to appeal against its decisions.

5.3 On the other hand, the Appellant takes the view that the present case concerns purely national, Brazilian facts without any international connecting factor. The STJD is, he argues, an independent, Brazilian sports court, which had decided this matter at final instance. Its decision was not a decision by the CBF, which is why neither FIFA nor WADA was entitled to appeal to the CAS against the decision. CAS did not have jurisdiction based on R47 of the Code de l'arbitrage en matière de sport (CAS Code) to decide an appeal against the same. The requisite statutory basis in the CBF's statutes was missing for this.

6.
6.1 R47 CAS Code reads:

"*Un appel contre une décision d'une fédération, association ou autre organisme sportif peut être déposé au TAS si les statuts ou règlements dudit organisme sportif le prévoient ou si les parties ont conclu une convention d'arbitrage particulière et dans la mesure aussi où l'appelant a épuisé les voies de droit préalables à l'appel dont il dispose en vertu des statuts ou règlements dudit organisme sportif*".

In translation:

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

Art. 61(1) of the FIFA Statutes (2007 edition) provides:

"*Appeals against final decisions passed by FIFA's legal bodies, and against decisions by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question*".

Pursuant to Art. 61 (5) and (6) of the FIFA Statutes, FIFA and WADA are entitled to appeal to the CAS against internally final and binding doping-related decisions.

6.2 Said FIFA rules are binding on the Appellant. As a professional footballer, who is played internationally, he is a member of the Brazilian football association CBF, which in turn is a member of FIFA. Consequently FIFA's rules, particularly the jurisdiction of the CAS pursuant to Art. 61 of the FIFA Statutes, also apply to the Appellant. The CAS adjudged this correctly.

The Appellant is of the opinion that the condition of R47 of the CAS Code, whereby an appeal against a decision by a federation can be lodged with the CAS, *"si les statuts ou règlements dudit organisme sportif le prevoient"* ("insofar as the statutes or regulations of the said body so provide") was not met because the rules of the Brazilian association did not provide for any such appeal to the CAS.

This cannot be agreed with. Art. 1(2) of CBF's Statutes provide, inter alia, that the athletes, who are members of the CBF, must comply with FIFA's regulations. This global reference to FIFA's regulations, and thereby to FIFA's and WADA's right to appeal to the CAS provided for in FIFA's Statutes, is sufficient to justify CAS's jurisdiction in the light of R47 of the CAS Code; this is in line with the case law, which considers a global reference to an arbitration clause contained in the statutes of an association to be valid (judgment 4P.253/2003 of 25th March 2004 E. 5.4, ASA-Bull. 2005 pp. 128 *et seq.*, 136, and 4P.230/2000 of 7th February 2001 E. 2a, ASA-Bull. 2001 pp. 523 *et seq.*, 528 *et seq.*, each with notes; cf. also BGE [Decisions of the Swiss Federal Tribunal] 133 III 235 E. 4.3.2.3 p. 245 and 129 III 727 E. 5.3.1 p. 735, each with notes).

6.3 The Appellant further claims that the STJD is an independent sports court. Its decisions must therefore not be considered to be appealable decisions of a member within the meaning of Art. 61 of the FIFA Statutes.

These arguments already fail because the Swiss Federal Tribunal is bound by the factual findings in the previous instance (Art. 105(1) Federal Act on the Swiss Federal Tribunal *(BGG)*, consideration 5.1 above). Appraising a letter by the President of the STJD of 13th September 2007 – in which the President stated, "*it (the STJD) is just one of the bodies of the CBF …*" – the CAS came to the factual conclusion that the STJD was an organ of CBF. The Appellant has not raised any complaints within the meaning of Art. 190(2) Switzerland's Federal Code on Private International Law *(IPRG)* about this factual finding. The Swiss Federal Tribunal must therefore presume that the STJD is an organ of CBF, which is why the CAS correctly considered the decision by the STJD to be the decision of a member of FIFA within the meaning of Art. 61 of the FIFA Statutes. This is not altered by the fact that the STJD acts independently when dispensing justice and enjoys organisational independence. The fact that the STJD is an organ of CBF and is institutionalised by its statutes remains the decisive factor.

6.4 The Appellant's complaint that the CAS ought not to have affirmed that it had jurisdiction to decide the appeals by FIFA turns out to be unfounded. The appeal must therefore be dismissed.

7.
In accordance with the outcome of the proceedings the Appellant is ordered to pay costs and compensation (Art. 66(1) and Art. 68(2) Federal Act on the Swiss Federal Tribunal *(BGG)*).

Accordingly, the Swiss Federal Tribunal (Bundesgericht) holds that:

1.
The appeal is dismissed.

2.
The Appellant is ordered to pay the court fees of Fr. 5,000.

3.
The Appellant must compensate the Respondents for the proceedings before the Swiss Federal Tribunal *(Bundesgericht)* with Fr. 6,000 each.

4.
The parties and the Court of Arbitration for Sport (CAS) shall be notified of this judgment in writing.

Lausanne, 9 January 2009

In the name of the 1st Civil Division of the Swiss Federal Tribunal *(Schweizerisches Bundesgericht)*

The President:	The Court Reporter:
Klett	Widmer

4A_424/2008*
Judgment of 22 January 2009
1st Civil Division

Composition	Federal Tribunal Judge Klett, President Federal Tribunal Judge Corboz Federal Tribunal Judge Rottenberg Liatowitsch Court Reporter: Mr Leemann
Parties	X._____ Appellant, represented by the attorneys-at-law (*Rechtsanwälte*) Dr Philipp Habegger and Fabian Meier, **versus** Fédération Internationale de Hockey (FIH), Respondent, represented by Maître Claude Ramoni, attorney-at-law.
Subject Matter	International arbitration court; public policy (*"ordre public"*); jurisdiction Appeal (*Beschwerde*) against the decisions by the Court of Arbitration for Sport (CAS), ad hoc Division, of 2nd August and 8th August 2008.

* Translation (Original: German)

Facts

A.

A.a As the national field hockey federation of B._____, X._____ (Appellant), which has its registered office (seat) in A._____, is a member of the world hockey federation, Fédération Internationale de Hockey (FIH; Respondent), a federation under Swiss law, which has its registered office (seat) in Lausanne.

A.b From 12th until 20th April 2008 a qualification tournament was held in A._____, the winners of which would qualify for the Summer Olympic Games in Beijing. On 20th April 2008 the Spanish national women's team and the Respondent's team faced each other as the finalists of said tournament. The Spanish team won the final with 3 goals to 2.

During the tournament doping tests were carried out. On 21st May 2008 the Respondent notified that the A samples of two of the Spanish team's players had tested positive. On 4th June 2008 the Respondent reported that the B samples confirmed the A samples. At the same time it was communicated that the players concerned had demanded a hearing before the Respondent's internal Judicial Commission.

However, the hearing concerned not only the two players; rather it might affect the entire Spanish team because Art. 11.1 of the Respondent's Anti-Doping Policy provided the following:

> "*if more than one team member in a Team Sport is found to have committed an Anti-Doping Rule violation during the Event, the team may be subject to Disqualification or other disciplinary action.*"

The Respondent moved that the Judicial Commission find the two players guilty of a doping abuse and that as a consequence the Spanish team be disqualified.

Thereupon the Judicial Commission held that one of the Spanish players had violated the anti-doping rules. However, because the player was not at fault no sanction was imposed. With regard to the second player the Judicial Commission decided that no anti-doping rule had been violated.

B.
The Appellant together with its team's players and the National Olympic Committee of B._____ lodged an appeal against this decision by the Judicial Commission with the Court of Arbitration for Sport (CAS) on 31st July 2008, the main motions of which were that the decision by the Judicial Commission be set aside, the two Spanish players be found guilty of a doping abuse, the Spanish team be disqualified, the B._____ team be considered the winner of the tournament, which should replace the Spanish team at the Olympic Games. The ad hoc Division of the CAS dismissed the prayers by arbitral award of 2nd August 2008 for "want of standing" on the part of the Appellant and the other parties to appeal against the decision by the Judicial Commission.

After the same parties had unsuccessfully tried to pursue another arbitration case they arrived at the ad hoc Division of the CAS for a third time, with essentially the same prayers as had already been filed in the first proceedings. By decision of 8th August 2008 the ad hoc Division of the CAS again dismissed the arbitral action.

C.
With an appeal *(Beschwerde)* in civil matters the Appellant is requesting the Swiss Federal Tribunal *(Bundesgericht)* to quash the two arbitral awards by the CAS of 2nd August 2008 and of 8th August 2008.

The Respondent is requesting that the appeal *(Beschwerde)* be dismissed to the extent that it can be heard. The CAS has waived the right to comment.

D.
The Respondent's request that any damages that may be awarded to a party be secured was granted and the Appellant was asked to transfer Fr. 7,000 to the cashier's office of the Swiss Federal Tribunal *(Bundesgericht)* by order of the President of 12th November 2008.

Considerations

1.
Pursuant to Art. 54(1) Federal Act on the Swiss Federal Tribunal *(BGG)* the decision by the Swiss Federal Tribunal *(Bundesgericht)* is to be delivered in an official language, usually that of the decision being appealed against. If said decision has been drawn up in another language, the Swiss Federal Tribunal uses the official language used by the parties.

The decision being appealed against has been drawn up in English. Since this is not an official language and the parties use different languages before the Swiss Federal Tribunal, the decision by the Swiss Federal Tribunal shall, in accordance with general practice, be rendered in the language of the appeal.

2.
In the field of international arbitral jurisdiction, an appeal *(Beschwerde)* in civil matters is admissible under the conditions of Art. 190-192 Switzerland's Federal Code on Private International Law *(IPRG)* (Art. 77(1) Federal Act on the Swiss Federal Tribunal *(BGG)*).

2.1 In the present case the arbitration court has its registered office (seat) in Lausanne. At least one of the parties, in the present case the Appellant, does not have its registered office (seat) in Switzerland. Since the parties have not excluded the application of the provisions of Chapter 12 of Switzerland's Federal Code on Private International Law *(IPRG)* in writing, said provisions apply (Art. 176(1) and (2) Switzerland's Federal Code on Private International Law *(IPRG)*.

2.2 The only complaints that are admissible, are those that are exhaustively set out in Art. 190(2) Switzerland's Federal Code on Private International Law *(IPRG)* (BGE [Decisions of the Swiss Federal Tribunal] 134 III 186 E. 5; 128 III 50 E. 1a p. 53; 127 III 279 E. 1a p. 282). Pursuant to Art. 77(3) Federal Act on the Swiss Federal Tribunal *(BGG)* the Swiss Federal Tribunal only reviews the complaints that have been pleaded and substantiated in the appeal; this complies with the obligation whereby a complaint concerning the violation of fundamental rights and of cantonal and inter-cantonal law must be pleaded as stipulated in Art. 106(2) Federal Act on the Swiss Federal Tribunal *(BGG)* (BGE [Decisions of the Swiss Federal Tribunal] 134 III 186 E. 5 with a note). In the case of complaints under Art. 190(2) (e) Switzerland's Federal Code on Private International Law *(IPRG)* the incompatibility of the arbitral award being appealed against with public policy *("ordre public")* must be shown in detail (BGE [Decisions of the Swiss Federal Tribunal] 117 II 604 E. 3 p. 606). Appellatory criticism is inadmissible (BGE [Decisions of the Swiss Federal Tribunal] 119 II 380 E. 3b p. 382).

2.3 The Swiss Federal Tribunal will base its judgment on the facts established by the arbitration court (Art. 105(1) Federal Act on the Swiss Federal Tribunal *(BGG)*). It can neither correct nor add to the facts established by the arbitration court even if said established facts were obviously incorrect or based on a violation of the law within the meaning of Art. 95 Federal Act on the Swiss Federal Tribunal *(BGG)* (cf. Art. 77(2) Federal Act on the Swiss Federal Tribunal *(BGG)*, which excludes the application of Art. 105(2) and Art. 97 Federal Act on the Swiss Federal Tribunal *(BGG)*). However, the Swiss Federal Tribunal can review the factual findings made in the arbitral decision being appealed against if admissible complaints within the meaning of Art. 190(2) Switzerland's Federal Code on Private International Law *(IPRG)* are pleaded or, as an exception, new facts or evidence compared with said factual findings are taken into account (BGE [Decisions of the Swiss Federal Tribunal] 133 III 139 E. 5 p. 141; 129 III 727 E. 5.2.2 p. 733; each with notes). Whoever invokes an exception to the rule that the Swiss Federal Tribunal is bound by the factual findings of the previous instance and, based on this, wishes to correct or add to the facts must demonstrate with reference to the files that such factual claims had already been made in the previous instance in accordance with the procedural law (cf. BGE [Decisions of the Swiss Federal Tribunal] 115 II 484 E. 2a p. 486; 111 II 471 E. 1c p. 473; each with notes).

The Appellant precedes its legal submissions with a detailed statement of facts, in which it describes the sequence of events and the proceedings before the previous instance from its point of view. In said statement of facts it deviates from or adds to the factual findings of the previous instance in numerous points without claiming any substantiated exceptions to the rule that the Swiss Federal Tribunal is bound by the facts established by the previous instance pursuant to Art. 105(2) and Art. 97(1) Federal Act on the Swiss Federal Tribunal *(BGG)*. To that extent its submissions must be disregarded.

3.

Invoking Art. 190(2)(b) Switzerland's Federal Code on Private International Law *(IPRG)* the Appellant is claiming that the previous instance ought to have held that it did not have jurisdiction.

3.1 Applying Art. 11 and 13.2 of the FIH Anti-Doping Policy the previous instance dismissed both arbitral actions on the ground that the Appellant did not have standing to appeal against the Judicial Commission's decision.

3.2 In reply to this the Appellant submits that there are many situations in which the question of the binding nature of the main contract (competence in respect of the subject matter of the claim *(Sachlegitimation)*) cannot be separated from the binding nature of the arbitration agreement (capacity to be a party to an action *(Parteifähigkeit)*), which is why in such cases an arbitration court must, when reviewing the question of jurisdiction, fully review as a preliminary question whether the parties are bound by, or the competence of the parties with respect to, the main contract (competence in respect of the subject matter of the claim *(Sachlegitimation)*). If the decision on jurisdiction is negative, the arbitration court that does not have jurisdiction has no competence to assess the competence in respect of the subject matter of the claims *(Sachlegitimation)* arising out of the main contract; rather it renders a purely procedural judgment. The Appellant further claims that the arbitration court lacked subjective arbitrability, which is why both arbitration courts - if they did not share the Appellant's interpretation of Art. 13.2.1 in conjunction with Art. 13.2.3 of the FIH Anti-Doping Policy, ought to have held that they did not have jurisdiction and could not dismiss the action substantively.

3.3 The Swiss Federal Tribunal *(Bundesgericht)* is free to review the legal aspects of the complaint about jurisdiction in accordance with Art. 190(2)(b) Switzerland's Federal Code on Private International Law *(IPRG)*, including preliminary questions of substantive law, upon which jurisdiction depends (BGE [Decisions of the Swiss Federal Tribunal] 133 III 139 E. 5 p. 141; 129 III 727 E. 5.2.2 p. 733; 128 III 50 E. 2a p. 54). However, the Appellant has failed to appreciate that the question of standing to appeal against the Judicial Commission's decision, which it has criticised, is not a substantive preliminary question in relation to the judgment on jurisdiction. Whether a party has standing to appeal against the decision of the Respondent's internal organ under the applicable provisions in the federation's statutes and statutory provisions does not concern the jurisdiction of the arbitration court intended to resolve the dispute; rather it concerns the question of standing to bring an action *(Aktivlegitimation)*. On the basis of Art. 13.2 FIH Anti-Doping Policy, which does not provide a right of appeal

for the national federations in connection with international competitions, the ad hoc Division of the CAS answered this question with regard to the arbitral action by the Appellant in the negative ("no standing to request relief for the merits"), Also taking into account Art. 11 FIH Anti-Doping Policy the previous instance held that the Appellant did not have standing to bring an action *(Aktivlegitimation)*.

Contrary to the Appellant's opinion, in the case to be decided, the question of competence in respect of the subject matter of the claim *(Sachlegitimation)* can be clearly separated from the question of being bound by the arbitration agreement. The Appellant's submissions made under the guise of a complaint under Art. 190(2)(b) Switzerland's Federal Code on Private International Law *(IPRG)*, is correctly seen, appellatory criticism of the CAS's interpretation of Art. 11 and 13.2 of the FIH Anti-Doping Policy, which govern the conditions for an appeal against decisions of the federation in connection with doping offences. The previous instance reviewed the conditions for an appeal against the Judicial Commission's decision, held that the Appellant did not have standing to bring an action *(Aktivlegitimation)* and therefore dismissed its prayers. The Swiss Federal Tribunal does not review whether the arbitration court applied the law, upon which it based its decision, correctly. The Appellant's submissions therefore lead nowhere.

Besides this, the Appellant instituted both arbitration cases with the previous instance and therefore assumed that it had jurisdiction. Even for this reason alone the Swiss Federal Tribunal cannot hear it with a plea of lack of jurisdiction (cf. Art. 186(2) Switzerland's Federal Code on Private International Law *(IPRG)*).

3.4 Under these aspects, the decisions being appealed against, with which the previous instance judged the Appellant's arbitral actions and dismissed them for want of standing to bring an action, cannot be criticised. The Appellant's false accusation that the previous instance failed to review whether the claims asserted were substantiated and therefore violated public policy *("ordre public")* also lead nowhere. Finally, the fact introduced by the Appellant that the two arbitral awards, as judgments on the merits *(Sachurteile)*, have substantive legal force, which would possibly preclude an action to set aside *(Anfechtungsklage)* the Judicial Commission's decision within the meaning of Art. 75 Swiss Civil Code *(ZGB)* brought before a state court, cannot - contrary to the Appellant's opinion - be considered to be a violation of public policy *("ordre public")* (Art. 190(2) (e) Switzerland's Federal Code on Private International Law *(IPRG)*), rather it follows logically from the substantive assessment and dismissal of its prayers.

4.
The appeal *(Beschwerde)* proves to be unfounded and must be dismissed to the extent that it can be heard. In accordance with the outcome of the proceedings the Appellant is ordered to pay costs and compensation (Art. 66(1) and Art. 68(2) Federal Act on the Swiss Federal Tribunal *(BGG)*).

Accordingly, the Swiss Federal Tribunal (Bundesgericht) holds that:

1.
The appeal is dismissed to the extent that it can be heard.

2.
The Appellant is ordered to pay the court fees of Fr. 6,000.

3.
The Appellant must compensate the Respondent for the proceedings before the Swiss Federal Tribunal *(Bundesgericht)* with Fr. 7,000. Said compensation shall be paid out of the security furnished as a payment to the court's cashier's office.

4.
The parties and the Court of Arbitration for Sport (CAS), ad hoc Division, shall be notified of this judgment in writing.

Lausanne, 22 January 2009

In the name of the 1st Civil Division of the Swiss Federal Tribunal *(Schweizerisches Bundesgericht)*

The President:	The Court Reporter:
Klett	Leemann

4A_600/2008
Arrêt du 20 février 2009
Ire Cour de droit civil

Composition	Mmes et M. les Juges Klett, Présidente, Kolly et Kiss Greffier: M. Carruzzo
Parties	X._____, recourant, représenté par Me Cédric Aguet, **contre** Y._____, intimé, représenté par Me Ettore Mazzilli.
Objet	arbitrage international; avance de frais; délai, recours en matière civile contre l'Order rendu le 18 novembre 2008 par le Tribunal Arbitral du Sport (TAS).

Faits

A.
Le 22 février 2006, le club de football Y._____ a saisi la Fédération Internationale de Football Association (FIFA) d'une demande visant, notamment, à obtenir de X._____, son ancien entraîneur, le paiement de 400'000 euros à titre d'indemnité conventionnelle pour résiliation anticipée du contrat de travail.

Alléguant avoir déjà versé cette somme au club en question, le défendeur a conclu au rejet de la demande.

Par décision du 13 mars 2008, notifiée aux parties le 20 juin 2008, la Commission du Statut du Joueur, considérant que la preuve de ce paiement n'avait pas été apportée, a condamné le défendeur à verser au demandeur la somme de 400'000 euros et les intérêts y afférents.

B.
B.a Le 7 juillet 2008, Me Z._____, avocat à Paris, a déposé une déclaration d'appel auprès du Tribunal Arbitral du Sport (TAS) au nom et pour le compte du défendeur.

Par lettre du 23 juillet 2008, le Greffe du TAS a accusé réception de la déclaration d'appel et attiré l'attention des parties sur le fait qu'elles seraient invitées à verser des avances de frais, conformément à l'art. R64 du Code de l'arbitrage en matière de sport (ci-après: le Code). Les chiffres 1 et 2 de cette disposition énoncent ce qui suit:

> "*R64.1*
> *Lors du dépôt de la requête/déclaration d'appel, le demandeur verse un droit de Greffe minimum de CHF 500.-, faute de quoi le TAS ne procède pas. Cet émolument reste acquis au TAS. La Formation en tient compte dans le décompte final des frais.*
>
> *R64.2*
> *Lors de la constitution de la Formation, le Greffe fixe, sous réserve de modifications ultérieures, le montant et les modalités de paiement de la*

provision de frais. L'introduction de demandes reconventionnelles ou nouvelles entraîne la fixation de provisions distinctes.

Pour fixer le montant de la provision, le Greffe estime les frais d'arbitrage qui seront supportés par les parties conformément à l'article R64.4. La provision est versée à parts égales par la partie demanderesse et la partie défenderesse. Si une partie ne verse pas sa part, l'autre peut le faire à sa place; en cas de non-paiement, la demande/déclaration d'appel est réputée retirée; cette disposition s'applique également aux éventuelles demandes reconventionnelles".

En date du 29 août 2008, le Greffe du TAS a invité les deux parties à verser chacune une provision de 19'000 fr. jusqu'au 15 septembre 2008. L'appelant a donné suite à cette invitation. L'intimé, en revanche, n'a pas versé sa part de l'avance de frais requise.

Sur quoi, le Greffe du TAS, par lettre du 25 septembre 2008, se référant à son précédent courrier et à l'art. R64.2 du Code, a fixé à l'appelant un délai au 10 octobre 2008 pour verser une avance de frais complémentaire de 19'000 fr. Cette lettre se terminait par la phrase suivante: "*I remind you that in the absence of payment within the said time limit, the appeal will be deemed withdrawn*" (soulignement figurant dans le texte original).

Par lettre du 15 octobre 2008, le Greffe du TAS, relevant que le délai fixé était échu depuis le 10 du même mois, a demandé au recourant de lui fournir la preuve du paiement de la seconde avance de 19'000 fr.

Le conseil du recourant lui a répondu en ces termes par courrier du 17 octobre 2008 (sic): "*I received your letter dated october, 15 informing me that you are expetting to the second advance of costs of CHF 19.000. My client informed me that payment will be made shortly*".

Le 12 novembre 2008, le Greffe du TAS, constatant que la provision complémentaire n'avait toujours pas été versée, a envoyé un fax aux parties pour les informer que l'appel était réputé retiré, en application de l'art. R64.2 du Code, et qu'une ordonnance de clôture leur serait notifiée dans les prochains jours.

Par courrier du 13 novembre 2008, le conseil de l'appelant a adressé au TAS une "attestation de paiement" et lui a demandé de l'informer au sujet de la suite de la procédure. La pièce annexée à ce courrier est, en fait, une copie d'une lettre du 12 novembre 2008 par laquelle l'appelant prie sa banque de verser la somme de 19'000 fr. sur le compte bancaire du TAS.

B.b Par Order du 18 novembre 2008, le Président suppléant de la Chambre arbitrale d'appel du TAS, constatant que l'appel était réputé retiré du fait que les avances de frais requises n'avaient pas toutes été payées, a prononcé la clôture de la procédure, rayé la cause du rôle et ordonné la restitution à l'appelant du montant versé par lui. L'ordonnance a été transmise aux parties par fax du même jour.

Le 20 novembre 2008, le Greffe du TAS a reçu un avis de crédit d'une banque l'informant que l'appelant avait versé la somme de 19'000 fr. sur le compte du TAS, valeur 18 novembre 2008.

C.
Agissant par la voie du recours en matière civile, X._____, représenté par un nouvel avocat, demande au Tribunal fédéral d'annuler la "sentence arbitrale" rendue le 18 novembre 2008. A titre principal, il se plaint d'une violation de l'ordre public matériel, en particulier du principe de la bonne foi et de l'interdiction de l'abus de droit. Subsidiairement, le recourant dénonce une violation par le TAS de l'ordre public procédural.

L'intimé n'a pas déposé de réponse dans le délai qui lui avait été imparti à cette fin.

Dans sa réponse, le TAS, qui a produit son dossier, conclut au rejet du recours.

L'effet suspensif a été accordé au recours par ordonnance présidentielle du 21 janvier 2009.

Considérant en droit

1.
D'après l'art. 54 al. 1 LTF, le Tribunal fédéral rédige son arrêt dans une langue officielle, en règle générale dans la langue de la décision attaquée. Lorsque cette décision est rédigée dans une autre langue (ici l'anglais), le Tribunal fédéral utilise la langue officielle choisie par les parties. Devant le TAS, celles-ci ont utilisé l'anglais. Dans le mémoire qu'il a adressé au Tribunal fédéral, le recourant a employé le français. Conformément à sa pratique, le Tribunal fédéral adoptera la langue du recours et rendra, par conséquent, son arrêt en français.

2.

2.1 Dans le domaine de l'arbitrage international, le recours en matière civile est recevable contre les décisions de tribunaux arbitraux aux conditions prévues par les art. 190 à 192 LDIP (art. 77 al. 1 LTF).

2.2 Le siège du TAS se trouve à Lausanne. L'une des parties au moins (en l'occurrence, les deux) n'avait pas son domicile en Suisse au moment déterminant. Les dispositions du chapitre 12 de la LDIP sont donc applicables (art. 176 al. 1 LDIP).

2.3 Dans sa réponse au recours, le TAS fait valoir que la décision attaquée n'est pas une sentence arbitrale, en ce sens qu'elle n'a pas été prise par une Formation arbitrale mais par le Président suppléant de la Chambre arbitrale d'appel, lequel est un membre du Conseil International de l'Arbitrage en matière de Sport (CIAS) que cet organisme élit pour remplacer le Président en cas d'empêchement (art. S6.2 du Code) et remplir les fonctions qui sont dévolues à celui-ci, telle la constitution de la Formation (art. R52 du Code).

A ne considérer que son intitulé (Order), la décision attaquée pourrait être une simple ordonnance de procédure susceptible d'être modifiée ou rapportée en cours d'instance; comme telle, elle ne pourrait pas être déférée au Tribunal fédéral (cf. **ATF 122 III 492** consid. 1b/bb). Toutefois, 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. De ce point de vue, il n'est pas douteux que, dans sa décision, le TAS ne s'est pas borné à fixer la suite de la procédure. Il y constate que l'avance de frais requise n'a pas été faite dans le délai fixé à cet effet et 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 à une décision d'irrecevabilité qui clôt l'affaire pour un motif tiré des règles de la procédure. Qu'il émane du Président suppléant de la Chambre arbitrale d'appel 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_126/2008 du 9 mai 2008 consid. 1).

2.4 Le recourant est directement touché par la décision attaquée, puisque celle-ci le prive de la possibilité de remettre en cause, devant le TAS, la décision du 13 mars 2008 au terme de laquelle la Commission du Statut du Joueur l'a condamné à verser à l'intimé la somme de 400'000 euros, intérêts en sus. Il a ainsi un intérêt personnel, actuel et juridiquement protégé à ce que la décision du TAS n'ait pas été rendue en violation de l'art. 190 al. 2 let. e LDIP, ce qui lui confère la qualité pour recourir (art. 76 al. 1 LTF).

Déposé dans les 30 jours suivant la notification de la sentence attaquée (art. 100 al. 1 LTF en liaison avec l'art. 46 al. 1 let. c LTF), le recours, qui satisfait aux exigences formelles posées par l'art. 42 al. 1 LTF, est recevable.

3.

Le Tribunal fédéral statue sur la base des faits établis par le Tribunal arbitral (art. 105 al. 1 LTF). Il ne peut rectifier ou compléter d'office les constatations des arbitres, même si les faits ont été établis de manière manifestement inexacte ou en violation du droit (cf. l'art. 77 al. 2 LTF qui exclut l'application de l'art. 105 al. 2 LTF). En revanche, comme c'était déjà le cas sous l'empire de la loi fédérale d'organisation judiciaire (cf. **ATF 129 III 727** consid. 5.2.2; **128 III 50** consid. 2a et les arrêts cités), le Tribunal fédéral conserve la faculté de revoir l'état de fait à la base de la sentence attaquée si l'un des griefs mentionnés à l'art. 190 al. 2 LDIP est soulevé à l'encontre dudit état de fait ou que des faits ou des moyens de preuve nouveaux sont exceptionnellement pris en considération dans le cadre de la procédure du recours en matière civile (arrêt 4A_450/2007 du 7 janvier 2008 consid. 2.2).

Ces principes ne sont pas directement applicables en l'espèce, étant donné que le prononcé attaqué ne fait que constater le retrait - présumé irrévocable - de la déclaration d'appel, consécutivement au défaut de paiement de la provision requise par le TAS. Cependant, ils peuvent l'être, à tout le moins, par analogie. Aussi la Cour de céans tiendra-t-elle compte, pour l'examen du cas présent, des circonstances relatées dans la décision de la Commission du Statut du Joueur ainsi que du déroulement de la procédure devant le TAS, tel qu'il ressort du dossier produit par ce dernier. En revanche, elle ne prendra pas en considération les allégations du recourant relatives à des circonstances exorbitantes de la procédure arbitrale en cause, telles que la référence à un autre arbitrage conduit devant le TAS par le même conseil français que celui qui a assisté le recourant dans la procédure arbitrale close par la décision querellée (affaire T._____).

4.

A titre principal, le recourant se plaint d'une violation de l'ordre public matériel, plus précisément du

principe de la bonne foi et de l'interdiction de l'abus de droit.

4.1 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 (**ATF 132 III 389** consid. 2.2.1).

Selon la jurisprudence, les règles de la bonne foi et l'interdiction de l'abus de droit doivent être comprises à la lumière de la jurisprudence rendue au sujet de l'art. 2 CC (arrêt 4A_220/2007 du 21 septembre 2007, consid. 12.2.2).

4.2

4.2.1

4.2.1.1 Dans la première branche de son moyen principal, le recourant expose, tout d'abord, que l'avocat français qui l'a représenté devant le TAS avait agi antérieurement devant la même institution en qualité de conseil d'un jeune footballeur dénommé T._____. Or, dans cette affaire, le TAS, faisant preuve d'une "grande souplesse" quant au respect du délai dans lequel il devait rendre sa sentence, en application de l'art. R59 al. 5 du Code, avait "outrageusement" étendu ce délai. Aussi, confiant dans cette souplesse du TAS, le recourant n'avait-il pas versé l'avance de frais dans le délai qui lui avait été imparti à cette fin.

Le moyen considéré repose sur un fait étranger à la procédure arbitrale en cause. Comme tel, il est irrecevable (cf., ci-dessus, le consid. 3 in fine). Ce moyen est de toute façon inconsistant. Le recourant admet d'ailleurs lui-même que le TAS n'a pas adopté un "comportement contradictoire au sens strict", puisqu'il ne lui a pas fixé un délai péremptoire qu'il n'aurait pas imparti aux parties dans l'affaire T._____. De surcroît, le TAS précise, sous chiffre 17 de sa réponse, que les délais fixés dans la procédure relative à cette affaire ont tous été respectés, qu'ils aient été prolongés ou non. On peine à discerner, au demeurant, ce qu'il pourrait y avoir de commun entre le fait, pour un tribunal arbitral, de ne pas rendre une sentence dans le délai d'ordre prévu à cet effet (sur la nature de ce délai dans le cas du TAS, cf. Antonio Rigozzi, L'arbitrage international en matière de sport, 2005, p. 516 n. 1005) et le fait pour une partie de ne pas verser une avance de frais dans le délai qui lui a été fixé sous peine de voir son appel être considéré comme retiré irrémédiablement. Il paraît enfin surprenant, pour ne pas dire plus, de la part d'un avocat, de ne pas attacher d'importance au respect d'un tel délai sur la seule foi d'une prétendue souplesse avec laquelle le tribunal arbitral appliquerait les règles procédurales touchant les délais.

4.2.1.2 De ce que le délai litigieux aurait pu être prolongé, en vertu de l'art. R32 du Code, le recourant entend déduire, ensuite, que le délai en question ne revêt aucun "caractère absolu". L'argument est dénué de tout fondement. Qu'un délai puisse être prolongé est une chose. Que le non-respect d'un délai prolongeable, mais qui n'a pas été prolongé faute d'une requête ad hoc, ne doive pas être sanctionné en est une autre.

4.2.1.3 Le recourant soutient, enfin, que l'art. R64.2 du Code ne sanctionne que le défaut de paiement de la provision et non l'omission de respecter le délai imparti pour la verser. Pour lui, le délai en question ne serait qu'un délai d'ordre. Dès lors, la décision attaquée, prise "dans un mouvement d'humeur manifeste", serait contraire au principe de la bonne foi en tant qu'elle sanctionne exclusivement l'omission de demander la prolongation d'un délai d'ordre et qu'elle entraîne la perte de 400'000 euros pour la "victime de la mauvaise foi d'une institution arbitrale".

Semblable grief, inutilement blessant dans sa formulation, ne résiste pas à l'examen. Il a échappé à son auteur que 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). Qui plus est, l'interprétation littérale de la disposition citée, que propose le recourant, impliquerait, si elle était suivie, que les parties pourraient décider elles-mêmes, sans égard aux délais fixés par le TAS, le moment auquel il leur conviendrait de verser tout ou partie des avances de frais requises par l'institution arbitrale. Outre qu'il mettrait en péril la sécurité du droit et l'égalité des parties, un tel système serait de nature à paralyser le fonctionnement d'une institution qui n'a pas la possibilité de fournir ses

services à crédit, ainsi que le souligne le TAS sous chiffre 24 de sa réponse. Il va sans dire, enfin, que, lorsque la sanction découlant du non-respect d'un délai est l'irrecevabilité ou - ce qui revient au même - le retrait, présumé de manière irréfragable, d'un recours, la partie qui a exercé le moyen de droit n'est plus en mesure de faire sanctionner par l'autorité de recours une éventuelle erreur commise par celle qui a rendu la décision attaquée. Et l'on n'imagine pas que cette sanction puisse s'appliquer ou non suivant les conséquences pécuniaires plus ou moins graves que cette décision entraîne pour la partie recourante, sauf à ouvrir la porte à l'arbitraire. Pour le surplus, il n'y a pas ici la moindre trace de la mauvaise foi que le recourant impute gratuitement au TAS.

4.2.2 Dans la seconde branche de son moyen principal, le recourant fait grief au TAS de n'avoir pas réagi au courrier qu'il lui avait adressé le 17 octobre 2008 et de lui avoir laissé croire, en demeurant silencieux pendant plusieurs semaines, que le délai initialement fixé au 10 octobre 2008 pour le versement de l'avance de frais avait été prolongé par acte concluant. A le suivre, la bonne foi, dans ces conditions, aurait imposé au TAS de lui fixer un dernier délai pour effectuer ce versement.

Il n'en est rien. La lettre du TAS du 25 septembre 2008 indiquait clairement la sanction à laquelle le recourant s'exposait s'il ne versait pas l'avance de frais de 19'000 fr. jusqu'au 10 octobre 2008 inclusivement. Par courrier du 15 octobre 2008, le Greffe du TAS, relevant que le délai fixé était échu depuis le 10 du même mois, a demandé au recourant de lui fournir la preuve de ce paiement. Il ne lui a donc nullement laissé entendre que son inaction avant l'expiration de ce délai ne tirerait pas à conséquence. Sur quoi, le conseil du recourant, par courrier du 17 octobre 2008, a simplement informé le TAS que le versement attendu serait effectué sous peu. A l'évidence, il ne pouvait pas considérer de bonne foi l'absence de réaction du TAS à ce courrier en ce sens que l'institution d'arbitrage avait traité la lettre du 17 octobre 2008 comme une requête de prolongation de délai, qu'elle avait admise par l'acte concluant que constituait son silence. Il pouvait d'autant moins le faire que le TAS venait de l'inviter à prouver qu'il avait respecté le délai fixé au 10 octobre 2008.

Partant, le grief examiné, qui confine à la témérité, tombe à faux.

5.
A titre subsidiaire, le recourant reproche au TAS d'avoir violé l'ordre public procédural.

5.1 L'ordre public procédural garantit aux parties le droit à un jugement indépendant sur les conclusions et l'état de fait soumis au Tribunal arbitral d'une manière conforme au droit de procédure applicable; il y a violation de l'ordre public procédural lorsque des principes fondamentaux et généralement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de la justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit (**ATF 132 III 389** consid. 2.2.1).

5.2

5.2.1 Le recourant soutient, en substance, que le TAS a fait preuve de formalisme excessif en rayant la cause du rôle après avoir reçu l'entier de la provision requise. Selon lui, la décision de clôture était dépourvue d'intérêt pour le TAS, auquel elle ne causait pas le moindre préjudice, tandis qu'elle faisait perdre à la partie recourante toute possibilité d'échapper au paiement à double du montant de 400'000 euros.

5.2.2 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. Selon une jurisprudence bien établie, il n'y a pas de rigueur excessive à ne pas entrer en matière sur un recours lorsque, conformément au droit de procédure applicable, la recevabilité de celui-ci est subordonnée au versement d'une avance de frais dans un délai déterminé; il faut cependant que son auteur ait été averti de façon appropriée du montant à verser, du délai imparti pour le paiement et des conséquences de l'inobservation de ce délai (**ATF 104 Ia 105** consid. 5 p. 112; **96 I 521** consid. 4 p. 523).

En l'occurrence, la lettre que le TAS avait adressée au recourant le 25 septembre 2008 remplissait toutes ces conditions. Aussi le TAS pouvait-il 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 était applicable aux circonstances du cas qui lui était soumis.

Que l'avance ait bien été versée avant que le TAS prenne acte du retrait de l'appel dans la décision attaquée n'est pas déterminant, quoi qu'en dise le recourant, sans compter que le versement, opéré par ce dernier le même jour que celui où ladite décision a été rendue, n'est parvenu à la connaissance du TAS que deux jours plus tard. Le Tribunal fédéral n'entre pas non plus en matière sur un recours, conformément à l'art. 62 al. 3 LTF, quand l'avance de frais n'a pas été versée en temps utile, même s'il est en possession du montant de cette avance effectuée hors délai lorsqu'il prononce l'arrêt d'irrecevabilité. Il considère, en effet, que les formes procédurales sont nécessaires dans 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. On ne voit pas pourquoi il devrait en aller autrement dans le cas d'une institution d'arbitrage. Ce serait 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.

L'arrêt 4P.2/2003 du 12 mars 2003, cité par le recourant, ne lui est d'aucun secours. Il invite le tribunal arbitral à déterminer clairement la conséquence péremptoire éventuellement liée au non-paiement de l'avance de frais pour autant que le règlement applicable ne la stipule pas déjà (consid. 3.4). Or, c'est bien ce qu'a fait le TAS en l'espèce, par son courrier du 25 septembre 2008, dans lequel il rappelle au recourant la sanction prévue à l'art. R64.2 du Code en cas de défaut de versement de l'avance de frais.

Quant aux arguments du recourant tirés de la comparaison avec le précédent T._____ et de l'incidence de la décision attaquée sur sa situation patrimoniale, ils ont déjà été écartés plus haut, de sorte qu'il n'y a pas lieu d'y revenir (cf. consid. 4.2.1.1 et 4.2.1.3 in fine).

6.
Il ressort de cet examen que le recourant a tenté en vain d'imputer au TAS la négligence dont son ancien mandataire a fait preuve dans la conduite de la procédure devant cette institution. Le présent recours ne peut, dès lors, qu'être rejeté dans la mesure où il est recevable.

Par voie de conséquence, le recourant devra payer les frais judiciaires relatifs à la procédure fédérale (art. 66 al. 1 LTF). En revanche, il n'aura pas à indemniser l'intimé puisque celui-ci n'a pas déposé de réponse.

Par ces motifs, le Tribunal fédéral prononce:

1.
Le recours est rejeté dans la mesure où il est recevable.

2.
Les frais judiciaires, arrêtés à 5'000 fr., sont mis à la charge du recourant.

3.
Le présent arrêt est communiqué aux mandataires des parties et au Tribunal Arbitral du Sport (TAS).

Lausanne, le 20 février 2009

Au nom de la Ire Cour de droit civil du Tribunal fédéral suisse

La Présidente:	Le Greffier:
Klett	Carruzzo

4A_368/2009
Arrêt du 13 octobre 2009
Ire Cour de droit civil

Composition	Mme et MM. les Juges Klett, Présidente Corboz et Kolly Greffier: M. Carruzzo
Parties	X._____ Sàrl, requérante, représentée par Mes Douglas Hornung et Tetiana Bersheda, **contre** Y._____, intimé, représenté par Me Rocco Taminelli.
Objet	arbitrage international; révision, demande de révision de la sentence rendue le 15 juin 2009 par le Tribunal Arbitral du Sport (TAS).

Faits

A.
Par contrat du 15 novembre 2007, soumis au droit suisse, la société X._____ Sàrl, responsable financière de l'équipe professionnelle de cyclisme W._____, a engagé le coureur cycliste professionnel Y._____ pour une durée de deux ans à compter du 1er janvier 2008. La rémunération du coureur cycliste a été fixée à 275'000 euros pour 2008 et à 340'000 euros pour 2009.

X._____ Sàrl a résilié ledit contrat avec effet immédiat par lettre recommandée du 23 juillet 2008, au motif qu'un rapport médical, annexé à cette lettre, faisait apparaître des anomalies dans les valeurs de l'urine et du sang prélevés sur le coureur cycliste à l'occasion d'un contrôle interne effectué par l'équipe. Selon elle, il y avait là de sérieux indices d'une stimulation de la moelle osseuse consécutive à l'administration d'EPO exogène.

B.
Le 1er septembre 2008, Y._____, se fondant sur la clause compromissoire insérée dans le contrat, a déposé une requête d'arbitrage auprès du Tribunal Arbitral du Sport (TAS) afin d'obtenir quelque 5,7 millions d'euros d'indemnités en application des art. 49, 328 et 337c CO.

X._____ Sàrl a conclu au rejet de la demande et, reconventionnellement, à l'octroi d'une indemnité d'un million d'euros à titre de réparation du tort moral.

Par sentence du 15 juin 2009, le TAS, admettant partiellement la demande, a condamné X._____ Sàrl à payer à Y._____ la somme de 654'166,67 euros avec intérêts à 5% dès le 27 novembre 2008, autorisé la publication de la sentence par ses soins et décidé de transmettre celle-ci à l'Union Cycliste Internationale (UCI). Il a mis 75% des frais d'arbitrage à la charge de X._____ Sàrl, condamné cette dernière à verser 25'000 fr. de dépens à Y._____ et rejeté toutes autres ou plus amples conclusions des parties. En résumé, le TAS a considéré que l'employeur avait résilié de manière injustifiée le contrat de travail liant les parties, sur la base d'une simple suspicion

de dopage et sans avoir mis en oeuvre la procédure préalable ad hoc prévue dans le contrat.

C.
Le 15 juillet 2009, X._____ Sàrl a formé un recours en matière civile contre la sentence du 15 juin 2009. Ce recours a été rejeté par arrêt séparé de ce jour.

D.
En date du 10 août 2009, X._____ Sàrl a déposé une demande de révision en vue d'obtenir l'annulation de la même sentence.

L'intimé conclut principalement à l'irrecevabilité de la demande et, subsidiairement, au rejet de celle-ci. Le TAS propose le rejet de la demande.

Considérant en droit

1.
La loi sur le droit international privé (LDIP; RS 291) ne contient aucune disposition relative à la révision des sentences arbitrales au sens des art. 176 ss LDIP. Le Tribunal fédéral a comblé cette lacune par voie jurisprudentielle. Les motifs de révision de ces sentences étaient ceux que prévoyait l'art. 137 OJ. Ils sont désormais visés par l'art. 123 LTF. Le Tribunal fédéral est l'autorité judiciaire compétente pour connaître de la demande de révision de toute sentence arbitrale internationale, qu'elle soit finale, partielle ou préjudicielle; sa compétence en ce domaine ne concerne que les sentences liant le tribunal arbitral dont elles émanent, à l'exclusion des simples ordonnances ou directives de procédure susceptibles d'être modifiées ou rapportées en cours d'instance. S'il admet une demande de révision, le Tribunal fédéral ne se prononce pas lui-même sur le fond mais renvoie la cause au tribunal arbitral qui a statué ou à un nouveau tribunal arbitral à constituer (**ATF 134 III 286** consid. 2 et les références).

2.
L'intimé conteste la recevabilité de la demande de révision en faisant valoir que la requérante a valablement renoncé à attaquer la sentence. On laissera en suspens, ici, le point de savoir si la renonciation à recourir, prétendument incluse dans la clause compromissoire, excluait aussi le dépôt d'une demande de révision (cf. l'arrêt 4A_234/2008 du 14 août 2008 consid. 2.1 et les références). En effet, pour les motifs indiqués au considérant 3 de l'arrêt rendu ce jour sur le recours en matière de droit civil connexe, la renonciation en question est, de toute façon, inopérante.

3.
3.1 Dans sa demande de révision, la requérante invoque l'existence d'un fait nouveau et de preuves nouvelles constitués par les pièces qu'elle a fait parvenir au TAS en annexe à son fax daté du 12 juin 2009 (mais envoyé le 15 du même mois). La circonstance nouvelle alléguée par elle consiste dans l'adoption, le 9 mai 2009, et l'entrée en vigueur, le 31 mai 2009, de nouvelles directives techniques de l'Agence Mondiale Antidopage (AMA) au sujet de l'EPO (TD2009EPO). Selon elle, la stimulation de la moelle osseuse de l'intimé causée par l'administration d'EPO exogène devrait être tenue pour avérée au regard de ces nouvelles directives, ce qui suffirait à justifier après coup le bien-fondé du licenciement immédiat du coureur cycliste.

3.2
3.2.1 En vertu de l'art. 123 al. 2 let. a LTF, la révision peut être demandée dans les affaires civiles si le requérant découvre après coup des faits pertinents ou des moyens de preuve concluants qu'il n'avait pas pu invoquer dans la procédure précédente, à l'exclusion des faits ou moyens de preuve postérieurs à l'arrêt.

Cette disposition reprend en substance l'art. 137 let. b aOJ, de sorte que la jurisprudence antérieure conserve toute sa valeur. Ainsi, seuls peuvent justifier une révision fondée sur l'art. 123 al. 2 let. a LTF les faits qui se sont produits jusqu'au moment où, dans la procédure principale, des allégations de fait étaient encore recevables, mais qui n'étaient pas connus du requérant malgré toute sa diligence et n'ont été découverts par lui que postérieurement au prononcé de la décision dont la révision est demandée; ces faits doivent, de surcroît, être pertinents, à savoir de nature à modifier l'état de fait qui est à la base de la décision attaquée et à aboutir à un jugement différent en fonction d'une appréciation juridique correcte (**ATF 134 III 669** consid. 2 et les références). Il en va de même, mutatis mutandis, en ce qui concerne les preuves nouvelles (cf. arrêt 4P.213/1998 du 11 mai 1999 consid. 2b).

3.2.2 Les conditions justifiant une révision de la sentence du TAS sur le fondement de l'art. 123 al. 2 let. a LTF ne sont de toute évidence pas remplies en l'espèce.
Dans son recours en matière civile connexe, la requérante soutenait que la directive TD2009EPO était certes entrée en vigueur le 31 mai 2009, c'est-à-dire postérieurement

à l'audience du 29 avril 2009, mais qu'il avait été signalé, lors de cette audience, "qu'il est probable que cette nouvelle norme entrera en vigueur prochainement" (p. 18, dernier §). L'intéressée allègue derechef, dans sa demande de révision, qu'il a bien été question, au cours de ladite audience, des nouvelles normes de l'AMA, "dont l'entrée en vigueur était possible pour la fin mai 2009" ; elle ajoute que le médecin de l'équipe avait précisément appliqué ces nouvelles règles (mémoire, p. 8, ch. 23). Par ailleurs, elle fait remonter au 9 mai 2009 le moment de la découverte du motif de révision, qui détermine le point de départ du délai fixé par l'art. 124 al. 1 let. d LTF pour le dépôt de la demande ad hoc (mémoire, p. 12 let. c). Il est ainsi clairement établi que la requérante a eu connaissance du prétendu fait nouveau, resp. des preuves nouvelles, avant la communication de la sentence du 15 juin 2009.

Qu'il lui eût été possible d'introduire le "fait nouveau" pendente lite n'est guère contestable, quoi qu'elle en dise. Il en avait été question, faut-il le rappeler, au cours de l'audience du 29 avril 2009. Dès lors, l'élémentaire prudence eût commandé à cette partie d'inviter le TAS à prendre en considération la nouvelle directive qui était sur le point d'être adoptée et dont l'entrée en vigueur était envisagée pour la fin du mois suivant déjà, quitte à requérir, au besoin, la suspension de la procédure arbitrale jusqu'à l'entrée en force de la directive à venir. Au lieu de quoi, la requérante a attendu de connaître le sort réservé à la demande de l'intimé pour se prévaloir, alors seulement, de la circonstance prétendument nouvelle. Or, contrairement à ce qu'elle affirme et comme le TAS le fait remarquer avec raison dans sa réponse à la demande de révision, l'art. R.44.3 du Code de l'arbitrage en matière de sport lui permettait d'intervenir auprès du TAS afin qu'il prît en compte pareille circonstance. Par conséquent, la requérante doit, de toute façon, se laisser opposer son manque de diligence.

3.3 Au demeurant, même si le motif de révision était avéré, la demande de révision ne pourrait être admise. Il ressort, en effet, des chiffres 87 à 96 de la sentence attaquée que, de l'avis du TAS, la requérante n'a pas mis en oeuvre la procédure préalable prévue dans le contrat de travail qui aurait dû être appliquée avant que l'intimé puisse être licencié. Cet argument surabondant, que la requérante laisse intact, suffirait à justifier le maintien de ladite sentence même s'il fallait admettre, sur le vu des nouvelles directives de l'AMA, que l'intimé s'est effectivement dopé et que les soupçons de la requérante étaient donc fondés.

4.
Cela étant, la demande de révision ne peut qu'être rejetée, ce qui rend sans objet la requête d'effet suspensif pendante.

En conséquence, la requérante, qui succombe, devra payer les frais de la procédure fédérale (art. 66 al. 1 LTF) et verser des dépens à l'intimé (art. 68 al. 2 LTF).

Par ces motifs, le Tribunal fédéral prononce:

1.
La demande de révision est rejetée.

2.
Les frais judiciaires, arrêtés à 9'000 fr., sont mis à la charge de la requérante.

3.
La requérante versera à l'intimé une indemnité de 10'000 fr. à titre de dépens.

4.
Le présent arrêt est communiqué aux mandataires des parties et au Tribunal Arbitral du Sport (TAS).

Lausanne, le 13 octobre 2009

Au nom de la Ire Cour de droit civil du Tribunal fédéral suisse

La Présidente:	Le Greffier:
Klett	Carruzzo

4A_358/2009**
Judgement of 6 November 2009
1st Civil Division

Composition	Federal Tribunal Judge Klett, President Federal Tribunal Judge Corboz Federal Tribunal Judge Rottenberg Liatowitsch Federal Tribunal Judge Kolly Federal Tribunal Judge Kiss Clerk of the Court: Mr Leemann
Parties	A._____, Appellant, represented by Dr Maurice Courvoisier and Dr Philippe Nordmann, **versus** World Anti-Doping Agency (WADA), Respondent, represented by Mr François Kaiser and Mr Yvan Henzer.

*** From Charles Poncet's translation, courtesy of the law firm ZPG/Geneva (www.praetor.ch).**
*** Translator's note: Quote as A._____ v. World Anti-Doping Agency (WADA), 4A_358/2009. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.**

Facts

A.

A.a A._____ (the Appellant) domiciled in D._____ is a professional ice hockey player. He took part in various international competitions with the German national team and among others in the world ice hockey championships of the years 2003, 2004, 2006, 2007 and 2008 as well as in the Winter Olympics in Turin in 2006. The World Anti-Doping Agency (WADA) (the Respondent) is a foundation under Swiss law with seat in Lausanne. Its goal is the worldwide battle against doping in sport. The International Ice Hockey Federation (IIHF) is the international ice hockey federation with its seat in Zurich.

A.b On March 6, 2008 at 12.30 pm, Mr B._____, acting on behalf of the German National Anti-Doping Agency (NADA) appeared at the Appellant's domicile to undertake an out-of-competition sample collection[1]. According to the Respondent the Appellant refused to submit to the test even after he was advised by the controller of possible heavy disciplinary sanctions. It is undisputed that the doping controller left the Appellant's domicile at 12.50 pm without accomplishing anything. Four minutes later the Appellant called NADA to inform them of what had happened. At 2.16 pm he called NADA again and stated that he wanted to submit to a sample collection and NADA told him that a repetition of the test was not possible. Later and at his initiative, a doping test took place the same day at 5 pm, organised by the German Ice Hockey Federation (DEB) and carried out by Mr B._____. The test was analysed by the Institute of Doping Analysis and Sports Biochemistry Dresden; no forbidden substance or impermissible method was shown.

1. Translator's note: in English in the original text.

A.c On March 7, 2008, NADA informed the German Ice Hockey Federation of the case. On March 19, 2008, the latter advised NADA of its intent to warn the Appellant publically. NADA again told the DEB that refusing a sample collection was a violation of article 2.3 of the NADA code (NADC), which corresponds to article 2.3 of the WADA code (WADC) and had to be sanctioned accordingly. The DEB informed NADA that the sanctions in the NADC or the WADC were disproportionate and that in view of the circumstances of the case a public warning would be sufficient. Accordingly it pronounced a public warning against the player on April 15, 2008 and punished him with a fine of Eur. 5'000.- and 56 hours of charitable work. NADA became aware of the decision of the DEB in the media and learned also that the IIHF approved it and would let the player play in the World Ice Hockey Championship in Canada on May 2 – 11, 2008. NADA advised the Respondent on April 21, 2008 in order to enable it to take measures. In a letter of May 6, 2008, the Respondent requested the directorate of the IIHF World Championship to suspend the Appellant provisionally from May 6, 2008 and requested the IIHF to issue a decision within 48 hours as to his provisional suspension. Furthermore the Respondent requested the IIHF disciplinary committee to initiate a disciplinary procedure against the Appellant and to sanction him with a two years suspension. The presidency of the IIHF advised the Respondent in an e-mail of May 7, 2008 that it was not in a position to act according to the request. The IIHF pointed out among other things that the disciplinary committee set in motion by the German Ice Hockey Federation had issued a decision in the matter on April 15, 2008 and that the time to appeal was not yet expired. The Respondent wrote to the IIHF on the same day that it assumed that the letter of May 7, 2008 was a decision within the meaning of the IIHF Rules, which was subject to an appeal to the Court of Arbitration for Sport (CAS).

A.d On May 9, 2008 the Respondent appealed the decision of the DEB of April 15, 2008 to the *ad-hoc* Arbitral Tribunal of the German Olympics Sports Confederation and submitted that the decision should be annulled and a two years suspension pronounced against the player. The *ad-hoc* arbitration tribunal rejected the appeal in a decision of December 3, 2008, as there was no legal basis for the sanctions requested by the Respondent.

B.
On May 27, 2008 the Respondent appealed to the CAS against the IIHF letter of May 7, 2008 and submitted that a two years suspension should be ordered (CAS case 2008/A/1564). It pointed out that the request for arbitration was made to protect its rights in particular should the request be rejected, which it had filed with the German *ad-hoc* Arbitral Tribunal. The proceedings were then stayed until a decision by the German Arbitral Tribunal. Subsequently the Respondent appealed the decision of the *ad-hoc* Arbitral tribunal of the German Olympics Sports Confederation in front of the CAS as well (CAS case 2008/A/1738). In a decision of June 23, 2009, the CAS held that it had no jurisdiction. The IIHF did not participate in the arbitration. The Appellant raised in particular the lack of jurisdiction as there was no arbitration agreement.

C.
With regard to the first appeal (CAS case 2008/A/1564), the CAS held that it had jurisdiction on the basis on the "Player Registration Form" signed by the Appellant each time with a view to the World Championship and held that the May 7, 2008 e-mail from the IIHF was a decision that could be appealed. In an award of June 23, 2009, it annulled the IIHF decision and ordered the Appellant suspended for two years.

D.
In a Civil law appeal the Appellant submits that the Federal Tribunal should annul the CAS award of June 23, 2009 (CAS case 2008/A/1564). Both the Respondent and the CAS[2] submit that the appeal should be rejected. The Appellant submitted a reply to the Federal Tribunal.

E.
The Federal Tribunal ordered a stay of the award on September 7, 2009.

Considerations

1.
According to art. 54 (1) BGG[3], the Federal Tribunal issues its decision in one of the official languages, as a rule that of the decision under appeal. Should the decision have been issued in another language, the Federal Tribunal resorts to the official language used by the parties. The decision under appeal is in English. As English is not a (Swiss) official language and the parties used different languages in front of

2. Translator's note: In the following developments I translated the word "Vorinstanz" by "CAS", although the word literally means "the lower court". CAS is clearer in the context.

3. Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

the Federal Tribunal, the decision shall be issued in the language of the appeal brief according to practice.

2.
In the field of international arbitration a Civil law appeal is possible under the requirements of art. 190-192 PILA[4] (art. 77 (1 BGG)).

2.1 The seat of the Arbitral Tribunal is in Lausanne in this case. At the relevant time the Appellant had neither his domicile nor his habitual residence in Switzerland. As the Parties did not rule out in writing the provisions of chapter 12 PILA, these are to be applied (art. 176 (1) and (2) PILA).

2.2 All grievances exhaustively set forth in art. 190 (2) PILA are admissible (BGE 134 III 186 at 5 p. 187; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282). According to art. 77 (3) BGG the Federal Tribunal reviews only the grievances which are brought forward and reasoned in the appeal; this corresponds to the requirement at art. 106 (2) BGG as to the violation of constitutional rights or of cantonal and intercantonal law (BGG 134 III 186 at 5 with references).

2.3 The Federal Tribunal bases its decision on the facts found by the arbitral tribunal (art. 105 (1) BGG). It may not rectify or supplement the factual findings of the arbitral tribunal, even when these are manifestly wrong or rely on a violation of the law within the meaning of art. 95 BGG (see art. 77 (2) BGG), which rules out the application of art. 105 (2) and art. 97 BGG). However the Federal Tribunal may review the factual findings of the decision under appeal when some admissible grievances are made against them within the meaning of art. 190 (2 PILA) or exceptionally when new evidence is taken into consideration (BGG 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733 with references). New facts or evidence may only be presented to the extent that the decision of the lower jurisdiction itself justifies doing so (art. 99 (1BGG). The Appellant precedes his legal developments with a detailed statement of facts in which he presents the course of events and the proceedings from his point of view. As the Respondent rightly objects, he thus deviates in various points from the factual findings of the CAS or broadens them without claiming any exceptions to the binding character of the factual findings according to art. 105 (2) and art. 97 (1) BGG. His submissions shall be disregarded to that extent. The new evidence introduced by the Appellant is also irrelevant.

3.
Based on art. 190 (2) (b) PILA the Appellant claims that the CAS wrongly accepted jurisdiction.

3.1 The CAS initially held that in view of the WADC's duty to comply with and implement the broad purpose of the IIHF Statutes at the time, which went beyond the IIHF championships and in view of the membership of the DEB in the IHF, the Appellant had to be considered, from the point of view of the IIHF Statutes, as a player summoned for an IIHF championship or event and as such he was bound by the IIHF Statutes and had to recognize the final and binding decision power of the IIHF. On the occasion of an IIHF championship or an IIHF event, the IIHF would consequently request from the players that they sign a Player Entry Form[5] which reads in particular as follows: "I, the undersigned, declare, on my honour that a) I am under the jurisdiction of the National Association I represent. ... 1) I agree to abide by and observe the IIHF Statutes, By-Laws and Regulations (including those relating to Medical Doping Control) and the decisions by the IIHF and the Championship Directorate in all matters including disciplinary measures, not to involve any third party whatsoever outside of the IIHF Championship and/or the Statutes, By-Laws and Regulations and decisions made by the IIHF relating thereto excepting where having exhausted the appeal procedures within the IIHF in which case I undertake to submit any such dispute to the jurisdiction of the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, for definitive and final resolution".[6] The CAS rightly held that the aforesaid arbitration clause would have to meet the requirements of art. 178 PILA and that the parties agree that Swiss law is applicable. The CAS thus interpreted the Appellant's statement on the basis of the principle of trust and considered that the players would have declared themselves generally bound by the IIHF Statutes and Regulations as well as by the decisions issued by the IIHF (including disciplinary measures). The duty to seize the CAS after exhausting the internal legal remedies would apply not only to disputes in relation with the IIHF Championship but also to those which are not necessarily connected to the IIHF Championship and to the

4. Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute of December 18, 1987, on Private International Law, RS 291.

5. Translator's note: In English in the original text.

6. Translator's note: In English in the original text.

aspects of the IIHF Statutes and Regulations in relation thereto. This would result from the use of the words "and/or" in the text of *litt.* l and from the general wording of the introductory sentence in that clause. Nothing would point to an exclusion of the jurisdiction of the CAS. Moreover the CAS adjudicated that the fact that the Appellant signed the aforesaid application form almost every year since 2003 would not mean that the validity of the document would be limited to a year. Besides, the IIHF demanded repeated signatures for administrative purposes on the occasion of each IIHF Championship also from players who had already signed such a form and only in order to ensure that everyone at the present IIHF Championship would have signed the form. Since the IIHF could not know whether a player summoned to one IIHF championship would also participate in the following or in a later championship, due to injury or feeble performance, the IIHF could meet its duty towards WADA to perform sample collections during training and outside the season only if players once summoned for an IIHF Championship remain within the legal jurisdiction of the IIHF as long as they may be considered for future championships or events. According to the CAS the registration form signed by the Appellant thus meets the requirements of a valid arbitration clause. Moreover the IIHF letter of May 7, 2008 must be considered as a decision of the IIHF disciplinary Committee thus giving jurisdiction to the CAS as to the Respondent's appeal pursuant to art. 3.9 of the IIHF 2004 Disciplinary Regulations in connection with article 47-49 of the IIHF Statutes in force at the time, which allow for an appeal to the CAS. To the extent that the Appellant signed the registration form, in particular on April 26, 2007 as well as on May 1st, 2008, he is bound by these provisions.

3.2

3.2.1 The Federal Tribunal exercises free judicial review from a legal point of view as to jurisdictional grievances according to art. 190 (2) (b) PILA, including the preliminary material issues from which the determination of jurisdiction depends. On the other hand, even within the framework of an appeal as to jurisdiction, (the Federal Tribunal) reviews the factual findings of the award under appeal only to the extent that some admissible grievances within the meaning of art. 190 (2) PILA are brought forward against such factual findings or exceptionally when new evidence is taken into consideration (BGE 134 III 565 at 3.1 p. 567; 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733).

3.2.2 Being unable to determine an actual intent of the parties, the CAS accurately interpreted the statement of intent contained in the registration form according to the principle of trust (see BGE 132 III 268 at 2.3.2 p. 274 with references). The statement must therefore be interpreted as it could and should have been understood according to its wording and context and under the circumstances (BGE 133 III 61 at 2.2.1 p. 67; 132 III 268 at 2.3.2 p. 274 f; 130 III 417 at 3.2 p. 424, 686 at 4.3.1 p. 689; with references). According to *litt.* l of the inscription form, the player submits certain disputes – "such dispute"[7] – to the jurisdiction of the CAS. The preceding part of the sentence describes to which disputes this undertaking relates, namely "the resolution of any dispute whatsoever arising in connection with the IIHF Championship and/or the Statutes, By-Laws and Regulations and decisions made by the IIHF relating thereto"[8]. To begin with the wording, the use of the two words "and/or" does suggest that the statutes and regulations concerning disputes even without connection to the IIHF Championship then held would have to be submitted to the CAS, as the CAS recognized accurately in principle. On the other hand the Appellant's objection cannot be rejected out of hand, that the additional "relating thereto" must be understood as a limitation, namely that disputes relating to the statutes, regulations and decisions of the IIHF can be covered by the arbitration clause only when they are connected to the IIHF Championship. The issue needs not be analysed in depth however as the meaning of the statement at hand can be deducted from the context according to the rules of good faith.

3.2.3 The Appellant signed the registration form at the time with a view to participating in the IIHF Championship. The "Player Entry Form"[9] consisted of a one page form, on which the IIHF competition involved, its venue and date as well as the player's team were mentioned first of all. Moreover the description of the competition appeared in part already on the letterhead (for instance

7. Translator's note: In English in the original text.

8. Translator's note: In English in the original text.

9. Translator's note: In English in the original text.

in the years 2006 and 2007: "IIHF World Championship, Men"[10]) once also with the corresponding logo of the World Championship (in the year 2007: "World Championship, Russia"[11]). The player's personal data are registered in the main body of the form whilst various explanations, including the aforesaid arbitration clause are mentioned in some distinctly smaller and thus hardly readable fonts. Irrespective of the wording of the clause the player filling out and signing the inscription form in principle for a year in a recurring manner at irregular intervals should assume that his statements and the indications given relate to a specific competition. When signing with a view to a sport competition precisely described in time and space he should not take into account that he would submit at the same time in small fonts, generally and without connection to the specific championship to the jurisdiction of an arbitral tribunal for any disputes. The Respondent's argument and the reasons of the CAS, according to which a signature recurring yearly would be necessary merely for administrative purposes and would change nothing to the unlimited validity as to time and object are not persuasive. It is much more plausible that the inscription form was to be filled and signed by the players yearly precisely and exclusively with a view to the coming world championship, corresponding to its purpose, to the description as "Player Entry Form" and to its reference to a specific tournament. The Respondent failed to demonstrate a connection between the sample collection ordered on March 6, 2008 as well as the requested general suspension for two years and the IIHF World Championship taking place in Canada on May 2-11, 2008. According to the factual findings of the decision under appeal, the test was ordered neither by WADA nor by IIHF and the latter held to the contrary that it had no jurisdiction in the matter. The test was not conducted by WADA but by NADA and the German Ice Hockey Federation was primarily competent to assess its results. The reference by the CAS to the duty of the IIHF towards WADA to conduct tests during training and outside the season could not justify a connection to an IIHF competition. According to the rules of good faith, the Appellant did not have to assume that by signing the inscription form of May 1st, 2008, he would enter into an arbitration agreement which included sanctions for his behaviour as to the doping test of March 6, 2008, which had already led to disciplinary proceedings in front of the national federation. The dispute at hand as to the two years suspension requested by the Respondent in connection with the doping test conducted by NADA on March 6, 2008 is not included in the arbitration clause contained in *litt.* l of the Player Entry Form[12]. Contrary to the decision under appeal the CAS jurisdiction against the Appellant cannot be deducted from the registration form.

3.2.4 Except for the registration form to the World Championship, which has proved to be insufficient for the purposes of art. 178 PILA, the factual findings of the decision under appeal do not show any effective arbitration clause within the meaning of that provision. The Respondent flatly claims in its answer that by signing the inscription form the Appellant would have merely confirmed a pre-existing state of affairs as he belongs to a national federation participating in the World Championship which is itself a member of the international federation IIHF. Yet the CAS based its finding that the Appellant was bound to its jurisdiction on the signature of the IIHF inscription form, in particular in 2007 and 2008. In its brief it does hold that the IIHF statutes and other IIHF regulations, in particular article 3.1 of the IIHF 2004 Disciplinary Regulations established an additional legal ground for its jurisdiction, yet it refers again to the signature of the inscription form to claim that the player was bound, to the extent that it holds that the second legal basis would be deducted from the first one "in cascade". Neither the CAS nor the Respondent show concretely how the Appellant would have submitted in a formally valid and general way to the IIHF Statutes and other provisions, in particular the IIHF 2004 Disciplinary Regulations. Admittedly case law as to the validity of arbitration agreements in the field of international arbitration is generous, as shown in adjudicating the validity of arbitration agreements by reference (BGE 133III 235 at 4.3.2.3 p. 244 with references). Hence the Federal Tribunal found that a global reference to an arbitration clause contained in the statutes of a federation was valid (Decision 4A_460/2008, January 9,

10. Translator's note: In English in the original text.

11. Translator's note: In English in the original text.

12. Translator's note: In English in the original text.

2009 at 6.2; 4P.253/2003, March 25, 2004 at 5.4; 4P.230/2000, February 7, 2001 at 2A; 4C.44/1996, October 31, 1996 at 3c; see also BGE 133 III 235 at 4.3.2.3 p. 245; 129 III 727 at 5.3.1 p. 735; with references). Also, in the case of a football player who belonged to a national federation, which had in its statutes a provision according to which the members would have to abide by the rules of FIFA, it held that there was a legally valid reference to the arbitration clause contained in the FIFA Statutes (Decision 4A_460/2008, January 9, 2009 at 6.2). However, the factual findings of the decision under appeal do not show that in the case at hand there would be some corresponding relationship. Contrary to what was held in the decision under appeal there is no valid arbitration agreement according to art. 178 PILA. The CAS was wrong to accept jurisdiction to decide the case at hand on the basis of the "Player Entry Form"[13]. Whether or not on the basis of the submissions of the Parties in the arbitral proceedings, jurisdiction, if any, could be based on a reference accepted by the player to an arbitration clause contained in the regulations of a federation remains open.

4.
The Civil law appeal against international arbitral awards only purports to the annulment of the decision (see art. 77 (2) BGG), ruling out the application of art. 107 (2) BGG, with some exceptions, the conditions of which are not met here (see BGE 127 III 279 at 1b p. 282; 117 II 94 at 4 p. 95 f.). The decision of the CAS of June 23, 2009 is accordingly to be annulled as a consequence of the appeal being accepted. In view of the outcome of the proceedings the Respondent must pay the costs and compensate the other party (art. 66 (1) and art. 68 (2) BGG).

Therefore the Federal Tribunal pronounces:

1.
The appeal is accepted and the decision of the CAS of June 23, 2009 is annulled.

2.
The judicial costs, set at CHF 5'000.-, shall be paid by the Respondent.

3.
The Respondent shall pay to the Appellant an amount of CHF 6'000.- for the federal judicial proceedings.

4.
This judgment shall be notified in writing to the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, 6 November 2009

In the name of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:	The Clerk:
Klett	Leemann

13. Translator's note: In English in the original text.

4A_490/2009*
Judgement of 13 April 2010
1st Civil Division

Composition	Federal Tribunal Judge Klett, President Federal Tribunal Judge Corboz Federal Tribunal Judge Rottenberg Liatowitsch Federal Tribunal Judge Kolly Federal Tribunal Judge Kiss Clerk of the Court: Mr Leemann
Parties	Club Atlético de Madrid SAD, Appellant, represented by the attorney-at-law Mr Philipp J. Dickenmann, **versus** Sport Lisboa E Benfica - Futebol SAD, Respondent, represented by the attorney-at-law Mr Ettore Mazzilli & Fédération Internationale de Football Association (FIFA), Participant in the proceedings, represented by the attorney-at-law Mr Christian Jenny.

*** Translator's note: Quote as Club Atlético de Madrid SAD v. Sport Lisboa E Benfica - Futebol SAD and Fédération Internationale de Football Association (FIFA), 4A_490/2009. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.**

Facts

A.

A.a Club Atlético de Madrid SAD (Appellant) is a Spanish football club based in Madrid.

Sport Lisboa E Benfica - Futebol SAD (Respondent) is a Portuguese football club based in Lisbon.

Both are members of their respective National Federations, which in their turn belong to the Fédération Internationale de Football Association (FIFA; Participant in the proceedings), an Association under Swiss law having its seat in Zurich.

A.b In the beginning of September 2000 the Respondent hired the Portuguese player X._____ from the Dutch football club AFC Ajax NV. The corresponding employment contract was executed on September 13, 2000 and anticipated a duration of four seasons. The parties had a dispute shortly afterwards and player X._____ terminated the contract for cause on December 6, 2000.

On December 19, 2000 X._____ entered into a new employment contract with the Appellant. The claims and counterclaims between X._____ and the Respondent in front of the Lisbon Labour Court were settled on January 9, 2003.

B.

B.a On June 1st, 2001 the Respondent claimed compensation for training and promotion within the meaning of Art. 14.1 of the then in force FIFA Regulations for the Status and Transfer of Players[1], October 1997 edition

1. Translator's note: In English in the original German text.

(hereafter 1997 FIFA Transfer Regulation) against the Appellant.

On April 26, 2002 the FIFA Special Committee granted compensation to the Respondent in the amount of USD 2.5 million for training and promotion of player X._____.

In June 2002, the Appellant challenged the decision of the FIFA Special Committee of April 26, 2002 in front of the Commercial Court of the Canton of Zurich. In a judgement of June 21, 2004 the Commercial Court held that the decision of the FIFA Special Committee was void. It held that the 1997 FIFA Transfer Regulation violated European and Swiss Competition laws among other things and was therefore invalid, as well as the decision of the FIFA Special Committee which was based on it. No appeal was made against the judgment of the Commercial Court. The Respondent was not involved in the proceedings.

Further to the judgment of the Commercial Court, the Appellant and FIFA entered into an agreement on August 25, 2004 by which FIFA undertook to take into consideration the judgment of the Zurich Commercial Court of June 21, 2004 should the Respondent make any new claims with FIFA against the Appellant in the same matter.

B.b On October 21, 2004 the Respondent again sought a decision from FIFA as to compensation for the training and/or promotion of player X._____ and submitted that the Appellant should pay EUR 3'165'928.-. The FIFA Special Committee rejected the Respondent's claim in a decision of February 14, 2008 (notified on December 23, 2008).

B.c On January 13, 2009 the Respondent appealed the decision of the FIFA Special Committee of February 14, 2008to the Court of Arbitration for Sport (CAS) and demanded its reversal as well as EUR 3'165'928.93 plus interest or a higher amount to be determined by the arbitral tribunal, alternatively the remanding to the FIFA Special Committee for a new decision.

The Appellant opposed the appeal and among other things relied on the *res indicata* effect of the judgment of the Zurich Commercial Court of June 21, 2004.

In an award of August 31, 2009, the CAS upheld the Respondent's appeal in part and ordered the Appellant to pay EUR 400'000.- to the Respondent based on the 1997 FIFA Transfer Regulation.

C.
In a Civil law appeal the Appellant submits principally that the Federal Tribunal should set aside the CAS arbitral award of August 31, 2009.

The Respondent and the CAS submit that the appeal should be rejected. FIFA did not participate actively in the proceedings.

D.
On February 24, 2010 the Federal Tribunal rejected the Appellant's request for an interlocutory decision as to the timeliness of the answer to the appeal and the request for a time limit to file a brief in rebuttal. (The Court) also indicated to the Appellant that it would be deemed to renounce a brief in rebuttal if the brief was not filed within a few days after the decision. Consequently, the Appellant did not file a brief in rebuttal.

Considerations

1.
A Civil law appeal is allowed against arbitral awards under the requirements of Art. 190-192 PILA[2] (Art. 77 (1) BGG4[3]).

1.1 The seat of the Arbitral Tribunal is in Lausanne in this case. The Appellant and the Respondent both had their seat outside Switzerland at the relevant point in time. Since the Parties did not rule out in writing the provisions of Chapter 12 PILA, they apply (Art. 176 (1) and (2) PILA).

The CAS held that Swiss law was applicable along with the provisions of the FIFA Regulations. The Parties do not challenge the applicability of Swiss law. In the arbitral proceedings they also agreed that the 1997 FIFA Transfer Regulation applies to the issue at hand.

1.2 Only the grievances limitatively enumerated in Art. 190 (2) PILA are allowed. (BGE 134 III 186 E. 5 p. 187; 128 III 50 E. 1a p. 53; 127 III 279 E. 1a p. 282). According to Art. 77 (3) BGG the Federal Tribunal reviews only the grievances which are brought forward and reasoned in the appeal. This corresponds to the duty to provide

2. Translator's note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

3. Translator's note: BBG is the German abbreviation for the Federal Statute of June 17, 2005 organising the Federal Tribunal, RS 173.110.

reasons contained in Art. 106 (2) BGG with regard to the violation of constitutional rights and of cantonal and inter-cantonal law (BGE 134 III 186 E. 5 p. 187 with references). Criticism of an appellate nature is not allowed (BGE 119 II 380 E. 3b p. 382).

1.3 The issue as to whether the Respondent timely submitted its request to extend the time limit for its answer and thus timely submitted its brief to the Federal Tribunal needs not be explored in depth as the appeal is to be granted even in consideration of the answer.

2.

The Appellant claims that the CAS violated public policy (Art. 190 (2) (e) PILA) as it did not heed the material legal validity of the judgment of the Commercial Court of the Canton of Zurich of June 21, 2004 in the same case.

2.1 Public policy (Art. 190 (2) (e) PILA) has material and procedural contents.

Procedural public policy is breached in case of violation of fundamental and generally recognised procedural principles, the disregard of which contradicts the sense of justice in an intolerable way, so that the decision appears absolutely incompatible with the values and legal order of a state ruled by laws (BGE 132 III 389 E. 2.2.1 p. 392; 128 III 191 E. 4a p. 194; 126 III 249 E. 3b p. 253 with references).

The arbitral tribunal violates procedural public policy when it leaves unheeded in its award the material legal force of an earlier judgment or when it deviates in the final award from the opinion expressed in a preliminary award as to a material preliminary issue (BGE 128 III 191 E. 4a p. 194 with references; see also BGE 127 III 279 E. 2b p. 283). *Res indicata* is limited to the holding of the judgment. It does not extend to its reasons. The reasons of a judgment have no binding effect as to another disputed issue, but they may have to be relied upon to clarify the scope of the holding of the judgment (BGE 128 III 191 E. 4a p. 195; 125 III 8 E. 3b p. 13; 123 III 16 E. 2a p. 18 f.).

The scope of the specific holding of the case is accordingly to be assessed in each case on the basis of the entire reasons in the judgment.

2.2 The CAS was wrong to reject the defence of *res indicata* in the arbitral proceedings.

2.2.1 The CAS wrongly overlooked that the proceedings in front of the Commercial Court of the Canton of Zurich did not involve an appeal against a FIFA decision, as was the case in front of the CAS, but the impugnment of the decision of an association according to Art. 75 ZGB5[4]. Contrary to the award under review, it is irrelevant to the assessment of the legal effect of the Commercial Court judgement of June 21, 2004 that the proceedings involved were not arbitral proceedings but an "independent Swiss domestic procedure aiming to contest a decision rendered by a Swiss law association"6[5] according to Art. 75 ZGB (see BGE 127 III 279 at 2c/bb p. 284). As the Appellant rightly argues and as the Respondent does not deny, upon receiving the original decision of the FIFA Special Committee of April 26, 2002, it was not for lack of arbitrability that an arbitral tribunal could not be seized to impugn the decision, but because at the time the review of the decisions of the association by the CAS was not contemplated by the FIFA Statutes. Accordingly the FIFA decision had to be appealed to a State Court according to Art. 75 ZGB.

Contrary to the Respondent's view, the fact that the second decision of the FIFA Special Committee of February 14, 2008 could be appealed to the CAS due to the arbitration clause in the FIFA Statutes, does not change anything to the fact that these proceedings once more involved the decision of the association as to the Respondent's claim against the Appellant for the award of compensation for training and promoting player X._____.

Ultimately, the proceedings in front of the CAS, in which the Respondent challenged the denial by FIFA of the compensation sought, are nothing else than the arbitral adjudication of the impugnment of a decision of a Swiss association (see Urs Scherrer, Aktuelle Rechtsfragen bei Sportvereinen, in: Riemer [Hrsg.], Aktuelle Fragen aus dem Vereinsrecht, 2005, p. 60 f.; Heini/ Portmann, Das Schweizerische Vereinsrecht, in: Schweizerisches Privatrecht, Bd. II/5, 3. edition 2005, Rz. 285). With regard to jurisdiction, the CAS refers to Art. R47 of the CAS Code, which among other

4. Translator's note: ZGB is the German abbreviation for the Swiss Civil Code.

5 Translator's note: In English in the original German text.

things provides for an appeal against the decisions of an association (see the caption "Special Provisions Applicable to the Appeal Arbitration Procedure"[6]) and not to Art. R38 ff of the CAS Code concerning Ordinary Arbitration Procedure8[7], based on Art. R38 ff of the CAS Code, which concerns a dispute irrespective of a decision by an association (see Art. R27 CAS Code).

2.2.2 In the two proceedings in front of the Zurich Commercial Court and in front of the CAS the legality of the decision of the FIFA Special Committee as to the Respondent's claim against the Appellant as to formation and promotion of player X._____ had to be adjudicated. In a decision of June 21, 2004, the Commercial Court held that the FIFA Transfer Regulation of 1997 on which the first decision of the FIFA Special Committee relied was void because the decision was based on a transfer regulation which, among other things, was void due to a violation of European and Swiss Competition Rules. Whilst the impugnment allowed by Art. 75 ZGB may as a matter of principle only overturn a decision, the competent body of the association is bound by the judgment with which the decision of the association under review is set aside (BGE 118 II 12 at 1c p. 14 with reference to Riemer, Berner Kommentar, 3rd edition 1990, N. 82 at Art. 75 ZGB). The FIFA Special Committee had all the more to abide by the judgment of the Commercial Court that its decision was not merely rescinded due to an invalid legal basis but held to be void (see Riemer at N 129 f. at Art. 75 ZGB) and it could not proceed to award the Respondent compensation for training and promotion of player X._____ in a new decision based on the same 1997 FIFA Transfer Regulation. Accordingly, the FIFA Special Committee rejected the Respondent's renewed claim for compensation for training and promotion of player X._____ in a decision of February 14, 2008 which is correct in its result. On appeal, the CAS imposed on the Appellant compensation in the amount of EUR 400'000.- based on Art. 14 of the 1997 FIFA Transfer Regulation and set its quantum by applying Art. 42 (2) OR9[8] alternatively. In doing so it ignored the judgment of the Commercial Court of the Canton of Zurich of June 21, 2004, which held as void the Appellant's obligation to pay compensation for the formation and promotion as per the FIFA Special Committee based on the 1997 FIFA Transfer Regulation. The Respondent's argument, based on the right to be heard, that it was not a party to the proceedings in front of the Commercial Court and did not participate in them in any other way does not change the situation. The parties in front of the Commercial Court were logically determined by Art. 75 ZGB which, in an action for impugnment, always gives standing to be sued to the association and not to some other member interested in the decision (Riemer, ad N. 60 at Art. 75 ZGB; see also BGE 132 III 503 E. 3.1 p. 507). Apart from this, when the impugnment of the decision of an association or a challenge is upheld, this, as opposed to its rejection, has an effect not only as to the parties to the proceedings but *erga omnes* (Riemer, Anfechtungs- und Nichtigkeitsklage im schweizerischen Gesellschaftsrecht [AG, GmbH, Genossenschaft, Verein, Stockwerkeigentümergemeinschaft], 1998, Rz. 304, 218; derselbe, at N. 81 at Art. 75 ZGB; Heini/Scherrer, in: Basler Kommentar, Zivilgesetzbuch I, 3rd edition 2006, N. 31 and 38 at Art. 75 ZGB; see also Henk Fenners, Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport, 2006, p 75 Rz. 253; BGE 122 III 279 E. 3c/bb p.284 f. as well as Art. 706 Abs. 5 OR).

The fact that FIFA subsequently introduced an arbitral procedure to impugn its decisions, to which the Respondent is now a party and which makes it possible for the CAS to decide the case anew (Art. R57 of the CAS Code) does not change the fact that the issue in front of the CAS as to the legality of the decision by which the FIFA Special Committee granted or refused compensation between the Respondent and the Appellant as to the training and/or promotion of player X._____ had already been decided in a decision of the Commercial Court of June 21, 2004, which is enforceable. The subsequent introduction of an arbitral review of the decisions of the association remained without influence on the enforceability of the State Court decisions on impugnments previously issued. In relation to the new impugnment possibilities as well, contradictory decisions on the same issue in different proceedings had to be prevented (see Max Guldener, Schweizerisches Zivilprozessrecht, 3rd

6. Translator's note: In English in the original German text.

7. Translator's note: In English in the original German text.

8. Translator's note: OR is the German abbreviation for the Swiss Code of Obligations.

edition 1979, p.10 364). Whether or not the Commercial Court of the Canton of Zurich would have been bound by its earlier decision in which it held that the compensation awarded by FIFA was void due to the invalidity of the FIFA Transfer Regulation of 1997 had a second impugnment be made against a new FIFA decision as to compensation for player X._____'s formation and promotion, the Arbitral Tribunal obtaining jurisdiction later could not examine anew an issue which had already been decided.

2.2.3 Moreover the Arbitral Tribunal may not be followed when it holds that the Appellant and FIFA, in connection with the issue of *res iudicata*, would have provided in their agreement of August 25, 2004 following the judgment of the Zurich Commercial Court that a new claim could be made in the same matter. When FIFA undertook towards the Appellant that it would take into consideration the judgment of the Commercial Court should the Respondent make new claims against the Appellant in the same matter, this reinforced its validity for later proceedings, contrary to the view of the CAS. That (FIFA) reckoned with further claims in no way means that they would have agreed with a new adjudication of the same claims.

2.2.4 The CAS award as to compensation for training and promotion of player X._____ is barred by *res iudicata*. The arbitral award by which the CAS awarded compensation for training and promotion of the player X._____ in the amount of EUR 400'000.- on the basis of the 1997 FIFA Transfer Regulation to the Appellant in disregard of the material legal effect of the judgment of the Zurich Commercial Court of June 21, 2004 accordingly violates procedural public policy.

3.
The appeal is to be granted and the CAS Award of August 31st 2009 set aside.

In view of the outcome of the proceedings the Respondent shall pay costs and compensate the other Party (Art. 66 (1) and Art. 68 (2) BGG).

Therefore, the Federal Tribunal pronounces:

1.
The appeal is upheld and the award of August 21, 2009 is set aside.

2.
The judicial costs, set at CHF 8'500.- shall be paid by the Respondent.

3.
The Respondent shall pay to the Appellant an amount of CHF 9'500.- for the federal judicial proceedings.

4 .
This judgment shall be notified in writing to the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, 13 April 2010

In the name of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:	The Clerk:
Klett	Leemann

Observations related to the judgment of the Swiss Federal Tribunal 4A_490/2009

1. On 13 April 2010, the Swiss Federal Tribunal has annulled the CAS award issued in the case CAS 2009/A/1965 Sport Lisboa & Benfica v. Club Atlético de Madrid SAD & FIFA on the basis of a violation of Swiss procedural public policy (article 190(1)(d) of the Swiss Private International Law Act), and more precisely of the *res judicata* principle.

The CAS case concerned a dispute between the Portuguese football club Sport Lisboa & Benfica (hereinafter "Benfica") and the Spanish football club Atlético de Madrid SAD (hereinafter "Atlético") with respect to the training compensation requested by Benfica to Atlético concerning a Portuguese player on the basis of article 14(1) of the FIFA Regulations for the Status and Transfer of Players, edition 1997.

On 26 April 2002, FIFA's Special Committee issued a decision whereby Atlético was ordered to pay to Benfica an amount of USD 2,500,000 as "*compensation for the training and/or development of the player*". This sum was calculated on the basis of criteria used at that time by FIFA when deciding disputes involving breach of contracts (regardless of the title of the compensation) which included the remunerations and premiums received by the player, his career as well as his international ability.

Atlético appealed this decision before the Commercial Court of the Canton of Zurich[1]. The judicial proceeding involved FIFA and Atlético, but not Benfica who, in spite of being a direct interested party to the dispute, was not joined as a party to the proceedings.

On 21 June 2004, the Commercial Court of the Canton of Zurich issued its decision by which it rendered null and void the FIFA decision of 26 April 2002. This decision by the Commercial Court of the Canton of Zurich has not been appealed against.

On 25 August 2004, FIFA and Atlético concluded an agreement by means of which it was agreed that in the event that Benfica would lodge a new claim with FIFA for compensation for the training and/or compensation of the player, FIFA would take into account the findings of the decision of the Commercial Court of the Canton of Zurich when conducting the proceedings. Again, Benfica was not a party to this agreement.

On 21 October 2004, As indeed foreseen by FIFA and Atletico when signing the agreement, Benfica sought a new decision from FIFA on the compensation payable by Atlético for the training and/or development of the player. On 14 February 2008, the FIFA Special Committee decided to reject Benfica's claim after entering into the merits of the case.

This second decision from the FIFA Special Committee was referred to the CAS by Benfica. The CAS upheld the appeal in part and ordered Atlético to pay to Benfica the amount of EUR 400,000 based on the FIFA Regulations for the Status and Transfer of Players, 1997 edition.

2. The present comment from the Panel only aims at expressing the Panel's point of view on issues raised by the Federal Tribunal in its decision of 13 August 2010.

As stated by the Federal Tribunal itself in its judgment: "*[r]es judicata is limited to the holding of the judgment. It does not extend to its reasons. The reasons of a judgment have no binding effect as to another disputed issue, but they may have to be relied upon to clarify the scope of the holding of the judgment*".

According to the holding of the decision from the Commercial Court of the Canton of Zurich of 21 June 2004, the decision rendered by the FIFA Special Committee on 26 April 2002 is null and void. A null decision suffers from such serious irregularity that it cannot deploy any effect. Such decision is effective as long as it has not been contested and its nullity stated. The nullity of the decision means that it never existed from a legal point of view. It also implies that this decision never had any effect, even prior to the judgment stating its nullity (*ex tunc*).

When reviewing the decision from the Commercial Court of the Canton of Zurich, the Panel, like the FIFA Special Committee in its

1. At the time of the decision of FIFA's Special Committee, no appeal to CAS was available. However, pursuant to article 75 of the Swiss Civil Code, "*[e]very member of a society is absolutely entitled by law to apply to the courts to avoid any resolutions passed by the society without his assent, which are contrary to law or the constitution of the society, provided the application is made within one month from the day on which he became cognizant of such resolutions*".

second decision of 14 February 2008, following a new claim from Benfica against Atlético de Madrid, considered that the first decision from the FIFA Special Committee had been declared by the Commercial Court null and void as it had been reached arbitrarily. Based on this consideration, and the clear understanding that the dispute was a dispute on compensation for breach of contract, the FIFA Special Committee, and then the CAS Panel, entered into the substance of the dispute in order to determine objectively, applying specific criteria, whether Benfica was entitled to have its claim upheld. The CAS Panel considered that article 14 of the FIFA Regulations for the Transfer and Status of Players, edition 1997, applicable to the dispute, was not considered null and void *per se* by the Commercial Court of the Canton of Zurich, but that only the first decision rendered by the FIFA Special Committee was null and void as reached arbitrarily. The CAS Panel only reviewed the second decision from the FIFA Special Committee while respecting the decision of the Commercial Court of the Canton of Zurich as to the nullity of the first decision of the FIFA Special Committee. Therefore, the Panel considers it was complying with the *res judicata* principle.

Moreover, the Panel wishes to emphasize that article 75 of the Swiss Civil Code, on which an appeal against a decision rendered by FIFA was based[2] prior to the insertion of the arbitration clause in favor of the CAS, does not take into consideration the specificities of sport organizations. In fact, article 75 of the Swiss Civil Code is based on the premises of a vertical relationship between the association and one of its members or several of its members individually, whose rights this provision is aiming to protect. The present decision from FIFA has a judicial aspect as it settles a dispute between two of its members, and does not address the relationship between the association and its members. Therefore, when appealing the first decision from the FIFA Special Committee, even though it was legally correct to have only Atlético (the appellant) and FIFA (the association) as parties to the proceedings before the Commercial Court of the Canton of Zurich, the Panel still considers that such an appeal does not guarantee the rights of one of the concerned parties to the dispute which has been settled (in the present case Benfica), such as a CAS procedure would do.

3. In view of the definition of *res judicata* given by the Swiss Federal Tribunal which seems to allow a more intrusive control of the enforcement of judgments, and the fact that the situation was altered in application of a regulation which does not take into consideration the current organization of professional sport, the CAS Panel is of the opinion that the characteristics of the *res judicata* principle were not straightforward in the case at stake.

Lausanne, October 2010

Henrik Willem **Kesler**
President of the Panel

Efraim **Barak**
Arbitrator

José Juan **Pintó Sala**
Arbitrator

2. See note N° 1

Publications récentes relatives au TAS / Recent publications related to CAS

- Anderson P. (dir.), 2009 Annual Survey: Recent Developments in Sports Law, 20 Marquette Sports Law Review 2/2010, p. 497 ss (spéc. TAS p. 541-563)

- Crespo Perez J. D. (dir.), Tribunal Arbitral del Deporte, Revista Aranzadi de Derecho de Deporte y Entretenimiento 1/2010, p. 557 ss

- Crespo Perez J. D. (dir.), Tribunal Arbitral del Deporte, Revista Aranzadi de Derecho de Deporte y Entretenimiento 2/2010, p. 463 ss

- Dubey J.-P., Panorama 2009 des sentences du Tribunal Arbitral du Sport, Jurisport 99/2010, p. 27 ss

- Hascher D./Loquin E., Tribunal Arbitral du Sport, JDI 1/2010, chron. 1, p. 199 ss

- Maisonneuve M., Chronique de jurisprudence arbitrale en matière sportive, Revue de l'arbitrage 3/2010, p. 601 ss

- Maisonneuve M., L'arbitrage des litiges sportifs, coll. Bibliothèque de droit public, Paris: LGDJ, à paraître