



# Bulletin TAS CAS Bulletin

2014/2



**TAS / CAS**

TRIBUNAL ARBITRAL DU SPORT  
COURT OF ARBITRATION FOR SPORT

**Bulletin TAS**  
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## Message from the CAS Secretary General

With over 400 cases registered and the unprecedented number of 5 CAS ad hoc divisions constituted to resolve sport disputes arising during major sport events, 2014 has been particularly busy for the Court of Arbitration for Sport (CAS).

Hence, in addition to the “regular” ad hoc divisions organised for the Olympic Winter Games (Sochi, Russia), the Commonwealth Games (Glasgow, Scotland) and the football World Cup (Rio de Janeiro, Brazil), the International Council of Arbitration for Sport (ICAS) has created for the first time in 2014 an ad hoc Division for the Asian Games held in Incheon (South Korea) and for the Asian Beach Games held in Phuket (Thailand). Moreover, a new CAS ad hoc Division has been set up for the first time on the occasion of the 2015 Asian Cup of the Asian Football Confederation (AFC).

The beginning of 2015 was marked by the launch of a new CAS website, refreshed and easier to consult. One of the main innovation of the website is the implementation of a system of electronic filing which offers to the parties the possibility to file their written submissions and related exhibits on the CAS platform. This system has the advantage of facilitating the access to the files and to reduce the mailing costs.

Following the nomination of the ICAS members appointed for a new cycle of four years, eight new members have begun their function on 1 January 2015. These ICAS new members are (shortened bios):

- Dr Abdullah Al Hayyan (Kuwait) is a Professor of Law at Kuwait University and Head of the Kuwait National Sport Arbitration Tribunal.
- Mr Scott Blackmun (USA) is Chief Executive officer of USA Olympic Committee since 2010 and member of the IOC Marketing Commission since 2011.

- Ms Alexandra Brilliantova (Russia) is Head of Legal Department of the Russian Olympic Committee and President of the Russian Sports Law Association.
- Mr Miguel Cardenal Carro (Spain) is Professor of Law, President of the High Council for Sport and Spain's State Secretary for Education, Culture and Sport.
- Ms Carole Malinvaud (France) is partner in the Arbitration practice group of Gide Loyrette Nouel, Chair of the International Chamber of Commerce French international arbitration commission (ICC France) and of the Comité Français de l'Arbitrage.
- Justice Yvonne Mokgoro (South Africa) was Judge of the Constitutional Court of South Africa from 1994 to 2009 and Judge in the office of the Chief of Justice from 2011 to 2013. She has been selected by the President of South Africa as an official Advocate for Social Cohesion in South Africa.
- Ms Wilhelmina Thomassen (Netherlands) was Justice of the Supreme Court of the Netherlands from 2004 to 2012, Professor of International Human Rights Law from 2006 to 2009 and Judge of the European Court of Human Rights from 1998 to 2004.
- Judge Hanqin Xue (China) is Judge at the International Court of Justice since 2010 and Professor at Wuhan University School of Law.

Finally, new arbitrators and mediators have been appointed respectively bringing their number to approximately 300 and 60. The football list of arbitrators has also been enriched. The new lists are currently being updated and are available on the CAS website.

Regarding the content of this issue, the majority of the so called “leading cases” selected, i.e. seven, are related to football and

reflect the high proportion of football cases dealt with by the Court of Arbitration for Sport. Of particular note is the well-known case Luis Suárez v. FIFA which analyses the proportionality of the sanction applicable to a player having assaulted another player during a match. Among the four doping cases selected for this issue, the case WADA v. Juha Lallukka interestingly deals with the burden of proof regarding the reliability both of Growth Hormone test and of the decision limits.

Also included in this Bulletin an interesting article prepared by Professor Matt Mitten entitled “*The Court of Arbitration for Sport and its global jurisprudence: International Global Pluralism in a World Without National Boundaries*”. The role of an arbitrator in CAS proceedings has been analysed by Mr Reiner Martens who

highlights the way to prepare and conduct a hearing of a CAS case. Professor Gérald Simon addresses the admissibility of appeals by clubs against decisions related to the international transfer of players and Mr Bernard Foucher makes a practical comparison between arbitration, mediation and conciliation. Ultimately, the article of Ms Estelle de La Rochefoucauld deals with the status of minors in sport.

I wish you a pleasant reading of this new edition of the CAS Bulletin and an excellent start in 2015.

**Mathieu REEB**  
CAS Secretary General

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**Articles et commentaires**  
**Articles and Commentaries**



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## Arbitrage, Conciliation, Médiation : étude comparative à partir d'un exemple concret

Bernard Foucher\*

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### I. Approche comparative des modalités de règlement du litige examiné

#### A. Le recours au juge

1. Inconvénients du recours au juge pour régler les litiges sportifs
2. Garanties fondamentales apportées par le juge

#### B. Le recours à l'arbitrage

1. Procédure applicable en matière d'arbitrage
2. Les garanties offertes

#### C. Le recours à la médiation

1. S'agissant de la procédure
2. Les garanties offertes

#### D. Le recours à la conciliation

1. La procédure applicable
2. Les garanties offertes

### II. Intérêt du recours à la médiation ?

- A. La médiation permet de ne pas se sentir engagé dans « une voie sans retour »
  - B. la médiation offre une palette d'instruments de résolution des litiges plus large
  - C. La médiation libère de règles de procédure contraignantes
  - D. La médiation garantit la confidentialité
  - E. La médiation allège les coûts et les délais
- 

Le contentieux sportif est certainement l'un des contentieux qui se prête le plus aux modes alternatifs de règlement des litiges : arbitrage ; médiation; conciliation. La place qu'occupe aujourd'hui le Tribunal Arbitral de Sport (TAS) témoigne d'ailleurs de l'importance que revêt l'arbitrage dans le traitement des litiges sportifs.

Mais le TAS n'offre pas uniquement le mécanisme de l'arbitrage. Il offre aussi les mécanismes de médiation et de conciliation.

Un colloque tenu à Lausanne en mai dernier, sous l'égide du TAS visait précisément à promouvoir ces autres modes de règlement des conflits et plusieurs intervenants ont pu mettre en avant l'intérêt du recours à la médiation. Il a paru également intéressant de

confronter ces différents modes de résolution des litiges sportifs, dont la méthode et la portée ne sont pas les mêmes.

C'est l'objet de la présente intervention qui, à partir d'un exemple concret de litige – d'ailleurs soumis au TAS- vise à examiner son traitement selon qu'il ait été soumis à l'arbitrage, ou à la médiation, voire à la conciliation.

Le litige choisi pour illustrer ce propos opposait la Fédération Internationale de Gymnastique (FIG) à la société française G.<sup>1</sup> sur la base des données suivantes :

- La FIG avait confié à la Fédération Française de Gymnastique (FFG) le soin d'organiser les Championnats du Monde

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\* Conseiller d'Etat

<sup>1</sup> TAS 2011/A/2543.

de Sports Acrobatiques, en novembre 2010 à Metz. Pour cet événement, la société française G. avait obtenu le titre de fournisseur exclusif et avait installé à titre gratuit, 12 trampolines. Ce type d'appareils avait obtenu un certificat d'homologation de la part de la FIG.

- Lors de ces championnats, la FIG a considéré que le matériel fourni par G., n'était pas satisfaisant au double motif (i) que ces appareils installés n'étaient pas conformes au certificat d'homologation ; (ii) que de toute façon, ces matériels étaient défectueux dès lors que les ressorts n'étaient pas assez rigides et que les toiles se distendaient trop vite.
- La FIG a alors pris à l'encontre de G. les mesures suivantes : (i) une amende de 5000 euros, (ii) le retrait du certificat d'homologation des matériels en cause pour une durée de 2 ans, (iii) la publication de ces mesures sur le site et les journaux de la FIG.
- L'originalité de cette affaire est que ces mesures ont été prises sur un fondement juridique assez étonnant. Ainsi, elles n'ont pas été prises sur la base d'une violation d'un contrat commercial ou d'un contrat d'homologation qui aurait pu exister entre G. et la FIG mais sur le fondement d'une sanction disciplinaire, édictée par le « Tribunal d'Appel » de la FIG qui a « *reconnu G. coupable d'infraction aux normes prescrites dans l'article IV du Code d'Autodiscipline, en ayant fourni à une manifestation de la FIG, des trampolines comportant des ressorts défectueux ainsi que des toiles non conformes* ».
- Un litige est alors né entre G. et la FIG au sujet de ces mesures.

Dans un premier temps, il convient de se livrer à une approche comparative des modalités possibles de règlement de ce litige ; dans un second temps, de s'interroger sur l'intérêt qu'il y aurait pu avoir à soumettre ce litige à une médiation.

## I. Approche comparative des modalités de règlement du litige examiné

D'une manière générale, il existe 4 voies de règlement possibles du litige :

- Le recours au juge
- Le recours à l'arbitrage
- Le recours à la médiation
- Le recours à la conciliation

### A. Le recours au juge

Je l'évoquerai rapidement car il nous intéresse moins. Le sport essaie d'éviter le juge, ce que l'on peut le comprendre en relevant un certain nombre d'inconvénients que présente le recours au juge pour régler les litiges sportifs, tout en reconnaissant cependant que ce recours offre des garanties fondamentales.

#### 1. Inconvénients du recours au juge pour régler les litiges sportifs

- *D'abord quel juge ?* En l'espèce, en fonction de la territorialité du litige, on pouvait se demander si c'était bien un juge français qui était compétent (la société G. est une société française) ou un juge suisse (la FIG ayant son siège en Suisse). En fonction de la nature du litige, on pouvait aussi se demander quel était la catégorie de juge à devoir saisir (un juge compétent en matière disciplinaire ? ou un juge compétent en matière commerciale ?).
- *Un juge suffisamment compétent ?* Le contentieux sportif est très spécifique et même parfois très technique. En conséquence, il est plus confortable d'être assuré que le litige sera confié à des spécialistes de ce type de contentieux.
- *Avec quels délais de réponse ?* Les choses se sont certes améliorées, en tout cas en France avec le développement des procédures de référé, permettant une réponse rapide. Cependant, même en obtenant une réponse rapide, il n'est jamais certain que cette réponse soit définitive en raison des recours toujours possibles en appel et en cassation.

- Pour une réponse pas toujours adaptée ? La réponse issue de la procédure devant le juge est très souvent « binaire » : il y a un gagnant et un perdant, alors que les autres modes de règlement des litiges permettent des solutions beaucoup plus nuancées.
- Avec une publicité inévitable du jugement.

## 2. Garanties fondamentales apportées par le juge

Ceci dit, ce n'est pas le juge que je suis ou que j'ai été, qui va dénigrer le recours au juge. Il apporte en effet deux garanties fondamentales qui n'existent nulle part ailleurs.

Il s'agit, d'une part, du caractère obligatoire et contraignant du procès : le défendeur assigné devant le juge est contraint d'aller au procès ou de voir juger son affaire par défaut en ce qui le concerne. Il ne peut pas déclarer qu'il n'accepte pas l'intervention du juge et qu'il n'a pas envie d'aller devant le juge (quitte bien sûr à dénier ensuite sa compétence).

Il s'agit, d'autre part, de la force exécutoire du jugement : la solution s'impose aux parties y compris, au besoin, par la force.

## B. Le recours à l'arbitrage

Le litige en cause a été réglé –il faut tout de suite le dire– par cette voie devant le TAS (2011/A/2543). Quelle est la procédure qui s'y applique et quelles sont les garanties qu'offre ce mécanisme de résolution des litiges ?

### 1. Procédure applicable en matière d'arbitrage

La procédure d'arbitrage du TAS distingue la procédure d'arbitrage ordinaire et celle de l'arbitrage d'appel. Cette distinction revêtait en l'espèce une importance particulière. En effet, prise par un organe disciplinaire, la mesure contestée avait pour la FIG un caractère disciplinaire et en conséquence, la procédure d'arbitrage d'appel était a priori, applicable.

Cependant, la Formation s'est longuement interrogée sur la question de savoir :

- si une sanction disciplinaire pouvait être prise à l'encontre d'une société commerciale tiers, alors que notamment, selon l'article 1 du Règlement disciplinaire, sont soumis à ce règlement disciplinaire « les fédérations membres de la FIG, les gymnastes, les officiels-juges, entraîneurs, personnels médical et autres-et les membres des autorités de la FIG ».
- ou si, au contraire, la mesure contestée se rattachait à l'application d'un engagement de type commercial formalisé notamment par le certificat d'homologation. Le litige aurait alors relevé de la procédure d'arbitrage ordinaire.

Au vu de l'ensemble du dossier, la Formation a retenu la procédure d'arbitrage d'appel. Elle a en effet retenu, qu'en échange du certificat d'homologation, G. avait signé un document ainsi rédigé : « Nous nous engageons irrévocablement à reconnaître et à respecter strictement les documents suivants de la FIG : Statuts, Règlement technique, Codes de pointage et Normes des engins, Règlement pour le contrôle de publicité ». Elle acceptait par là même de se soumettre aux Règles disciplinaires de la FIG (l'Annexe V du Règlement des Normes sur les engins renvoyant au code de discipline et d'Autodiscipline dont le § V considère comme une infraction « le fait de vendre, louer, sponsoriser, offrir, livrer, installer 1) des engins non certifiés (ou différents de ceux certifiés) ; 2) des engins de mauvaise qualité ».

Bien évidemment, que ce soit pour l'arbitrage d'appel ou l'arbitrage ordinaire, le consentement des parties est une condition indispensable pour admettre la légitimité du TAS à intervenir et donc fonder sa compétence. Il n'y avait pas de difficultés ici. Ainsi, selon les statuts de la FIG : art21 et 42.1 (donc explicitement reconnus par G.) : « Toute décisions du Tribunal d'Appel de la FIG peut exclusivement faire l'objet d'un appel auprès du TAS » ce qui validait cette compétence dans le cadre d'un arbitrage d'appel. En outre G., en contre partie du certificat d'homologation reconnaissait que : « Tous litiges découlant de

*l'homologation seront portés devant le TAS, la voie de droit ordinaire étant exclue* » ce qui aurait validé également la compétence du TAS dans le cadre d'un arbitrage ordinaire.

A noter que les modalités de procédure sont plus restrictives pour l'arbitrage d'appel que pour l'arbitrage ordinaire : le délai de recours est en principe de 21 jours à compter de la notification de la mesure contestée (selon le Code de l'arbitrage). Par ailleurs, le « cadrage » de la présentation et de l'instruction (déclaration d'appel puis motivation de l'appel) est plus strict.

## 2. Les garanties offertes

Elles ne sont pas tout à fait les mêmes que celles relatives au recours au juge.

La réponse apportée au litige a bien la même valeur juridique puisque la sentence arbitrale a un caractère exécutoire comme le jugement prononcé par le juge. Certes ce caractère exécutoire passe par la reconnaissance des Etats de la formule de l'arbitrage formalisée notamment par la Convention de New York. Mais la plupart des Etats ont validé le système de l'arbitrage et signé cette convention.

On peut noter aussi que la sentence du TAS peut faire l'objet d'un renvoi au Tribunal Fédéral Suisse (TFS) ; mais le jugement d'un juge peut aussi être renvoyé en cassation et même avant en appel.

Cependant, le recours à l'arbitrage ne peut être contraint : il faut, à la différence du recours au juge, que les parties soient d'accord pour « arbitrer ».

## C. Le recours à la médiation

Aurait-t-on pu soumettre ce litige à la médiation ?

On aurait pu effectivement soumettre ce litige à la médiation, mais à la condition de considérer que ce litige se rattachait à un différend d'ordre commercial et contractuel et non pas comme cela a été retenu, à un

contentieux disciplinaire. L'art. 1 du Règlement de Médiation du TAS limite en effet le champ d'application de la médiation à « la résolution des litiges relevant de la procédure ordinaire du TAS. Tous les litiges relatifs à des affaires disciplinaires, de même que les affaires de dopage sont expressément exclus de la Médiation du TAS ».

A supposer donc que cette condition ait été remplie- ce qui pouvait en l'espèce, ne pas être totalement exclu -, *qu'est ce qui aurait changé ?*

### 1. S'agissant de la procédure

D'une manière générale, les parties auraient bénéficié d'une plus grande souplesse dans le déroulement de la procédure et de ses modalités.

Comme pour l'arbitrage, la médiation n'aurait été possible qu'avec l'accord de volonté des parties de recourir à la médiation. Mais cet accord de volonté résultant d'une clause de médiation dans un contrat ou, ultérieurement, d'une convention de médiation (Art. 2 Règlement de Médiation) – à l'instar de la clause arbitrale dans un contrat ou dans un règlement ou une convention d'arbitrage ultérieure (Art.27 Code de l'arbitrage)- a une portée beaucoup plus grande dans la procédure de Médiation.

D'une part, et notamment dans la procédure d'arbitrage d'appel où la clause arbitrale figure généralement dans le règlement d'une fédération, il n'est pas toujours certain que le sportif en ayant pris une licence ait compris que cette licence l'engageait à respecter toutes les clauses du règlement en cause et notamment l'arbitrage du TAS en cas de litige.

D'autre part, dans la Médiation les parties ou l'une d'entre elles gardent toujours la liberté de se « retirer » de la Médiation et donc de ne pas poursuivre le règlement du litige. Elles n'ont pas cette liberté dans l'Arbitrage. En ayant exprimé leur volonté de s'y soumettre, la Formation d'arbitrage peut très bien rendre une sentence par défaut de participation du défendeur (Art.44.5 du Code de l'arbitrage).

- L'intervention d'un seul médiateur et non pas de trois arbitres comme généralement dans l'arbitrage, peut aussi paraître plus simple tant au regard de la facilité de désignation qu'au regard des coûts (en soulignant néanmoins qu'une formation collégiale offre une meilleure garantie de traitement du litige), et peut être au regard des délais.
- Le choix du médiateur – comme dans l'arbitrage- appartient aux parties. Mais si en cas de désaccord, ce choix revient au Président du TAS, il ne le fait qu'après consultation des parties (Art.6 du Règlement médiation) alors que dans la procédure d'arbitrage, le Président de la Chambre y procède de manière impérative (Art. 40.2 Code arbitrage), ce qui souligne encore l'importance des parties dans le cadre de la médiation.
- Les conditions de saisine du Médiateur ne sont pas strictement enfermées dans un délai, à la différence de la procédure d'arbitrage d'appel.
- Les modalités de procédures sont également beaucoup plus souples. La procédure est en effet à l'initiative des parties : « *La procédure de médiation se déroule de la manière décidée par les parties* » ; ce n'est pas le cas de l'arbitrage où la procédure est encadrée par des règles strictes. Par exemple, il n'y a pas de limite quant au nombre des échanges de mémoires. Le contradictoire peut être assoupli : « *Toute information reçue d'une partie ne peut être révélée par le médiateur à l'autre partie qu'avec le consentement de la partie concernée* » (Art.10). Le médiateur peut aussi se réunir séparément avec l'une des parties s'il l'estime nécessaire » (Art.8).

## 2. Les garanties offertes

Elles restent toutefois moindres que dans l'arbitrage.

L'arbitrage aboutit à une solution formalisée par une sentence. Cette sentence a un caractère exécutoire.

La Médiation peut ou non aboutir à une solution, le médiateur constatant le cas échéant un échec. Si elle aboutit à une solution celle-ci peut être formalisée par une ou des propositions émises par le médiateur. En tout état de cause, la solution doit être acceptée par les parties qui doivent alors manifester leur accord à l'accepter et à la respecter. Cet accord est alors formalisé par la signature d'un accord voire d'une transaction mais celle-ci n'a d'effet pour autant que les parties aient manifesté leur volonté de l'accepter et de la respecter.

## D. Le recours à la conciliation

Je considère tout d'abord qu'il n'y a pas vraiment de différence de nature entre médiation et conciliation. Les deux termes et méthodes visent à offrir à des parties en litige, un intermédiaire qui va tenter de faciliter la discussion entre les parties et de les aider à faire émerger une solution acceptable par elles. Si différence il y a, elle se limite peut être au fait que le médiateur a un rôle de facilitateur sans obligation de formuler une proposition formelle de solution, alors que le conciliateur se doit coûte que coûte de présenter une proposition ? C'est en tout cas dans ce sens que se situe le système de conciliation pratiqué dans le contentieux sportif français.

Supposons donc maintenant que le litige examiné se situe en France et oppose pour les mêmes raisons G. et la FFG. *Que se serait-il passé ?*

Il faut savoir que le législateur français a mis en place en 1992, pour la plupart des contentieux sportifs, un système de conciliation avec pour objectif d'éviter l'encombrement des juridictions étatiques et d'essayer de régler les litiges au sein de la famille sportive. La mise en œuvre de ce système a été confié au CNOSF à charge pour lui de désigner une liste de conciliateurs (21 au maximum) et de faire fonctionner ce mécanisme. Au bout de 20 ans, 4500 affaires environ ont été traitées avec un taux de réussite de l'ordre de 70% à savoir que le litige à été résolu par la conciliation.

Aurait-on pu alors soumettre notre litige à la conciliation ?

Oui mais à la condition que ce litige relève d'un contentieux disciplinaire et non pas d'un contentieux contractuel ou commercial. Notre système de conciliation ne s'applique en effet qu'aux décisions prises par les fédérations sportives « *dans l'exercice de prérogatives de puissance publique ou en application des statuts* ».

En un mot, il faut savoir qu'en France les fédérations sportives agissent « au nom de l'Etat » pour tout ce qui concerne l'organisation d'une discipline sportive et le fonctionnement des compétitions. Ainsi toutes les décisions qu'elles prennent dans ces domaines (donc décisions relatives aux athlètes, -discipline ; sélection... ; décisions relatives aux compétitions...) sont des décisions de nature administrative d'ailleurs du ressort du juge administratif (et non judiciaire). Ce sont donc toutes ces décisions (et bien les plus nombreuses) qui relèvent de la conciliation.

En revanche les litiges contractuels (Ex. contrat d'octroi des droits télé entre Fédération Française de Football (FFF) et Canal+ ; contrat entre un club et un joueur) ne sont pas visés. C'est la raison pour laquelle a été mise en place une instance d'arbitrage : la Chambre d'Arbitrage Sportif offrant à côté du système de la conciliation, un mode de résolution par la voie de l'arbitrage pour ce type de litiges.

En l'espèce, notre litige, se rattachant à une décision disciplinaire relève de la conciliation.

Qu'est ce qui aurait changé ?

### 1. La procédure applicable

D'une manière générale, on constate beaucoup plus de rigidité que dans la médiation au TAS.

- Ainsi, le recours à la conciliation a un caractère obligatoire du fait de l'impossibilité de poursuivre le contentieux

devant le juge si les parties ne sont pas passées par la « case conciliation ». Le juge déclarera en effet la requête irrecevable si elle n'a pas été précédée de la conciliation. C'est évidemment un peu paradoxal avec le principe même de la conciliation dont la mise en place ne peut résulter que d'un accord de volonté des parties. C'est la loi qui a imposé cette obligation qui aboutit à devoir considérer que ce système s'apparente surtout à un mécanisme de recours préalable obligatoire même s'il emprunte tous les instruments de la conciliation.

- L'absence de choix du conciliateur. Ce ne sont pas les parties qui le choisissent, mais le président de la Conférence des Conciliateurs en fonction de la nature du dossier et de la disponibilité des conciliateurs qui interviennent à titre bénévole.
- Une procédure beaucoup plus encadrée. Un décret est venu préciser la procédure applicable avec notamment :
  - ✓ l'existence de délais de recours (en principe 2 mois)
  - ✓ la présentation d'une demande écrite de conciliation assortie d'un exposé des faits, de conclusions et de moyens
  - ✓ le respect du contradictoire et la tenue d'une audience
  - ✓ l'effet suspensif de la décision contestée à partir de la désignation du conciliateur
  - ✓ la notification aux parties d'une proposition dans le délai d'un mois

### 2. Les garanties offertes

Elles sont certainement moindre que dans l'arbitrage mais supérieures à celles offertes par le système de médiation devant le TAS.

Comme pour la médiation, le conciliateur ne peut pas imposer une solution.

Si, dans à peine 5% des cas le conciliateur parvient à faire signer à l'audience un accord ou une transaction entre les parties, pour la quasi-totalité des litiges, il formule une proposition de solution qui est notifiée aux parties et que celles-ci sont libres d'accepter ou de refuser.

Cependant, il convient de souligner que:

- le conciliateur est tenu de rédiger une proposition de conciliation qui est une proposition de solution du litige. Il doit donc s'engager. Cette proposition est communiquée au juge en cas de poursuite du contentieux au tribunal et servira à éclairer le juge ;
- si la proposition de conciliation n'a pas un caractère exécutoire, un mécanisme d'acceptation tacite de cette proposition est cependant prévu. Si en effet les parties n'ont pas manifesté de manière expresse leur désaccord à cette proposition dans le délai d'un mois à compter de la réception de cette proposition, cette dernière est réputée être acceptée et s'applique non pas avec une autorité de la chose jugée mais avec l'autorité de « la chose conciliée » ce qui veut dire que la partie qui ne respecte pas la solution engage sa responsabilité.

L'autre « garantie » qu'offre ce système comme indiqué précédemment est le caractère obligatoire de la conciliation. Il est certain que cet aspect change tout et est à l'origine du taux de réussite (70% des propositions sont acceptées) de la conciliation « à la française ».

## II. Intérêt du recours à la médiation ?

Le litige examiné a été réglé devant le TAS - on l'a dit - par la voie de l'arbitrage. La Formation a estimé que le grief de non conformité des engins avec le certificat d'homologation n'était pas établi dès lors que le certificat d'homologation ne visait aucune définition précise quant à la rigidité des ressorts et la tenue des toiles. Elle a en revanche estimé que ces engins comportaient quelques défauts qui ont été corrigés au cours de la compétition et qui n'ont en rien

altéré le bon déroulement des épreuves. Elle a donc maintenu une amende mais supprimé le retrait de l'homologation qui avait été prononcé pour deux ans.

L'avantage de l'arbitrage a donc été de disposer d'une solution définitive qui s'imposait aux parties.

On pourrait alors se demander quel intérêt il y aurait eu à ce que les parties, au lieu de supporter les frais de trois arbitres, choisissent de recourir à la médiation, au risque de ne pas aboutir à une solution ou à une solution qui ne s'imposait nullement aux parties ?

Plusieurs considérations peuvent cependant plaider en faveur du système de la médiation.

### A. La médiation permet de ne pas se sentir engagé dans « une voie sans retour »

- La médiation va permettre aux parties de « tester » la pertinence de leurs arguments juridiques et de leurs prétentions.
- La médiation va également leur permettre, à partir des observations du médiateur, de disposer d'« un conseil juridique » relatif au litige et, à partir de là, d'éventuellement mieux préparer la suite du litige s'il se poursuit en arbitrage ou en juridiction.
- La médiation va permettre aux parties de mieux mesurer ainsi leurs chances de succès de « continuer » ou non le contentieux et ce, même en disposant d'une proposition de solution. Les parties peuvent aussi trouver ici l'opportunité et les moyens de régler certains points du litige sans pour autant le résoudre complètement.
- Certes, on ne saurait dénier que l'intérêt premier de la médiation est bien de résoudre le litige, mais cette liberté qu'ont les parties à tout moment de garder l'initiative et de ne pas se sentir « prisonnières » de la médiation est à mon sens l'argument le plus « vendeur » de la médiation.

## **B. La médiation offre une palette d'instruments de résolution des litiges bien plus large**

Devant le juge ou même devant l'arbitre, l'instrument de résolution des litiges reste avant tout le droit. La solution résulte de l'application du droit, beaucoup plus rarement de l'équité. Le juge aura surtout du mal à tenir compte de la spécificité de la règle sportive, face à la règle étatique (faut-il le redire, l'arrêt Bosman en est un exemple significatif, au niveau de la règle européenne). C'est d'ailleurs cette rigidité du droit étatique (ou européen) qui fait le succès du recours à l'arbitrage au TAS qui, tout en appliquant le droit, tient compte de l'ordre sportif et des règles sportives.

Devant le médiateur, les instruments sont beaucoup plus larges :

- Ce peut être l'équité : le médiateur (comme l'arbitre) s'y réfère en fonction des cas d'espèce, en faisant parfois prévaloir l'équité sportive sur la lettre de la règle.
- Ce peut être le bon sens : dans certains cas, face à des contentieux où aucune des parties n'est assurée juridiquement de son bon droit, la loi du terrain peut être la meilleure réponse et la solution peut consister tout simplement à faire rejouer le match litigieux.
- Ce peut être l'efficacité. Je ne sais si on peut dire « *qu'un mauvais arrangement vaut mieux qu'un bon procès* » mais ce peut être le cas dans certains litiges comme par exemple dans le cas d'une mesure disciplinaire dont la procédure est viciée mais dont la justification est établie et pour laquelle la solution pourra consister à admettre une réduction de peine mettant fin à tout contentieux.

Dans l'utilisation de ces « instruments », l'art du médiateur est évidemment déterminant. C'est à lui d'apprécier en fonction de chaque cas d'espèce si on peut s'éloigner du droit, quels sont les leviers de nature à faire avancer le litige, de quelle persuasion et psychologies il

doit faire preuve pour arriver à un résultat (dont la solution ne saurait cependant contrevenir à l'ordre public).

## **C. La médiation libère de règles de procédures contraignantes**

Il faudrait reprendre ici tout ce qui a été dit sur les procédures de ces différents modes de résolution des litiges. Rappelons surtout et ajoutons que dans la médiation:

- le respect du contradictoire n'est pas formalisé
- les droits de la défense sont plus souples
- il n'y a pas d'exigence de motivation de la solution

## **D. La médiation garantit la confidentialité**

La résolution d'un litige par la voie de l'arbitrage ne met pas totalement les parties à l'abri de la confidentialité du dossier –et encore moins, bien sûr, lorsqu'elles ont recours au juge qui rend un jugement qui a un caractère public.

La médiation, en revanche offre cette garantie de confidentialité qui pour certains litiges (les litiges de nature commerciale notamment) constitue un paramètre essentiel. Dans le litige examiné par exemple, la société G aurait eu tout intérêt à éviter tout risque de publicité, les données de son affaire pouvant mettre en cause sa notoriété commerciale.

## **E. La médiation allège les coûts et les délais**

Il est évident que la procédure beaucoup plus simplifiée applicable à la médiation et le principe du recours à un seul médiateur, ont un impact positif sur les coûts engendrés par ce mode de résolution des litiges ainsi que sur les délais dans lesquels peut être menée la médiation.

**En conclusion**, il importe de souligner que tous ces modes alternatifs de règlement des

litiges sportifs sont amenés à coexister et qu'il convient de retenir celui qui paraît le mieux adapté au traitement d'une affaire, en fonction du cas d'espèce et en ayant bien mesuré les avantages et les inconvénients qu'il présente.

La médiation doit pouvoir y trouver sa juste place et il n'est pas inutile de l'aider aujourd'hui à la conquérir

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# Minors in Sport

Estelle de La Rochefoucauld\*

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### I. Introduction

This Article analyses the existing framework related to minors in sport and more specifically in the doping and in the football field which are the two domains mainly covered by the current minor-related provisions.

Under the World Anti-Doping Code (WADAC) 2009<sup>1</sup>, a minor is defined as “*a natural person who has not reached the age of majority as established by the applicable laws of his or her country of residence*”.

Under the FIFA Regulations on the Status and Transfer of Players (FIFA RSTP) 2014, a minor is defined as a player who has not yet reached the age of 18.

The main question is whether the fact to be minor justifies a special treatment in sport.

In a doping context in particular the question is whether a minor has sufficient discernment and autonomy to be considered totally responsible for his actions. Thus, should a minor be regarded as an adult or like in the existing system of criminal law adopted in many countries, should he or she receive a different and more lenient treatment?

In the football field, we will see that the provisions concerning minors are primarily designed to protect and avoid the exploitation of young players in the context of transfers.

In the following pages we will examine, in light of the CAS jurisprudence, the impact of age on the applicability of the Anti-Doping rules on the one hand and on the international transfer of minors football players on the other hand.

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\* Counsel to the CAS.

<sup>1</sup> The World Anti-Doping Code is the document that brings consistency to anti-doping rules, regulations and policies worldwide. Adopted in 2003 and entered into force on 1 January 2004, a first revised version came into force on 1 January 2009. A further

revised version will come into force on 1 January 2015.

## II. Minors and doping

### A. Disciplinary proceedings in sport are governed by civil law rather than by criminal law

The CAS has already clarified that disciplinary proceedings in sport are governed by civil law rather than by criminal law. Therefore, the argument according to which the age limit for criminal responsibility should be taken into account to assess whether a sanction may be taken against a minor has not been accepted by CAS panels.

The case 2010/A/2268 well illustrates the CAS position:

*“There is a difference as to the nature of sporting and criminal sanctions and between the effects of doping sanctions imposed by a sporting federation and those of criminal punishments. The disciplinary powers of a federation are an expression of an association’s genuine autonomy to regulate its own sporting affairs. Hence, the types of disciplinary measures that may be imposed on an individual are limited by the association’s scope. They are directed – solely – to the individual’s associative life... The personal restriction deriving from such a sanction [the ineligibility for a given period] concerns, therefore, only the possibility of practicing organized sport. For everything else that is not related to the associative sphere, the sanctioned athlete may lead a normal life. These limited effects of sporting sanctions cannot be compared to the hardship and the stigma of a criminal punishment”<sup>2</sup>.*

The Swiss Federal Tribunal has also clarified that sports disciplinary rules are civil law rules and not criminal rules and that judging bodies must apply civil law principles, rather than criminal law principles<sup>3</sup>.

On its side, the WADC’ Introduction provides as follows:

*«These sport-specific rules and procedures aimed at enforcing anti-doping rules in a global and harmonized way are distinct in nature from and are, therefore, not intended to be subject to or limited by any national requirements and legal standards applicable to criminal proceedings».*

Furthermore, the 2005 UNESCO International Convention against Doping in Sport states that “States Parties commit themselves to the principles of the [WADA] Code” (Art. 4.1). Art. 2.2 of the UNESCO Convention recognizes that all anti-doping organizations are “responsible for adopting rules for initiating, implementing or enforcing any part of the doping control process” and Art. 16(g) provides that State Parties should “mutually recognize the doping control procedures and test results management, including the sport sanctions thereof, of any anti-doping organization that are consistent with the [WADA] Code”.

Therefore, national legislations recognize as legitimate the anti-doping rules based on the WADC, including the sanctions, and admit that anti-doping law cannot be taken for criminal law<sup>4</sup>.

Moreover, if the argument -according to which the age limit for criminal responsibility should be taken into account to assess whether a sanction may be taken against a minor- was to be retained, there would be a distinction between athletes of different ages competing in the same event and therefore discrimination. Further, the age of criminal responsibility being different from country to country, the submission to anti-doping sanctions would depend on the athletes’ nationality. In other words, athletes having

<sup>2</sup> CAS 2010/A/2268 I. v. FIA, 15 September 2011, paras. 99-100 & s.

<sup>3</sup> See STF 2nd Civil Division, in its Judgment of 31 March 1999, 5P.83/1999, para. 3.d.

<sup>4</sup> 2268 op. cit. fn 2, para. 105.

attained the age of majority or of criminal responsibility could be sanctioned whereas minors or athletes too young to be considered capable of criminal responsibility would benefit from immunity from sanctions. Obviously, such situation would be unfair.

### **B. The applicable regime of sanctions is not contrary to human right**

The WADAC is generally considered to be consistent with the human rights regulations and with public policy<sup>5</sup>.

In this respect, CAS jurisprudence and various legal opinions acknowledge that the WADC regime is not contrary to human rights legislation<sup>6</sup>.

The Swiss Federal Tribunal's case law has also established that breaches of personality rights such as doping sanctions imposed by sports organizations should not be regarded as non-compliant with public policy under Art. 190 (2) (e) of the Swiss Private International Law Act<sup>7</sup>.

Hence, the imposition of a two-year ban for a first violation of anti-doping rules has been generally considered as proportionate under Swiss law by the Swiss Federal Tribunal<sup>8</sup>.

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<sup>5</sup> CAS 2011/A/2307 WADA v. Johson Leandro Pereira de Oliveira, CBF & STJD, 14 Sept. 2011, paras. 175 & 177 ff.

<sup>6</sup> CAS 2004/A/690 D. Hipperdinger v. ATP, 24 March 2005; CAS 2005/A/830 G Squizzato v. FINA, 15 July 2005; CAS 2009/A/2012 Doping Authority Netherlands v. Mr Nick Zuijkerbuijk, 11 June 2010, para 47; Prof. G. Kaufmann-Kohler, Prof. G. Malinverni and Dr. A. Rigozzi, Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law, 26 February 2003, p 5 and 6; and Dr. C. Roullier, Legal Opinion 25 October 2005, p 33 et seq.

<sup>7</sup> Decision dated 31 March 1999, in: Reeb M. (ed.), Digest of CAS Awards II 1998-2000, 2002, p 775 et seq., in particular 780 consid. 3 (c).; Decision dated 4 August 2006, in ASA Bull 2007, p 105; cited in Dr.

### **C. The same regime is applicable for minors and for adults**

According to a consistent CAS jurisprudence, it is the participation of an athlete in sporting events and not the age of an athlete, which determine the application of the anti-doping rules<sup>9</sup>. Generally speaking, the young age of an athlete is not a circumstance which, by itself, warrants an immunity from or an alleviation of anti-doping rules<sup>10</sup>. In other words, the anti-doping rules must apply in equal fashion to all participants in competitions they govern, irrespective of the participant's age<sup>11</sup>.

In this respect, in CAS case 2006/A/1032, the Panel considered that:

*“The reason for ignoring the age of the athlete is that either an athlete is capable of properly understanding and managing her/his anti-doping responsibilities, whatever her/his age, in which case she/he must be deemed fully responsible for her/his acts as a competitor, or the athlete is not mature enough and must either not participate in competitions or have her/his anti-doping responsibilities exercised by a person – coach, parent, guardian, etc. – who is capable of such understanding and management. In the latter case, the only way to ensure equality of treatment between participants and to protect the psychological,*

A. Rigozzi, Legal Opinion on the Conformity of the Exclusion of 'Team Athletes' from Organized Training during their Period of Ineligibility with Swiss law, including the General Principles of Proportionality and Equal Treatment, 9 July 2008, p 28.

<sup>8</sup> H Hausheer and R Aebi-Müller, *Sanktionen gegen Sportler – Voraussetzungen und Rahmenbedingungen, unter besonderer Berücksichtigung der Doping Problematik*, RSJB 2001. See also 2010/A/2311, 2312 NADO & KNSB v. W., 22 August 2011, paras. 9.26 & 9.27.

<sup>9</sup> See CAS 2006/A/1032 Karantancheva v. ITF, 3 July 2006, paras. 137, 139.

<sup>10</sup> 2268, op. cit. fn 2, para.115.

<sup>11</sup> 2311, 2312 op. cit. fn 8, para. 9.22.

*moral and physical health of younger athletes is to require that their representatives meet the same standards as any adult athlete. Otherwise, unscrupulous or negligent coaches, parents, guardians, etc. will be in a position to take the risk of blame while knowing that their protégés are safe from sanction. That would open the door to a possible system of doping abuse that would put the youngest athletes at the highest risk when in fact they need the most protection. In other words, any attempt to reduce the responsibility of younger athletes due to their age will in fact increase their vulnerability”<sup>12</sup>.*

In order to protect the Athletes’ fundamental right to compete in a clean sport and thus promote health, fairness and equality for athletes worldwide, the comment to Art. 10.2 WADAC specifies that “[M]inors are not given special treatment per se in determining the applicable sanction”<sup>13</sup>. There is no wording in the provisions of the WADC 2009, or in the official comments in the latter, indicating that the responsibility of minors should be assessed differently and foreseeing a different regime for minors.

In light of CAS jurisprudence, we will see that minors participating in a competition are submitted to the same rules than adult athletes – anti-doping rule violations, prohibited list, doping control procedure, athlete’s duties, proof of doping, disciplinary sanctions. Again, there is no automatic exception based on age since such an exception would not only possibly cause unequal treatment of athletes, but could also threatens the whole mechanism and logic of anti-doping rules<sup>14</sup>.

- Minor participating in a competition are submitted to the sporting rules adopted and published by their international federation

Athletes, whatever their age, are submitted to the sporting rules adopted and published by their international federation. It would not be conceivable that an athlete might take part in an international competition sanctioned by an international federation without, at the same time, being subject to the sporting rules of that international federation. In this respect, the signing by the athlete of the application form for the International sport Licence is a clear acceptance of the International Federation Anti-Doping Rules (ADR). Furthermore, the requested signing of the entry form concerning a particular sport event must be seen as the athlete’s clear acceptance of all the rules adopted and published by the sporting organizations sanctioning such event<sup>15</sup>. Minors participating in a competition are therefore submitted to the same rules and procedures than adults<sup>16</sup>.

- Minors are subject to the same duties than adults

Every athlete has the duty to be aware of the contents of the WADA Prohibited List and to ensure that no prohibited substance enters his or her body. Pursuant to the legal principle *ignorantia legis neminem excusat*, an athlete may not escape anti-doping liability merely because he or she was ignorant of the content of anti-doping rules. Pertinently, the first paragraph of Article 2 of the WADC states that “*athletes or other persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substance and methods which have been included on the Prohibited List*”. By not containing any specific provision related to minors, the article suggests that all athletes are concerned by this duty.

By the same token, an athlete, irrespective of

<sup>12</sup> Op. cit. fn 8.

<sup>13</sup> WADAC preamble & CAS 2268, op. cit. fn 2, paras. 113 & 114.

<sup>14</sup> see CAS 2003/A/459 Van Herk v. FINA, CAS 2005/A/830 op. cit. fn 6, CAS 2006/A/1032 op. cit.

fn 8, para. 140 – 142 & 1132 Ismail Mohammed v. FEI, 29 November 2006.

<sup>15</sup> 2268, op. cit. fn 2, paras.69 ff.

<sup>16</sup> 2268, op. cit. fn 2, para. 93.

his age, has the duty to ensure that any product he or she used –medication or supplement- does not contain any substance forbidden on the Prohibited List<sup>17</sup>.

In this regard, in CAS 2005/A/830, despite the fact that the athlete was aged 17, the Panel found the athlete negligent to use a medical product without the advice of a doctor. The athlete was therefore considered responsible for the doping offence. In this particular case, the negligence of the swimmer in omitting to check the content of the product used was considered not significant, as it appeared that the latter had no intention to gain an advantage. The Panel found therefore that the negligence was mild compared to athletes who are using doping product to gain an advantage towards other competitors<sup>18</sup>.

More recently, in CAS 2011/A/2523, the Panel found that the athlete, an international-level roller sports athlete who tested positive for methylhexanamine, a Specified Substance under the 2010 prohibited list, failed in her duty to verify the source and ingredients of the products she ingested and had not established that she bore No Significant Fault or Negligence. The Panel found therefore no ground to reduce the sanction according to Art. 10.5.2 FIRS ADP despite the fact that the athlete was aged 16 when she tested positive<sup>19</sup>.

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<sup>17</sup> See CAS 2011/A/2524 WADA v. Federación Colombiana de Patinaje & Anhlly Andrea Perez Moreno, 23 August 2012, para. 5.30; CAS 2007/A/1413 WADA v. FIG & N. Vysotskaya, para. 80; CAS 2011/A/2523 WADA v. Federación Colombiana de Patinaje & Yenny Paola Serrano Burgos, 23 August 2012, para.5.34.

<sup>18</sup> op. cit. fn 6, paras. 10.11 – 10.14.

<sup>19</sup> It is the Panel's view that an athlete, in order to fulfill his or her duty according to Art. 2.1 FIRS ADP, has to be active to ensure that a medication or a supplement that he or she uses does not contain any compound that is on the Prohibited List. In the

- Minors participating in a competition are subject to the same disciplinary consequences than adults

The CAS jurisprudence has affirmed that in principle the young age of an athlete is not a circumstance which, by itself, warrants an immunity from or a reduction of anti-doping rules. In this respect, in CAS 2010/A/2268, the fact that a minor tested positive for the presence of "Nikethamide", a Specified Substance included in the class S6 b (stimulants) of the WADA prohibited list was considered irrelevant. The minor was a Polish kart driver aged 12 years old who, in the context of a karting competition, underwent a positive test. A young athlete must bear all the "normal" consequences of such competitions, including doping control procedures and disciplinary sanctions. The panel also stressed that this duty is especially appropriate since one can observe the rejuvenation of athletes appearing at international events<sup>20</sup>.

In CAS 2005/A/830, the age of the athlete, a swimmer of 17 years old was also irrelevant and was not considered as 'Exceptional Circumstances' justifying a reduction of the athlete's responsibility. The swimmer had been competing for 10 years and 17 years old athletes competing at the highest level in swimming are not rare<sup>21</sup>.

present case, the Athlete has not done anything to ensure this, even if one considers her youth. The Panel is of the view that the Athlete has not established that she bears No Significant Fault or Negligence. Therefore, the Panel finds no ground to reduce the sanction according to Art. 10.5.2 FIRS ADP (2523 op. cit. fn 17, para. 5.33,5.34).

See also 2524, fn 17 para. 5.30 and 2007/A/1413 WADA v/ FIG & N. Vysotskaya, paras. 80 & 81.

<sup>20</sup> CAS 2268, op. cit. fn 2, para.110.

<sup>21</sup> CAS 2005/A/830 op. cit. fn 6.

In CAS 2003/A/447, the age of the athlete was not considered to be an exceptional circumstance either warranting a reduction of the sanction<sup>22</sup>. The athlete had been negligent to use a medical product without the advice of a doctor and was therefore considered responsible for the doping offence.

- To benefit from a reduced sanction for No Fault or Negligence or for No Significant Fault or Negligence as provided in the WADAC, minor athletes would need to demonstrate the route of ingestion of the prohibited substance to the Panel's comfortable satisfaction

This is a prerequisite for being able to apply the mitigating grounds<sup>23</sup>.

In CAS 2009/A/1954, the Panel considered that<sup>24</sup>:

*“Notwithstanding the assessment of the Athlete’s youth and inexperience, it is, nevertheless, still a prerequisite according to Art. 10.5.2 that the Athlete can prove, how the Prohibited Substance entered his system”.*

#### **D. Consideration of age as exceptional circumstance when assessing an appropriate sanction**

If the same regime is in principle applicable for minors and for adults, age might be considered as exceptional circumstance when assessing an appropriate sanction.

The comment to Art. 10.5.2 of the 2009 WADC foresees that: *“While minors are not given special treatment per se in determining the*

*applicable sanction, certainly youth and lack of experience are relevant factors to be assessed in determining the athlete or other person’s fault under Art. 10.5.2 [No Significant Fault or Negligence] as well as Art. 10.3.3 [Whereabouts Filing Failures and/or Missed Tests] 10.4 [Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances] and 10.5.1 [No Fault or Negligence].”*

The following examples show that the young age of athletes, the principle of proportionality, the report for submission to adults, inexperience and lack of doping education, lack of intention to enhance performance or mask the use of a prohibited substance are favourable factors justifying a reduction of the otherwise applicable sanction.

In the above mentioned case 2268, the panel recognized that a two years suspension should in principle be imposed on the young kart driver since no element allowed a reduction of the ineligibility period under Articles 10.4 [Elimination or Reduction of the period of ineligibility for Specified Substances under Specific Circumstances] or 10.5 [Elimination or Reduction of the period of ineligibility for Based on Exceptional Circumstances]. Yet, the Panel noted that the principle of proportionality is a fundamental principle of sports law and reminded that even after the entry into force of the WADC, the CAS has recognized that any anti-doping sanction inflicted by a sports federation – that is, a private association – must in any event be consistent with the principle of proportionality: The panel found that *“the*

<sup>22</sup> CAS 2003/A/447 S. v. FINA, 30 January 2004, para. 10.8: “...age does not fall within the category of “Exceptional Circumstances” which warrant consideration in reducing the term of ineligibility”.

<sup>23</sup> See 2011/A/2336 WADA v. FCL & Margarita Mercado Villarreal & CAS 2011/A/2339 WADA v. FCL & Katerine Mercado Villarreal, 2 March 2012, para. 95; CAS 2008/A/1471 FINA v. Tagliaferri and

Federazione Italiana Nuoto & CAS 2008/A/1486 WADA v. CONI and Tagliaferri, 5 February 2009, para. 9.5.2.; CAS 2006/A/1032 op. cit. fn 9 at paras 139 *et seq.*

<sup>24</sup> CAS 2009/A/1954 WADA v. Confederação Brasileira de Judô (CBJ) & Victor Penalber, 20 May 2010, para. 6.14.

*principle of proportionality may mandate a judging body, in particular circumstances, to reduce the sanction below what is provided by the applicable sports rules derived from the WADC*". Moreover, the panel stressed that *"the weighing of any anti-doping sanction on the basis of the principle of proportionality is not only inherent in sports law but is also mandated by European Union (EU) law"*... *"[It] is also one of the general principles of law recognized by the Swiss legal system, which is the legal system under which CAS awards may be reviewed"*. In this regard, taking into account the youth of the kart driver, the youth category in which the athlete competed, the fact that the sense of fairness and justice would be affected if a 12 years child was applied the same sanction a an adult competing at top level and the fact that the overall effect of the sanction would extend far beyond the 2 years, the Panel exceptionally decided that an eighteen months period of ineligibility should be considered as proportionate to the offense<sup>25</sup>.

In case 2403, the athlete, a gymnast affiliated with the Ukrainian Gymnastics Federation (UGF) was 15 years old at the time of the positive testing for the Specified Substance Furosemide. The Panel was satisfied that the athlete established on the balance of probabilities the reason for the presence of the substance in her body namely that Furosemide entered her system through the ingestion of the prescription medication Lasix. The panel held that an athlete bears a high responsibility in the choice of his medical attendant and that caution must be exercised in the ingestion of medication. However, for an athlete of 15 years of age at the time of the offence much of the responsibility normally accorded to an athlete must be expected of the athlete's coaches and the federation. When considering the appropriate sanction, the Panel must also consider if the decision relating to the health

of the athlete –the prescription- had to be taken quickly, or if the athlete did ask the treating doctor whether the medication prescribed could lead to a violation and if the response given was inaccurate. The Panel found that a suspension of four months was justified considering the seriousness of the offense, the fundamental responsibility of the athlete and her young age and lack of experience<sup>26</sup>.

In CAS case 2493, the athlete, Vaton Zyberi, was still at school age and ignored what was given to him – Nicéthamide, a specified stimulant included in the 2011 list of substances and methods prohibited in competition- when he received what he thought was grape sugar. In those circumstances, the Panel found that the route of ingestion of the prohibited substance in the body of the athlete was not contested, as well as the lack of improvement of the performance of the athlete, respectively the fact that the specified substance found was not used either to mask the use of a performance enhancing substance. Consequently, the Panel held that Art. 10. 4 of the Statute on Doping 2009 of the Swiss Olympic Association clearly applied. The Panel also considered that the athlete being still of compulsory school age at the time of the doping control, was not only minor, but still young enough to have a report for submission to the adult, in this case to his coach, whom his parents entrusted. Knowing also that he was not yet old enough to start a vocational training with all that entails learning in the adult world, it was necessary to take into account this circumstance to reduce the penalty within the meaning of Art. 10. 4 of the applicable Swiss Statute on Doping. Given the very slight fault, the Panel found justified to stick to the minimum sanction provided by the Statute. Therefore,

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<sup>25</sup> See 2268 op. cit. fn 2, para. 132-143.

<sup>26</sup> CAS 2011/A/2403 WADA v. Fédération Internationale de Gymnastique (FIG), 25 August 2011.

in lieu of a suspension, a reprimand was imposed on Vaton Zyberi<sup>27</sup>.

Likewise, in CAS case 2311, the Panel confirmed that if there is no special anti-doping regime for minors, “*the young age of an athlete can be taken into account inasmuch as it has an impact on the athlete’s fault*”<sup>28</sup>. However in this case, the Respondent who was 15 years old had not submitted any facts demonstrating a link between his age and his degree of fault. The Panel, thus, found the athlete guilty of having committed an anti-doping rule violation caused by the presence of the prohibited substance norandrosterone (anabolic agent) in his sample.

In CAS case 1558, the Panel considered that the young age of the athlete, a South African horse rider who was 17 and who refused to submit to doping control should not be regarded as an exceptional circumstance. The Panel found in this case that young athletes cannot escape responsibility for the actions of parents who are in control of their athletic career especially where according to the testimony of the athlete’s father, his son was free at all times to provide a sample if he wished to do so. There were therefore no ground to reduce the athlete’s sanction on the basis of the provisions of Art. 10.5.2 of the FEI AD Rules.

### **E. Minor’s representation**

In CAS case 2268, the panel had the opportunity to interpret the notion of joint responsibility and representation of a minor. It held that once a young athlete is introduced with the consent of both parents in a context of international competitions, he must bear

all the “normal” consequences of such competitions, including doping control procedures and disciplinary sanctions. A young driver could not avoid, just because one of his parents was not present at the race, a sanction deriving from an unsportlike and dangerous behaviour or a sanction for an anti-doping violation.

*“The joint representation by the parents of a child does not require that both parents be present and expressly give their consent on every possible occasion when the minor could act in a way that could bring about [...] disciplinary consequences for the child”... “A “factual” joint representation – meant as the actual need for the presence and expression of consent of both parents in a concrete circumstance – might be required only in situations characterized by a particular significance, which cannot be defined as a “normal act”. This interpretation of the notion of joint responsibility and representation of a minor is very common all over Europe, and can be deemed to be a generally accepted legal principle”.* Bank transactions, surgical interventions, choice of the name of the child are among the practical examples of circumstances in which the joint representation of the parents is actually necessary<sup>29</sup>.

### **F. Modifications introduced by the new WADAC**

After almost two years of consultation and over 2000 amendments, a revised World Anti-Doping Code has been adopted in November 2013 in Johannesburg (South Africa). The new Code will come into force on 1 January 2015.

By modifying the sanctioning regime, the new Code aspires to be fairer than in the past. To achieve this goal, the revised Code has introduced provisions targeting and imposing stricter penalties for real cheats while

<sup>27</sup> CAS 2011/A/2493 Antidoping Switzerland c. Vaton Zyberi, 29 novembre 2011, para. 46.

<sup>28</sup> CAS 2010/A/2311 Stichting Anti-Doping Autoriteit Nederland (NADO) & the Koninklijke

Nederlandsche Schaatsenrijders Bond (KNSB) v. W., 22 August 2011, para. 9.28.

<sup>29</sup> See 2268 op. cit. fn 2, paras.78-82.

inadvertent dopers may benefit from more flexibility.

Contrary to the current WADAC, the new Code creates *de facto* a special status for minors.

Under the new WADC 2015, a minor is defined as “[A] natural Person who has not reached the age of eighteen years”.

Hence, the definition of No Fault or Negligence establishes a special and more flexible regime for minors.

*“No Fault or Negligence: The Athlete or other Person’s establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Art. 2.1 [presence of a prohibited substance], the Athlete must also establish how the Prohibited Substance entered his or her system””.*

As of 1 January 2015, minors will therefore no longer be required to establish how the prohibited substance entered their system to be eligible for a finding of No Significant Fault or Negligence.

Moreover, Art. 20.3.10 and 20.5.9 establish an obligation for International Federations and National Anti-Doping Organizations to automatically investigate Athlete Support Personnel when a minor is found to have committed an Anti-Doping violation. In addition, under the new Article 14.3.6, the publication of the sanction is not mandatory for a minor athlete whereas it becomes so for adults under the new regime.

In conclusion, the new Code introduces a more lenient regime for minors. For example, a swimmer aged 17 won’t be required to establish how the prohibited substance entered his system to benefit from the No

Significant Fault or Negligence regime.

### III. Minors and Football: International Transfer of Minor Players

#### A. Principle: Prohibition of International Transfer of Minors

Art. 19 of the FIFA RSTP 2014 referring to the protection of minors provides as follows:

1.  
*International transfers of players are only permitted if the player is over the age of 18.*
2.  
*The following three exceptions to this rule apply:*
  - a) *The player’s parents move to the country in which the new club is located for reasons not linked to football;*
  - b) *The transfer takes place within the territory of the European Union (EU) or European Economic Area (EEA) and the player is aged between 16 and 18. In this case, the new club must fulfil the following minimum obligations:*
    - i) *It shall provide the player with an adequate football education and/or training in line with the highest national standards.*
    - ii) *It shall guarantee the player an academic and/or school and/or vocational education and/or training, in addition to his football education and/or training, which will allow the player to pursue a career other than football should he cease playing professional football.*
    - iii) *It shall make all necessary arrangements to ensure that the player is looked after in the best possible way (optimum living standards with a host family or in club accommodation, appointment of a mentor at the club, etc.).*
    - iv) *It shall, on registration of such a player, provide the relevant association with proof that it is complying with the aforementioned obligations;*

c) *The player lives no further than 50km from a national border and the club with which the player wishes to be registered in the neighbouring association is also within 50km of that border. The maximum distance between the player's domicile and the club's headquarters shall be 100km. In such cases, the player must continue to live at home and the two associations concerned must give their explicit consent.*

CAS panels consistently stressed the importance of strictly enforcing the three exceptions since they constitute an exception to an essential rule aimed at protecting a fundamental legal right i.e. the safety of minor players and at avoiding any form of abuse linked to the youth of the players<sup>30</sup>.

According to its Circular Letter no. 801, dated 28 March 2002, FIFA also presses on the strict application of the rules on the protection of minors<sup>31</sup>.

CAS Panels consider that Art. 19 applies equally to amateur and professional minor players. In CAS case 1485, the Panel found that “*a literal construction of the provision does not indicate that the application of the provision would be limited to professional players*”. In this regard, chapter V of the RSTP, under which Art. 19 is included, is entitled “*International Transfers involving Minors*”. The term “*Transfer*” is to be bound to the concept of “*Registration*”, which as indicated in Art. 5 para. 1 of the RSTP applies to both amateur and professional players. Moreover, Art. 19 refers to the “*Protection of Minors*” and Art. 19 para. 1 mentions the international transfer of “*Players*” in general without any clarification as to the status of these players as

professional or amateur. Therefore, it appears clear that the aim of Art. 19 is to protect minor players in general<sup>32</sup>.

### **B. Compatibility of Art. 19 with EC policy and exclusion of the direct application of EC law**

At all times, CAS Panels have concluded that the prohibition of international transfers of under aged players complies with the European Community policy since the ban has a legitimate interest, namely the protection of young players, and since CAS Panels found that the prohibition is proportionate to the objective pursued. Therefore the rules contained in Art. 19 of the FIFA Regulations do not violate any provision, rule or principle of Community law<sup>33</sup>.

In this regard, in CAS case 1485, the appellants submitted that a strict application of Art. 19 of the RSTP would infringe the EC Regulations, notably the Cotonou Agreement, which should be considered as included in the existing EC Legislation, the case law of the European Court of Justice prohibiting any discrimination based on nationality as regards working conditions and Art. 12 of the Charter of Fundamental Rights of the European Union providing for the freedom of assembly and of association.

The Cotonou Agreement has been concluded between members of certain African, Caribbean and Pacific (ACP) States on the one part, and the European Community and its member states, on the other part in order

<sup>30</sup> See TAS 2011/A/2494 FC Girondins de Bordeaux c. FIFA, 22 décembre 2011, para. 61 and CAS 2007/A/1403, para. 81, p. 16 (laudo).

<sup>31</sup> TAS 955 & 956 2005/A/955 Cádiz C.F., SAD v. FIFA and Asociación Paraguaya de Fútbol, 30 December 2005, 7.3.9 et s.

<sup>32</sup> CAS 2008/A/1485 FC Midtjylland A/S v. FIFA, 6 March 2009, paras. 7.2.4 and 7.2.5.

<sup>33</sup> TAS 2012/A/2862 FC Girondins de Bordeaux c. FIFA, 11 janvier 2013; CAS 2005/A/955 & 956, especially para. 7.2 and 1485 op. cit. fn 32, paras. 7.4.2 – 7.4.3.; TAS/2005/A/983-984 Peñarol c. Bueno Rodriguez et PSG, 12 juillet 2006, especially para. 62 and following.

to promote and expedite the economic, cultural and social development of the ACP group of States, with a view to contributing to peace and security and to promoting a stable and democratic political environment. In particular, Art. 13 para. 3 of the Cotonou Agreement, 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”.*

Non-discrimination referred to in this provision is related to employment terms and conditions only, but not to access to employment. Accordingly, Players who are not workers but students are outside of the scope of application of Art. 13 para. 3 of the Cotonou Agreement<sup>34</sup>.

Consequently, the rules provided by Art. 19 RSTP do not contradict any provision, principle or rule of EC Law, of mandatory nature or not.

With regard the direct effect and the scope of any Partnership Agreements concluded between the EC and third countries, which ensures that the treatment accorded to foreigners legally employed in the territory of a member State shall be free from any discrimination based on nationality as

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<sup>34</sup> See 1485 op. cit. fn 32, para. 7.4.11 – 7.4.15. Those partnership agreements 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 States, without any restriction.

compared to EC nationals, the European Court of Justice considered that the relevant provision of those Agreements have a scope of application only related to working conditions, remuneration or dismissal, and not to the rules concerning access to employment. Therefore, players having a status of students are outside of the scope of application of this jurisprudence of the ECJ<sup>35</sup>.

Furthermore, contrary to the appellant's submissions in CAS case 1485, it is well recognised by CAS jurisprudence that EC Law is not directly binding upon the CAS, as regards disputes connected with FIFA Regulations. In this respect, not only Art. R58 of the Code of Sports-related Arbitration provides that CAS Panels shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties but in cases involving FIFA, the parties generally recognise the FIFA Statutes, which provide for the application of FIFA regulations and, additionally, Swiss law. Moreover, pursuant to the Swiss doctrine and to CAS jurisprudence, Art. 187 of the Swiss Private International Law 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<sup>36</sup>. As a result, before the CAS, the direct application of EC Law provisions or principles are in principle excluded by the parties unless the latter are able to demonstrate that an EC provision is of a mandatory nature according to the applicable Swiss law<sup>37</sup>.

<sup>35</sup> See judgment of the Court of Justice dated 12 April 2005, in the case C-265/03, Igor Simutenkov v. Ministerio de Educacion y Cultura and Real Federacion Espanola de Football, para. 37.

<sup>36</sup> Antonio Rigozzi, *L'arbitrage international en matière de sport*, Bâle 2005, No. 1178.

<sup>37</sup> Jean-François Poudret / Sébastien Besson, *Comparative Law of International Arbitration*, 2<sup>nd</sup> edition, London 2007, N. 707 c, page 615: “In order to claim that a specific provision of EC Law is to be

In CAS case 2862, the appellant's club, FC Girondins de Bordeaux, submitted that the application of Art. 19 para. 2 letter b breached the player's right to the protection of property provided by Art. 1 of the Additional Protocol of the European Convention on Human Rights (ECHR) and the right to privacy guaranteed by Art. 8 ECHR. The Panel however excluded the direct application of EC law<sup>38</sup>. The Panel reminded that the fundamental rights and procedural guarantees provided by international treaties for the protection of human rights are not intended to apply directly to private relations between individuals and therefore do not apply in disciplinary cases heard by private associations - fundamental rights are rather applicable in the vertical relationship between the state and the individual. This position is consistent with the case law of the Swiss Federal Tribunal<sup>39</sup> and with the Swiss doctrine<sup>40</sup>.

Finally, in CAS case 1485, contrary to the Appellant submission, the Panel considered that the Charter of Fundamental Rights is not a legal document having binding effect. In consequence, one cannot rely upon Art. 12 on the freedom of assembly and of association in order to declare any legally enforceable right. Hence, 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 since Art. 19 of the RSTP does

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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".

<sup>38</sup> See 2862 op. cit. fn 33, paras.105 & 106.

<sup>39</sup> See Federal Court judgment of 11 June 2001, Abel Xavier c. UEFA consid. 2 (d), reprinted in Bull ASA, 2001, which, in the context of an appeal against a decision of the CAS, clarified: "The appellant relies on the art. 27 Cst. and 8 ECHR. However, he has not been subject to a state measure, so that these

not prevent the Players from playing football or from joining other people in order to play football.

### **C. Exceptions to the principle prohibiting the transfer of minor players: Art 19 al. 2 et seq.**

The general rule prohibiting the international transfer of players under age eighteen has three exceptions that can be summarized as:

- The player's parents settled in the country of the club for reasons unrelated to football; (Art. 19 para. 2 letter a).
- The transfer takes place within the European Union (EU) or European Economic Area (EEA), the player is aged sixteen to eighteen years and certain additional criteria are met by the new club (Art. 19 para. 2 letter b).
- The player lives close from a border and the club with which the player wishes to be registered is close to this border (maximum distance, Art. 19 para.2 letter c).

Under Swiss law, the statutes of an association as well as the regulations enacted by an association should be interpreted according to the meaning of the text as it can and should be understood, taking into account the overall circumstances<sup>41</sup>.

provisions are in principle not applicable". Free translation of «Le recourant invoque les art. 27 Cst. et 8 CEDH. Il n'a cependant pas fait l'objet d'une mesure étatique, de sorte que ces dispositions ne sont en principe pas applicables».

<sup>40</sup> A. Rigozzi/G. Kaufmann-Kohler/G. Malinverni, *Doping and Fundamental Rights of Athletes : Comments in the Wake of the Adoption of the World Anti-Doping Code*, International Sports Law Review, 2003, pp. 46-47.

<sup>41</sup> J.-F. Perrin/ C. Chapuis, *Droit de l'association*, 3ème éd., Genève 2008, ad art. 63 CC, pp. 38-39 and

According to the general principles of law, the laws of Switzerland, FIFA and CAS jurisprudence, exceptions should be strictly interpreted<sup>42</sup>.

In CAS case 1485, the Panel has however considered that the list of exceptions of Art. 19 para. 2 is not exhaustive and that Art. 19 para. 2 can be interpreted as allowing the application of unwritten exceptions concerning students<sup>43</sup>:

- The international transfer of minors is allowed in cases where the players concerned could establish without any doubt that the reason for relocation to another country was related to their studies, and not to their activity as football players.
- The international transfer is also allowed in cases in which the Association of origin and the new club of the players concerned have signed an agreement within the scope of a development program for young players under certain strict conditions (agreement on the academic and/or school education, authorization granted for a limited period of time).

#### 1. Art. 19 para. 2 letter a) RSTP

The player's parents settle in the country of the club for reasons unrelated to football.

CAS case law has clarified the context in which Art. 19 para. 2 letter a) RSTP should apply<sup>44</sup>. Under 2011/A/2494, the words "for reasons unrelated to football" in Art. 19 para. 2 letter a) should not be interpreted extensively that is beyond the objective pursued by that text. However, the panel held that any link between the Player's parents move to the country in which the

new club is located and the practice of football by their child in this club cannot be absolutely prohibitive. In fact, the protection sought by this provision targets essentially two separate cases:

- the minor player would suffer from a social, cultural, economic and/or educational uprooting, or from a sporting or commercial exploitation of his football potential at the expense of his well-being and personal development;
- the Player's parents move to the country in which the new club is located for reasons not linked to football would prevent the under aged player to continue to practice football in his new country of destination without any good reason.

This second hypothesis means that a minor player should certainly be able to settle abroad with his family without being penalized in his football development, provided this move is not precisely motivated by its football practice. Art. 19 para. 2 letter a) must therefore protect the minor who follows his family settling abroad for personal reasons but not the parents who follow their child in order to integrate their child in a club located abroad. The notion of intent in the goal sought by the parents of the minor player seems decisive. In this respect, it is not necessary to establish that the priority of the minor's parents is the football practice of their child. Indeed, the mere fact that the move of the parents is based on reasons that are not unrelated to football exclude the application of the exception provided for in

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H. M. Riemer, *Berner Kommentar, Das Personenrecht*, 3ème éd., Berne 1990, N 349 ad Systematischer Teil, p. 147; P. Zen-Ruffinen, *Droit du Sport*, Zürich Bâle Genève 2002, N 170, p. 63.

<sup>42</sup> CAS 2007/A/1403, para. 81, p. 16 fn 29 & TAS 2862, op. cit. fn 33 para. 90 fn 32.

<sup>43</sup> See 1485, op. cit. fn 32, paras. 7.3.3-7.3.4.

<sup>44</sup> See 2494, op. cit. fn 30, paras. 62 a & b, 63, 64.

Art. 19 para. 2 letter a) RSTP<sup>45</sup>.

For example, in the first Vada case (2011), an Italian player under 15 residing in Argentina joined the French Football Club Girondins de Bordeaux with his family. The Panel found that if the presence of Valentin Vada in France appeared to be motivated in part by personal and human reasons, the fact remained that the objective analysis of the case and of the testimonies presented at the hearing showed that there was a strong link between the practice of football by Valentin Vada and the life project of the Vada family<sup>46</sup>. The Panel took into consideration the existence of a partnership between the Argentinean club Proyecto Crecer -whose goal is to allow French clubs to discover new young Argentinean talents and, where appropriate, to give them the opportunity to develop within a European club level- and the French Football Club as well as the fact that Valentin Vada joined several times the French Club for football camps. In the particular case, the choice of Valentin Vada's parents to move to France was not motivated by professional reasons insofar as Mr. Vada has a technical background and a qualification as a sport teacher in Argentina which is not recognized in France. Mr Vada explained his wish to obtain the recognition of his training and education in France and, where appropriate, to work one day in this area. However, the concept of "reasons unrelated to football" in Art. 19 para. 2 letter a) RSTP makes reference, to a large extent, to persons with a special training - sometimes highly qualified – whose professional career's evolution implies to move abroad. That was clearly not the case of Mr. Vada since he had to accept a job requiring no such training in order to meet its obligations of maintenance. Moreover, his wife, was unemployed<sup>47</sup>.

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<sup>45</sup> Id., para. 64.

<sup>46</sup> Id. para. 73.

In CAS case 2354, the CAS stressed that the Commentary to Art. 19 para. 2 a) FIFA RSTP calls for an interpretation of the term "parents" *stricto sensu*. Although the Panel held that the term "parents" could "*conceivably cover situations beyond the natural parents*", the Panel found that it did not cover the case at hand. The natural mother of the football player did not move at the time when her son moved from Bosnia and Herzegovina to Germany. As a consequence, the provision of Art. 19 para. 2 letter a) allowing the international transfer of a minor player where the player's parents settle in the country of the club for reasons unrelated to football could not be invoked as a legal basis in order to authorize an international transfer for under aged player. The player's residence might have been at his aunt's house, however, she was not a parent to the player. Moreover, the aunt's reasons for moving to Germany from Bosnia and Herzegovina were not clarified before the CAS Panel, but apparently were unrelated to the Player<sup>48</sup>.

## 2. Art. 19.2 para. 2 letter b) RSTP

The transfer takes place within the European Union (EU) or European Economic Area (EEA), the player is aged sixteen to eighteen years and certain additional criteria are met by the new club.

In 2011, the CAS Panel stressed in the case CAS case 2354 that Art. 19.2 para. 2 letter b) is limited to a well-defined geographic scope. The transfer should take place between clubs located within the European Union (EU) or European Economic Area (EEA). Therefore, as Bosnia-Herzegovina -which is the country where the player was coming from- is neither a member of the EU, nor of the EEA, the exception would not apply. In his briefs, the Appellant had, however, suggested that this

<sup>47</sup> Id. 2494 paras. 65-67.

<sup>48</sup> 2011/A/2354 Elmir Muhic v. FIFA, 24 August 2011, paras. 44, 45.

provision might apply to the facts of this case by analogy in light of the Stabilization and Association Agreement signed between the EU and Bosnia and Herzegovina<sup>49</sup>. Yet, the CAS Panel noted that, as a matter of principle, the rationale for Art. 19 para. 2 letter b) is clear and aimed at recognising free movement of services and services suppliers within the EU and the EEA and exceptionally allowing for international transfers of under-aged players. The Stabilization and Association Agreement contains only trade provisions and does not anywhere address free movement<sup>50</sup>.

With respect to Art. 19 para. 2 letter b), in a subsequent 2012 Vada case, the Italian player at the time aged between sixteen to eighteen years was residing in Argentina and was still wishing to be transferred to the French Football Club Girondins de Bordeaux. This time, the French Football Federation entered a second request for approval in the FIFA transfer managing system (TMS) based on Art. 19 para.2 letter b) RSTP. The FIFA sole judge rejected the request holding that the exception was not applicable for the player, an Italian citizen registered with a club affiliated to the Argentine Football Association wishing to be transferred to a club located in France i.e. in the EU. Such transfer does not meet the strict requirements of the exception, which clearly refers to a transfer taking place within the territory of the EU or EEA. The exception is based on a criterion of territoriality without consideration to a nationality test. The French Club appealed the decision to the CAS.

The CAS panel reminded that in principle exceptions should be strictly interpreted. Accordingly, the exception of Art. 19 para. 2 letter b) FIFA RSTP should be applicable only where the transfer takes place between

clubs located within the EU or EEA. Art. 19 para. 2 letter b) does not indeed make any reference to a nationality criterion.

However, the Panel referred to the internal memo produced by the Appellant -FC Girondins de Bordeaux- entitled "*Protection of minors – case-law of the sub-commission of the FIFA Commission of the Statute of Player*" presenting the jurisprudence linked to Art. 19 RSTP. This memo specifies that there is no established case law regarding EU citizens seeking to be transferred from outside EU or EEA toward a club located in the EU or EEA. The memo stressed that although two divergent interpretations have been followed by the sub-commission, in most cases, the interpretation tends to include the exception in question as being intended to apply the freedom of movement of workers as from the age of 16 in accordance with the European legislation. In addition, this document also contains developments in connection with the case law of the sub-commission not based on the exceptions of art. 19 para. 2 RSTP. The internal memo provides in this respect that "*It is worth remembering that the jurisprudence of the sub-commission was very strict in maintaining that, in principle, the list of exceptions contained in art. 19 of the regulations and [...] the related case law is exhaustive. However, if a club believes that very special circumstances, which do not meet any of the exceptions provided by the FIFA regulations justify the registration of a minor player, the association of the club concerned may, on behalf of its affiliate, submit a formal request in writing to the FIFA sub-commission to consider the specific case and make a formal decision*"<sup>51</sup>.

The Panel also noted that the FIFA RSTP has been the subject of a commentary available on the website of FIFA according to which the exception contained in Art. 19 para. 2 letter b) was included in the agreement signed

<sup>49</sup> Council Regulation 594/2008 of June 16, 2008.

<sup>50</sup> See 2354, op. cit. 48, para. 47-49.

<sup>51</sup> Free translation.

in March 2001 between the EU and FIFA/UEFA in order to respect the principle of free movement of workers within the EU/EEA<sup>52</sup>.

Furthermore, the Panel referred to the 1485 jurisprudence – mentioned above- pursuant to which Art. 19 para. 2 can be interpreted as allowing the application of unwritten exceptions concerning students<sup>53</sup>.

The foregoing considerations led the Panel to consider that there is an unwritten exception in the RSTP authorizing a player with the nationality of one of the country members of the EU or EEA to benefit from the exception in Art. 19 para. 2 letter b) FIFA Regulations, provided that his new club guarantees the player's education and sports training (additional criteria of Art. 19 para. 2 letter b) i, ii, iii and iv)<sup>54</sup>.

### 3. Art. 19 para. 2 letter c) RSTP

For the time being, Art. 19 para. 2 letter c) RSTP providing the possibility for a minor player living close from a border to be transferred to “*a club registered in the neighbouring association and located within 50km of that border*” has not been subject to any particular case law.

## IV. Concluding remarks

In the doping field, it is interesting to note that according to the current WADAC, there is no specific regime for minors whereas the new Code creates a special status for minors. Future CAS case law will show how this special status will be actually applied.

In the football context, it can be seen that despite the principle of strict interpretation and the *de facto* strict application of the rule concerning minor players under 16 with art. 19 para. 2 letter a), both the CAS and FIFA have considered the list of exceptions of Art. 19 para. 2 letter b) as non-exhaustive.

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<sup>52</sup> FIFA RSTP Commentary fn 95 page 58.

<sup>53</sup> See 1485 op. cit. fn 32, paras. 7.3.3-7.3.4.

<sup>54</sup> See 2862 op. cit. fn 33, paras. 96-98.

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## The Role of the Arbitrator in CAS Proceedings

Dr. Dirk Reiner Martens\*

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Author's note<sup>1</sup>: This paper sets out the personal views of the author based on his almost 30 years of experience as a CAS arbitrator. It is in no way intended to be an official CAS guideline nor is it designed to describe the "best way" of proceeding as a CAS arbitrator.

Furthermore, this paper is not an academic treatise, rather, it simply aims at providing guidance to newcomers to the family of CAS arbitrators and attempts to give some suggestions as to the most efficient way of conducting a CAS hearing.

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\* Dr. Dirk-Reiner Martens, Martens Rechtsanwälte, Agnesstr. 14, 80798 Munich, Germany, Telephone: +49-89-452 44 22 0, Facsimile: +49-89-452 44 22 99, [www.martens-lawyers.com](http://www.martens-lawyers.com)

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## I. Introduction

The Court of Arbitration for Sport ("CAS") is not simply another organisation offering arbitration services. CAS operates in a very special sector of society and at the same time resolves disputes in one of the largest industries of the world, which is estimated to account for 3% of world trade. Just as an arbitrator at the London Metal Exchange should be familiar with the peculiarities of trading in copper and steel, the ideal CAS arbitrator not only has experience in arbitration but also an in-depth understanding of the world of sport which is special in many ways.

The features of arbitration that are commonly mentioned as being the advantages to resolving disputes through arbitration (rather than through state court litigation) must be examined through the prism of sport (2. below).

CAS cases are primarily international disputes and are decided by arbitrators from a variety of countries with markedly diverse legal traditions<sup>2</sup>, a fact which makes CAS popular with members of the sports community from around the world and which – incidentally – makes the work as a CAS arbitrator so challenging. There can be no question that an arbitrator from Los Angeles has a different approach to conducting arbitration than his or her colleague from Switzerland. The different perception of the role of the judge in common law and civil law may not necessarily produce different end results, but it certainly accounts for some of the major differences from a procedural point of view

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<sup>2</sup> It should be noted that S16 of the CAS Code ("the Code") expressly postulates that in establishing the list of CAS arbitrators, the International Council for Arbitration in Sport (ICAS) "*shall consider continental representation and the different juridical cultures*".

<sup>3</sup> According to the 2013 International Arbitration Survey on Corporate choices in International

(3. below). This, in turn, leads to differences in how CAS arbitrators act from the initial phase of a CAS arbitration, being the appointment of the arbitrator until the hearing (4. below), and will have a major impact on how a hearing is conducted (5. below) and also on how an award is drafted (6. below).

The author of this paper has been trained in civil law but has always thoroughly enjoyed being part of panels of arbitrators with different legal backgrounds. My colleagues from the other side will forgive me for showing a certain preference for the civil law approach to arbitration which will clearly show in the reflections which follow.

## II. The Perceived Advantages of Arbitration from a Sports Law Perspective

Promoters of arbitration commonly mention at least the following features when praising the advantages of arbitration versus state court litigation, particularly in an international environment:

- speed
- low cost
- confidentiality
- procedural versatility
- easier to enforce

### A. Is Arbitration Quicker?

It certainly should be, but often is not!<sup>3</sup>

Arbitration conducted by PwC and the School of International Arbitration at Queen Mary, University of London (based on the responses of 101 corporate counsel), the length of the proceedings and costs were the two most commonly cited **disadvantages** of arbitration, p. 9.

It has become commonplace to complain about the increasing duration of commercial arbitration and the most popular arbitration institutions put significant efforts into speeding up the process.

CAS arbitrators operate in the short-lived world of sport and have an absolute duty to bring their cases to a quick resolution. The fact that they do not always succeed often cannot be blamed on them. Frequent delays are often the result of the parties' actions – or non-actions! Nevertheless, a lot can be done by the arbitrators to accelerate the proceedings and the following chapters will touch upon ways of how to do it.

### B. Low Cost?

To a large extent, the low cost argument in comparison with state court litigation in complex international cases speaks in favour of arbitration only for the reason that unlike state court judgements, arbitration awards cannot be appealed (disregarding the mostly very limited review by state courts of arbitral awards primarily for procedural flaws<sup>4</sup>).

In respect of CAS proceedings, the cost argument clearly works in favour of using this specialised arbitral institution. Due to financial contributions from the sports family, the court costs are relatively moderate and so are the fees of the arbitrators. Moreover, CAS jurisdiction has been fairly

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<sup>4</sup> In Switzerland, the appeal according to Art. 190 of the Federal Code on Private International Law ("PILA"). For further information on the finality of awards see 6.4. below.

<sup>5</sup> R64.5. For further information on the ruling on costs see 6.3. below

<sup>6</sup> References to S(...) or R(...) are references to articles of the Code.

<sup>7</sup> According to S20, CAS is composed of two divisions: the Ordinary Arbitration Division and the Appeals Arbitration Division. The Ordinary Arbitration Division deals with disputes in which

conservative when it comes to awarding "a contribution towards legal fees and other expenses" of the prevailing party.<sup>5</sup>

### C. Confidentiality

According to R43 of the CAS Code of Sports-related Arbitration (the "Code")<sup>6</sup>,

*"[p]roceedings under these Procedural Rules are confidential. The parties, the arbitrators and CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of CAS. Awards shall not be made public unless all parties agree or the Division President so decides."*

R43 refers to the Ordinary Procedure<sup>7</sup> (R38 to R46). In appeal arbitration proceedings (R47 to R59) the awards are not confidential.<sup>8</sup> This is a very sound rule because it enables parties (or their counsel) who contemplate CAS appeals to assess their chances of success by reviewing decisions rendered in similar circumstances. Furthermore, the ability to review CAS case law in appeal matters is particularly useful for those who have to administer anti-doping codes and need to rely on CAS decisions in their work of applying the WADC (World Anti-Doping Code). In reality, therefore, the non-confidentiality turns out to be an advantage of CAS proceedings in appeal cases, at least for the sports world as a whole.

reference has been made to CAS either arising "out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings)". The Appeals Arbitration Division rules on appeals "against a decision rendered by a federation, association or sports-related body, where the statutes of regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings)" (R27).

<sup>8</sup> In either case, the hearings are not public unless parties decide otherwise. (R44.2 and R57 / R44.2)

In this context, it must be pointed out that under the general rule of S19 the "*CAS arbitrators (...) are bound by the duty of confidentiality, which is provided for in the Code and in particular shall not disclose to a third party any facts or other information relating to proceedings conducted before CAS.*" This rule is also the basis for the CAS policy that CAS arbitrators should refrain from speaking to the media on any CAS cases, no matter whether they were involved or not.

#### **D. Procedural Versatility**

It is obvious that arbitration proceedings generally allow the arbitrators greater flexibility than would be available to a state court judge who is bound by very detailed procedural laws.

This general principle equally applies to CAS arbitrators as is evidenced by R44.2<sup>9</sup> and R44.3<sup>10</sup>. Nowhere does the Code give any guidance as to whether proceedings shall be held in the "Anglo-American" or "continental European" style. This leaves a great deal of flexibility to CAS panels which are well-advised to structure their proceedings not only as they best fit the particular circumstances of the case but also best

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<sup>9</sup> "R44.2 Hearing

*If a hearing is to be held, the President of the Panel shall issue directions with respect to the hearing as soon as possible and set the hearing date. As a general rule, there shall be one hearing during which the Panel hears the parties, any witnesses and any experts, as well as the parties' final oral arguments, for which the Respondent is heard last.*

*The President of the Panel shall conduct the hearing and ensure that the statements made are concise and limited to the subject of the written presentations, to the extent that these presentations are relevant...."*

<sup>10</sup> "R44.3 Evidentiary Proceedings Ordered by the Panel

*A party may request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall*

correspond to the practice with which they are most familiar. In reality, CAS hearings very often tend to be a mix of practices of both worlds.

#### **E. Easier to Enforce**

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") is most likely the most successful international treaty from a lawyer's perspective. It renders arbitral awards enforceable in practically all relevant countries and thus makes arbitration the preferred option in international commercial disputes.

Unlike ordinary arbitration proceedings at CAS which very often have a commercial background and thus at times require enforcement, the New York Convention is less of an argument in favour of CAS appeal proceedings where the awards are "self-enforcing".<sup>11</sup> A CAS award upholding a federation's decision to suspend an athlete from competition for a doping violation is "enforced" by the sports community by simply not allowing this athlete to compete during the applicable period.

*demonstrate that such documents are likely to exist and to be relevant.*

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

<sup>11</sup> As the Swiss Federal Tribunal says in re Cañas (ATF 4P. 172/2006 of 22<sup>nd</sup> March 2007, at 4.3.2.1: "*Par ailleurs, les sanctions infligées aux sportifs, telles que la disqualification ou la suspension, ne nécessitent pas de procédure d'exequatur pour être mises en œuvre.*"

### III. The Role of the Judge in the Civil Law and Common Law Tradition

It is undisputable that the question as to the role of the judge/arbitrator will be answered differently depending on whether the judge/arbitrator has been brought up in the civil law or common law tradition and it is equally unquestionable that the professional background largely influences the way a CAS case is conducted.

In civil law, the judge directs and controls the proceedings (the "inquisitorial" system). He/she determines which facts are relevant for the outcome of the case. It is the judge who decides which witnesses proffered by the parties will be heard (and denies hearing witnesses whose testimony he believes is irrelevant) and it is the judge who examines the witnesses in the first place with the parties having the right to ask "additional" questions. There is no cross-examination common-law style.

The role of the judge is markedly different in the common law tradition (the "adversarial" system). His/her role is much more passive. He/she listens to the presentations of oral argument by the parties and the testimony of "their" witnesses (very often on the basis of written witness statements) and to the cross-examination. Unlike in civil law, the principal actors in common law proceedings are the lawyers, not the judge.

In international arbitration, there appears to be a trend towards conducting the proceedings "common-law style". The parties are given considerable freedom in shaping their case and the evidence. The arbitrators very often do not give any indication as to what arguments/evidence they consider to be crucial for the outcome of the case. As a result, parties very often inundate the panel with written submissions, documents and witness statements, which the arbitrators –

due to their prior study of the case – already know will be irrelevant. Similarly, during the hearing, counsel go to great lengths in examining/cross-examining the witnesses on issues which have no impact whatsoever on the ultimate decision, thus ignoring the general advice to counsel never to tire or irritate the minds of those they seek to persuade. A lot of time and money is wasted that way!

To avoid any misunderstanding: the author does not advocate any system which does not provide the parties with the full right to be heard, a requirement under almost all procedural codes.

It is not for the author of this paper to pass judgement on which system is preferable in CAS arbitration. On the other hand, it is hardly surprising that he argues in favour of a system which makes more use of certain features of the civil law system and of a technique which – in varied forms – is common in parts of continental Europe and which is briefly described below:

On the basis of the parties' submissions in the statement of claim and the answer, the arbitrators make a preliminary assessment which of the contentions of the parties will likely determine the outcome of the case. In doing so, the arbitrators will assume the veracity of the contested contentions of the claimant and will determine whether these contentions, together with the uncontested facts, support the claimant's case. As a next step, the arbitrators will do a similar exercise with the respondent's contested contentions, which they will assume to be true, and will subsequently examine whether they, together with the uncontested facts, would lead to an inadmissibility of the claimant's case, or would lead to it being dismissed on the merits. On the basis of the foregoing two steps, the arbitrator will make an order as to which evidence needs to be taken on those facts which remain contested and are relevant

for the outcome. The arbitrator may also issue a procedural order setting out additional elements which he/she considers relevant and which shall require further submissions by one or both parties.

The foregoing describes the so-called "*Relationstechnik*" (relevance technique), which is standard in German civil procedure, but the author is far from suggesting that it should be adopted slavishly in CAS proceedings. Yet, certain elements of this technique may in fact help streamline CAS proceedings and make them more efficient and less expensive. And this is exactly what R44.2, 2<sup>nd</sup> paragraph attempts to achieve by providing that "[t]he President of the Panel shall [...] ensure that the statements made are concise and limited to the subject of the written presentations, to the extent that these presentations are relevant."

The chapters below will pick up certain features of the *Relationstechnik* and suggest their use in CAS proceedings. It is interesting to note that the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") in fact do exactly that by encouraging the Arbitral Tribunal "*to identify to the Parties, as soon as it considers it to be appropriate, any issues: (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/ or (b) for which a preliminary determination may be appropriate*" (Art. 2(3)).

#### **IV. From the Appointment as Arbitrator to the Hearing**

##### **A. The Appointment of the Arbitrator(s)**

The Code establishes certain qualifications for an arbitrator to be appointed to a case.<sup>12</sup> These requirements relate to language skills,

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<sup>12</sup> It should be noted that both in ordinary and appeal cases, party-nominated arbitrators require a confirmation by the President of the respective division of CAS (R40.3 for the Ordinary Division and R54.2 for the Appeals Arbitration Procedure).

availability and independence/impartiality. It is essential for the swift disposition of CAS cases that the arbitrators are completely honest about these issues.

##### **1. Availability**

R33 expressly stipulates that "*every arbitrator [...] shall be available as required to complete the arbitration expeditiously.*"

This requirement is more than a formality! Very often proceedings are unduly delayed because not only the parties but also the arbitrators are unable (or unwilling) to find dates convenient to everyone. There is nothing wrong with an arbitrator refusing to be part of a panel if he/she is unable to devote the necessary time for the fulfilment of his/her tasks.

##### **2. Language skills**

A delicate issue is the requirement provided for in S14 according to which CAS arbitrators shall have "*a good command of at least one CAS working language*". The same requirement is stipulated with respect to the appointment to an individual case (R33). Frequently, arbitrators underestimate the level of skill required to draft an award in a foreign language. In order to overcome these difficulties, CAS panels frequently seek assistance of an ad hoc clerk<sup>13</sup> who will not only assist the panel with research etc., but also help draft the award in a language which is his/her native tongue. However, it would be improper for a panel/its President to leave (part of) the decision-making to an ad hoc clerk (S18): "[...] *CAS arbitrators [...] shall sign an official declaration undertaking to exercise their functions personally [...]*".

<sup>13</sup> R40.3, 3<sup>rd</sup> paragraph and R54, 4<sup>th</sup> paragraph read as follows: "*An ad hoc clerk independent of the parties may be appointed to assist the Panel. His fees shall be included in the arbitration costs.*"

### 3. Independence

It is a matter of course that "*every arbitrator shall be and remain independent of the parties and shall immediately disclose any circumstances likely to affect his independence with respect to any of the parties*" (R33).

Conflict of interest is a delicate matter in arbitration. This is particularly true in CAS arbitration for two reasons: (a) CAS operates in a closed society (especially in appeal matters) where the "players" involved regularly meet within the same circles, and (b) it works on the basis of a closed list of arbitrators who have known or have come to know each other well over the years.

As a response to rising criticism that the problem of conflict of interest has been taken too lightly, CAS in 2010 introduced a new rule according to which "*CAS arbitrators (...) may not act as Counsel for a party before the CAS*" (S18, 3<sup>rd</sup> paragraph). This provision has proven its worth in that it takes away the concern that the closeness of a number of arbitrators – inevitable as a result of the closed list of CAS arbitrators – have led to embarrassing situations where on one day two arbitrators were sitting on the same panel, and on the next day one of them

appears before the other as counsel for a party.

Despite confirmation by the Swiss Federal Tribunal<sup>14</sup> that the same standards with respect to conflicts of interest must be applied in commercial and sports arbitration, there is still a fair amount of scepticism that the particularities of CAS arbitration are being used as a justification for a more relaxed approach regarding the requirements of independence and impartiality, particularly before the background that in reality athletes have no choice but to accept CAS as the ultimate competent court.<sup>15</sup>

A further area of concern is the fact that as a result of the closed list of arbitrators, some of them are repeatedly appointed by the same litigants. Repeated appointments have the potential of putting into question the independence and impartiality of the arbitrator. In a commercial context, the Swiss Federal Tribunal has confirmed its liberal approach and rejected a challenge based on repeated appointments by the same party<sup>16</sup>, holding in essence that this would not cast doubts on impartiality. In contrast, the IBA Guidelines on Conflict of Interest in International Arbitration<sup>17</sup> have put "*previous services*" on the Orange List<sup>18</sup> if "[t]he arbitrator has within the past three years been appointed as

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<sup>14</sup> Decisions 4A\_506/2007 (dated 20 March 2008); 4A\_458/2009 (dated 10 June 2010); 4A\_234/2010 (dated 29 October 2010)

<sup>15</sup> In a decision of 26 February 2014 the Regional Court in Munich (Landgericht München I, 37 O 28331/12) ruled that arbitration agreements between an athlete and a (national and international) federation are invalid because they do not reflect the free will of the athlete. The matter is under appeal.

<sup>16</sup> Decisions 4A\_256/2009 and 4A\_208/2009, both dated 11 January 2010.

<sup>17</sup> IBA Guidelines on Conflicts of Interest in International Arbitration, 22 May 2004 (The Guidelines are currently being revised by the IBA.

The new version was not yet available when this article went to print.)

<sup>18</sup> IBA Guidelines on Conflicts of Interest in International Arbitration, Application of the General Standards, Section 3, p. 17: "*3. The Orange List is a non-exhaustive enumeration of specific situations which (depending on the facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), so that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made. (General Standard 4(a)).*"

*arbitrator on two or more occasions by one of the parties ...*"<sup>19</sup>, softening in a footnote this fairly rigid statement with respect to specialized courts of arbitration<sup>20</sup>. Notwithstanding the above, CAS currently asks arbitrators to disclose in the arbitrator's acceptance form **all** previous appointments by the same party and the same counsel. In an extreme case, the President of the respective division of CAS may exercise his authority (see footnote 13) to refuse confirmation of a party-nominated arbitrator should he accept a nomination despite an obvious conflict of interest.

In summary, in the interest of CAS' reputation, CAS arbitrators should be particularly sensitive about conflicts of interest and especially about their relationship with the parties (and their counsel) and should refrain from giving any signs of a bias in favour of the party that nominated them (in the interest of repeated nominations?).<sup>21</sup>

### **B. Single Arbitrator or a full Panel?**

In both divisions of CAS, cases are dealt with either by a single arbitrator or a panel of three (3) arbitrators.

In respect of ordinary cases, the parties can agree, in their arbitration agreement or after the dispute has arisen, on the number of arbitrators. In the absence of such choice, "[t]he President of the Division shall determine the number [of arbitrators], taking into account the circumstances of the case" (R40.1).

In appeal matters, the case shall be submitted to a panel of three arbitrators unless there is an agreement of the parties in favour of a sole arbitrator, or unless the President of the

Division "*decides to submit the appeal to a sole arbitrator, taking into account the circumstances of the case, ...*" (R50).

As a result of mounting pressure in international arbitration as to cost and time, the respective organisations increasingly push towards appointing single arbitrators. In fact, most of the problems relating to challenges and scheduling can be avoided if a case is tried before only one arbitrator. This applies to CAS arbitration as well. However, unquestionably the right of the parties to appoint an arbitrator with known arbitration experience and expertise in the subject matter of the case is not only a psychological advantage but a clear means to ensure that the necessary know-how is available to decide the case. This advocates for a prudent use of single arbitrators.

### **C. The Role of the Chairman vis-à-vis Party-Nominated Arbitrators**

The role of the President is defined differently in the provision regulating the two types of proceedings (see footnote 7). While in ordinary proceedings the President "*shall issue directions with respect to the hearing and set the hearing date*" (R44.2, 1<sup>st</sup> paragraph), the authority of the President of an appeal panel is described in more detail in R57, 1<sup>st</sup> paragraph according to which he "*may request communication of the file of the federation, association or sports-related body, whose decision is the subject of the appeal. Upon transfer of the CAS file to the Panel, the President of the Panel shall issue directions in connection with the hearing for the examination of the parties, the witnesses and the experts, as well as for the oral arguments.*" Despite his ample power in pre-hearing procedural matters, the

*arbitrator in different cases, no disclosure of this fact is required where all parties in the arbitration should be familiar with such custom and practice.*"

<sup>21</sup> It should be noted that "[d]issenting opinions are not recognized by CAS and are not notified." (R46, 1<sup>st</sup> paragraph, *in fine*; R59, 2<sup>nd</sup> paragraph *in fine*)

<sup>19</sup> IBA Guidelines on Conflicts of Interest in International Arbitration, Section 3.1.3, p. 21.

<sup>20</sup> "*It may be the practice in certain kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same*

President of the panel will consult with his co-arbitrators in non-routine matters.

To avoid any misunderstanding: when it comes to taking a decision within the full panel, be it on procedural matters or the final award, the President has no greater voting power than his co-arbitrators; except in the absence of a majority within the panel, in case of which the "*award is rendered (...) by the President alone*" (R46 and R59).

#### D. Use of a clerk?

Pursuant to R40.3, 3<sup>rd</sup> paragraph and R54, 4<sup>th</sup> paragraph, "[a]n *ad-hoc clerk, independent of the parties, may be appointed to assist the Panel. His fees shall be included in the arbitration costs.*"

The Code does not give guidance as to the extent to which clerks can be involved in the arbitral process<sup>22</sup>. While it is common ground in international commercial arbitration that clerks may be instructed to help with organisational and administrative tasks, it is more controversial to what extent they should be allowed to attend the deliberations of the Panel, perform research and prepare drafts of orders or even parts of the award. But there is consensus that under no circumstances can a clerk be a "fourth decision-maker".

If properly instructed clerks can be – if they are not complete newcomers in arbitration – helpful in reducing the cost of the arbitration and their use should be encouraged. But CAS arbitrators should resist the temptation triggered by their modest remuneration which in many instances is dramatically below the rates they are able to charge in their "normal" work to employ the clerk as a "fourth arbitrator" and allow him to influence the outcome of the arbitration.

<sup>22</sup> Some of the most prominent arbitration rules define the role of the clerks, eg. the ICC, JAMS, HKIAC and UNCITRAL, where others do not.

<sup>23</sup> A good analysis of R37 can be found in the "CAS Code Commentary" by Rigozzi/Hasler in Arroyo,

## E. Pre-Hearing Procedural Measures

### 1. Provisional or Conservatory Measures

The outcome of a case may often be heavily influenced by a panel's willingness to make – upon application by one of the parties – an order for provisional or conservatory measures, which, "in cases of extreme urgency", can be issued *ex parte* (R37). There is ample CAS case law regarding the requirements for such an order (irreparable harm, likelihood of success on the merits, balance of the interests of the parties) and panels should not hesitate to make use of this authority, for instance in cases where important evidence may get lost or where there are serious doubts of an anti-doping rule violation and a risk that an athlete would miss an important competition because he/she is unable to compete in qualifying events.<sup>23</sup>

### 2. Pre-Hearing Telephone Conference?

Modern information technology provides very sophisticated tools to facilitate the flow of information, but it cannot and should not fully replace direct communication!

It can be utterly frustrating when countless e-mails/faxes are being exchanged over several weeks between the parties and their counsel, the members of the panel, the clerk of the panel and the CAS court office/CAS counsel in search of a convenient hearing date. Paper (also "electronic paper") is patient and it is simply all too easy to send an e-mail stating that one is "regrettably" unavailable at a particular date – not infrequently because this fits well with one's own strategy. Why not organise a telephone conference between the

Arbitration in Switzerland, The Practitioner's Guide, Chapter 5 - Sports Arbitration under the CAS Rules, p. 936 et seq..

panel (or even the President alone), the parties' counsel and the CAS counsel in which procedural issues (and only those!) such as hearing dates and deadlines for submissions or a general procedural time table (as is provided for in 18 (4) of the ICC Rules) are being discussed? Considerable time can be saved and frustration avoided.

### 3. Pre-Hearing Evidentiary Measures

R44.3, 2<sup>nd</sup> paragraph provides the following, both with respect to ordinary cases and the appeal proceedings (R57, 1<sup>st</sup> paragraph, *in fine*):

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

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

This rule provides CAS panels with the necessary tools to prepare a case for swift resolution. In order to make appropriate use of these tools, the panel (or at least its President) must familiarize itself with the file early on and, in particular, with the parties' submissions, so that it can make a timely assessment whether a request for production of (relevant!) documents should be granted, whether the panel wishes additional documents to be produced and/or whether experts must be heard. It should also be mentioned that the panel has the power to *"limit or disallow the appearance of any witness or expert, or any part of their testimony, on the grounds of irrelevance."* (R44.2, 5<sup>th</sup> paragraph)

The panel can also *"proceed with any other procedural step"*, e.g. it can undertake its own investigations<sup>24</sup> relative to the case. In this context, a word of caution should be added: Whatever *"procedural step"* the panel takes, it should give the parties an opportunity to comment on this *"step"* or the relative findings, at least to the extent that they impact on the parties' procedural rights. A failure to do so may open the door to an appeal to the Swiss Federal Tribunal for a violation of the parties' right to be heard.

The Code provides the CAS panels with ample flexibility in respect of the way it intends to conduct the evidentiary hearing. From the parties' perspective, this flexibility has the disadvantage that they are unable to predict what to expect from the panel. This is particularly true if a panel is comprised of arbitrators from different legal backgrounds. Will the panel hear the witnesses "common law style"; will there be cross-examination; will there be concerns as to the extent the witnesses have been coached? In these instances it may be helpful to give the parties an indication of what to expect and one of the ways of doing that would be a reference (e.g. in a procedural order or, preferably, as early as the pre-hearing telephone conference, see 4.4.2 above) to the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules") which – as is stated in its foreword – *"may be particularly useful when the parties [and – in the opinion of the author hereof – when the arbitrators] come from different legal cultures"*. The IBA Rules are increasingly popular in international commercial arbitration in that they strike a reasonable balance between the common law and civil law traditions. The detailed provisions on important evidentiary issues like document production, witness statements and expert testimony will give the parties an indication of how the panel intends

dealing with the submissions of the parties without the power to make own investigations.

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<sup>24</sup> This is fundamental and distinguishes (CAS-) arbitration from basic procedural principles in many civil law systems where the judge is restricted to

to deal with these and other evidentiary measures.

If a CAS panel intends to make use of the IBA Rules, it should advise the parties accordingly as early as possible, and could do so by stating that, in addition to the Code, the panel will be "guided" by the IBA Rules. By using the word "guided" the panel will maintain the necessary degree of flexibility in dealing with evidentiary issues.

A particularly difficult problem in appeal arbitration proceedings relating to doping sanctions is created by the necessary reliance by the panel on expert testimony on complex physiological and chemical issues. Such experts are called by the parties and must be "*specified in their written submissions*" (R44.2, 3<sup>rd</sup> paragraph). For CAS arbitrators who have been sitting on numerous doping cases, there is almost no need to hear the experts of the two sides as they have heard these experts many times before and can predict with little difficulty what their testimony (and their probative value) is going to be. This may be an opportunity to exercise – preferably at an early stage in the proceedings – the power granted to the panel to "*appoint and hear experts*" after consulting "*the parties with respect to the appointment and terms of reference of any expert.*" (R44.3, 2<sup>nd</sup> and 3<sup>rd</sup> paragraph). One has to recognise though that in this highly-specialized area it may be difficult to find a fully independent expert who has not testified on behalf of either an athlete or the prosecuting body and/or has not manifested in a publication his/her view on a particular matter thus putting in question his/her impartiality.

#### 4. Discretion to Exclude Pre-Existing Evidence

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<sup>25</sup> Rigozzi/Hasler in Arroyo, *Arbitration in Switzerland, The Practitioner's Guide*, Chapter 5 -

The 2013 edition of the Code has brought about a notable amendment of R57, 3<sup>rd</sup> paragraph, which now provides that "[t]he panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered".

While the author to a large extent advocates the "streamlining" of CAS proceedings through an active involvement of the arbitrator, he suggests that the discretion to exclude pre-existing evidence contained in R57 be used with caution. According to R57 CAS panels have the power to conduct a full review (*de novo*) in appeals cases, a characteristic feature considered to be a cornerstone of sports arbitration and an important justification for the exclusion of state court jurisdiction in sports disputes. As a result, CAS is not bound by the factual or legal findings of a previous instance, including the evidence which has or has not been brought forward earlier.

Panels should therefore use the discretion to exclude pre-existing evidence only in those cases where the late filing "*constitutes an abusive or otherwise unacceptable procedural conduct by a party*"<sup>25</sup>.

#### 5. "Guidance" by the Panel on Relevant Questions?

As has been explained in 3. above, in the interest of expediting the proceedings, the author advocates a limited use of techniques which are common in continental Europe.

It is not uncommon in CAS proceedings that in the absence of guidance from the panel, hundreds of documents and hundreds of pages of witness statements are being produced by the parties on issues which in the panel's opinion, formed hopefully at an early

Sports Arbitration under the CAS Rules, R57, p. 1036, para. 4.

stage of the proceedings, are completely irrelevant for the outcome of the arbitration. In these circumstances, it would be very helpful if the panel were to give some indication to the parties of what it believes to be particularly relevant, e.g. by stating in a communication to the parties that "*without in any way restricting the parties' freedom to make whatever submissions they see fit, and considering the current status of the proceedings, the panel suggests that the parties focus their submissions and their presentation at the oral hearing particularly on the following issues: (...)*" Ideally, this indication should be given after a thorough study of the grounds of appeal and the answer and before a possible second round of submissions.

It goes without saying that the foregoing "guidance" by the panel requires an early in-depth study and constant re-assessment of the case so that an informed statement as to the likely relevant issues can be made. In any event, the proper use of this technique can help reduce time and cost of the proceedings.

## 6. Bifurcation

According to Art. 188, 2<sup>nd</sup> paragraph of the PILA "[u]nless the parties have agreed otherwise, the arbitral tribunal may render partial awards." In the interest of saving time (and money), CAS panels should make use of this authority if its jurisdiction is in question so that no unnecessary efforts are wasted should jurisdiction/admissibility eventually be denied.

## V. The Oral Hearing

### A. Must a Hearing be held?

In ordinary cases, "[t]he proceedings before the Panel comprise written submissions and, if the Panel deems it appropriate, an oral hearing" (R44.1).

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<sup>26</sup>In one case, however, a CAS panel decided - contrary to both parties' request - to schedule a hearing because the arbitrators considered drawing negative inferences from one of the parties' failure to

In appeal arbitration, "[a]fter consulting the parties, the Panel may if it deems itself to be sufficiently well-informed decide not to hold a hearing." (R57, 2<sup>nd</sup> paragraph).

Ultimately, in either case, it is in the panel's discretion to hold or not to hold a hearing. If both parties request a hearing, the panel will only in very exceptional circumstances decide not to hold one. Similarly, if both parties do not want a hearing, the panel will most likely respect that wish<sup>26</sup>. A more difficult decision must be taken if only one party requests a hearing: Despite the panel's decision-making power, it will likely follow the request for a hearing, even though, strictly speaking, a hearing is not required in order to respect a party's right to be heard as long as it had sufficient opportunity to make written submissions<sup>27</sup>.

### B. Keeping Track of Time

The more "guidance" the panel has given to the parties (4.4.5. above), the more focussed the parties presentation at the hearing will be. In this context, it is worth mentioning the directions given to the President of CAS panels (both in ordinary and appeal cases) in R44.2, 2<sup>nd</sup> paragraph:

*"The President of the Panel shall conduct the hearing and ensure that the statements made are concise and limited to the subject of the written presentations, to the extent that these presentations are relevant."*

In addition, depending on the circumstances of the case, the panel may allocate certain time slots to the parties' (their counsels') opening and closing statement. In extreme cases, where there are extensive submissions and a great number of witnesses, the panel may – after consultation with the parties – go

produce certain documents and wanted to ensure that the respective party is heard in person.

<sup>27</sup> CAS 94/129 USA Shooting & Q./UIT, para. 58.

so far as granting to each side a specific number of hours for "their case" including the hearing of their witnesses. In such cases, the time would be monitored by a chess clock.

### C. Documents

The Code attempts to strike a balance between sweeping requests for production of documents US-style and the rather restrictive concept in most countries of continental Europe by providing in R44.3, 1<sup>st</sup> paragraph that

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

Here again, the arbitrators will only be able to apply the "relevance test" (3. above) and make the appropriate order if they are fully familiar with the case and can thus assess such relevance. In addition, the panel itself has the authority to "order the production of additional documents" of its own initiative (R44.3, 2<sup>nd</sup> paragraph).

### D. Witnesses

It has become common practice for CAS panels to just "swear in"<sup>28</sup> the witnesses<sup>29</sup> and then hand him/her over to the party for direct testimony. The examination of the witnesses in both ordinary and appeal

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<sup>28</sup> "Before hearing any witness, expert or interpreter, the Panel shall solemnly invite such person to tell the truth, subject to the sanction of perjury" (R44.2, 6th paragraph).

<sup>29</sup> Technically, a party cannot be a witness under Swiss law (Art. 168, 1<sup>st</sup> paragraph Swiss Code of Civil Procedure: "The admissible means of evidence are: a) witness testimony, (...) f) party testimony (...)". In practice, however, the testimony of a party is an important part of the evidence and it is for the

proceedings is done mostly with reference to a "brief summary of their [the witnesses'] expected testimony" or on the basis of "witness statements" (R44.1, 3<sup>rd</sup> paragraph, R51, 2<sup>nd</sup> paragraph), which, it should be noted, are almost without exception prepared by counsel and thus do not necessarily reflect the witness' own perception.

Once again, considerable time could be gained if the arbitrators were to take the lead in examining the witnesses because they know best what is relevant in their eyes for the outcome of the proceedings. But this runs counter to the common law system where the witnesses are those of the parties not of the court<sup>30</sup>. It goes without saying that regardless of the method of proceeding the parties must be given an opportunity to ask additional questions and to cross-examine the witnesses.

With respect to the physical presence of witnesses and experts at the hearing, the Code provides the following (R44.2, 4<sup>th</sup> paragraph, R57, 1<sup>st</sup> paragraph, *in fine*):

*"The President of the Panel may decide to conduct a hearing by video-conference or to hear some parties, witnesses and experts via tele-conference or video-conference. With the agreement of the parties, he may also exempt a witness or expert from appearing at the hearing if the witness or expert has previously filed a statement"*.

Notwithstanding the above, the author advocates that panels, as a rule, should insist on the personal presence of the witnesses

arbitrators to assess the probative value of such testimony.

In contrast, see Article 4, 2<sup>nd</sup> paragraph of the IBA Rules: "Any person may present evidence as a witness, including a Party (...)".

<sup>30</sup> However, in order to expedite proceedings, arbitrators may also resort to "newer" procedural methods, such as witness conferencing where (fact or expert) witnesses sit together and testify on a common issue in a discussion led by the tribunal.

(bearing in mind that an arbitral tribunal does not have the power to enforce such presence, but would require the assistance of a judge, Article 184, section 3 PILA). Telephone connections are frequently very bad or get constantly interrupted and, in practice, a meaningful cross-examination is impossible. Testimony by tele-conference is particularly problematic and, in fact, at times useless if the witness speaks a language other than the language of the proceedings and needs an interpreter. How can the panel verify whether what is being translated is in fact what the witness said?

In a number of jurisdictions, witnesses are routinely asked to leave the room while other witnesses are being examined so as to avoid the risk of testimony being "influenced" by others. At CAS, the panels should assess that risk and take their decision – after consultation with the parties – on the presence of witnesses accordingly. More often than not, all witnesses are allowed in the hearing room in CAS proceedings, but this practice should be reconsidered as far as fact witnesses are concerned so that the last to be heard cannot adapt his testimony to what has been said before him. The contrary is true for expert witnesses where interaction/discussion between them often produces the best results.

Finally, a word of caution with respect to witnesses who do not speak the language of the proceedings and thus require the assistance of an interpreter: According to R44.2, 2<sup>nd</sup> paragraph, R57, 3<sup>rd</sup> paragraph, *in fine*, "[a]ny person heard by the Panel may be assisted by an interpreter at the cost of the party which called such person". It is common practice at CAS that the interpreter is not only paid for, but also brought to the hearing by the respective

party. In instances where there is no "risk" of one of the panel members understanding the witness' native tongue, the interpreter may be tempted to apply the rule of "who pays the piper calls the tune" and to "translate" what is good for the respective party and not what is being said.<sup>31</sup> To counter this, CAS may want to consider establishing a list of CAS interpreters from which the parties have to select.

### **E. Encouragement to settle**

Both in ordinary and appeal cases "... *the Panel may at any time seek to resolve the dispute by conciliation. Any settlement may be embodied in an arbitral award rendered by consent by the parties*" (R42 and R56, 2<sup>nd</sup> paragraph). The extent to which the panel will make use of such authority will again largely depend on whether its members come from common law or civil law countries. Arbitrators from the former will be more reluctant to take the initiative for fear of a challenge for lack of impartiality in case a settlement is ultimately not reached and information has been disclosed during settlement discussions which would otherwise not have been revealed. Civil law arbitrators, in contrast, are more forthcoming in actively seeking to bring the parties together.<sup>32</sup>

Obviously, an early settlement saves time and cost and given the express authority in the Code, it should be actively promoted whenever possible.

## **VI. The Award**

### **A. Short reasons**

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<sup>31</sup> In extreme cases CAS panels may want to listen to the tape recording with the help of an independent translator in order to verify what the witness said.

<sup>32</sup> For instance, Section 32.1 of the rules of the German Institution for Arbitration (DIS) provides that the arbitral tribunal should encourage an amicable settlement at any stage of the proceedings.

For ordinary and appeals cases alike, R46 provides the following with respect to the award:

*"The award shall be made by a majority decision, or, in the absence of a majority, by the President alone. The award shall be written, dated and signed. Unless the parties agree otherwise, it shall briefly state reasons. The sole signature of the President of the Panel or the signatures of the two co-arbitrators, if the President does not sign, shall suffice. Before the award is signed, it shall be transmitted to the CAS Secretary General who may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle. Dissenting opinions are not recognized by the CAS and are not notified."*

*The Panel may decide to communicate the operative part of the award to the parties, prior to delivery of the reasons. The award shall be enforceable from such notification of the operative part by courier, facsimile and/or electronic mail."*

Despite the call for brief reasons in R46 and R59, CAS awards are usually fairly long and at times fill pages by partly stating the obvious. Arbitrators should bear in mind that it is sufficient to state in the award the *relevant* facts and legal issues of the case and the *essential* allegations and arguments of the parties reflected in the panel's considerations<sup>33</sup>.

### **B. Apply the rules, don't re-write them**

CAS operates in a very specialised environment that is highly political at the same time. Therefore, it is at times difficult for CAS arbitrators to remain uninfluenced by considerations of perceived sporting fairness and political governance. This is

<sup>33</sup> Cf. Rigozzi/Hasler in Arroyo, *Arbitration in Switzerland, The Practitioner's Guide*, Chapter 5 - Sports Arbitration under the CAS Rules, R46, p. 980, para. 7.

<sup>34</sup> This has been very aptly described in CAS 2009/A/1768, *Hansen v. FEI*: "First, CAS is an adjudicative, not legislative body. It is not for CAS

dangerous for CAS' reputation. CAS arbitrators should not forget that CAS is a court of law and is called upon to apply the rules of sporting bodies, not to re-write them.

<sup>34</sup>

Finally a word on precedent: while CAS panels are not bound by findings of other arbitrators in earlier cases, it should be a matter of course for the arbitrators to discuss precedent in the award and if necessary, distinguish their award from other CAS decisions.

### **C. A word on costs**

Another challenging issue for CAS arbitrators is the ruling on costs, governed by R64 and R65. In the award, the panel "*shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them*" (R64.5). While the exact amount of costs of the arbitration (including the CAS Court Office fee; the administrative costs of CAS, the costs and fees of the arbitrators; the fees of the ad hoc clerk, if any; a contribution towards the expenses of CAS; and the costs of witnesses, experts and interpreters) may be left to be determined by the CAS Court Office (R64.4, *in fine*), the question whether a prevailing party will be awarded a contribution towards its legal costs regularly will have to be addressed already in the award. In this regard, R64.5 raises particular difficulties, providing that

*"[...] As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall*

*to write the rules of the FEI. As long as those rules are not incompatible with some relevant aspect of ordre public, be it competition law, the law of human rights, or Swiss statute, we have to apply them as they stand. For us the only lex lata, not the lex ferenda has relevance."*

*take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties."*

Unfortunately, by simply identifying four criteria (complexity and outcome of the proceedings; conduct and financial resources of the parties) the code provides only little guidance as to the calculation of the amount of the contribution towards a party's legal costs. As a result many arbitrators feel uncertain and CAS jurisprudence on this issue is not fully consistent. CAS tends to award a contribution way below the costs actually incurred, even if reasonable calculated. The following basic rules should always be considered<sup>35</sup>:

- A party can be granted a contribution only if it made a request to that effect.
- In any case, the panel has no obligation to award a contribution towards a party's legal costs.
- If the panel decides to award a contribution it will not order a full reimbursement but only a part of the actual costs.

In light of the above and in order to provide better guidance for arbitrators and parties alike, CAS may want to consider adapting to reality the contributions to be awarded towards a party's legal fees while introducing *de lege ferenda* a ceiling for those contributions, comparable to the framework applied by the Basketball Arbitral Tribunal (BAT)<sup>36</sup>. While maintaining the discretion of the panel to a large extent, the BAT system has proven to deliver decisions on costs which are easier to

make for the arbitrators and more predictable for the parties.

#### **D. Finality of Awards**

CAS awards are final and binding (R46, 3<sup>rd</sup> paragraph and R59, 4<sup>th</sup> paragraph) but they can be appealed to the Swiss Federal Tribunal for the very limited reasons listed in Art. 190, section 1 of the PILA:

- "a. if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;*
- b. if the arbitral tribunal wrongly accepted or declined jurisdiction;*
- c. if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;*
- d. if the principle of equal treatment of the parties or the right of the parties to be heard was violated;*
- e. if the award is incompatible with public policy."*

Of the possible challenges of CAS awards before the Federal Tribunal, the ones that have been successful and that require particular attention of CAS panels were violations of the principles of "*ne ultra* [or *infra*] *petita*" (lit c. PILA), a failure by the panel to properly grant the right to be heard (lit. d. PILA) or a violation of Swiss public policy (lit. e. PILA).

With respect to the parties' "*petita*", it is crucial to carefully read the parties' request for relief or, as the case may be, to ask the parties to clarify them in order not to rule on something

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<sup>35</sup> For further information turn to Rigozzi/Hasler in Arroyo, Arbitration in Switzerland, The Practitioner's Guide, Chapter 5 - Sports Arbitration under the CAS Rules, R46, p. 1047, para. 27.

<sup>36</sup> Cf. BAT Arbitration Rules, Section 17.4, 1 May 2014 version, whereby the maximum contribution to a party's reasonable legal fees and other expenses (including the non-reimbursable handling fee) shall

be as follows: For cases with a sum in dispute of up to 30,000 EUR – a contribution of max. 5,000 EUR; from 30,001 to 100,000 EUR - max. 7,500 EUR; from 100,001 to 200,000 EUR – max. 10,000 EUR; from 200,001 to 500,000 EUR – max. 15,000 EUR; from 500,001 to 1,000,000 EUR – max. 20,000 EUR; over 1,000,000 EUR – max. 40,000 EUR.

which is not requested or to leave out issues on which the parties request a ruling.

Moreover, it is critical to give the parties at all times an opportunity to comment on important procedural steps and on issues of the merits on which the award will be based. Better to give the party that opportunity once too often than to risk a successful appeal to the Federal Tribunal!

## **VII. Conclusion**

The Code provides CAS arbitrators with a variety of tools to bring cases to a speedy resolution without sacrificing any aspects of fair proceedings and high quality judgements. Let's make use of them!

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# The Court of Arbitration for Sport and its Global Jurisprudence: International Legal Pluralism in a World Without National Boundaries

Prof. Matthew J. Mitten \*

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- VI. Conclusions and Recommendations

## Abstract

This article considers an issue of global importance that has received little scholarly attention: whether the Court of Arbitration for Sport (CAS), whose developing body of *lex sportiva* is a form of international legal pluralism, provides an appropriate level of procedural fairness and substantive justice to the world's athletes, who are subject to its jurisdiction as a condition of their participation in Olympic and international sports competition. It provides an overview of the CAS arbitration system and the very limited scope of national judicial review of its arbitration awards decisions. It concludes that the CAS is a procedurally fair private legal system for resolving Olympic and international sports

disputes that generally provides substantive justice to athletes, thereby justifying judicial

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\* Professor of Law and Director, National Sports Law Institute and LL.M. in Sports Law for Foreign Lawyers Program, Marquette University Law School; Member, Court of Arbitration for Sport, Lausanne, Switzerland. I want to thank Bruce W. Burton, Courtney Hall, Dr. Shuli Guo, Richard Karcher, Michael Lenard, Richard McLaren, Michael O'Hear, Josephine ("Jo") Potuto, Andrea Schneider, and Maureen Weston for their insightful comments regarding earlier drafts of this article as well as Jeremy Abrams, Marquette University Law School Class of 2014, for his research and editorial assistance in connection with this article. Originally published in 30 Ohio St. J. On Disp. Resol. \_\_ (2014) and reprinted with permission.

deference to its adjudications along with their recognition and enforcement by sovereign nations. It also makes some recommendations for internal CAS reforms to better achieve these objectives.

## I. Introduction

The primary objective of this article is to analyze whether the Court of Arbitration for Sport (CAS), a private independent international arbitration tribunal based in Lausanne, Switzerland, provides an appropriate level of procedural fairness and substantive justice to the world's athletes, who are subject to its jurisdiction as a condition of their participation in Olympic and international sports competition, to justify an exceptional degree of judicial deference by national courts and sovereign countries' recognition and enforcement of its arbitration awards. This has enabled the development and evolution of a separate body of Olympic and international sports law jurisprudence by the CAS that is based primarily on underlying private agreements, which constitutes a form of global legal pluralism<sup>1</sup> that coexists with—and sometimes displaces—sovereign national laws. Thus far, however, there has been little scholarly analysis of this phenomenon and its implications for the resolution of disputes with international

dimensions by private tribunals rather than international or national courts.

The International Olympic Committee (IOC), a private association based in Lausanne, Switzerland, has exercised monolithic rule-making and governing authority over Olympic sports competition throughout the world since 1894.<sup>2</sup> There are no sport-specific national laws that directly regulate the IOC or the International Federations (IFs), which individually oversee a particular sport or related sports on a worldwide basis, International and national legislative bodies generally permit the IOC and IFs to govern their own affairs without government intervention.

Although Olympic athletes have a voice and representation on IOC rule and decision-making bodies, they lack any collective veto power and must “agree to” the eligibility rules (including anti-doping rules established by the World Anti-doping Agency) and dispute resolution processes chosen by the IOC as a condition of having the opportunity to participate in Olympic sports competition. The CAS arbitration system, which was established by the IOC in 1983,<sup>3</sup> resolves the merits of virtually all disputes involving Olympic sport athletes with very limited judicial review by the Swiss Federal Tribunal (Switzerland's

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<sup>1</sup> See generally GUNTHER TEUBNER, *GLOBAL LAW WITHOUT A STATE*, at xiii (1997) (“[The] globalization of law creates a multitude of decentred law-making processes in various sectors of civil society, independently of nation-states.... They claim worldwide validity independently of the law of nation-states and in relative distance to the rules of international public law. They have come into existence not by formal acts of nation-states but by strange paradoxical acts of self-validation.”); Matthew J. Mitten & Hayden Opie, “*Sports Law*”: *Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution*, 85 *TUL. L. REV.*

269, 289 (2010) (“For legal theorists, the evolving body of *lex sportiva* established by CAS awards is an interesting and important example of global legal pluralism without states, arising out of the resolution of Olympic and international sports disputes between private parties.”).

<sup>2</sup> See generally MITTEN, DAVIS, SMITH & DURU, *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 259–62 (3d ed. 2013).

<sup>3</sup> *Origins*, CAS (2013), <http://www.tas-cas.org/history>.

highest court) and other national courts.<sup>4</sup> Even if they have jurisdiction, courts generally are reluctant to apply national public laws in a manner that constrains the plenary governing authority of these international sports bodies in their relations with athletes, or that precludes or invalidates the final and binding resolution of disputes by the CAS.

Section II of this Article provides a brief description of the international governing structure and rule-making processes for Olympic sports as well as the historical reluctance of national courts to use domestic non-sports specific public laws to externally regulate Olympic sports. Section III provides an overview of the CAS arbitration system and the very limited scope of national judicial review of its decisions. Section IV proposes several requirements that a procedurally fair and substantively just private legal system for resolving Olympic and international sports disputes should have, thereby justifying judicial deference to its adjudications along with recognition and enforcement by sovereign nations. Section V analyzes whether the CAS arbitration system generally satisfies these requirements. This Article concludes by determining that it does, while suggesting some potential reforms to enhance the existing level of procedural fairness and substantive justice the CAS arbitration system provides to athletes.

## II. Olympic Sports Internal Governance Structures and Rule-Making Processes

The modern Olympic Movement “is the concerted, organised, universal and permanent action, carried out under the supreme authority of the IOC, of all individuals and entities who are inspired by the values of Olympism,” which “is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind.”<sup>5</sup> It “blend[s] sport with culture and education” and “seeks to create a way of life based on the joy of effort, the educational value of good example, social responsibility and respect for universal fundamental ethical principles.”<sup>6</sup> In addition to the IOC, the Olympic Movement includes IFs, the international governing bodies for each Olympic sport; National Olympic Committees (NOCs), such as the United States Olympic Committee (USOC); National Federations (NFs) for each Olympic sport recognized by each NOC (for example, USA Track & Field); thousands of individual athletes, judges, and coaches who are members of the NFs for their respective Olympic sports; and others.<sup>7</sup>

The Olympic Charter codifies the fundamental principles, rules, and bylaws adopted by the IOC, and it establishes the framework for governance of the Olympic Movement and operation of the Olympic Games.<sup>8</sup> It states that the IOC, an “international non-governmental not-for-profit organization”<sup>9</sup> is the “supreme

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<sup>4</sup> See *infra* notes 81-90.

<sup>5</sup> INT’L OLYMPIC COMM., OLYMPIC CHARTER, at 11 (2013), available at [http://www.olympic.org/Documents/olympic\\_charter\\_en.pdf](http://www.olympic.org/Documents/olympic_charter_en.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* R. 1(1)–(3).

<sup>8</sup> *Id.* at 9.

<sup>9</sup> *Id.* R. 15.

authority” of the Olympic Movement,<sup>10</sup> and that all members of the Olympic Movement are “bound by the provisions of the Olympic Charter and shall abide by the decisions of the IOC.”<sup>11</sup>

The IOC currently has 100 members,<sup>12</sup> all whom are individuals who “represent and promote the interests of the IOC and of the Olympic Movement in their respective countries.”<sup>13</sup> The total number of IOC members cannot exceed 115; no more than 15 of them may be active athletes who are members of the IOC Athletes’ Commission.<sup>14</sup> The duties of IOC members include adopting and amending the Olympic Charter, electing the IOC president, vice presidents, and other members of the executive board, and collectively making final decisions on behalf of the IOC.<sup>15</sup>

The IOC Athletes’ Commission “serves as a consultative body and is the link between active athletes and the IOC.”<sup>16</sup> It represents athletes within the Olympic Movement and to ensure that their interests are protected. A majority of the

Commission’s members must be athletes who are elected by Olympic athletes;<sup>17</sup> elections of new members occur when the Games of the Olympiad (i.e., Summer Games) and the Olympic Winter Games are held.

The governance of Olympic sports is based on the European model of sports, a hierarchical, inverted pyramid model in which each sport is governed vertically on a global basis by an international body with corresponding transnational, national, regional, and local federations.<sup>18</sup> Each of the 64 IFs currently recognized by the IOC are international nongovernmental organizations that function as the worldwide governing body for a particular sport (or a related group of sports), and each one’s respective members are the NFs that administer the particular sport(s) in each country.<sup>19</sup> An IF’s statutes, practices, and activities, including its athlete eligibility criteria for the Olympic Games, must conform to the Olympic Charter and be approved by the IOC; each IF must adopt and implement the World Anti-Doping Code (WADC).<sup>20</sup> Subject to these

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<sup>10</sup> *Id.* R. 1(4).

<sup>11</sup> *Id.*.

<sup>12</sup> *IOC Members*, <http://www.olympic.org/content/the-ioc/the-ioc-institution/ioc-members-list/> (last visited May 5, 2013).

<sup>13</sup> OLYMPIC CHARTER, *supra* note 5, R. 16(1.4).

<sup>14</sup> *Id.* R. 16(1.1). New IOC members are elected by the IOC’s existing membership for renewable eight-year terms after being submitted as candidates by “IOC members, IFs, associations of IFs, NOCs, world or continental associations of NOCs and other organisations recognised by the IOC,” reviewed by the IOC Nominations Commission, and proposed by the IOC Executive Board. *Id.* R. 16, Bye-law 2.1.

<sup>15</sup> *Id.* R. 18.

<sup>16</sup> *Athletes’ Commission*, <http://www.olympic.org/athletes-commission> (last visited May 5, 2013).

<sup>17</sup> OLYMPIC CHARTER, *supra* note 5, R. 21, Bye-law 1.

<sup>18</sup> *See generally* James A.R. Nafziger, *European and North American Models of Sports Organization*, in HANDBOOK ON INTERNATIONAL SPORTS LAW 88-111 (James A. R. Nafziger & Stephen F. Ross eds., 2011); LARS HALGREEN, *EUROPEAN SPORTS LAW: A COMPARATIVE ANALYSIS OF THE EUROPEAN AND AMERICAN MODELS OF SPORT* (2004).

<sup>19</sup> OLYMPIC CHARTER, *supra* note 5, R. 25.

<sup>20</sup> *Id.* *See* World Anti-doping Code (2009) [hereinafter WADC], available at <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/>.

requirements, “each IF maintains its independence and autonomy in the administration of its sport.”<sup>21</sup>

The more than 200 NOCs develop and protect the Olympic Movement within their respective countries consistent with the Olympic Charter and are required to adopt and implement the WADC.<sup>22</sup> Each NOC “is obliged to participate in the Games of the Olympiad by sending athletes.”<sup>23</sup> An NOC “has exclusive authority regarding the representation of its country at the Olympic Games” and selects its athletes based on the recommendations of its recognized NF for the particular sport.<sup>24</sup>

An NF<sup>25</sup> is the national governing authority for a particular sport that is a member of the corresponding IF and is recognized by the country’s NOC.<sup>26</sup> NFs must comply with the Olympic Charter and their respective IF’s rules as well as “exercise a specific, real and on-going sports activity.”<sup>27</sup> The NFs serve a function at the national level similar to that of the IFs at the international level of athletic competition.

The Olympic Charter provides that the practice of sport is a human right<sup>28</sup> and requires all NOCs to ensure that no athlete “has been excluded for racial, religious or

political reasons or by reason of other forms of discrimination.”<sup>29</sup> However, no athlete “is entitled as of right to participate in the Olympic Games” and his or her “entry is subject to acceptance by the IOC, which may at its discretion, at any time, refuse any entry, without indication of grounds.”<sup>30</sup> To be eligible to participate in the Olympic Games, a competing athlete must satisfy several conditions, including being a national of the country of the NOC that is entering him<sup>31</sup> and complying with the eligibility requirements of the Olympic Charter and IF for the subject sport.<sup>32</sup> All athletes must “respect the spirit of fair play and non-violence and behave accordingly” on the sports field as well as fully comply with the WADC.<sup>33</sup>

Historically, courts have been reluctant to use general national laws (i.e., statutes not specifically applicable to sports) protecting individual civil liberties to externally regulate Olympic sports competition within their respective countries’ boundaries or to interfere with valid decision- and rule-making authority, even if the challenged conduct of the IOC subjects it to the court’s jurisdiction. As one scholar has observed, “[t]he IOC increasingly acts [as] a global legislator in international sport, setting common standards.”<sup>34</sup> Courts generally defer to the IOC’s private plenary authority rather than

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* R. 27.

<sup>23</sup> *Id.* R. 27(3).

<sup>24</sup> MITTEN, DAVIS, SMITH & DURU, *supra* note 2, at 260.

<sup>25</sup> In the U.S., National Governing Body (NGB) is the commonly used terminology.

<sup>26</sup> MITTEN, DAVIS, SMITH & DURU, *supra* note 2 at 260–61.

<sup>27</sup> OLYMPIC CHARTER, *supra* note 5, R. 29.

<sup>28</sup> *Id.* at 11.

<sup>29</sup> *Id.* R. 44, Bye-law 4.

<sup>30</sup> *Id.* R. 44, Bye-law 3.

<sup>31</sup> *Id.* R. 41.

<sup>32</sup> *Id.* R. 40.

<sup>33</sup> *Id.*

<sup>34</sup> Ken Foster, *Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport’s Jurisprudence*, in IAN S. BLACKSHAW, ROBERT C.R. SIEKMANN & JAN WILLEM SOEK, *THE COURT OF ARBITRATION FOR SPORT 1984–2004*, at 420, 438 (2006).

judicially invalidating its rules, even if they allegedly violate athletes' civil liberties as defined under their national laws. For example, in *Martin v. International Olympic Committee*,<sup>35</sup> the Ninth Circuit rejected plaintiffs' claims that not including the same 5,000- and 10,000-meter track events for women that existed for men in the 1984 Los Angeles Olympic Games constituted illegal gender discrimination. The court explained: "[W]e find persuasive the argument that a court should be wary of applying a state statute to alter the content of the Olympic Games. The Olympic Games are organized and conducted under the terms of an international agreement—the Olympic Charter."<sup>36</sup>

Consistent with *Martin*, the British Columbia Court of Appeal rejected a similar gender discrimination claim under Canadian law in connection with the 2010 Vancouver Olympic Games. In *Sagen v. Vancouver Organizing Committee for the 2010 Olympic & Paralympic Games*,<sup>37</sup> the court ruled that the IOC's decision not to include women's ski jumping as an event in the

Vancouver Games (while including men's ski jumping events) did not violate the Canadian Charter of Rights and Freedoms.

### III. Overview of CAS Arbitration System and Its Legal Recognition

The Olympic Charter states that "any dispute arising on the occasion of, or in connection with the Olympic Games shall be submitted exclusively" to the CAS.<sup>38</sup> As a condition of participating in the Olympic Games, athletes are required to submit any disputes in connection therewith to the CAS for final resolution.<sup>39</sup> Outside of the Olympic Games, virtually all IFs have agreed to CAS jurisdiction and their rules generally require their respective NFs and athletes to submit all disputes with the IF to CAS arbitration.<sup>40</sup> All disputes arising out of the application, interpretation, or enforcement of the WADC (e.g., international athlete doping violations and sanctions) also are resolved by CAS arbitration.<sup>41</sup>

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<sup>35</sup> 740 F.2d 670 (9th Cir. 1984).

<sup>36</sup> *Id.* at 677. Adopting a similar deferential approach, U.S. courts have rejected state discrimination law claims by foreign athletes seeking to march in Olympic Games opening ceremonies held in the United States under flags of countries not recognized by the IOC. *See, e.g.*, *Spindulys v. Los Angeles Olympic Organizing Comm.*, 175 Cal. App. 3d 206, 220 Cal. Rptr. 565 (Cal. App. 1985); *Ren-Guey v. Lake Placid 1980 Olympic Games*, 72 A.D.2d 439, 424 N.Y.S.2d 533, *aff'd*, 49 N.Y.2d 771, 429 N.Y.S.2d 473 (1980).

<sup>37</sup> 98 B.C.L.R.4th 141 (Can. B.C.). The Supreme Court of Canada refused appellants' leave to appeal. *Sagen v. Vancouver Org. Comm. for the 2010 Olympic & Paralympic Winter Games, 2009 Carswell BC 3468* (Can. S.C.C.) (WL).

<sup>38</sup> OLYMPIC CHARTER, *supra* note 5, R. 61(2). More broadly, it also provides that any disputes regarding the IOC decisions or its application or

interpretation of the Olympic Charter are to be submitted to the CAS for resolution. *Id.* R 61(1), at 105. However, national courts or arbitration systems generally are used to resolve purely domestic disputes between athletes and their respective NOCs and/or NFs regarding their eligibility or qualifications to be selected for the country's Olympic team. *See, e.g.*, Arbitration CAS ad hoc Division (O.G. Sydney 2000) 007, *Sieracki v IOC*, award of 21 September 2000 in CAS Awards—Sydney 2000 at 81 (recognizing withdrawal of U.S. athlete's appeal because underlying dispute with USA Wrestling and USOC resolved by American Arbitration Association arbitration award, the validity of which was confirmed by U.S. court).

<sup>39</sup> *See id.* R. 40; *see also id.* R. 61.

<sup>40</sup> Cricket currently is the only major international sports that has not done so.

<sup>41</sup> WADC, *supra* note 20, art. 13.2.1.

The CAS's jurisdiction and authority as an arbitration tribunal is based on agreement of the parties;<sup>42</sup> its origin and association with the Olympic Movement have facilitated its recognition and acceptance as the world's "supreme court for sport." Courts generally will enforce a written arbitration agreement requiring that the parties submit a dispute to CAS for resolution as well as IOC or IF rules requiring arbitration before the CAS as a condition of participating in an Olympic or international athletic competition, which bars an athlete from litigating the merits of the subject dispute in a judicial forum.<sup>43</sup>

The CAS "provides a forum for the world's athletes and sports federations to resolve their disputes through a single, independent and accomplished sports adjudication body that is capable of consistently applying the rules of different sports organizations," and it "ensures

fairness and integrity in sport through sound legal control and the administration of diverse laws and philosophies."<sup>44</sup> Its creation recognizes the need for a unitary international legal system that protects the integrity of Olympic and international athletics competition, while also safeguarding athletes' legitimate rights and adhering to fundamental principles of natural justice.<sup>45</sup>

In 1994, the International Council of Arbitration and Sport (ICAS), a group of 20 distinguished jurists or international lawyers with a background in sports and/or arbitration,<sup>46</sup> was created pursuant to a multi-party agreement between the IOC, the Association of Summer Olympic International Federations, the Association of International Winter Sports Federations, and the Association of National Olympic Committees.<sup>47</sup> The ICAS oversees the CAS, manages its funds, and appoints its

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<sup>42</sup> CAS, CODE OF SPORTS-RELATED ARBITRATION (2013) [hereinafter CODE], R27, available at [http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code201320corrections20finales20\(en\).pdf](http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code201320corrections20finales20(en).pdf). See *supra* notes 39–41 and accompanying text.

<sup>43</sup> *N. v. Federation Equestre Internationale* (Swiss Federal Tribunal 1996), in DIGEST OF CAS AWARDS 1986–1998 at 585 (Reeb, ed. 1998); *Raguz v. Sullivan*, 2000 NSW LEXIS 265 (Sup. Ct. NSW, Ct. of Appeal 2000); see also *infra* notes 79 and accompanying text. But see *Slaney v IAAF*, 244 F.3d 580, 591 (7th Cir. 2001) (observing that valid written agreement to arbitrate before a foreign sports arbitral tribunal is enforceable in the U.S. under an international treaty, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, but "[w]hether Slaney's written agreement to follow the rules of the USATF [U.S. NGB for track and field] would satisfy the requirement of an agreement in writing for purposes of enforcing an arbitration agreement with the IAAF [IF for track and field] is a question we need not resolve").

<sup>44</sup> Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for the World's*

*Sports Disputes*, 35 VAL. U. L. REV. 379, 381 (2001).

<sup>45</sup> Tricia Kavanagh, *The Doping Cases and the Need for the International Court of Arbitration for Sport (CAS)*, 22 UNIV. NEW S. WALES L.J. 721 (1999).

<sup>46</sup> Most current or former ICAS members "are substantial people in the world of international law," including "cabinet level officials of France, Syria, and Egypt; the president as well as former current judges of the International Court of Justice at the Hague; the president of the Supreme Court of India and a member of Switzerland's [highest court]; two United States federal appellate judges; two presidents of the ICC Court of arbitration (which is the premier international arbitration body); the president of the Constitutional Court for Bosnia-Herzegovina; [and] the president of the U.S.-Iran claims tribunal at the Hague." Michael Lenard, *The Future of Sports Dispute Resolution*, 10 PEPP. DISP. RESOL. L. J. 173, 176 (2009).

<sup>47</sup> The ICAS was established in response to dicta in a case decided by the Swiss Federal Tribunal, Switzerland's highest court that expressed concern about the CAS's independence from the

member arbitrators (functions that previously were done by the IOC)<sup>48</sup> as well as promulgates the Code of Sports-Related Arbitration (“Code”),<sup>49</sup> which governs the organization, operations, and procedures of the CAS. The purpose of ICAS “is to facilitate the resolution of sports-related disputes through arbitration or mediation and to safeguard the independence of CAS and the rights of the parties.”<sup>50</sup> Members of the ICAS cannot serve as CAS arbitrators or represent a party in a case before the CAS.<sup>51</sup>

The Code broadly provides that the mission of the CAS is to constitute arbitration panels having “the responsibility of resolving disputes arising in the context of sport” in accordance with

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IOC. In *G. v. Federation Equestre Internationale* (Swiss Federal Tribunal 1993), in DIGEST OF CAS AWARDS 1986-1998, at 561 (Reeb, ed. 1998), a horse rider challenged the validity of a CAS award affirming the International Equestrian Federation’s finding of a doping violation and imposition of a disciplinary sanction. He contended that the CAS was not sufficiently independent and impartial to be considered a valid arbitral authority whose decisions should be given binding legal effect. Finding that “the CAS is a true arbitral tribunal independent of the parties, which freely exercises complete juridical control over the decisions of the associations which are brought before it,” the Swiss court upheld the validity of the CAS award and ruled that “the CAS offers the guarantees of independence upon which Swiss law makes conditional the valid exclusion of ordinary judicial recourse.” *Id.* at 568–69. Observing that the IOC established the CAS’s rules, appointed its members, and paid its operating costs, the court limited its holding to “proceedings conducted before the CAS in which the IOC does not appear as a party.” *Id.* at 569.

<sup>48</sup> The IOC, IFs, and NOCs continue to fund the operations of ICAS and the CAS, but they do not govern or administer either organization.

<sup>49</sup> Code, *supra* note 42.

<sup>50</sup> *Id.* S2.

<sup>51</sup> *Id.* S5.

its procedural rules.<sup>52</sup> However, it will not resolve any and all sports-related issues. The CAS generally considers disputes involving a sport’s rules of the game and referee field of play decisions to be non-justiciable to avoid interfering with the autonomy of Olympic and international sports governing bodies to determine or resolve these issues.<sup>53</sup>

At the site of each Olympic Games, the CAS operates an ad hoc Division, which consists of a pool of CAS arbitrators specifically chosen by the ICAS,<sup>54</sup> to provide for expedited resolution of all disputes that arise during the Games or during a period of ten days preceding the Opening Ceremony,<sup>55</sup> including those between an athlete and the IOC or an IF.<sup>56</sup>

<sup>52</sup> *Id.* S12. In addition to the ad hoc Division and appeals arbitrations procedures, the CAS also has an ordinary arbitration procedure that is used to resolve sports-related disputes between the parties relating to matters such as sponsorship contracts, television rights to sports events, and contracts between agents and their agents. *Id.*

<sup>53</sup> James A.R. Nafziger, *Defining the Scope and Structure of International Sports Law: Four Conceptual Issues*, 2011 INT’L SPORTS L.J. 14, 18.

<sup>54</sup> Usually fifteen arbitrators are selected for the Summer Olympic Games, and nine arbitrators for the Winter Olympic Games.

<sup>55</sup> See generally GABRIELLE KAUFMAN-KOHLER, *ARBITRATION AT THE OLYMPICS: ISSUES OF FAST-TRACK DISPUTE RESOLUTION AND SPORTS LAW* (2001); Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515, 517 (2001).

<sup>56</sup> The first CAS ad hoc Division panel operated at the 1996 Summer Olympic Games in Atlanta. ICAS member Michael Lenard notes that there were two reasons for establishing the CAS ad hoc Division:

The first reason was because of the Butch Reynolds case in 1992. Anyone who is interested in athletes’ rights knows that story. Butch Reynolds won a court case in the United

Disputes are resolved by a panel of three arbitrators appointed by a member of the ICAS who serves as president of the CAS ad hoc Division. The applicable substantive law is the Olympic Charter and the general principles and rules of law that the arbitration panel deems appropriate.<sup>57</sup> A written arbitration award generally must be rendered within 24 hours of the filing of a request for CAS adjudication.<sup>58</sup>

Outside of the Olympic Games, the CAS appeals arbitration procedure is used to resolve appeals from final decisions of the IOC or an IF, including athlete doping, discipline, and other eligibility issues.<sup>59</sup>

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States in order to compete in the Barcelona Olympic Games and the IAAF (the track and field IF) said, “So what? We do not live in the United States. Come and sue us in Barcelona two days before the Games start and see if we will let you in.” Because of the structure of sport, the IOC could not overrule the IAAF. That scenario posed a large problem for athletes’ rights. It became a key reason for, and the hallmark of future, Ad-hoc Panels’ purpose: “Never leave an athlete knocking at the gate of the Olympic Village.” The other reason for the Ad-hoc Panel was the fear that, without an alternative, athletes would run into federal court in Atlanta, and the rulings would disrupt the Games.

Lenard, *supra* note 47, at 177.

<sup>57</sup> ARBITRATION RULES FOR THE OLYMPIC GAMES, art. 17 (2012), available at [http://www.tas-cas.org/d2wfiles/document/422/5048/0/RULES200G20FOR20LONDON20201220\\_ENG\\_.pdf](http://www.tas-cas.org/d2wfiles/document/422/5048/0/RULES200G20FOR20LONDON20201220_ENG_.pdf)

<sup>58</sup>*Id.* art. 18.

<sup>59</sup> CODE, *supra* note 42, R47.

<sup>60</sup> See *infra* notes 113–114 and accompanying text.

<sup>61</sup> CODE, *supra* note 42, R53–54.

<sup>62</sup> *Id.* R58. See, e.g., CAS 2008/A/1480, Pistorius v. IAAF, award of 16 May 2008 (applying IF’s rules and law of country in which the IF is based (Monaco), but not the Convention on the Rights of Persons with Disabilities and its Optional

These proceedings usually are before a three-person panel chosen from a closed list of approximately 300 arbitrators;<sup>60</sup> each party selects one arbitrator, and the president of the CAS appeals arbitration procedure (who is an ICAS member) appoints the third arbitrator who serves as the panel’s chair.<sup>61</sup> The applicable substantive laws generally are the relevant sport governing body rules (e.g., IOC or IF rules) and the law of the country in which the governing body is domiciled,<sup>62</sup> although the CAS panel has authority to resolve the dispute according to the “rules of law” it deems appropriate.<sup>63</sup> The CAS panel must issue a written award that

Protocol because Monaco has not signed or ratified this international treaty at the time of the parties’ dispute). Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 LOY. U. CHI. L. J. 1203, 1251 (2006) (“While the primary source of supplementary law used by panels is Swiss domestic law, largely due to the fact that many IFs are headquartered in Switzerland, panels have also drawn upon the domestic law of the United Kingdom, general principles of law, civil law traditions, and concepts from international human rights.”).

<sup>63</sup> As one CAS panel observed:

The Panel is of the opinion that all sporting institutions, and in particular all international federations, must abide by general principles of law. Due to the transnational nature of sporting competitions, the effects of the conduct and deeds of international federations are felt in a sporting community throughout various countries. Therefore, the substantive and procedural rules to be respected by international federations cannot be reduced only to its own statutes and regulations and to the laws of the country where the federation is incorporated or of the country where its headquarters are. Sports law has developed and consolidated along the years, particularly through the arbitral settlement of disputes, a set of unwritten legal principles – a sort of *lex mercatoria* for sports or, so to speak, a [*lex sportiva*] – to which national and international sports federations must conform, regardless of the presence of such principles within their

resolves the dispute within three months after receiving the case file.<sup>64</sup>

Regardless of its geographical location, the “seat” of all CAS arbitration proceedings is always deemed to be Lausanne, Switzerland.<sup>65</sup> This ensures uniform procedural rules for all CAS arbitrations, which provides a stable legal framework and facilitates efficient dispute resolution in locations convenient for the parties.<sup>66</sup> All parties in any CAS arbitration proceeding may be represented by counsel.<sup>67</sup> The Code does not establish any formal rules of evidence, although it

authorizes a CAS panel to limit or disallow witness testimony on the grounds of relevance,<sup>68</sup> thus providing the panel with significant discretion regarding the admissibility of evidence.

In both CAS ad hoc Division and appeals arbitration proceedings, the arbitration panel provides *de novo* review of the challenged IOC or IF rule or decision.<sup>69</sup> This standard of review means the CAS panel is not “limited in any way in its review of both the facts and law”<sup>70</sup> relevant to the dispute. Thus, the parties may introduce new evidence and make additional legal

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own statutes and regulations or within any applicable national law, provided that they do not conflict with any national «public policy» (*«ordre public»*) provision applicable to a given case. Certainly, general principles of law drawn from a comparative or common denominator reading of various domestic legal systems and, in particular, the prohibition of arbitrary or unreasonable rules and measures can be deemed to be part of such [*lex sportiva*].

Arbitration CAS 98/200 AEK Athens and SK Slavia Prague / Union of European Football Associations (UEFA), award of 20 August 1999, at ¶156.

<sup>64</sup> CODE, *supra* note 42, R59.

<sup>65</sup> *Id.* R28; ARBITRATION RULES FOR THE OLYMPIC GAMES, *supra* note 58, art. 7. There also are CAS offices in New York City and Sydney, Australia.

<sup>66</sup> Raguz v. Sullivan, 2000 NSW LEXIS 265, \*47-49 (Sup. Ct. NSW, Ct. of Appeal 2000).

<sup>67</sup> CODE, *supra* note 42, R30.

<sup>68</sup> *Id.* at R44.2 & R57.

<sup>69</sup> Article R57 provides: “The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.” *Id.* R57; *see also* ARBITRATION RULES FOR THE OLYMPIC GAMES, *supra* note 57, art. 16 (“The Panel shall have full power to establish the facts on which the application is based.”) & art. 17 (“The Panel shall

rule on 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.”).

<sup>70</sup> *See, e.g.*, D’Arcy v. Australian Olympic Committee, Arbitration CAS 2008/A/1574, Award of 11 June 2008, at ¶19. Rather, “it is the duty of the [appeal panel] to make its independent determination of whether the Appellant’s contentions are correct, not to limit itself to assessing the correctness of the award or decision from which the appeal was brought.” *Id.* ¶50. Pursuant to Rule 57 of the Code, a CAS panel “not only has the power to establish whether the decision of the first instance was or was not lawful, but to issue an independent and free standing decision.” Despina Mavromati & Pauline Pellaux, *Article R57 of the CAS Code: A Purely Procedural Provision?*, in COURT OF ARBITRATION FOR SPORT, CAS SEMINAR MONTRIEUX 2011 at 57, 59 (2012). It must apply (but not rewrite) the existing rules and law to the facts and respect the wide discretion that a private sport governing body has to make and enforce its rules. However, “Article R57 does not mean that the Panel will disregard the assessment made by the first-instance adjudicating body without having specific reasons to do so.” *Id.* at 60. Therefore, “[w]hen the applicable provision provides a certain margin of appreciation, CAS panels may freely use it and substitute their appreciation to the previous instance’s one without deeming that it was manifestly erroneous, while some times they will be more deferential; both attitudes are in line with the CAS Code.” *Id.* at 60–61.

arguments in the CAS proceeding that were not considered by the IOC or IF internal decision-making bodies. The scope of CAS de novo review is broader than the very narrow arbitrary and capricious or rational basis standard that national courts generally apply when reviewing sport governing body rules and decisions.<sup>71</sup>

The CAS panel adjudicates the dispute by majority decision and issues a written award setting forth the reasons for its decision. All CAS ad hoc Division and most appeals arbitration awards are published.<sup>72</sup> The CAS Secretary General (Matthieu Reeb), who oversees administration of the CAS, has published separate volumes of ad hoc Division awards for each Olympic Games<sup>73</sup> and a three-volume Digest of CAS Awards, which includes selected appeals arbitration awards (some of which are edited) rendered from 1986–2003.<sup>74</sup> CAS awards after 2003 are posted on the CAS website,

but not all awards are readily available and accessible.<sup>75</sup>

Both CAS ad hoc Division and appeals arbitration awards provide final and binding resolution of the parties' dispute, subject to judicial review by the Swiss Federal Tribunal (SFT), Switzerland's highest court.<sup>76</sup> In *Canas v. ATP Tour*,<sup>77</sup> the SFT refused to enforce an IF's contractual waiver, which required an athlete to agree not to judicially appeal a CAS award as a condition of allowing him to participate in its organized or sponsored events. The court initially determined that an athlete's agreement to arbitrate dispute before the CAS is enforceable because it "promotes the swift settlement of [sports] disputes . . . by specialized arbitral tribunals that offer sufficient guarantees of independence and impartiality."<sup>78</sup> It then noted the importance of ensuring that athletes are not forced to waive their right to appeal a CAS award to the SFT ("the supreme judicial authority of the state in which the arbitral tribunal is domiciled"<sup>79</sup>). This is

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<sup>71</sup> D'Arcy, *supra* note 71, at ¶¶ 30, 42. See generally Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 130-31 (2008).

<sup>72</sup> CODE, *supra* note 42, R59. The parties may agree that a CAS appeals arbitration award will be confidential.

<sup>73</sup> E.g. CAS, CAS AWARDS – SYDNEY 2000 (2000); CAS, CAS AWARDS – SALT LAKE CITY 2002 & ATHENS 2004 (2004); CAS, CAS AWARDS – TURIN & MELBOURNE 2006 (2006); CAS, CAS AWARDS – BEIJING 2008 (2008).

<sup>74</sup> CAS, DIGEST OF CAS AWARDS: 1986–1998 (Matthieu Reeb ed., 1998); CAS, DIGEST OF CAS AWARDS II: 1998–2000 (Matthieu Reeb ed., 2002); CAS, DIGEST OF CAS AWARDS III: 2001–2003 (Matthieu Reeb ed., 2004).

<sup>75</sup> *Case Law Documents*, CAS, <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/Fo rms/By%20Year.aspx> (last visited Sept. 27, 2013)

<sup>76</sup> *20 Questions About the CAS*, CAS, <http://www.tas-cas.org/en/20questions.asp/4-3-231-1010-4-1-1/5-0-1010-13-0-0/> (last visited Nov. 11, 2013).

<sup>77</sup> 4P.172/2006 at 4.4.2 (1st Civ. Law Ct., Mar. 22, 2007).

<sup>78</sup> *Id.* at 4.3.2.3. But see Jan Lukomski, *Arbitration Clauses in Sports Governing Bodies' Statutes: Consent or Constraint? Analysis From the Perspective of Article 6(1) of the European Convention on Human Rights*, 13 INT'L SPORTS L.J. 60 (2013) ("Even if arbitration clauses are valid from the point of view of Swiss legal system, which was confirmed by Swiss Federal Supreme Court, it does not necessarily mean they are in compliance with provisions of the European Convention . . . in my view they are not" because their enforcement denies athletes the right to a fair trial before a court of law).

<sup>79</sup> 4P.172/2006 at 4.3.2.3.

because “the continuing possibility of [a judicial] appeal act[s] as a counterbalance”<sup>80</sup> to the requirements of the IOC and IFs that Olympic and international sport athletes must agree to submit disputes to the CAS as a condition of participation in their athletic events.

Article 190(2) of the Swiss Federal Code on Private International Law of December 18, 1987, specifies only very limited procedural and substantive grounds for judicially challenging a CAS award before the SFT.<sup>81</sup> Procedural grounds for vacating an award include: an irregularity in the composition of the arbitration panel (e.g., lack of independence or impartiality); an erroneous assertion of jurisdiction; a failure to comply with the scope of an arbitration agreement by not ruling on a submitted claim or ruling on extraneous matters; or a

violation of the parties’ rights to be heard or to be treated equally.<sup>82</sup> The sole basis for challenging the substantive merits of a CAS award is its incompatibility with Swiss public policy, a defense that the SFT has construed very narrowly. According to the SFT, the public policy defense “must be understood as a universal rather than national concept, intended to penalize incompatibility with the fundamental legal or moral principles acknowledged in all civilized states.”<sup>83</sup> It has ruled that “even the manifestly wrong application of a rule of law or the obviously incorrect finding of a point of fact is still not sufficient to justify revocation for breach of public policy of an award made in international arbitration proceedings.”<sup>84</sup> The SFT has vacated very few CAS arbitration awards on public policy grounds.<sup>85</sup>

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<sup>80</sup> *Id.* Given the very limited scope of SFT review of CAS awards, this “counterbalance” provides athletes with primarily procedural rights in connection with a CAS arbitration proceeding rather than any right to appellate review of the merits of a CAS award. See *infra* notes 177–179 and accompanying text.

<sup>81</sup> *Switzerland’s Federal Code on Private International Law*, CAS (Dec. 18, 1987), <http://www.tas-cas.org/en/arbitrage.asp/4-3-292-1023-4-1-1/5-0-1023-3-0-0/>. The website of the Swiss law firm ZPG Avocats (<http://www.praetor.ch/>) provides an English translation of all SFT cases reviewing CAS awards from January 2008 to the present, which enables these cases to be downloaded without charge. See *Swiss International Arbitration Decisions*, <http://www.swissarbitrationdecisions.com/> (last visited Nov. 11, 2013). See generally Charles Poncet, *When Is a “Swiss” “award” Appealable?*, 2012 *PARIS J. INT’L ARB.* 135 (providing overview of SFT process for reviewing CAS awards).

<sup>82</sup> See generally Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 *PEPP. DISP. RESOL. L.J.* 51, 55–58 (2009).

<sup>83</sup> *N., J., Y., W. v. FINA*, 5P.83/1999 (1999) (Switz.), in *CAS, DIGEST OF CAS AWARDS II: 1998–2000* at 775, 779 (Matthieu Reeb ed., 2002).

<sup>84</sup> *Id.* at 779. See also *Azerbaijan Field Hockey Fed’n. v. Fédération Internationale de Hockey*, 4A\_424/2008 at 6 (Switz.) (“The Swiss Federal Tribunal does not review whether the arbitration court applied the law, upon which it based its decision, correctly.”).

<sup>85</sup> In *Matuzalem v. FIFA*, 4A\_558/2011 (1st Civil Court, March 27, 2012), the SFT stated that the CAS’s “substantive adjudication of a dispute violates public policy only when it disregards some fundamental legal principles and consequently becomes completely inconsistent with the important, generally recognized values, which according to dominant opinions in Switzerland should be the basis of any legal order.” *Id.* ¶ 4.1. It explained that an arbitral award would be “annulled only when its result contradicts public policy and not merely its reasons.” *Id.* ¶ 4.1. Applying this principle, the SFT vacated a CAS award upholding a Federation Internationale de Football Association (FIFA) disciplinary sanction prohibiting a soccer player from playing professionally worldwide until he paid damages of 11,858,934 euros for breaching his contract with his former club. The court ruled that the challenged CAS award violated an

The CAS is recognized under the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations.<sup>86</sup> CAS arbitration awards are enforceable in the 148 countries that are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), an international treaty.<sup>87</sup> As a foreign arbitration award in all countries except Switzerland, a CAS award is subject to judicial review in national courts of countries, including the U.S., that are parties to the New York Convention.<sup>88</sup> Pursuant to Article V(2)(b) of the New York Convention, a national court may refuse to recognize and enforce a CAS arbitration award if doing so “would be contrary to the public policy of that country.”<sup>89</sup> Similar to the SFT, U.S. courts

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individual’s right to economic freedom protected by the Swiss civil code, which “belongs to the important generally recognized order of values, which according to dominant opinion in Switzerland should be the basis of any legal order.” *Id.* ¶ 4.3.1. It concluded that the FIFA disciplinary sanction curtails the athlete’s economic freedom “to such an extent that the foundations of his economic existence are jeopardized” and is “an obvious and grave violation” of the civil code, which is “contrary to public policy.” *Id.* ¶ 4.3.2. To date, *Matuzalem* represents the only case in which the SFT has vacated a CAS award on substantive grounds.

<sup>86</sup> Ian S. Blackshaw, *Introductory Remarks to BLACKSHAW ET AL.*, *supra* note 34 at 4 (“CAS rulings are legally effective and can be enforced internationally.”).

<sup>87</sup> *New York Convention Countries*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states> (last visited Nov. 13, 2013).

<sup>88</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter *New York Convention*], 9 U.S.C. §201 et seq.

<sup>89</sup> *Id.* art. V(2)(b).

have construed this defense very narrowly and enforced the one CAS award that has been judicially reviewed to date.<sup>90</sup>

#### IV. General Requisites of a Private Legal System for Resolving Sports Disputes that Justify Judicial Deference and Sovereign Recognition

All dispute resolution systems, whether governmental or private, should aspire to provide procedural fairness and substantive justice.<sup>91</sup> Procedural fairness means adequate notice of rules to individuals who may be affected (as well as potential consequences for violations), along with an adequate opportunity for them to present their case to an unbiased decision maker if violations are alleged or disputes arise.<sup>92</sup> Substantive justice (i.e.,

<sup>90</sup> In *Gatlin v. U.S. Anti-Doping Agency, Inc.*, 2008 WL 2567657 (N.D. Fla. 2008), a federal district court ruled that a CAS arbitration award rejecting an athlete’s claim that his prior doping violation for taking prescribed medication violated the Americans with Disabilities Act, which the court characterized as “arbitrary and capricious,” did not violate the New York Convention’s public policy exception and justify its refusal to recognize the award. *See generally* Mitten, *supra* note 83, at 62–66; Mitten & Opie, *supra* note 2, at 301–302.

<sup>91</sup> *See, e.g.*, TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 273–74, 278 (2d ed. 2006); Amy Gangl, *Procedural Justice Theory and Evaluations of the Lawmaking Process*, 25 POL. BEHAV. 119, 135 (2003); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103, 132 (1988); Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 LAW & SOC’Y REV. 809, 827 (1994).

<sup>92</sup> *See, e.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Mathews v. Elridge*, 424 U.S. 319 (1976). *See also* Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to

just results in individual cases) are a product of procedural fairness combined with a good faith and rational decision based on the information presented by the parties, which follows applicable precedent and does not discriminate against those affected (i.e., like cases produce like results).<sup>93</sup>

The IOC and IFs have plenary authority to adopt rules that determine athletes' eligibility to compete, impose disciplinary sanctions, and take other action that may adversely affect athletes' interests. Because they generally require that all disputes be resolved by final and binding CAS arbitration, it is essential that a private legal system for resolving Olympic and international sports disputes provides "sports justice," particularly to the athletes directly affected by their rules and decisions. Professor Roger Abrams defines "sports justice" as "the product of the authoritative procedures used in the business of sports to resolve disputes and controversies," which he suggests should result in "objective, impartial, unbiased,

equitable, fair, [and] dispassionate" decisions.<sup>94</sup>

Professor James Nafziger notes that "A core principle, perhaps *the* core principle to inform not only the *lex sportiva*, but also the larger body of international sports law, is *fairness*."<sup>95</sup> This encompasses both procedural and substantive fairness. The former implicates "due process or natural justice" concerns, specifically "the rule against bias and the right to a fair hearing," which requires "prior notice of a decision, consultation and written representation, adequate notice of applicable sanctions, an oral hearing, a right to call and cross-examine witnesses, an opportunity for legal representation, and a reasoned decision."<sup>96</sup> Recognizing that a "definition of substantive fairness, in the sense of distributive justice, is more elusive" and that "many issues of fairness cannot be pigeon-holed as either 'procedural' or 'substantive,'" he suggests that its defining characteristics include "impartiality, equity, good faith, and coherence in the sense of consistency and uniformity."<sup>97</sup>

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which Switzerland is a contracting party, that creates an individual right to a "fair trial" requiring "a fair and public hearing [including a public judgment] within a reasonable time by an independent and impartial tribunal established by law, which decides on civil rights and obligations." Ulrich Haas, *Role and Application of Art. 6 of the European Convention on Human Rights (ECHR) in CAS Procedures*, in CAS, CAS SEMINAR MONTREUX 2011, at 74, 74 (2012).

<sup>93</sup> As one commentator notes: "It is of the very essence of any system of law, of course, that its rules are consistent, accessible and predictable. Lawyers must be able to advise their clients with a degree of confidence as to what those rules actually are. It is only with such predictability that the core objectives of swift and inexpensive justice can be achieved. Without legal certainty, every case, no matter how small and apparently straightforward, will descend into an expensive legal debate." James Segan, *Does the Court of Arbitration for Sport Need a Grand Chamber*,

SPORTS L. BULL. (Apr. 19, 2013), *available at* <http://sportslawbulletin.org/2013/04/19/does-the-court-of-arbitration-for-sport-need-a-grand-chamber/>.

<sup>94</sup> ROGER I. ABRAMS, *SPORTS JUSTICE: THE LAW AND BUSINESS OF SPORTS* 14 (2010). *See also* Josephine R. Potuto & Jerry R. Parkinson, *If It Ain't Broke, Don't Fix It: An Examination of The NCAA Division I Infractions Committee's Composition and Decision-Making Process*, 89 NEB. L. REV. 437, 453 (2011). ("There can be no disagreement that independence and neutrality are critical to effective functioning of any adjudicative body" that resolves sports disputes).

<sup>95</sup> James A. R. Nafziger, *International Sports Law*, in *HANDBOOK ON INTERNATIONAL SPORTS LAW* 3, 17 (James A. R. Nafziger & Stephen F. Ross eds., 2011).

<sup>96</sup> *Id.* at 19–20.

<sup>97</sup> *Id.* at 20.

To provide procedural fairness and substantive justice,<sup>98</sup> a private legal system for resolving Olympic and international sports disputes must have, at a minimum, the following components: 1) an open forum accessible to all aggrieved parties, particularly athletes whose eligibility to participate in sports competitions is or may be adversely affected, who have the right to legal counsel; 2) independent and impartial adjudicators; 3) a full and fair opportunity for all parties to be heard; 4) timely, reasoned, and final decisions; and 5) the development of a clearly articulated uniform body of law (which provides equal and unbiased treatment of those similarly situated) resulting in the consistent, predictable application of Olympic sport governing body regulations and rules of law.

## V. Analysis of CAS Arbitration in Light of Procedural Fairness and Substantive Justice Concerns

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<sup>98</sup> “Empirical research reveals that decision-making and dispute resolution procedures [including arbitration] are most likely to be effective if they are perceived as procedurally fair. If parties perceive a dispute resolution or decision-making process as procedurally fair, they are more likely to perceive the outcome as substantively fair even if it is adverse to them, comply with that outcome, and perceive the institution that provides or sponsors the process as legitimate. . . . Four process characteristics reliably predict parties' perceptions of fairness: the opportunity for parties to express themselves and their positions (‘voice’), demonstration of sincere consideration of these expressions by a trustworthy decision-maker (‘being heard’), even-handed treatment and the neutrality of the forum, and dignified, respectful treatment. Parties assess decision-makers' trustworthiness in order to determine whether they ‘can trust that in the long run the [decision-making] authority with whom they are dealing will work to serve their interests.’” Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of*

This Section considers whether the CAS arbitration system has sufficient indicia of procedural fairness (i.e., an impartial, unbiased, and dispassionate adjudicative process) and substantive justice (i.e., objective and equitable results) to justify substantial judicial deference and sovereign recognition of its awards, particularly those that resolve disputes between the IOC or an IF and an athlete.

### A. Open Forum Accessible to Athletes Represented by Counsel

The CAS arbitration system provides an open forum fully accessible to all aggrieved parties,<sup>99</sup> including athletes whose eligibility to participate in Olympic or other international sports competitions is adversely affected by IOC or IF rules or decisions. The CAS ad hoc Division ensures “‘fair, fast, and free’ resolution of an athlete’s eligibility to compete in the Olympic Games.”<sup>100</sup> All parties in CAS ad hoc Division and appeals arbitration have

*Mediation into Bilateral Investment Treaty Arbitration*, 18 Harv. Negot. L. Rev. 71, 95-98 (2013).

<sup>99</sup> The Code establishes procedures for third parties whose interests may be affected to be joined or to intervene in a CAS arbitration proceeding, and it authorizes a CAS panel to permit non-parties to file amicus briefs. CODE, *supra* note 43, R41.2, R41.3, & R41.4. For example, because it was a particularly significant case that would determine the eligibility of athletes who previously had been suspended more than six months to participate in the London Olympic Games, interested non-parties were permitted to submit amicus briefs in CAS 2011/O/2422, USOC v. IOC, award of 4 October 2011. Nine amicus briefs were filed by various organizations, including WADA, several anti-doping agencies, two NOCs, and two athlete groups. *Id.* at 6.

<sup>100</sup> Mitten & Davis, *supra* note 71, at 79.

the right to be represented by legal counsel of their choice.<sup>101</sup> Volunteer lawyers may be available to represent athletes without charge in CAS ad hoc Division proceedings, although their availability generally is dependent on the willingness, language skills, and expertise of the local bar.

Pursuant to Article S6(9) of the Code, ICAS has created “a legal aid fund to facilitate access to CAS arbitration for individuals without sufficient financial means”<sup>102</sup> and established guidelines for its operation.<sup>103</sup> CAS appeals arbitration proceedings in which athletes are challenging IF rules or decisions against them (which include doping sanctions) are free of charge except for a filing fee of CHF 1,000 (approximately \$1,000), which may be waived if the athlete qualifies for legal aid; the arbitrators’ costs and fees are borne administratively by the CAS.<sup>104</sup> Unless they qualify for legal aid, athletes must pay their own attorneys’ fees and expenses. If an athlete is the prevailing party, the CAS panel resolving the dispute has the discretion to order the IF to pay a contribution towards his legal fees and

other expenses (although the converse also is true).<sup>105</sup>

## B. Independent and Impartial Arbitrators

The CAS arbitration system currently appears to have adequate safeguards necessary to ensure that sports disputes will be resolved by independent and impartial arbitrators. In 1993, in *G. v. Federation Equestre Internationale (“Gundel”)*,<sup>106</sup> the SFT ruled that “the CAS is a true arbitral tribunal independent of the parties,” which “offers the guarantees of independence upon which Swiss law makes conditional the valid exclusion of ordinary judicial recourse.” Subsequently, in *A. and B. v. IOC and FIS (“Lazutina”)*,<sup>107</sup> a 2003 case, the SFT rejected the plaintiffs’ contention that the CAS is not impartial when it decides a dispute between an athlete and the IOC. It ruled that the CAS, whose operations have been overseen by the ICAS since 1994, is sufficiently independent from the IOC for its arbitration decisions “to be considered true awards, equivalent to the judgments of State courts.”<sup>108</sup> It concluded: “As a body

<sup>101</sup> CODE, *supra* note 42, R30.

<sup>102</sup> *Id.* S6(9).

<sup>103</sup> See CAS, GUIDELINES ON LEGAL AID BEFORE THE COURT OF ARBITRATION FOR SPORT (2013), available at [http://www.tas-cas.org/d2wfiles/document/7099/5048/0/Legal20Aid20Rules20ENG20\\_clean\\_FINAL.pdf](http://www.tas-cas.org/d2wfiles/document/7099/5048/0/Legal20Aid20Rules20ENG20_clean_FINAL.pdf) [hereinafter *Guidelines on Legal Aid*].

<sup>104</sup> CODE, *supra* note 42, S65.2.

<sup>105</sup> *Id.* S65.3.

<sup>106</sup> *G versus Federation Equestre International*, in DIGEST OF CAS AWARDS 1986–1998, *supra* note 73, at 561, 568–69. To date, there has been only one CAS award challenged by an American athlete in a U.S. court pursuant to the New York Convention treaty, and it did not involve a claim that the CAS arbitration system was not sufficiently independent and impartial for a U.S.

court to recognize and enforce its awards. See *Gatlin v. U.S. Anti-Doping Agency, Inc.*, 2008 WL 2567657 (N.D. Fla. June 24, 2008). Although the CAS’s “closed list” of arbitrators system has been upheld by the SFT, it is being challenged in pending litigation before the European Court of Human Rights on the ground it is not sufficiently independent to comply with Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which establishes an individual’s right to a “fair trial.” Antonio Rigozzi, Erika Hasler, & Brianna Quinn, *The 2011, 2012, and 2013 Revisions to the Code of Sports-related Arbitration*, JUSLETTER, June 3, 2013, at 3.

<sup>107</sup> *A. and B. versus IOC and FIS*, in Digest of CAS Awards III 2001–2003, *supra* note 72, at 674.

<sup>108</sup> *Id.* at 689. The SFT relied on the ICAS’s independence and autonomy to support its

which reviews the facts and the law with full powers of investigation and complete freedom to issue a new decision in place of the body that gave the previous ruling, the CAS is more akin to a judicial authority independent of the parties.”<sup>109</sup>

The Code provides that ICAS, in establishing the roster of CAS arbitrators, shall select persons with “legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language [English or French], whose names and qualifications are brought to [its] attention . . . including by the IOC, the IFs and the NOCs.”<sup>110</sup> When appointing arbitrators, ICAS is required to “consider continental representation and the different juridical cultures.”<sup>111</sup> CAS arbitrators must be independent, objective

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holding. It observed that ICAS “can amend its own Statutes (Art. S25 of the Code), does not take orders from the IOC and is not obliged to abide by the IOC’s decisions.” *Id.* at 684. It noted that the ICAS is an independent body “responsible for drawing up the list of [CAS] arbitrators.” *Id.* at 686. Although the IOC funds one-third of the annual costs of the operations of the ICAS and CAS, it does not fund the operational costs of CAS ad hoc Divisions, and the ICAS manages its funds and approves the CAS’s budget. *Id.* at 687. Observing that “State courts in countries governed by the rule of law are often required to rule on disputes involving the State itself, without their judges’ independence being questioned on the ground they are financially linked to the State,” the SFT concluded “there is not necessarily any relationship of cause and effect between the way a judicial body is financed and its level of independence.” *Id.* at 688.

<sup>109</sup> *Id.* at 686.

<sup>110</sup> CODE, *supra* note 42, S14. ICAS formerly appointed CAS arbitrators largely from a pool of nominees initially proposed by the IOC, IFs, and NOCs. Although these organizations still may nominate prospective arbitrators, the Code now permits any person who wants to be considered for appointment to the CAS to self-nominate by

and impartial in rendering their decisions, maintain confidentiality, and agree not to represent any parties in proceedings before the CAS.<sup>112</sup> As of November 1, 2013, there are 283 CAS arbitrators from 72 countries, including 30 from the U.S., who have been appointed by ICAS for four-year renewable terms.<sup>113</sup>

The Code does not limit a party’s discretion and freedom to select any arbitrator in the pool of CAS arbitrators, but some commentators have expressed concerns about the independence of CAS arbitrators because “in practice, the pool of arbitrators selected by parties is relatively small” and “largely homogenous in age, gender, and nationality.”<sup>114</sup> The Code requires that a chosen arbitrator “shall be and remain impartial and independent of the parties and shall immediately disclose any circumstances which may affect his

filling out a form on the CAS website. *Id.* S14. This process broadens the pool of prospective CAS arbitrators beyond those nominated by Olympic sports governing bodies. Lenard, *supra* note 46, at 179 (Current ICAS member advocates “there should be closed lists. People should not pick just the arbitrators that they want to ‘represent’ them. There is an important body of sports knowledge cases, even in non-doping, that arbitrators must know.”).

<sup>111</sup> CODE, *supra* note 42, S16.

<sup>112</sup> *Id.* S18 & S19. Although CAS arbitrators previously were permitted to represent parties in CAS arbitrations, the Code now prohibits them from doing so. *Id.* S18.

<sup>113</sup> The Code requires there to be a minimum of 150 CAS arbitrators. *Id.* S13. See CAS, LIST OF CAS ARBITRATORS PER NATIONALITY (2013), available at [http://www.tas-cas.org/d2wfiles/document/452/5048/0/Liste20des20arbitres20par20nationalit%C3%A920\\_octobre202013\\_.pdf](http://www.tas-cas.org/d2wfiles/document/452/5048/0/Liste20des20arbitres20par20nationalit%C3%A920_octobre202013_.pdf).

<sup>114</sup> Maureen A. Weston, *Doping Control, Mandatory Arbitration, and Process Dangers for Athletes in Professional Sports*, 10 PEPP. DISP. RESOL. L. J. 5, 20 & n.81 (2009).

independence with respect to any of the parties.”<sup>115</sup> It permits a party to challenge an arbitrator’s appointment “if the circumstances give rise to legitimate doubts over his independence or over his impartiality,” and requires the ICAS to provide a reasoned determination of any challenges.<sup>116</sup>

In *Alejandro Valverde Belmonte v. Comitato Olimpico Nazionale Italiano* (“*Belmonte*”),<sup>117</sup> the SFT held that “[s]imilarly to a state judge, an arbitrator must present sufficient guarantees of independence and impartiality” and that “[b]reaching that rule leads to irregular composition [of a CAS panel] pursuant to Art. 190(2)(a) PILA.”<sup>118</sup> It concluded that “the independence and the impartiality demanded from the members of an arbitral tribunal extend to the party appointed arbitrators as well as to the chairman of the arbitral tribunal.”<sup>119</sup> However, the SFT acknowledged that “absolute independence by all arbitrators is an ideal which will correspond to reality only rarely,”<sup>120</sup> observing that there is a closed list of CAS arbitrators who must have legal training and recognized expertise regarding sport and the existing historical associations and contacts many CAS arbitrators have with Olympic sports organizations, administrators, and counsel

as well as others associated with the Olympic Movement. Thus, it ruled that “an arbitrator may not be challenged merely because he was chosen by one of the parties to the dispute”<sup>121</sup> and there is “no justification for a special treatment of CAS arbitrators, namely to be particularly strict in reviewing their independence and impartiality.”<sup>122</sup> According to the SFT, this requires a case-by-case determination rather than “immutable rules.”<sup>123</sup>

### C. Full and Fair Opportunity to Be Heard

In *Belmonte*, the SFT ruled that, to be judicially recognized, a CAS arbitration proceeding must provide each party with the following specific rights:

to express its views on the essential facts for the judgment, to present its legal arguments, to propose evidence on pertinent facts and to participate in the hearing of the arbitral tribunal . . . have the possibility to present their arguments . . . have an opportunity to express its views on its opponent’s arguments, [and] to review and discuss its evidence and to challenge it with its own evidence.<sup>124</sup>

<sup>115</sup> CODE, *supra* note 42, R33.

<sup>116</sup> *Id.* R34.

<sup>117</sup> 4A\_234/2010 (1st Civ. Ct. 2010).

<sup>118</sup> *Id.* at 9.

<sup>119</sup> *Id.* at 12–13.

<sup>120</sup> *Id.* at 13.

<sup>121</sup> *Id.* at 13.

<sup>122</sup> *Id.* at 14.

<sup>123</sup> *Id.* at 15. In this case, the court concluded that the Italian Olympic Committee’s appointment of a Swiss law professor (who had previously participated in the revision of the WADC and been appointed as an independent observer by

WADA in connection with the Athens Olympic Games) as an arbitrator in a doping case in which WADA subsequently became a party did constitute the irregular composition of a CAS panel. *See generally* Mitten, *supra* note 83, at 55–58.

<sup>124</sup> *Belmonte*, 4A\_234/2010 at 22. Some legal scholars assert that CAS doping proceedings should have more procedural protections to ensure athletes have a full and fair opportunity to be heard. Because “[d]oping adjudications are imbued with many of the elements of a civil and quasi-criminal proceeding, without corresponding process protections,” Professor Maureen Weston advocates that CAS procedural rules should be amended to provide athletes with discovery rights and provide for appointment of

The de novo nature of a CAS arbitration panel's review in ad hoc Division and appeals arbitration proceedings provides a full and fair opportunity for all parties to be heard and to raise any relevant factual and legal issues. Thus, CAS de novo review generally enables any procedural flaws occurring during an Olympic or international sports governing body's prior disposition of the matter to be cured.<sup>125</sup> For example, if the IOC or an IF fails to provide an athlete with a hearing before taking adverse action against him, this deficiency is remedied via a CAS arbitration proceeding.

#### D. Timely, Reasoned, and Final Decisions

The Code requires that CAS awards must be rendered quickly, which ensures that an athlete's dispute with the IOC or an IF is resolved in a timely manner, thereby minimizing any adverse effects if the athlete's appeal is successful.<sup>126</sup> A CAS ad hoc Division award generally must be made within 24 hours of the filing of a request for CAS adjudication.<sup>127</sup> A CAS appeals arbitration generally must be resolved within three months.<sup>128</sup>

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independent scientific experts to address the validity of positive test results. Weston, *supra* note 112, at 46, 47–48. Professor Michael Straubel contends that “[d]oping cases are accusatory and quasi-criminal in nature and therefore fundamentally different from the typical contract dispute decided by arbitration CAS” and suggests “CAS should consider developing a second chamber, with separate procedures and arbitrators, to hear doping cases.” Straubel, *supra* note 62, at 1271–72; *see also* Haas, *supra* note 90 (discussing whether Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which creates an individual right to a “fair trial” with certain procedural safeguards, applies to CAS arbitration proceedings).

A CAS award must provide reasons for the resolution of each claim or defense raised by the parties in order to be judicially recognized. In *Canas v. ATP Tour*,<sup>129</sup> the SFT vacated a CAS award because it failed to provide reasons for rejecting arguments that his doping sanction violated United States and European Union laws and remanded it to the CAS panel for further consideration. The SFT ruled that CAS arbitrators are required to discuss all of the parties' arguments in their legal analysis of the relevant issues in dispute, including claims that applicable national, transnational, or international laws have been violated. The panel must explain “even briefly” their reasons “so that the petitioner could be satisfied upon a perusal of the award that the arbitrators had considered all of his arguments which had objective relevance, even if it was to dismiss them ultimately.”<sup>130</sup>

Recognizing that “[f]inality as well as fairness is a desirable objective of all litigation and arbitration,” the CAS has adopted the doctrine of *res judicata*, which precludes a CAS panel from subsequently considering “an appeal against its own

<sup>125</sup> Mavromati & Pellaux, *supra* note 70, at 58.

<sup>126</sup> CODE, *supra* note 42, R59.

<sup>127</sup> ARBITRATION RULES FOR THE OLYMPIC GAMES, *supra* note 57, art. 18.

<sup>128</sup> CODE, *supra* note 42, R59.

<sup>129</sup> *Canas*, 4P.172/2006 at 5.3.

<sup>130</sup> *Id.* The CAS panel subsequently remedied this deficiency by modifying its award to provide brief reasons for concluding that the athlete's doping sanction did not violate United States and European Union laws. Revised Award, CAS 2005/A/951, *Canas v. ATP*, award of 23 May 2007, at 18.

decision from a party to such decision.”<sup>131</sup> As one CAS panel concluded “in the absence of consent, it should not revisit prior decisions, where essentially the same parties are involved.”<sup>132</sup> Because all CAS proceedings are governed by Swiss law, appeals of CAS awards must be made to the SFT, which provides extremely limited review of the merits of an arbitration award. Therefore, virtually all CAS awards effectively provide a final and binding resolution of the parties’ dispute.<sup>133</sup>

### **E. Clearly Articulated Uniform Body of Law With Consistent, Predictable Application**

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<sup>131</sup> See, e.g., Arbitration CAS ad hoc Division (O.G. Sydney 2000) 009, In the Matter Angel Perez, award of September 25, 2000, in CAS, CAS AWARDS—SYDNEY 2000 at 91, 98–99 (2000) (refusing to consider Cuban NOC’s challenge to prior CAS award determining that athlete met Olympic Charter’s sport nationality requirement and is eligible to compete for U.S. in Sydney Olympic Games).

<sup>132</sup> Arbitration CAS ad hoc Division (O.G. Sydney 2000) 008, Arturo Miranda, Canadian Olympic Ass’n, and Canadian Amateur Diving Ass’n v IOC, award of September 24, 2000, in CAS, CAS AWARDS—SYDNEY 2000 at 83, 88 (2000) (noting that “it may well have dismissed” on res judicata grounds an athlete’s challenge to IOC decision declaring him ineligible to compete in Sydney Olympics, which was previously rejected in another CAS proceeding brought on his behalf by Canadian Olympic Association, if IOC had objected to CAS consideration of his new claims).

<sup>133</sup> See *supra* notes 81-85 and accompanying text.

<sup>134</sup> Professor Gabrielle Kaufmann-Kohler has noted: “[S]tatistics and history show a strong reliance on other sports law cases. A survey of all the cases published by the Court of Arbitration for Sports (CAS) from the first CAS case in 1986 to 2003 shows that only one award in six cited prior cases. A review of the cases since 2003 shows a drastic change; nearly every award contains one or more references to earlier CAS awards.” Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT’L 357,

Although CAS ad hoc Division and appeals arbitration awards are binding only on the parties, CAS panels frequently cite and rely on prior awards addressing the same or similar issues.<sup>134</sup> As one CAS panel observed: “In CAS jurisprudence there is no principle of binding precedent, or stare decisis. However, a CAS Panel will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel. Whether that is considered a matter of comity, or an attempt to build a coherent corpus of law, matters not.”<sup>135</sup> As Professor Nafziger has observed: CAS awards “provide guidance in later cases, strongly influence

365 (2007). Matthieu Reeb, the CAS secretary general, publishes digests of CAS Ad Hoc Division and appeals arbitration awards, and there is an index and database of CAS awards on the CAS website at <http://www.tas-cas.org>.

<sup>135</sup> International Assn. of Athletics Federations v. USA Track & Field and Jerome Young, Arbitration CAS 2004/A/628, award of June 28, 2004, ¶ 19. See also Anderson, et al. v. IOC, Arbitration CAS 2008/A/1545, award of July 16, 2010, at ¶ 55 (“although a CAS panel in principle might end up deciding differently from a previous panel, it must accord to previous CAS awards a substantial precedential value and it is up to the party advocating a jurisprudential change to submit persuasive arguments and evidence to that effect.”); D’Arcy v. Australian Olympic Committee, Arbitration CAS 2008/A/1574 at ¶ 56, Award of 11 June 2008 (“Of course, we are not bound by any previous determinations or awards of other panels of CAS. Arbitration awards are binding only by contractual force on the parties and do not create precedents. However, where those awards relate to the interpretation, scope or content of the CAS Code, considerations of certainty and consistency suggest that subsequent panels should not take a different approach to that adopted by earlier panels unless satisfied that the approach or view of the earlier panel is an erroneous one or is inapplicable because of different circumstances or different contractual language.”). By comparison, a federal appellate court panel “cannot overrule a prior decision of another panel” within the same circuit.

later awards, and often function as precedent,” which reinforce and help elaborate “established rules and principles of international sports law.”<sup>136</sup>

To determine whether the CAS arbitration system results in the development of a clearly articulated uniform body of law and its predictable application in a consistent manner, the following issues will be analyzed: 1) the role of CAS “precedent” in determining doping violations and sanctions (a substantial part of the CAS docket requiring interpretation and application of the WADC to the same or similar athlete conduct);<sup>137</sup> 2) the role of CAS “precedent” in determining an athlete’s “sport nationality” for purposes of his or her eligibility to participate in the Olympic or other international sports

competitions; and 3) the very narrow scope of national court review of CAS awards also is considered.

### 1. Doping Violations and Sanctions

The CAS has exclusive jurisdiction and authority to finally resolve all disputes between the IOC, IFs, NOCs, NFs, WADA, and athletes regarding the application, interpretation, or enforcement of the WADC.<sup>138</sup> The WADC is the “fundamental and universal document upon which the World Anti-Doping Program in sport is based, and its purpose “is to advance the anti-doping effort through universal harmonization of core anti-doping elements.”<sup>139</sup> In resolving doping cases, CAS arbitrators are required to interpret and apply the provisions of the

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*Union of Needletrades, Indus. & Textile Employees, AFL-CIO, CLC v. U.S. I.N.S.*, 336 F.3d 200, 210 (2d Cir.2003). A Second Circuit panel observed that it is “bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court.” *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir.2004). See also *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 695 (2d Cir. 2013).

<sup>136</sup> JAMES A.R. NAFZIGER, *INTERNATIONAL SPORTS LAW* 48–61 (2d ed. 2004); see also Ian Blackshaw, *Towards a “Lex Sportiva,”* 2011 *INT’L SPORTS L. J.* 140, 141 (“Although CAS arbitrators are not generally obliged to follow earlier decisions and obey the sacred Common Law principle of ‘*stare decisis*’ (binding legal precedent), in the interests of comity and legal certainty, they usually do so. As a result of this practice, a very useful body of sports law is steadily being built up.”).

<sup>137</sup> See *What Kinds of Dispute Can Be Submitted to the CAS?*, CAS, <http://www.tas-cas.org/en/20questions.asp/4-3-217-1010-4-1-1/5-0-1010-13-0-0/> (last visited Nov. 13, 2013); see also *What Law Do the Arbitrators Apply?* (2013), <http://www.tas-cas.org/en/20questions.asp/4-3-226-1010-4-1-1/5-0-1010-13-0-0/>; see *Case Law Documents*,

*supra* note 76 (providing a database of all CAS decisions).

<sup>138</sup> To comply with these international agreements as well as the Ted Stevens Olympic and Amateur Sports Act’s requirement that domestic Olympic sport eligibility disputes be resolved by AAA arbitration, see 36 U.S.C. § 220509, United States Anti-doping Agency (USADA) prosecutions of U. S. Olympic sport athletes for doping violations are adjudicated by a three-person panel of North American CAS/AAA arbitrators (which is essentially a national doping tribunal). An athlete who is dissatisfied with the panel’s arbitration award has the right to a *de novo* CAS appeals arbitration proceeding (as do USADA, the IF for the sport in which the athlete participates, and WADA). AM. ARB. ASS’N, *SUPPLEMENTARY PROCEDURES FOR THE ARBITRATION OF OLYMPIC SPORT DOPING DISPUTES*, in USADA, *PROTOCOL FOR OLYMPIC AND PARALYMPIC MOVEMENT TESTING R-45* (2009). See *Armstrong v. Tygart*, 886 F. Supp. 2d 572, 586 (W.D. Tex. 2012) (procedural rules governing North American CAS/AAA doping arbitrations “are sufficiently robust to satisfy the requirements of due process”). *But see* Straubel, *supra* note 62, at 1223–72 (expressing concerns about the fairness of these procedural rules to athletes).

<sup>139</sup> WADC, *supra* note 20, at 10.

WADC, the Code's procedural rules,<sup>140</sup> and any applicable national laws.<sup>141</sup> Although a comprehensive review and analysis of the hundreds of CAS doping awards is outside the scope of this Article, some illustrative examples and published scholarship establish that CAS panels generally cite and follow prior CAS awards (or at least rely on them for guidance) in resolving several issues arising in connection with doping disputes.

CAS panels have consistently followed *USA Shooting & Quigley v. International Shooting Union*,<sup>142</sup> a 1995 case upholding strict liability for doping offenses if clear

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<sup>140</sup> According to one commentator, who does not reference any particular CAS awards:

[S]ome CAS arbitrators consider—quite wrongly—that they can ignore the rules in doping cases and decide cases on the basis of fairness alone, justifying this point of view on the basis that in appeal cases they can deal with the case *de novo*, pursuant to Article R57 of the CAS Code . . . and also relying on the fact that the CAS has become the “Supreme Court of World Sport.” In effect, such CAS Panel members are claiming to be free to rewrite the applicable legal rules in the interests of what they consider fairness in the circumstances of the particular case. This is a dangerous course of action and not conducive to legal certainty. Or put another way, is contrary to a so-called “rule of sports law.” Blackshaw, *supra* note 136, at 141–42.

<sup>141</sup> Pursuant to the Code's choice of law rules, CAS doping panels generally apply Swiss law because WADA as well as the IOC and most IFs (whose anti-doping rules must be consistent with the WADC) are based in Switzerland. Annie Bersagel, *Is There a Stare Decisis Doctrine in the Court of Arbitration for Sport? An Analysis of Published Awards for Anti-Doping Disputes in Track and Field*, 12 PEPP. DISP. RESOL. L. J. 189, 193, n. 30 (2012) (“Forty-seven international sports federations are based in Switzerland, compared to five in Monaco, the next most popular federation host country.”). See, e.g., *Int'l Cycling Federation v. Jan Ullrich & Swiss Olympic*, CAS 2010/A/2083 ¶ 4, award of 9 February 2012 (explaining that Swiss arbitration

notice of this standard is provided to athletes.<sup>143</sup> This standard subsequently was codified by the WADC.<sup>144</sup>

An empirical analysis of twenty-three CAS doping awards for the sport of track and field from 2000–2010 revealed that seventeen awards contain at least one citation to a prior CAS award, and that the panel either followed or distinguished these previous awards on four separate issues: “(1) use of a particular testing method or procedure as evidence of a doping violation; (2) substance of parties' right to be heard; (3) rules of evidence; and (4) general principles of equity.”<sup>145</sup> In

legislation applies because the parties are domiciled in Switzerland); Straubel, *supra* note 60, at 1254 (“Swiss law, because it has a rich history of dealing with sports law issues and because it has been widely and consistently used by many CAS panels, is as good if not better than any other country's law.”). In doping cases, CAS panels often find other national, transnational, and international laws to be either inapplicable or not violated. See, e.g., *Gatlin v. USADA*, CAS 2008/A/1461 and *IAAF v USA Track & Field and Gatlin*, CAS 2008/A/1462, award of 10 September 2008 at 11 (use of athlete's 2001 doping offense to enhance his sanction for 2006 doping offense does not violate Americans With Disabilities Act); *Revised Award*, CAS 2005/A/951, *Canas v. ATP*, award of 23 May 2007, at 18 (athlete's doping sanction does not violate European Union law, even if it applies). See also *Mitten & Opie*, *supra* note 2, at 300 (observing that “CAS panels generally have refused to rule that athlete doping rules and sanctions violate the national laws of an athlete's home country.”).

<sup>142</sup> CAS 94/129, award of 23 May 1995, in *CAS DIGEST OF CAS AWARDS: 1986–1998* at 187 (Matthieu Reeb ed., 1998).

<sup>143</sup> Kaufmann-Kohler, *supra* note 134, at 365–366.

<sup>144</sup> WADC, *supra* note 20, art. 2.1.1 & cmt.

<sup>145</sup> Bersagel, *supra* note 141, at 201. Acknowledging that “[n]o CAS panel has gone so far to explicitly recognize a principle of stare decisis,” she concludes that “panels' frequent

addition, CAS panels have followed prior cases in applying the equitable doctrine of *lex mitior*,<sup>146</sup> pursuant to which “if newly applicable sanctions are less severe than those in effect at the time of the offense, the new sanctions must be applied.”<sup>147</sup>

Professor Nafziger observes that “CAS has been at its best when, for example, it has taken fully into account its past awards and those of national tribunals to evaluate the fairness, on a comparative basis of equality, of a proposed [doping] sanction against an athlete.”<sup>148</sup> In *Chagnaud v. FINA*,<sup>149</sup> the CAS ruled that sports governing bodies “should make allowance for an appreciation of the subjective elements in each case” in order to determine “a just and equitable sanction.” Rather than a fixed minimum sanction for all doping offenses (e.g., a two-year suspension), the CAS panel expressed its preference for “a sliding

scale of suspension periods depending on the degree of fault of the athlete.”<sup>150</sup> This principle of proportionality was incorporated into the WADC, which provides that the presumptive 2-year suspension for a first doping offense (and lifetime suspension for a second offense)<sup>151</sup> may be reduced based on the athlete’s level of fault (i.e., no fault or negligence, or significant fault or negligence).<sup>152</sup>

Professor Kaufmann-Kohler observes:

[S]ince the adoption of the [WADC], CAS panels ruling on non-significant fault have systematically considered other awards. Characteristically, the second award rendered under the [WADC] referred to the first one, distinguished it, and concluded that “in the absence any pertinent precedent, the Panel is of the opinion that the application of

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citations to previous CAS awards suggests a de facto doctrine of stare decisis may already be in operation. . . . Alternatively, what appears to be a doctrine of stare decisis from the perspective of a common law scholar may be more accurately described as a doctrine of *jurisprudence constante*, in which the CAS generally follows the weight of past precedent, but remains free to depart from previous awards in the interests of justice.” *Id.* at 195–196. She notes that her “study provides no support for the theory that an arbitrator’s background determines a panel’s approach to precedent” because “the percentage of awards that cited previous arbitral awards was actually slightly higher for [the three exclusively] civil law panels [of jurists] than for [the five exclusively] common law panels [of jurists]. For mixed panels, twelve of fourteen cited to past precedents.” *Id.* at 203–04.

<sup>146</sup> See, e.g., *USADA v. Brunemann*, Am. Arb. Ass’n/N. Am. CAS Panel, AAA No. 77-190-E-00447-08 JENF at 20–21 (Jan. 26, 2009) (observing that “[t]his doctrine is well established in *lex sportiva* through many cases arising in several different sports” and citing numerous CAS awards applying it in doping cases).

<sup>147</sup> *Id.* at 20. See also *Ullrich* CAS 2010/A/2083 ¶ 54 (applying a UCI rule that allows for application of *lex mitior*).

<sup>148</sup> NAFZIGER, *supra* note 95, at 28.

<sup>149</sup> Arbitration CAS 95/141 ¶ 16, Award of April 22, 1996, in DIGEST OF CAS AWARDS 1986–1998, *supra* note 42, at 215, 220–21.

<sup>150</sup> *Id.* ¶ 19.

<sup>151</sup> WADC, *supra* note 20, art. 10.2.

<sup>152</sup> *Id.* art. 10.5. If the athlete satisfies the difficult burden of proving no fault or negligence, he is not suspended for any period of time. *Id.* art. 10.5.1. If the athlete proves no significant fault or negligence, the standard suspension may be reduced by up to one-half of its presumptive length. *Id.* art. 10.5.2. In some instances, CAS awards have applied the Chagnaud proportionality principle to reduce an athlete’s sanction by more than the maximum length prescribed by the WADC. See, e.g., *Puerta v. Int’l Tennis Federation*, CAS 2006/A/1025, award of 12 July 2006. See generally Daniel Gandert, *The Battle Before the Games: The British Olympic Association Attempts to Keep Its Lifetime Ban for Athletes with Doping Offenses*, 32 N.J. INT’L LAW & BUS. 53A (2012).

'No Significant Fault or Negligence' is to be assessed on the basis of the particularities of the individual case at hand.' Ever since, CAS panels consistently have adopted the same reasoning. Inevitably, the analysis of the growing number of precedents has become more elaborate. In one of the latest awards, the panel referred to no less than 11 previous precedents before reaching its conclusion.<sup>153</sup>

Two recent related pairs of CAS awards considering essentially similar legal issues provide illustrative examples of CAS panels' prevailing practice of generally following prior awards.

In *USOC v. IOC & IAAF*,<sup>154</sup> a CAS panel held that the U.S. 1,600-meter relay team could retain the gold medal it won during the 2000 Sydney Games, although Jerome Young, who had competed in a preliminary round as a member of team, subsequently was found guilty of a 1999 doping offense that rendered him ineligible to compete in the Sydney Games. The panel found that the IAAF's rules in effect in 2000 concerned only the disqualification, ineligibility, and annulment of an individual athlete's performance results for a doping offense; it was not until their amendment in 2004–2005 that the rules expressly required disqualification of the results of any relay team for which an ineligible athlete competed.<sup>155</sup> In support of its

ruling, the panel concluded that "clarity and predictability are required so that the entire sport community are informed of the normative system in which they live, work and compete, which requires at the very least that they be able to understand the meaning of rules and the circumstances in which those rules apply."<sup>156</sup> Based on *USOC v. IOC & IAAF*, in *Anderson, et al. v. IOC*,<sup>157</sup> another CAS panel ruled that U.S. women's teams that won gold medals in the 4 × 100 meters and 4 × 400 meters relay events in the 2000 Sydney Games should not be disqualified, which enabled seven team members to keep the medals they had won. Although Marion Jones ran in both medal-winning final relays and subsequently admitted to a doping offense during the Games resulting in her individual disqualification and return of medals, this panel agreed with "the convincing analysis of the CAS 2004/A/725 panel [*USOC v. IOC & IAAF*] and sees no reason to reach a different conclusion" regarding the applicable IAAF rule in effect in 2000.<sup>158</sup>

Similarly, in *British Olympic Association (BOA) v. World Anti-Doping Agency*,<sup>159</sup> a CAS panel adopted the reasoning of *USOC v. IOC*,<sup>160</sup> a prior CAS award by the same three-person panel<sup>161</sup> that invalidated the IOC's "Osaka Rule" (which prohibited an athlete sanctioned with a suspension of more than six months from participating in the next Olympic Games) because this was

<sup>153</sup> Kaufmann-Kohler, *supra* note 134, at 366.

<sup>154</sup> Arbitration CAS 2004/A/725, award of July 20, 2005.

<sup>155</sup> *Id.* ¶ 14.

<sup>156</sup> *Id.* ¶ 20.

<sup>157</sup> Arbitration CAS 2008/A/1545, award of July 16, 2010.

<sup>158</sup> *Id.* ¶ 61.

<sup>159</sup> CAS 2011/A/2658, award of 30 April 2012.

<sup>160</sup> CAS 2011/O/2422, *USOC v. IOC*, award of 4 October 2011.

<sup>161</sup> Rule 50 of the Code provides: "When two or more cases clearly involve the same issues, the President of the Appeals Arbitration Division may invite the parties to agree to refer these cases to the same Panel; failing any agreement between the parties, the President of the Division shall decide [the appropriateness of having the same panel resolve the cases]." CODE, *supra* note 42, R50.

a disciplinary sanction not permitted by the WADC. Concluding that a British Olympic Association Bye-law providing that an athlete found guilty of a doping offense is ineligible for selection to the British Olympic team also is inconsistent with the exclusive disciplinary sanctions established by the WADC, the *BOA* panel expressly accepted and relied on the *USOC* panel's interpretation of what constitutes a sanction for a doping violation.<sup>162</sup>

On the other hand, there are some instances in which different CAS panels have reached conflicting conclusions regarding interpretation of the same WADC provision, which results in inconsistent resolution of the same legal issues and inhibits the development of a uniform body of international doping jurisprudence. For example, the *Oliveira v. USADA*<sup>163</sup> CAS panel was the first one to consider the meaning of the language “*corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sports performance,*” which is one of the predicate requirements an athlete must prove to justify a suspension

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<sup>162</sup> As described in the USOC Award, Article 10.2 of the WADA Code prescribes a “period of ineligibility” to be imposed for a doping offense. The Panel there found that the IOC Regulation was a sanction because it made an athlete ineligible to participate and, thus, compete in the next Olympic Games. . . . Similarly, the effect of the Bye-Law in rendering the athlete found guilty of a doping offence to be ineligible to be selected to Team GB is immediate, automatic and for life. . . . The difference in the wording of the Bye-Law and the IOC Regulation is inconsequential. . . . The fact of the matter is that, by operation of the Bye-Law, an athlete is unable to participate in the Olympics. Accordingly, this Panel finds that the Bye-Law renders an athlete ineligible to compete--a sanction like those provided for under the WADA Code.

CAS 2011/A/2658 ¶¶ 8.22–8.25.

of less than two years for use of a banned “specified substance” under Article 10.4 of the 2009 WADC. Finding “the express language of this clause is ambiguous and susceptible to more than one interpretation,”<sup>164</sup> the panel concluded it required the athlete “only to prove her ingestion of [the specified substance] was not intended to enhance her sport performance.”<sup>165</sup> Another CAS panel followed *Oliveira's* construction of this provision,<sup>166</sup> but two other CAS panels disagreed and determined this provision requires the athlete to prove no intent to enhance sport performance through the use of the product containing the specified substance.<sup>167</sup>

## 2. Sport Nationality Requirements

To maintain the integrity of Olympic and other international sports competitions, the IOC and IFs have rules that define an athlete's current sport nationality (which is limited to one country), provide that he or she is eligible to compete only for that country, and establish requirements for changing one's sport nationality.<sup>168</sup> Disputes regarding an athlete's sport

<sup>163</sup> CAS 2010/A/2107, award of 6 December 2010.

<sup>164</sup> *Id.* ¶ 9.13.

<sup>165</sup> *Id.* ¶ 9.17.

<sup>166</sup> *Querimaj v IWF*, CAS 2012/A/2822, award of September 12, 2012.

<sup>167</sup> *Foggo v NRL*, CAS A2/2011, award of May 2011; *ITF v Kutrovsky*, CAS 2012/A/2804, award of October 3, 2012.

<sup>168</sup> Rule 41 of the Olympic Charter, which is titled “Nationality of Competitors,” states:

1. Any competitor in the Olympic Games must be a national of the country of the NOC which is entering such competitor.
2. All matters relating to the determination of the country which a competitor may represent in the Olympic Games shall be resolved by the IOC Executive Board. Bye-laws 1 and 2 to

nationality may arise when an athlete with dual nationality now desires to compete for a country different from the one he or she previously competed for during the Olympics or another international sports competition.

Applying “general principles of law,” CAS panels have recognized that international sports governing bodies have a valid need to establish rules defining the sport nationality of athletes with dual nationality (which necessarily must be only one country at a given time) and a reasonable waiting period (e.g., three years) that must elapse before an athlete changing his or her sport nationality is eligible to compete for

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Rule 41 provide as follows:”1. A competitor who is a national of two or more countries at the same time may represent either one of them, as he may elect. However, after having represented one country in the Olympic Games, in continental or regional games or in world or regional championships recognised by the relevant IF, he may not represent another country unless he meets the conditions set forth in paragraph 2 below that apply to persons who have changed their nationality or acquired a new nationality. 2. A competitor who has represented one country in the Olympic Games, in continental or regional games or in world or regional championships recognised by the relevant IF, and who has changed his nationality or acquired a new nationality, may participate in the Olympic Games to represent his new country provided that at least three years have passed since the competitor last represented his former country. This period may be reduced or even cancelled, with the agreement of the NOCs and IF concerned, by the IOC Executive Board, which takes into account the circumstances of each case.

OLYMPIC CHARTER, *supra* note 5, at 78.

<sup>169</sup> Arbitration CAS 92/80, B. v. FIBA, award of March 25, 1993, in DIGEST OF CAS AWARDS 1986–1998, *supra* note 75, at 297, 302, 304–05. When interpreting and applying sport nationality rules, the CAS must consider applicable national laws (or at times international law) in determining

another country in Olympic or international competitions.<sup>169</sup> The CAS will enforce clear sport nationality rules that further the legitimate interests of the IOC or IF, even if a rule imposes hardship upon particular athletes in individual cases or “operates in such a fashion as to cause the overall duration of an emigrating athlete’s future Olympic eligibility to depend on the particular naturalization regime of the country in which he or she chooses to relocate.”<sup>170</sup> Consistent with the traditional limited role of common law courts historically, the CAS will not “judicially” legislate new nationality rules despite the foregoing potential adverse consequences.<sup>171</sup>

an athlete’s sport nationality, which generally requires the athlete to be a legally recognized national of the same country. *See, e.g.*, Arbitration CAS ad hoc Division (O.G. Sydney 2000) 001, USOC & USA Canoe/Kayak v. IOC (“Perez I”), award of September 13, 2000, in CAS, CAS AWARDS—SYDNEY 2000 at 13, 21 (2000) (concluding that athlete did not acquire U.S. nationality before September 1997 even though not naturalized until 1999 on any grounds “defined in Olympic Charter, or under international law, or indeed under U.S. law”); Arbitration CAS ad hoc Division (O.G. Sydney 2000) 005, Angel Perez v. IOC (“Perez II”), award of September 19, 2000, in CAS, CAS AWARDS—SYDNEY 2000 at 53, 21 (2000) (ruling that athlete became “stateless” under international law in 1993 and changed from Cuban to U.S. nationality in the same year, making him eligible to compete in 2000 Olympics for U.S.).

<sup>170</sup> Perez I, (O.G. Sydney 2000) 001, at 21. *See also* Arbitration CAS Ad hoc Division (O.G. Beijing) 2008/006, Moldova Nat’l Olympic Committee v IOC, award of August 9, 2008 in CAS, CAS AWARDS – BEIJING 2008 (2008) at 300, 301-302 (“this Panel has no authority to waive any part thereof” of the Olympic Charter’s nationality rule). *See generally* Mitten & Davis, *supra* note 71, at 82–85 (summarizing CAS jurisprudence regarding validity of IOC and IF athlete eligibility rules, including sport nationality rules).

<sup>171</sup> Perez I, (O.G. Sydney 2000) 001, at 21 (“The Panel is unwilling to engage in an act of

As they do in resolving doping disputes, CAS panels cite prior CAS awards in similar sport nationality cases and generally follow them to ensure equal legal treatment of all athletes.<sup>172</sup> In *Christel Simms v. Federation Internationale de Natation (FINA)*,<sup>173</sup> the CAS panel relied on a prior CAS award adopting the doctrine of “estoppel by representation” in determining that an athlete had validly changed her sport nationality and was eligible to compete for the Philippine team at the Beijing Olympics. Because FINA (the IF for swimming) had provided written confirmation that she could swim for the Philippines and she had done so during the April 2008 FINA World Championships in reliance upon this communication, FINA was estopped from subsequently asserting she was ineligible to swim for the Philippine team at the Beijing Olympics. The panel concluded that “[t]o exclude her from competing under these circumstances will be unfair and contrary to the rule of estoppel.”<sup>174</sup>

Similarly, in *Nabokov & Russian Olympic Committee & Russian Ice Hockey Federation v. International Ice Hockey Federation (IIHF)*,<sup>175</sup> the CAS panel cited two prior CAS awards

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legislation.”). This view is consistent with the admonition that U.S. courts have given to arbitrators that resolve domestic sports disputes. *Lindland v. U.S. Wrestling Ass’n, Inc.*, 227 F.3d 1000, 1004 (7th Cir. 2000) (“Arbitrators are not ombudsmen; they are authorized to resolve disputes under contracts and rules, not to declare how the world should work in the large.”).

<sup>172</sup> In some cases resolving a dispute concerning an athlete’s sport nationality, CAS panels have implicitly recognized the precedent established by prior awards by distinguishing them. *See, e.g.*, *Arbitration CAS ad hoc Division (O.G. Sydney 2000) 008*, Arturo Miranda, Canadian Olympic Ass’n, and Canadian Amateur Diving Ass’n v. IOC (“Miranda II”), award of September 24, 2000, in CAS, CAS AWARDS—SYDNEY 2000 at 83, 89 (2000) (concluding that “statelessness” rule of Perez II, which involved a Cuban defector, is inapplicable; this case is “fundamentally

and observed that “[p]revious CAS Panels have already expressed their view that they will interpret the applicable rules in a way ‘which seeks to discern the intention of the rule maker, and not to frustrate it.’” Construing and applying the IIHF’s sport nationality rule, the panel determined that an athlete who had played for the Kazakh ice hockey team during the 1994 World Championships when he was nineteen years old was ineligible to play for the Russian team during the 2002 Olympics.<sup>176</sup> It explained:

The Panel therefore has to acknowledge that the rule has always been interpreted as providing a possibility of representing two countries but only for players who were under the age of eighteen when they represented their first country. Since the Panel finds this to be a valid interpretation of the rule and since it has been interpreted in that way ever since it was implemented, the Panel will not interpret it differently. This is in the interest of fairness to all other players whose eligibility for playing for another country has previously been

different” because athlete is simply a non-resident Cuban, not a defector); *Spanish Basketball Federation v. FIBA*, Arbitration CAS 98/209, award of January 6, 1999 in CAS, DIGEST OF CAS AWARDS II: 1998–2000 at 500, 501–02 (Matthieu Reeb ed., 2002) (observing that current “circumstances need distinguishing from a previous CAS Case OG 98/004-005”).

<sup>173</sup> *Arbitration CAS Ad hoc Division (O.G. Beijing) 2008/002*, order of August 1, 2008, in CAS, CAS AWARDS—BEIJING 2008 (2008) at 270, 274.

<sup>174</sup> *Id.* at 274.

<sup>175</sup> *Arbitration CAS 2001/A/357* ¶ 8, award of January 31, 2002, in CAS, DIGEST OF CAS AWARDS III: 2001–2003 (Matthieu Reeb ed., 2004).

<sup>176</sup> *Id.* ¶ 27.

denied because of this particular interpretation of Bylaw 204 (1) c.<sup>177</sup>

### 3. Very Narrow Judicial Review of Merits of CAS Awards

National courts, including the SFT and U.S. courts, generally will recognize and enforce a CAS ad hoc Division or appeals arbitration award, the substantive merits of which will be invalidated only if it violates the forum country's public policy under a very narrow standard of judicial review.<sup>178</sup> Like the SFT, U.S. courts have adopted a similar international standard in judicially reviewing CAS awards.<sup>179</sup> As two legal scholars have observed: "Because one of the primary objectives of establishing a private legal regime to resolve international sports disputes is to create a uniform body of *lex sportiva* that is predictable and evenly applied worldwide, it is problematic if CAS awards are not judicially reviewed pursuant to a generally accepted international standard."<sup>180</sup>

This very narrow scope of judicial substantive review of the merits of CAS awards enables the development of a consistent body of Olympic and international sports jurisprudence by the CAS, which generally is globally recognized and enforced by national courts in the 148 countries that are signatories to the New York Convention. It also facilitates the predictable interpretation and application of IOC and IF rules (as well as the WADC)

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<sup>177</sup> *Id.* ¶ 9.

<sup>178</sup> See *supra* notes 81–90 and accompanying text.

<sup>179</sup> *Id.*

<sup>180</sup> Mitten & Opie, *supra* note 1, at 306.

<sup>181</sup> See, e.g., *D'Arcy v. Australian Olympic Committee*, Arbitration CAS 2008/A11574,

to resolve sports disputes by the CAS arbitration system.

## VI. Conclusions and Recommendations

Because Olympic and other international sports competitions occur worldwide and are based on consensual relationships among global entities and athletes throughout the world, universally accepted rules and a unitary dispute resolution system are necessary for their effective internal governance and external regulation. A CAS panel's use of *de novo* review in ad hoc Division and appeals arbitration proceedings generally provides broader scrutiny of IOC and IF rules and decisions, which is more favorable to Olympic and international sport athletes than the very deferential arbitrary and capricious standard of review that national courts typically provide when reviewing the rules and internal decisions of private sports governance bodies outside the context of collectively bargained employment agreements.<sup>181</sup> Moreover, "U.S. domestic sports law generally does not provide [Olympic and international sport] athletes with greater legal rights than the developing body of *lex sportiva*."<sup>182</sup>

Based on the above analysis, the level of procedural fairness afforded to Olympic and international sport athletes by the CAS arbitration system and the need for a uniform body of international *lex sportiva* appear to justify requiring them to submit disputes with the IOC and IFs to the CAS

Award of 11 June 2008 (observing that a CAS panel's duty to independently determine the merits of an athlete's claims and defenses pursuant to the CAS Code is broader than a court's rational basis review of an Olympic sports governing body's disciplinary action against an athlete). See also *supra* notes 69-71.

<sup>182</sup> Mitten & Opie, *supra* note 1, at 300.

for final and binding resolution along with very limited judicial review of CAS awards and their recognition and enforcement by national courts.<sup>183</sup> It is very difficult to objectively measure the extent to which the CAS arbitration system produces substantive justice (i.e., just results in individual cases), which has an inherent degree of subjectivity. However, its procedural fairness increases the likelihood of substantive justice, or at least tends to alleviate any potential concerns about a lack of systematic substantive justice. Perceptions of the fairness of outcomes in individual cases, a prerequisite for the necessary “buy-in” by the parties to a sports dispute as well as national governments and their respective judicial systems, are directly related to the general level of confidence in the fairness of the procedures by which CAS resolves these disputes. Professor Nafziger accurately observes that the CAS has established the “gold standard in resolving sports-related disputes” by “ensuring fairness in terms of even-handedness, impartiality, acting in good faith, and coherence.”<sup>184</sup>

As Professor Ken Foster, an English sports law scholar, explains:

“The conclusion derived from describing *lex sportiva* as a private

system of transnational law is that such a pluralistic notion of law allows us to see private arbitration as a non-state arrangement not created by governments but existing as a self-reflexive legal order, which is juridified in its own practice. This juridification, with institutionalized forms of rule creation and a forum for dispute settlement that respects substantive and procedural justice, is the ultimate reason why national courts will respect its exclusive jurisdiction.”<sup>185</sup>

On the other hand, legitimate public policy questions may be raised about whether such a limited scope of judicial review of CAS arbitration awards effectively protects athletes’ rights and interests, given that IOC and IF rules require athletes to submit to CAS jurisdiction as a condition of participating in Olympic and international sports competitions and to forego their right to judicial resolution of the merits of a dispute. This is even more problematic if a CAS panel makes factual or legal errors, which are not subject to correction by a national court. However, no public legal system is error free; even courts make mistakes. On balance, a consistent body of CAS jurisprudence that is uniformly applied to all the world’s Olympic athletes

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<sup>183</sup> *Michels v. U.S. Olympic Comm.*, 741 F.2d 155, 159 (7th Cir. 1984) (Posner, J., concurring) (“[T]here can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games.”).

<sup>184</sup> NAFZIGER, *supra* note 95, at 27–28. *See also* Allan Erbsen, *The Substance and Illusion of Lex Sportiva*, in *THE COURT OF ARBITRATION FOR SPORT 1984–2004*, *supra* note 32, at 454 (“CAS’s jurisprudence fills what until recently was a disturbing legal vacuum in international sports. Before the creation of CAS, the rights and obligations of athletes and officials were ill-defined and were enforceable—if at all—only

through costly and lengthy litigation in national courts or in arbitration before tribunals staffed by the same sports federations whose actions the tribunals were asked to judge. Legal claims were thus difficult to frame, difficult to pursue, and for political outsiders, difficult to win. Since the creation of CAS, rights and obligations have become more clearly defined and understood, adjudication is more accessible, and arbitrators are more independent.”).

<sup>185</sup> Ken Foster, *Global Administrative Law: The Next Step For Global Sports Law?*, University of Westminster School of Law Research Paper No. 12-10, available at <http://ssrn.com/abstract=2057750>.

with limited disruption by national courts probably is better than the risk of a potentially conflicting body of international sports law unduly influenced by nationalistic interests through broader judicial review.

The CAS arbitration system “demonstrates how civil and common law legal systems can function effectively together within an international tribunal to resolve a wide variety of complex, time-sensitive disputes between parties of different nationalities,” which produces “globally respected adjudications” of Olympic and international sports disputes.<sup>186</sup> Although the CAS is a private arbitral tribunal rather than a “court” established by agreement of sovereign countries, it is a form of international legal pluralism that is developing into and functioning as a de facto common law legal system.<sup>187</sup> As this unique, specialized form of international arbitration continues to evolve, certain reforms that are not part of more traditional arbitration systems appear necessary and should be considered to enhance the level of procedural fairness

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<sup>186</sup> Mitten & Opie, *supra* note 1, at 288.

<sup>187</sup> See *supra* Section E. In contrast to court proceedings whereby judges usually are randomly assigned to cases, the parties can select the person(s) who will arbitrate their dispute. Kate Kennedy, *Manifest Disregard in Arbitration Awards: A Manifestation of Appeals Versus a Disregard for Just Resolutions*, 16 J.L. & Pol’y 417, 420 (2007); ANDREA KUPFER SCHNEIDER ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 458–59 (2d ed. 2011). Discovery generally is limited in arbitration proceedings, and there are no strict rules limiting the evidence that arbitrators can consider. David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 452 (2011); Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 522–23 (2009). Judicial review of the merits of arbitration awards is much narrower than appellate court

and substantive justice afforded to athletes, who generally are required to submit disputes to CAS arbitration as a condition of participating in Olympic and other international sports competitions.

Some legal scholars assert that the existence of legal aid for athletes is “of crucial importance to sustain the legitimacy of the CAS system”<sup>188</sup> because “the obligation to submit sports disputes to arbitration deprives athletes from the benefit of any legal aid as may be available to them before the (otherwise) competent national courts.”<sup>189</sup> They contend that an athlete “without sufficient financial resources could rescind the arbitration agreement on the ground that it does not afford him access to justice.”<sup>190</sup> Although this is a strong statement with uncertain legal validity, it is important to ensure that athletes have effective access to CAS arbitration. In an effort to achieve this objective, the ICAS has established a legal aid fund for athletes and guidelines for them to be eligible for financial assistance and the appointment of pro bono legal counsel in CAS proceedings.<sup>191</sup> This is a

review of trial court decisions because courts do not provide broad substantive review of arbitration awards to correct mistakes of fact or law. Kennedy, *supra*, at 421–22. An arbitration award will be vacated on substantive grounds only if it violates public policy, or if the arbitrator acted arbitrarily and capriciously or manifestly disregarded the law. Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 245–46 (1999); SCHNEIDER ET AL., *supra*, at 462–63.

<sup>188</sup> Rigozzi, Hasler, & Quinn, *supra* note 106, at 17.

<sup>189</sup> *Id.* at 17, n. 129.

<sup>190</sup> *Id.*

<sup>191</sup> A natural person such as an individual athlete without sufficient financial means to defend his rights before the CAS must prove “his income and assets are not sufficient to allow him to cover the

laudable recent development, but more resources from sources other than ICAS may be needed to ensure that all Olympic and international sport athletes are adequately represented by knowledgeable counsel, particularly in CAS cases requiring specialized legal expertise.<sup>192</sup>

Although all CAS ad hoc Division awards and most appeals arbitration awards are published, it is important to ensure their ready availability to arbitrators, athletes, sports governing bodies, attorneys, and academics to facilitate “predictable and equitable decision making” by the CAS.<sup>193</sup> As one commentator has observed, “CAS panels are extremely reluctant to depart from precedent, [i]n the interest of fairness to the parties, it is therefore critical that the CAS publish all nonconfidential awards, and refrain from allowing parties to rely on confidential awards.”<sup>194</sup>

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costs of proceedings, without drawing on that part of his assets necessary to support him and his family.” GUIDELINES ON LEGAL AID, *supra* note 103, art. 5. The athlete must provide “supporting documents, e.g., tax returns, contract of employment, statement of salary, lease” and “set out, in a summary fashion, the grounds of his appeal/defence to establish that his appeal/defence has a legal basis.” *Id.* art. 9. The ICAS President provides a reasoned decision regarding a request for legal aid, which is not subject to any appeal. *Id.* art. 10. The request “will be refused if it is obvious that the applicant's claim or grounds of defence have no legal basis” or are frivolous or vexatious.” *Id.* art. 5. The ICAS President may grant the following forms of legal aid to an athlete: not requiring payment of the costs of the CAS procedure or an advance of costs; permitting him to choose pro bono counsel from a list established by ICAS; and/or granting a lump sum to cover his own travel and accommodation costs and those of his pro bono counsel as well as his witnesses, experts and interpreters in connection with a CAS hearing. *Id.* art. 5.

<sup>192</sup> Because athletes accused of doping violations need access to competent legal counsel to accurately evaluate the validity of charges and to

In addition, ICAS should examine and evaluate whether its existing internal procedures are sufficient to effectively minimize the possibility of conflicting interpretation and application of the WADC, Olympic Charter, and IF rules by different CAS panels. Currently, the President of the CAS ad hoc Division (who is an ICAS member) is required to review an ad hoc Division award before it is signed and issued by the arbitrators and “without affecting the Panel’s freedom of decision may also draw [their] attention to points of substance.”<sup>195</sup> Similarly, the CAS Secretary General reviews appeals arbitration awards and “may also draw the attention of the Panel to fundamental issues of principle.”<sup>196</sup> Legal scholars have proposed that ICAS consider establishing a closed list of CAS panel presidents<sup>197</sup> or alternative reforms such as single supreme

effectively defend themselves, Professor Maureen Weston proposes that Olympic sports organizations establish and fund a group of athlete advocates with specialized training to advise and represent athletes in doping matters. Weston, *supra* note 114, at 49.

<sup>193</sup> Richard McLaren, *The Court of Arbitration for Sport*, in HANDBOOK ON INTERNATIONAL SPORTS LAW 32, 62–63 (James A. R. Nafziger & Stephen F. Ross eds., 2011). *See also* Lenard, *supra* note 46, at 180 (recognizing that ICAS “must ensure greater and equal accessibility to CAS opinions and precedent”); Mitten, *supra* note 82 at 60 (suggesting that “lack of general public access to all CAS appeals awards violates the principles of good faith and equal treatment,” which is required by Swiss law and public policy).

<sup>194</sup> Bersagel, *supra* note 141, at 205.

<sup>195</sup> ARBITRATION RULES FOR THE OLYMPIC GAMES, *supra* note 57, art. 19.

<sup>196</sup> OLYMPIC CHARTER, *supra* note 5, R. 46

<sup>197</sup> Rigozzi, Hasler, & Quinn, *supra* note 106, at 17 and 17, n.31 (observing that the CAS may establish a special list of persons from its pool of arbitrators who would act as the president of CAS panels; “having a closed list of *Presidents* would

appellate panel within CAS<sup>198</sup> to facilitate the development of a consistent body of international *lex sportiva*. This is an important objective, but it is important to ensure that any internal reform does not compromise the timely and final resolution of Olympic and international sports disputes by CAS ad hoc Division and appeals arbitration proceedings, which is an essential component of the existing CAS system of international legal pluralism, which generally provides an appropriate level of procedural fairness and substantive justice to athletes in its existing form.

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promote consistency, and ensure that at least the key person in the Panel has the required expertise and professionalism to ensure both speed and the quality of the award without having to limit the parties' freedom in their choice of the arbitrator.”).

<sup>198</sup> Segan, *supra* note 93 (“When a case is lodged with CAS which raises a point of general importance – the identification of which would be a matter for the President – then the case would be relinquished to a five-arbitrator Grand Chamber for a binding decision on the point. The rules of CAS would be amended so that future panels were obliged to follow decisions of the Grand Chamber unless satisfied that a ruling was clearly and obviously wrong.”); Straubel, *supra* note 62, at

1272 (for CAS doping cases, “a mechanism, such as a single supervisory panel, should be created to reconcile conflicting precedent to ensure equal treatment and remove some of the arbitrariness of panel decisions.”); Maureen A. Weston, *Simply a Dress Rehearsal? U.S. Olympic Sports Arbitration and De Novo Review at the Court of Arbitration for Sport*, 38 GA. J. INT’L & COMP. L. 97, 128 (2009) (“For CAS to be a true ‘Supreme Court for Sport,’ it should institute a formal appellate body akin to a U.S. Supreme Court with discretionary review, to rule on conflicting interpretations of *lex sportiva* rendered by CAS panels.”).

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## L'admissibilité des appels formés par les clubs contre les décisions relatives aux transferts internationaux des footballeurs

Gérald Simon\*

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- I. Non admission de l'appel d'un club contre la délivrance d'un CIT provisoire
- II. Irrecevabilité de l'appel d'un club contre le refus de CIT à un joueur mineur

En football, comme dans la plupart des autres disciplines sportives, pour pouvoir jouer dans un club en tant qu'amateur ou comme professionnel, un joueur doit être au préalable enregistré auprès d'une fédération nationale elle-même affiliée à la FIFA. L'enregistrement est donc, comme en dispose l'article 5 du Règlement FIFA relatif au statut et au transfert du joueur (ci-après « RSTJ »), la condition pour participer au « football organisé », c'est-à-dire aux différentes compétitions qui se déroulent sous l'égide de la fédération internationale.

Le même règlement précise qu'un joueur ne peut être enregistré qu'auprès d'une seule fédération nationale. Lorsqu'il veut quitter son club pour être inscrit dans un club affilié auprès d'une autre fédération nationale, le joueur doit être enregistré auprès de la fédération nationale de son nouveau club. C'est cette opération que l'on désigne du nom de transfert international du joueur.

Or ce transfert est soumis à des conditions énoncées par le RSTJ.

Le principe est que l'enregistrement du joueur auprès de la nouvelle fédération nationale est subordonné à l'octroi d'un certificat international de transfert (ci-après « CIT ») délivré par la fédération nationale du club quitté sur demande de la nouvelle fédération. Un refus de la part de l'ancienne fédération d'accorder le CIT n'est pas forcément définitif : saisie par la fédération du nouveau club, la FIFA peut néanmoins autoriser celle-

ci à enregistrer le joueur à titre provisoire, ce qui permet au joueur de participer aux compétitions de son nouveau club malgré l'opposition initiale de son ancienne fédération. Les décisions relatives à la délivrance du CIT provisoire incombent à une instance juridictionnelle de la FIFA dénommée « le Juge Unique ».

Le transfert international des mineurs de 18 ans obéit à une procédure particulière. Dans ce cas en effet, le transfert international est subordonné à une approbation préalable délivrée, sur demande de la nouvelle fédération nationale, par une autre instance de la FIFA, dénommée « la Sous-Commission de la Commission du Statut du Joueur de la FIFA » (ci-après « la Sous-Commission »). Les décisions rendues en matière de CIT par ces deux instances – Juge Unique et Sous-commission – sont susceptibles d'un appel devant le TAS. Les statuts de la FIFA<sup>1</sup> donnent en effet compétence à l'institution arbitrale pour connaître de tout litige entre « *la FIFA, les membres, les confédérations, les ligues, les clubs, les joueurs, les officiels, les agents de matchs et les agents de joueurs licenciés* », sous réserve que les voies de recours internes aient été épuisées et que le recours devant le TAS ait été introduit dans un délai maximum de 21 jours à compter de la notification de la décision contestée ; tandis que l'article 23 alinéa 2 du RSTJ énonce que « *les décisions du Juge Unique (...) peuvent faire l'objet d'un recours devant le TAS* ».

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\* Gérald SIMON, Professeur à la Faculté de droit de Dijon, Directeur du Laboratoire de Droit du Sport, Arbitre du TAS.

<sup>1</sup> Articles 66 alinéa 1 et 67 des statuts FIFA.

On relèvera que ces dispositions ne précisent pas quelles parties peuvent saisir le TAS.

Dans le silence des textes, les formations du TAS, saisies de recours contre les décisions des instances de la FIFA en matière de CIT, ont été ainsi amenées à se prononcer sur l'admission des appels formés par les clubs contre ces décisions. Or, si des sentences rejettent le recours des clubs pour défaut de légitimation active, une sentence se distingue en déclarant recevable l'appel d'un club contre le refus de délivrer un CIT à un mineur ! Pourtant, la divergence ne semble être qu'apparente.

Pour le comprendre, il convient de distinguer selon que le litige porte sur la délivrance d'un CIT provisoire ou sur le refus d'approuver le transfert international d'un mineur.

### **I. Non admission de l'appel d'un club contre la délivrance d'un CIT provisoire**

Face à l'autorisation du Juge Unique de délivrer un CIT provisoire à un joueur malgré le refus opposé par la fédération nationale à la demande de CIT, un appel devant le TAS déposé par l'ancien club sera rejeté.

Les formations du TAS considèrent en effet que, dans ce cas, le club ne dispose pas de la légitimation active, c'est-à-dire de la qualité pour agir, pour faire appel de la décision et ceci en vertu aussi bien des statuts et règlements de la FIFA que des règles du droit suisse, applicable à titre supplétif.

Deux sentences au moins illustrent cette position :

1) La première a été rendue le 18 mars 2010 dans le cadre d'un litige opposant le club français de l'Olympique Lyonnais (ci-après « OL ») à l'US SOCCER FEDERATION (ci-après « US Soccer »)<sup>2</sup>. La Fédération française de football ayant refusé de délivrer un CIT pour deux joueuses de l'OL, le Juge Unique

accéda à la demande de la fédération américaine d'autorisation provisoire de transfert. Le club français fit alors appel devant le TAS.

Tout en reconnaissant que « *les autorisations de transfert provisoires ont frustré l'OL qui est touché dans les faits par les décisions du Juge Unique* », le TAS rejette cependant l'appel en raison de l'absence de légitimation active du club. En effet, après avoir constaté que les règlements de la FIFA n'autorisaient pas les clubs à requérir des CIT, fonction réservée aux fédérations membres, la formation en déduit que « *la procédure d'émission des CIT est clairement définie dans le RSTJ comme se déroulant entre fédérations nationales. De ce fait, le club ne peut participer à la procédure devant le Juge Unique. Il n'y a donc aucun motif que ce même club puisse ensuite faire appel de cette décision* ». En supposant même que le droit suisse fût applicable à titre supplétif, le club n'aurait pas davantage disposé de la qualité pour agir. Car, si le droit suisse reconnaît que, dans le cas d'associations faitières, dont seules des associations ou d'autres personnes morales peuvent devenir membres, le membre indirect peut attaquer les décisions de l'association, il reste que, selon la jurisprudence du TAS, « *la qualité de membre indirect ne peut être attribuée à des clubs de football, en cas de réglementations claires de l'association prévoyant la qualité des membres, qui n'admettent que les fédérations nationales en leur sein* »<sup>3</sup>.

Dès lors, aussi bien en vertu du règlement FIFA que du droit suisse tel qu'appliqué par les formations du TAS, un club de football est dépourvu de la légitimation active pour faire appel des décisions du Juge Unique autorisant la délivrance d'un CIT provisoire.

<sup>2</sup> TAS 2009/A/1828 & 1829, 18 mars 2010, *Olympique Lyonnais c. US Soccer Federation & Bompastor & Abily*.

<sup>3</sup> CAS 98/200, 20 août 1999, *AEK Athens & SK Slavia Prague c. UEFA*, cons. 52.

2) La position prise dans cette sentence, qui fait figure de décision de principe, a été confirmée récemment par le TAS<sup>4</sup>.

Dans cette affaire, relative à l'octroi d'un CIT provisoire permettant le transfert d'un joueur du club mauritanien ASAC Concorde dans un club tunisien, le TAS a également dénié au club la qualité pour appeler de la décision du Juge Unique en se fondant sur le même motif que « *la procédure relative à la demande de délivrance d'un CIT, à son octroi ou à son refus par l'ancienne association nationale et à sa contestation devant la FIFA ne fait intervenir que les associations nationales* ».

On pourrait faire valoir sans doute que le déclenchement de la procédure de demande de CIT est à l'initiative du club qui souhaite voir engager le joueur sous ses couleurs. De même qu'on pourrait relever que le refus de délivrance du CIT par la fédération d'origine est largement provoqué par le club quitté qui souhaite conserver le joueur, la fédération d'origine ne faisant le plus souvent que répondre, par ce refus, au souhait exprimé par le club qui y est affilié. De sorte que les clubs apparaissent bien comme les acteurs principaux dans la mise en œuvre de la procédure de CIT, soit en provoquant la demande de délivrance, soit en agissant en cas de refus.

Il reste que le déroulement de la procédure, tel que fixé par le RSTJ, ne met en relation que les fédérations nationales membres de la FIFA, à l'exclusion de toute autre entité. Dans ces conditions, il est difficile aux formations du TAS de ne pas rejeter les recours des clubs appelants en application des dispositions réglementaires de la FIFA.

Dura « *lex sportiva* », sed « *lex sportiva* » !

## **II. Irrecevabilité de l'appel d'un club contre le refus de CIT à un joueur mineur**

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<sup>4</sup> TAS 2013/A/3351, 24 janvier 2014, *FFRIM & ASAC Concorde c. CS Hammam-Lif & FTF & FIFA*.

La solution inverse prévaut pourtant lorsqu'un club saisit le TAS contre une décision de la FIFA refusant d'accorder un CIT à un joueur mineur. Dans ce cas, l'appel du club est recevable comme le montre une sentence en date du 5 avril 2013<sup>5</sup>.

Dans cette affaire, le club espagnol souhaitait engager un joueur de 12 ans de nationalité polonaise pour l'inscrire dans ses équipes de jeunes. À la demande du club, la Fédération espagnole (ci-après « la RFEF ») sollicita auprès de l'instance compétente de la FIFA, en l'occurrence le Juge Unique de la Sous-Commission de la Commission du Statut du Joueur de la FIFA, l'approbation du transfert international du mineur en application de l'article 19 alinéa 4 du RSTJ. La demande de la RFEF ayant été rejetée, le club de Villareal fit appel de cette décision devant le TAS.

Dans ses écritures, la FIFA soulevait l'irrecevabilité de l'appel du club en raison notamment de son absence d'intérêt à agir. La FIFA soutenait en effet que « *dans le cadre des demandes d'enregistrement de joueurs mineurs, l'interlocuteur est la fédération nationale du club souhaitant enregistrer le joueur* ». La FIFA reprenait donc l'idée, exprimée dans les sentences « OL » et « FFRIM », que le club, n'étant pas partie à la procédure de demande de transfert, était ainsi dépourvu d'intérêt à agir contre la décision du Juge de la Sous-Commission de la FIFA.

La formation du TAS rejette pourtant l'argumentation de la FIFA au motif que « *le club était directement concerné par la décision du Juge Unique dans la mesure où la demande d'enregistrement concernait un joueur pour lequel le club sollicitait l'inscription par l'intermédiaire de sa fédération nationale* » et déclarait donc l'appel du club recevable !

En apparence, la sentence « Villareal » semble en parfaite contradiction avec les deux sentences précitées, même si elle concerne le

<sup>5</sup> TAS 2012/A/2787, 5 avril 2013, *Villareal CF c. FIFA*.

cas particulier du transfert international des joueurs mineurs.

En effet, qu'il s'agisse d'une demande de CIT provisoire pour le transfert d'un joueur de plus de 18 ans ou d'une demande d'approbation préalable pour celui d'un joueur mineur, dans tous les cas les clubs sont absents de la procédure, les instances compétentes de la FIFA ayant à se prononcer sur les demandes exclusivement formées par les fédérations nationales. C'est bien pourquoi la FIFA, dans la sentence « Villareal », soulevait l'irrecevabilité du recours du club. On pourrait donc penser que la Formation du TAS dans cette affaire a suivi un raisonnement erroné, en tout cas en rupture avec la jurisprudence du TAS telle qu'énoncée dans les sentences précitées.

D'un autre côté, la solution de la sentence « Villareal » pourrait être regardée comme répondant davantage à la réalité que la position, excessivement formelle, adoptée dans les sentences « OL » et « FFRIM ». Comme nous l'avons dit, dans la grande majorité des cas en effet, les demandes de CIT ou d'approbation de transfert des mineurs sont faites par les fédérations nationales sur demande des clubs directement concernés par ces transferts. Et, s'agissant plus particulièrement de la délivrance de CIT pour les joueurs majeurs, le refus de la fédération nationale, à l'origine de la demande de CIT provisoire auprès de la FIFA, est le plus souvent fondé sur une demande en ce sens du club d'origine qui souhaite garder le joueur.

Autrement dit, c'est bien davantage au regard des intérêts de leurs clubs, plutôt que de leur intérêt propre, que les fédérations nationales agissent en matière de transfert. Dans les procédures de transfert international, les fédérations nationales jouent le rôle d'intermédiaire, voire de mandataire, du club affilié.

Malgré tout, une différence de nature demeure entre les deux situations et qui explique les solutions différentes adoptées

par les formations du TAS dans les affaires précitées.

Dans le cas de la délivrance d'un CIT provisoire, le litige porte sur *l'octroi* d'une autorisation d'enregistrement, tandis que dans le cas de transfert de mineurs, la contestation porte sur le *refus* d'enregistrement du joueur.

Or les effets de ces deux types de décisions sont de nature très différentes au regard de la situation du joueur : dans le premier cas, le CIT provisoire a pour effet d'autoriser le footballeur à jouer dans un club déterminé ; au contraire dans le second, le refus d'approbation lui interdit de jouer dans un tel club. La contestation de ces décisions aura ainsi des objets et des effets différents, sinon opposés.

Dans le premier cas en effet, le litige a pour objet l'autorisation de jouer, ce qui prive sans doute le club quitté du droit d'utiliser son joueur ; en revanche, les intérêts du joueur et de son nouveau club sont préservés. Le club quitté est certes lésé, surtout si, s'agissant d'un joueur professionnel, le transfert est opéré sur la base d'une rupture irrégulière du contrat qui le liait à son ancien club. Cependant, dans cette hypothèse, si le club quitté s'estime lésé en raison d'une rupture irrégulière, les règlements de la FIFA lui permettent de saisir une instance spécifique de la FIFA, la « Chambre de Résolution des Litiges » (ci-après « CRL »), pour régler ce contentieux contractuel et, éventuellement, de recourir devant le TAS en appel de la décision de la CRL. La volonté de la FIFA est donc clairement de distinguer les litiges liés au CIT des litiges purement contractuels. Les premiers sont réservés aux fédérations nationales, les clubs n'étant admis à faire valoir leurs droits que dans le cadre des seconds.

C'est donc en toute logique que les formations du TAS rejettent les appels des clubs lorsqu'ils contestent devant elles les autorisations d'enregistrement provisoire.

En revanche, dans les cas de refus d'enregistrement de joueurs mineurs, le club qui souhaitait inscrire le joueur en son sein n'a pas d'autre moyen de contester ce refus, non plus d'ailleurs que le joueur lui-même qui, pas plus que le club, n'est partie à la procédure. Le club est donc privé de toute possibilité de recours par ailleurs. Ses intérêts sont donc directement lésés par la décision de rejet d'approbation d'enregistrement.

En ce sens, la sentence « Villareal » est parfaitement cohérente en reconnaissant l'intérêt pour agir du club victime d'un tel refus, à charge, sur le fond, de vérifier que la situation justifiait ou non la décision litigieuse.

C'est une autre question.

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## Jurisprudence majeure\* Leading Cases



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

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

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**Arbitration CAS 2012/A/2869**  
**Fédération Internationale de Football**  
**Association (FIFA) v. Federação**  
**Portuguesa de Futebol (FPF) & Pedro**  
**António Pereira Teixeira**  
4 February 2014

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**Football; Doping;**  
**Cannabinoids/Specified Substance S8;**  
**MDMA/Non-specified Substance S6a);**  
**CAS jurisdiction; Authority of a National**  
**Anti-Doping Organization to establish a**  
**“follow up program”; Non-compliance of**  
**the “follow up program” with the WADA**  
**Code/substantive change; Irrelevance of**  
**the consent of the Player to the regime**  
**put in place by the Anti-Doping**  
**Organization;**

**Panel**

Mr Michele A. R. Bernasconi (Switzerland),  
Sole Arbitrator

**Facts**

This appeal was brought by the Fédération Internationale de Football Association (FIFA) against the Portuguese Football Federation (FPF) and Mr Pedro António Pereira Teixeira (the "Player"), an amateur football player of Portuguese nationality.

On 22 January 2011, after a first division match, the Player underwent an in-competition anti-doping control.

He tested positive for "*Cannabinoids*", which is a specified substance, classified under the category S 8 on the 2011 WADA Prohibited List as well as on the List of Classes of Prohibited Substances and Methods, published by the "Autoridade Antidopagem de Portugal" (ADoP).

On 18 July 2011 and in the context of the disciplinary procedure instigated against him, the Player signed a pre-filled form established by the ADoP, whereby he agreed to a "*Follow-up Program*" which is based on

recommendations from the ADoP and the purpose of which is to assist athletes who were found to have used such banned substances, back in their sporting career.

On 13 October 2011, the FPF Disciplinary Committee decided to suspend the Player for 6 (six) months from the sports activity, for violation of the Anti-Doping Regulation of the [FPF], provided that he agrees to submit to a Follow-up Programme as recommended by ADoP.

On 4 January 2012, the Player was subject to an anti-doping control test. The sample collection procedure was carried out at his home.

The Player's A sample revealed the presence of "*Cannabinoids*" as well as of "*MDMA and metabolite MDA*", which is a non-specified stimulant, classified under the category S 6 a) on the 2012 WADA Prohibited List as well as on the 2012 Prohibited List published by the ADoP.

It is undisputed that substances under the categories S 6 a) ("*MDMA*") and S 8 ("*Cannabinoids*") are prohibited only "*in-competition*".

In a decision rendered on 25 May 2012, the FPF Disciplinary Committee, *inter alia*, held that pursuant to the terms and conditions of the "*Follow up Program*", the Player must be found guilty of an anti-doping rule violation for the second time and, must be punished with suspension for a period of 15 to 20 years.

On 30 May and 14 June 2012, the ADoP, respectively the FPF Disciplinary Committee, informed FIFA of the Player's suspension for a period of 15 years.

On 30 July 2012, FIFA filed its statement of appeal with the Court of Arbitration for Sport (CAS).

The parties confirmed to the CAS Court Office that they agreed to waive a hearing.

In essence, FIFA submitted that the World Anti-Doping Code orders signatories to implement the Prohibited List without substantive changes and that considering that a) the substances found in the sample provided by the Player on 4 January 2012 are only prohibited in-competition, b) the anti-doping test carried out on 4 January 2012 occurred out-of competition, the FPF Disciplinary Committee erred when it held that the Player committed a second anti-doping rule violation. As a consequence, a 15-year suspension for a second anti-doping rule violation represents a clear violation of the existing applicable rules and is also disproportionate.

The FPF mainly submitted that the CAS had no jurisdiction to hear the appeal, that the ADoP is the relevant organ to handle doping matters and that as the 15-year suspension has its origin in the national law, it is irrelevant to examine whether it is disproportionate.

The Player basically agreed with FIFA's position.

### Reasons

1. The FPF is of the view that the matter at stake is related to the range of measures available to the FPF/ADoP to sanction anti-doping rule violations. It alleges that such an issue is purely of domestic nature and that the CAS cannot interfere in the sovereign authority of Portugal to decide over its sanctions program. In support of its position, the FPF makes reference to the "*Law 5/2007 of 16 January 2007*" as well as the "*Decree law 248-B/2008, 31<sup>st</sup> December Sports Associations Legal Regime*". However, the Panel finds that those legal texts are very general regulations which do not specifically deal with the fight against doping. Doping matters are governed by more specific and more recent legislations at both national and international levels. Based on the principles of "*Lex specialis*" as well as "*lex posterior derogate legi priori*", these

younger legislations override the legal texts referred to by the FPF.

The basis for the jurisdiction of the Sole Arbitrator to hear FIFA's appeal against a decision of the FPF Disciplinary Committee with respect to the Player is the following:

- The ADoP as well as the FPF agreed to abide by the WADA Code, which recognizes FIFA's right "*to appeal to CAS with respect to the decision of the national-level reviewing body*" (article 13.2.3 of the WADA Code).
- The FPF is a registered member of FIFA and, according to its own rules, it undertook to respect FIFA's Statutes and regulations, including the FIFA ADR. As a result, the guidelines set in articles 63 and 64 of the FIFA Statutes as well as in article 62 of the FIFA ADR are binding for the FPF. Therefore, to the extent they provide for an appeal to the CAS, they establish the jurisdiction of the CAS.
- In addition to the foregoing, the FPF's own Statutes and regulations contain express provisions granting jurisdiction to the CAS:
  - The jurisdiction of the CAS is foreseen in the presence of "*disputes which have a cross-border nature*" (Article 2 para. 3.4 of the FPF Statutes). The present dispute is obviously of "*cross-border nature*" as the appeal is submitted by FIFA, i.e. the governing body of international football at worldwide level.
  - The CAS has also jurisdiction to hear appeals against decisions rendered by the ADoP (article 57 of the Portuguese Bill 27/2009 of 19 June 2009; article 47 of the FPF ADR).

At the level of the FPF, the application of disciplinary sanctions related to doping matters is the responsibility of the ADoP and is

delegated to sports federations. However, the ADoP has the power to be involved in the decision making process and/or to render a decision different from the FPF's.

The Sole Arbitrator finds that the CAS must have jurisdiction not only when the ADoP actually decides to alter the initial decision of the first instance –the FPF Disciplinary Committee's decision- but also when it chooses to accept such decision without further ado. Therefore, as a consequence of the general reference to the FIFA rules as well as to the WADA Code contained in the various laws and regulations applicable at the FPF level, the CAS has jurisdiction to hear FIFA's appeal.

2. The Sole Arbitrator confirms that according to the Portuguese Bill 27/2009 of 19 June 2009 that "*regulates the [Autoridade Antidopagem de Portugal ADoP], as the Portuguese anti-doping organisation with duties to test for and fight against doping in sport, in particular as the entity responsible for adopting rules aimed at triggering, implementing or applying any stage of the doping control process*, the ADop has, in general the authority to establish a program dealing with anti-doping issues.
3. The Sole Arbitrator noted that the ADoP is a signatory to the WADA Code. In this capacity, the ADoP committed itself to adopting and implementing anti-doping rules and policies which conform with the WADA Code (see article 20.5.1 of the WADA Code) as well as to ensuring that it did not include any provision which negates, contradicts or otherwise changes the mandatory WADA Code articles. In this regard, article 23.2.2 of the WADA Code requires that its signatories must implement enumerated articles of the WADA Code "*without substantive change*". Hence, the ADoP agreed to limit its autonomy to act within its own spheres with respect to activities covered by the WADA Code (see CAS 2011/A/2658 BOA v. WADA, page 26 par. 8.12).

The ADoP is an Anti-Doping Organization for the purposes of the WADA Code and is obliged under its article 23.2.2 to comply among others with Article 10 providing for Sanctions on Individuals. Yet, the "*Follow up program*" does not make any distinction between "in-competition" and "out-of-competition" testing. Similarly, it does not make a difference between substances which are prohibited only "*in-competition*" - like social drugs- and substances which are prohibited at all time, both "in-competition" as well as "out-of-competition". Pursuant to the WADA Code, a substance prohibited only in-competition found in a Player's bodily sample out-of-competition, may not constitute an adverse analytical finding and may not lead to an anti-doping rule violation. Conversely, under the regime of the "*Follow-up Program*", the Player must take responsibility for the presence of *any* prohibited substance found to be present in his samples regardless of the fact that the substance is prohibited only "*in-competition*" or at all time.

Depending on which of the two above regimes is applied, the Player can either be cleared of any doping offence or declared ineligible for a minimum period of fifteen years – if the player is found guilty of an anti-doping rule violation for the second time. Such a contrast between the two systems is obviously incompatible with the general purpose of the World Anti-Doping Program, which aims to harmonize anti-doping policies and regulations within sport organizations and among governments.

More specifically, it appears that with its "*Follow-up Program*", the ADoP added provisions to its rules which change the effect of article 23.2.2 of the WADA Code. In particular, the regime put in place by the ADoP does not comply with article 10 of the WADA Code. Hence the "*Follow-up Program*" is not in compliance

with the WADA Code as it amounts to a substantive change to the sanctions provisions of the WADA Code. The ADoP has therefore breached its obligation under article 23.2.2 of the WADA Code.

4. The Sole Arbitrator found that the fact that the Player consented without reservation to the regime put in place by the ADoP is of no relevance as, otherwise, it would be another way for a signatory to circumvent its obligations and duties under the WADA Code and, as a consequence, pose a significant threat to the uniform regime, which the WADA Code seeks to create.

### **Decision**

Given that, on 4 January 2012, the Player was subject to an out-of-competition doping control and tested positive for substances prohibited only "*in-competition*", the request of the Appellant, i.e. to rule that "*The decision rendered by the Disciplinary Board of the [FPF] dated 25 May 2012 is annulled*" shall be accepted and the Appealed Decision must be annulled.

**Cycling; Refusal of registration according to the UCI Licensing Regulations; Deviation, by special agreement, from the Panel's full power of review; Full power of review and review of evidently and grossly disproportionate sanctions; Purpose of Article 2.15.011 of the UCI Cycling Regulations; Grossly disproportionate character of a sanction**

**Panel**

Prof. Luigi Fumagalli (Italy), President  
Mr Luc Argand (Switzerland)  
Mr. Michele Bernasconi (Switzerland)

**Facts**

Katusha Management SA (“Katusha” or the “Appellant”), a Swiss company with its registered seat in Geneva, Switzerland. Its goal is mainly the development and management of one or several professional cycling teams in Switzerland or abroad. In particular, Katusha is the “paying agent” and licence holder, under the rules of the Union Cycliste Internationale (UCI), of the Russian cycling ProTeam Katusha (the “Team”), which has competed since its date of creation in 2009 as a UCI ProTeam.

The Union Cycliste Internationale (the “UCI” or the “Respondent”) is an association under Swiss law, with headquarters in Aigle, Switzerland. The UCI is an international sporting federation and the world governing body for cycling. In such capacity, the UCI oversees competitive cycling events internationally.

In 2004 the UCI created a system, under which the teams of professional riders need to obtain a license or a registration to compete at international and national level. More specifically, as to the international level,

the UCI Cycling Regulations (the “Regulations”) currently provide for a license to take part in the UCI World Tour events, which include the major international competitions (such as the Tour de France, the Giro d’Italia, etc.) (the “World Tour license”: Articles 2.15.001 to 2.15.267 of the Regulations), and a registration to participate in the Professional Continental circuit (comprising races of the various continental calendars) (the “Professional Continental registration”: Articles 2.16.001 to 2.16.054). In order to obtain a World Tour license or a Professional Continental registration, teams need to satisfy sporting, ethical, financial and administrative criteria. The ongoing satisfaction of the same criteria is verified every year, as teams holding a World Tour license or a Professional Continental registration have to register again for the following season.

On 18 November 2011, the UCI Licence Commission (the “License Commission”) granted Katusha, for its Team, a World Tour licence for a four-year period, i.e. valid from 1 January 2012 until 31 December 2015 (the “License”).

On 13 September 2012, Katusha filed its registration form with the UCI for the season 2013.

On 15 October 2012, the auditor appointed by UCI and in charge of reviewing the teams’ applications for their registration (the “Auditor”) issued a preliminary report, that evaluated the conformity with the Regulations and the other applicable rules of the budget, the financial documentation, the working contracts, the insurances and the bank guarantee provided by Katusha. As indicated in this preliminary report, it appeared to the Auditor that the Appellant did not fulfil the “Financial Criterion” and the criterion relating to “Working contracts and Insurances” to obtain the registration for 2013. In accordance with the Regulations, the Auditor’s preliminary report only addressed the financial aspects of the Appellant’s

application. It did not examine the sporting, ethical and administrative requirements.

Upon receipt of such preliminary report, Katusha was given the possibility to provide the Auditor with explanations and documents about the criteria labelled as “not fulfilled”. As a result, from 16 to 30 October 2012, the Appellant provided the Auditor with explanations and documents regarding its financial situation.

The explanations provided by Katusha were however considered to be insufficient by the Auditor, in particular with respect to the increase in the “competition expenses” in 2012 (+195% compared to the 2011 budget).

On 10 December 2012, the Licence Commission informed the Appellant, and published in its website the news, of its decision “to refuse Katusha’s registration for 2013”.

On 18 December 2012, the Licence Commission transmitted to Katusha the text of its decision dated 7 December 2012 rejecting the Appellant’s application for 2013 (the “Decision”) with the grounds supporting it.

On 20 December 2012, Katusha filed a statement of appeal with the Court of Arbitration for Sport (the “CAS”), pursuant to Article R48 of the Code of Sports-related Arbitration (the “Code”), to challenge the Decision.

### Reasons

1. The Panel reiterated its full power to review the facts and the law based on Article R57 of the CAS Code. Article 2.15.239 of the Regulations, however, provides that “The CAS shall examine only whether the contested decision was arbitrary, i.e. whether it was manifestly unsustainable, in clear contradiction with the facts, or made without objective reasons or subsequent upon a serious breach of a clear and unquestioned rule or

legal principle. It may only be overturned if its outcome is found to be arbitrary”. The Panel further held that the question of the possibility for the parties to deviate, by special agreement, from the general rules set in the Code needed to be considered in a broader context, taking in mind the nature and function of the CAS and those mandatory rules that may limit the power of an association to limit access to justice.

The Panel found that the unrestricted scope of review of the CAS Panel as provided under Article R57 of the CAS Code may be validly limited to the same standard of review as the standard provided by State court proceedings. In Switzerland, seat of the UCI, this would mean that a review of a cassatory nature (“nature cassatoire”) as provided at Article 75 CC would be accepted. However, a provision such as Article 2.15.239 of the Regulations, as interpreted in the light of both the exclusion of the competence of Swiss State courts, the exclusive competence of CAS, and of the necessity to guarantee the Appellant’s right of access to justice, limiting the CAS’ power of review to arbitrariness, would not be in line with Swiss mandatory rules and / or with the Swiss *ordre public* (cf. CAS 2009/A/1782). In such situation, the judiciary control would not be fully exercised and may leave the door open to a review of a higher standard by State courts, as if the type of dispute at stake was not covered at all by the arbitration clause. The question to know whether a limitation such as the one provided by Article 2.15.239 of the Regulations would be acceptable if expressly stated in writing in an arbitration agreement signed by both parties can be left undecided as such agreement does not exist in the present matter.

2. Article 2.15.239 of the Regulations, however, if considered together with Article 2.15.240 and Article 2.15.241 of the Regulations, is not devoid of any meaning. In fact, it invites the Panel to pay

respect, by way of self-restraint, to the decisions of the License Commission, while exercising its power of review of the facts and the law. Therefore, and notwithstanding its full power of review, the Panel accepted the dictum in another award (CAS 2009/A/1870, at para. 125), under which “the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence”. While not excluding, or limiting, its power to review the facts and the law involved in the dispute heard (pursuant to Article R57 of the Code), a CAS panel can decide, in specific and appropriate circumstances, not to exercise the power it indisputably enjoys, and will defer to the discretion exercised by the internal body of an association.

3. With respect to the first question -whether under the Regulations the Appellant was entitled to registration and more specifically, whether Katusha satisfied the ethical criterion contemplated by the Regulations- the Panel found that the adoption of the mentioned measures marked a quite important step made by Katusha along the lines indicated by the UCI, also in the License, in order to build an anti-doping environment within the Team. Article 2.15.011 of the Regulations does not specify the measures that need to be adopted within a World Tour Team: mention is made only of the requirement that anti-doping rules be respected by the team and its members. The identification of such measures is problematic with respect to the consequences of the anti-doping rule violations committed by riders on a team’s possibility to obtain the registration (or a World Tour license). The mere fact that a doping offence was committed by one of the Team’s riders, in 2012 was not sufficient to lead per se to the denial of the Appellant’s registration for 2013. Therefore, the Panel found that the measures adopted by Katusha satisfied

the ethical criterion contemplated by the Regulations.

With respect to the second question - whether the adoption of such measures could be considered in this arbitration, and with respect to the Appellant’s application for the 2013 registration as a World Tour team, the Panel answered positively. In accordance with Article 2.14.240 of the Regulations, it is possible (i) for the Appellant to submit and invoke (“raise”) before the CAS not only the documents included in the “the license application documentation”, but also evidence relating to the circumstances considered by the License Commission, and (ii) for the Panel to consider such evidence in order to establish whether the criteria for registration (and, here, chiefly the ethical criterion) were satisfied.

4. The Panel noted that, in light of the measures adopted by Katusha, the Decision to deny the registration for 2013 appeared to be grossly disproportionate: the granting of a registration could have been accompanied by indications suitable to directly guarantee the ongoing implementation of such measures; as such, it would have followed a more reasonable, coherent and proportionate approach, to take into account both the efforts made by the Appellant and the purposes sought by the Regulations. The Panel also noted that, if one considered the content of the Evaluation Report 2012 and the one of the Evaluation Report 2013, Appellant could not reasonably expect that its registration would have been denied, notwithstanding the clarification of the financial requirements.

### Decision

The Panel upheld the appeal and set aside the Decision. The application of Katusha to be registered as a UCI ProTeam for the season 2013 was accepted, and registration was granted to Katusha for the season 2013. All other prayers and requests were dismissed.

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**Arbitration CAS 2012/A/3039**  
**Trevor McGregor Steven v. Fédération**  
**Internationale de Football Association**  
**(FIFA)**  
29 August 2013

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**Football; Violation of the FIFA Regulations on football agents; Burden of proof that the player's agent acted in violation of the FIFA Regulations; Definition of a player's agent according to the FIFA Regulations; Tipping off a third party and violation of the FIFA Regulations on player's agents**

**Panel**

Mr Chris Georghiades (Cyprus), President  
Mr Bruce M. Buck (United Kingdom)  
Mr Lars Hilliger (Denmark)

**Facts**

This appeal was filed by Mr. Trevor McGregor Steven (the "Appellant"), an officially licensed football "Players' Agent" against a decision rendered by the Appeal Committee of the Federation Internationale de Football Association (the "Respondent" or "FIFA"), the international governing body of football, with its seat in Zurich, Switzerland.

On 15 August 2011, The Football Association of England (the "FA") transmitted to FIFA a briefing document of its investigation regarding the transfer of the Estonian professional football player Tarmo Kink (the "Player") to the English football club of Middlesbrough FC (the "Club").

Based on the information collected by the FA, the latter expressed the view that there may have been breaches of the Regulations by the Appellant. In summary, it would appear that there may have been breaches of the Regulations including, but not limited to Article 2.2 of the Regulations.

On 13 December 2011, disciplinary proceedings were initiated against the Appellant in respect of an alleged violation of Articles 23(2) and 3(1) of the Regulations for having paid to a certain Mr. Valja (a person who was not a licensed "Players' Agent") an amount of GBP 23.000 in connection with the transfer of the Player to the Club.

On 7 February 2012, the FIFA Disciplinary Committee met and considered the matter whereupon it decided that the Appellant was guilty of failing to comply with Article 23(2) and Article 3(1) of the Regulations and imposed upon the Appellant a warning as per Article 10(a) of the FIFA Disciplinary Code and a fine of CHF10'000. The decision was notified to the Appellant on 9 March 2012.

On 12 March 2012, the Appellant lodged an appeal against the decision of the FIFA Disciplinary Committee.

On the 16 March 2012, the Appellant submitted his appeal brief and on the 5 July 2012, by way of a telephone conference, the FIFA Appeal Committee rejected the appeal with the decision notified to the Appellant on 10 July 2012 (the "Appeal Decision").

On 21 December 2012, the Appellant lodged an appeal with the Court of Arbitration for Sport (the "CAS") with respect the Appeal Decision.

**Reasons**

1. This dispute arose by reason of the investigation of the FA and its referral to the FIFA Players' Status Committee of a briefing document for consideration by the FIFA Disciplinary Committee. The FA investigation was triggered by several tabloid newspapers in England which in their publications made reference to Mr. Valja as an agent of the Player. This caused the FA to institute an investigation into the transfer of the Player from Gyori Eto of Hungary to the Club.

The Appellant, a licensed Players' Agent in Scotland, acted on behalf of the Club in the transaction. The main issue was whether or not Mr. Valja actually did perform any activity which in legal terms can be characterized as a player's agent activity in connection with the Player's transfer from Gyori Eto to the Club or otherwise whether the Appellant allowed Mr. Valja, a person who was not a licensed "Players' Agent", to perform activities of a player's agent.

The Panel found that the burden was on FIFA to prove that the Appellant acted in violation of the Regulations and in this respect.

2. The Regulations are relatively straight forward and clear with regard the definition of "Players' Agent": "a natural person who, for a fee, introduces players to clubs with a view to negotiating or renegotiating an employment contract or introduces two clubs to one another with a view to concluding a transfer agreement, in compliance with the provisions set forth in these regulations."
3. According to the evidence presented, the "work" done by Mr. Valja only consisted of tipping off the Appellant about the Player and did not constitute a "normal agency work" according to the above-mentioned definition, so that the Panel could not establish that Mr. Valja actually did perform any activity which could be held to be contrary or in violation of the provisions of the Regulations and particularly the definition "Players' Agent". If Mr. Valja did not act as a "Players' Agent" within the meaning of the Regulations, then the Appellant was not paying him for so doing.

To the extent that a licensed "Players' Agent" may pay a fee for receiving a tip from a third party, the Panel could not find that the Appellant breached the Regulations when paying (or deciding to pay) a fee (or a part of the fee) to Mr. Valja.

The Panel found that it was irrelevant whether the fee was a small or a significant amount or whether or not a legally binding agreement was concluded as between the Appellant and Mr. Valja.

From the facts of the case, the Panel could not see that Mr. Valja performed any of the activities detailed in the definition of a "Players' Agent" in which case he could not be viewed as having acted as an unlicensed "Players' Agent".

### **Decision**

On the basis of the above the Panel upheld the appeal and annulled the decision issued by the FIFA Appeal Committee.

**Football; Termination of a contract of employment; CAS jurisdiction and distinction between contractual cases and doping-related cases; Failure of a national association to create a national court of arbitration and CAS jurisdiction**

**Panel**

Mr D.-Reiner Martens (Germany), President  
Mr Hans Nater (Switzerland)  
Prof. Denis Oswald (Switzerland)

**Facts**

This dispute was between Football Club Rad (the “Appellant” or the “Club”), a Serbian football club which is a member of the Football Association of Serbia (“FAS”) and Nebojša Vignjević (the “Respondent” or “Vignjević”), a coach who is a member of the Association of Football Coaches of FAS.

In broad terms, in October 2011, Vignjević and the Club executed a contract whereby Vignjević would be the Club’s coach for two seasons in exchange for monthly salary payments, contractual instalment payments, and bonuses. In February 2012, the Respondent left the Club’s training camp in Turkey as a result of what he claims was a wrongful termination of his employment contract by a representative of the Club’s main sponsor. The crux of the dispute is whether Vignjević was in fact terminated on that occasion or was terminated later after his extended absence from the Club.

On 27 February 2012, the Club initiated disciplinary proceedings against Vignjević for various violations due to his “unjustified absence from work since 16 February 2012”.

On 5 March 2012, the Club concluded the disciplinary proceedings by determining that the appropriate sanction for these violations

was termination. On the same day, the Club initiated proceedings before the Arbitration Commission of the FAS (“First Instance Commission”) for termination at the expense of Vignjević.

On 9 November 2012, the First Instance Commission ruled that the Club-Coach Contract was terminated at the fault of the Club. In its decision, the First Instance Commission held that the Club was obligated to pay RSD 75,000 for monthly salary owed and EUR 35,250 for contractual instalments owed.

Subsequently, the Club appealed the decision to the Appeals Commission of the Assembly of the FAS (“Appeals Commission”).

On 18 December 2012, the Appeals Commission upheld the decision of the First Instance Commission in part agreeing that the termination was the fault of the Club. In its decision, the Appeals Commission concluded that the Club was obligated to pay RSD 75,000 for monthly salaries owed and, after a re-calculation of the amount of instalments owed, determined that EUR 43,850 were owed for contractual instalments.

By letter dated 14 January 2013, the Appellant filed its Statement of Appeal against the Respondent with the Court of Arbitration for Sport (“CAS”).

The Respondent contested the jurisdiction of CAS.

**Reasons**

1. In this award, the Panel addressed the issue of jurisdiction of CAS to hear the appeal lodged by the Appellant based on the Kompetenz-Kompetenz principle and Article R47 of the CAS Code. According to Article R47 of the CAS Code, there are three separate conditions in order for CAS to have jurisdiction over a claim (there must be: a decision of a federation,

association or sports-related body; an express grant of jurisdiction either through the statutes or regulations of that sports-related body or a specific arbitration agreement concluded by the Parties; and the Appellant must have exhausted all legal remedies available to him prior to the appeal).

The Panel found that neither the FIFA Statutes nor the FAS Regulations expressly provide for CAS jurisdiction or any reference to a right of appeal to CAS.

The Panel examined Article 67 of the FIFA Statutes in combination with Article 3 of the Statutes of FAS and held that, in accordance with previous CAS jurisprudence, the statutes or regulations should expressly provide CAS with jurisdiction over the claim.

The Panel noted that FIFA Statutes clearly distinguish between appeals to CAS in doping-related matters and appeals in all other matters. In doping-related matters, Article 67 Paragraphs 5 and 6 of the FIFA Statutes states that FIFA and WADA, respectively, are “entitled to appeal to CAS against any internally final and binding doping-related decision.” This difference in language has been recognised as an express reference that confers jurisdiction to CAS in doping-related matters by previous CAS Panels. In all non-doping matters, Article 67 of the FIFA Statutes does not by itself confer jurisdiction to CAS.

Moreover, the Panel held that the FAS Commission for Legal Matters, which opined that Article 67 of the FIFA Statutes granted CAS jurisdiction because there was no possible legal remedy available with FAS and that thus the Appellant had exercised all of its available remedies with FAS, incorrectly asserted that Article 67 of the FIFA Statutes would grant CAS jurisdiction over this claim: such opinion did not take into account CAS jurisprudence and is of no persuasive

use to the Panel.

2. The Panel further found that the FAS’ failure to create the court of arbitration of the FAS could not create a right of appeal to CAS: The RSTP Regulations call for the creation of a court of arbitration of FAS to handle contractual disputes among players, coaches and clubs within FAS. The decision of the Court of Arbitration of FAS would be final and binding pursuant to Article 96 of the RSTP Regulations.

The Panel concluded that there was an explicit and exclusive provision granting jurisdiction to the Court of Arbitration of FAS: According to the clear wording of Article 96 of the RSTP Regulations “[d]isputes among professional players, coaches and clubs in relation to status related issues and maintenance of contractual stability, that may arise at national level...shall be resolved by the Court of Arbitration of the FA of Serbia” and the decision of the Court of Arbitration of the FAS is final. The present dispute (between a Serbian club and Serbian coach over which party terminated the Club-Coach Contract) clearly fell within the parameters of this provision making it subject to a final decision by the Court of Arbitration of FAS.

### Decision

In light of the foregoing, the Panel dismissed the appeal filed by the Appellant due to a lack of jurisdiction of CAS.

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**Arbitration CAS 2013/A/3080**  
**Alemitu Bekele Degfa v. Turkish Athletics Federation (TAF) and International Association of Athletics Federations (IAAF)**

14 March 2013

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**Athletics; Doping; Athlete Biological Passport (ABP); Aggravating circumstances; Notion of deceptive or obstructing conduct; Sanction**

**Panel**

Mr James Robert Reid QC (United Kingdom),  
President

Prof. Ulrich Hass (Germany)

Mr Daniel Visoiu (Romania)

**Facts**

The appeal is brought by Ms Alemitu Bekele Degfa (the “Appellant” or “Ms Bekele”), an international long-distance runner of Turkish nationality and of Ethiopian origin born on 17 September 1977 against the Turkish Athletics Federation (TAF) and the International Association of Athletics Federations (IAAF).

On 17 August 2009, at the World Championship in Berlin, the IAAF collected an Athlete Biological Passport (ABP) blood sample from the Athlete. A second blood sample was collected on 11 March 2010 at the World Indoor Championships in Doha. A third blood sample was collected on 29 July 2010 at the European Championships in Barcelona.

As a result of a “tip-off” from an anonymous Turkish athlete which suggested, inter alia, that Ms Bekele was engaged in doping practices and of the ABP results from Ms Bekele in 2009 and 2010 (which the IAAF regarded as “highly

suspicious”) her name was added to the IAAF’s “Registered Testing Pool” in October 2010.

Three further blood samples were collected from the Athlete on 10 July 2011 out of competition in St Moritz; on 29 August 2011 at the IAAF World Championships in Daegu; and on 27 November 2011 out of competition in Turkey.

The Athlete’s hematological profile comprising the results of the first five of these tests was identified as being abnormal by the IAAF’s adaptive model with a probability of more than 99%.

The Athlete disputed the abnormalities in her blood passport arguing that such characteristics were due to her training methodology (high altitudes); an abortion; and bouts of malaria – not doping.

The TAF Penal Board referred the evidence to an expert medical panel. Having received its report, the Penal Board held that Ms Bekele had violated the anti-doping rules contrary to Rule 32.2.b IAAF Competition Rules. It therefore imposed a sanction of four years ineligibility on Ms Bekele pursuant to Rule 40.6(a) on the grounds that there were aggravating circumstances in that she had committed the violation as part of a doping plan or scheme.

By a statement of appeal dated 8 February 2013, Ms Bekele appealed against the underlying decision to the Court of Arbitration for Sport (CAS), naming the TAF as Respondent pursuant to Article R48 of the Code of Sports-related Arbitration (the “Code”).

On 22 March 2013, the IAAF having become aware of the appeal to the CAS, asserted the

right to intervene as a party pursuant to Articles R41.3 and R54 of the Code.

By letter dated 9 December 2013, Ms Bekele, by her lawyers, informed the CAS that she was limiting the scope of her appeal to the length of the sanction imposed on her.

The TAF's request for relief was principally to reject the claims of Ms Degfa.

The IAAF argued that the reticulocyte percentages in the Athlete's blood were consistent with systematic blood reinfusions and intentional blood doping and submitted that there were aggravating circumstances which justified the increase of the penalty up to a four-year period of ineligibility.

An oral hearing took place on Monday 16 December 2013 at the CAS headquarters in Lausanne, Switzerland.

### Reasons

1. The Panel found that the un rebutted and strong evidence demonstrated clearly to its comfortable satisfaction the commission of doping offences contrary to the IAAF Competition Rules i.e. abnormality of the Athlete's Biological Passport with a probability of more than 99% ahead of both the IAAF Indoor World Championships in Doha and the IAAF European Championships in Barcelona in 2010. However, although the Panel had suspicions that the results shown by the sample collected on 17 August 2009 at the World Championship in Berlin demonstrated a further doping offence, that suspicion was not enough to comfortably satisfy the Panel as to the Athlete's guilt in relation to that sample.
2. The Panel further considered that any conduct in advance of the taking of tested

Samples, involving a course of conduct over a considerable period, amounts to a doping plan or scheme implying the athlete's knowledge. Whilst this was not a sophisticated conspiracy -such as, for example, that found in CAS 2008/A/1718 to 1724- nor a case of an athlete taking a banned substance on a single occasion, it was a repetitive and planned application of drugs (rhEPO) or sophisticated, premeditated reinfusion techniques. Under these circumstances it is difficult to conceive that the Athlete acted without the help or assistance of others (athlete support personnel). Furthermore, the Panel was comfortably satisfied that she used or possessed a Prohibited Substance or Prohibited Method on multiple occasions. In line with IAAF Competition Rule 40.6(a), the use or possession of a Prohibited Substance or Prohibited Method on multiple occasions constitutes aggravating circumstances which may justify the imposition of a period of Ineligibility greater than the standard sanction of two-year ineligibility. Conversely, Ms Bekele had failed to prove to the comfortable satisfaction of the Panel that she did not knowingly commit anti-doping rule violations. The Panel found her assertions that she had never engaged in any doping practice or method entirely unconvincing.

3. As to the question whether Ms Bekele has been shown to have engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation, the view of the Panel is that for this factor to be brought into play an athlete must have done more than put the prosecuting authority to proof of its case. The further point which arose was that it could have been suggested that the cessation of the use of a Prohibited Substance or Method somewhere between

one and three weeks before the events which the athlete was targeting amounted to deceptive conduct to avoid detection. The same point arose in CAS 2012/A/2773 at para. 29. Even if such conduct amounts to one aggravating circumstance something further is needed before the conduct is such as to justify an increased sanction for another additional aggravating circumstance. An example of such conduct can be found in CAS 2008/A/1718 to 1724 in which athletes were shown to have provided specimens which were not their own.

In these circumstances, the Panel was not comfortably satisfied that Ms Bekele engaged in deceptive or obstructive conduct in such a manner as to require the imposition of a *per se* increased sanction to be imposed on this ground.

4. The Panel found that the established culpability of the athlete related only to a single year and to the targeting of two competitions within that year, though by the repeated use of a Prohibited Substance or Method. This is offending on a substantially lesser scale than that of an athlete whose career over five of six years appears to have been built on blood doping (2012/A/2773). It is also true that in the great majority of cases in which an athlete tests positive for a Prohibited Substance, the athlete will not have indulged in a single one-off breach of the rules and in many cases will have been targeting a specific competition or series of competitions. In light of the circumstances of the case and of the CAS case law, it appeared that this was not a case in which the period of ineligibility should be increased to the maximum available. To do so would be to suggest that in all cases of blood doping a four-year period of ineligibility would under the rules as they stand be almost *de rigueur*, when the

rules do not make specific provision for a more severe penalty in blood doping cases. Taking account of the gravity of the aggravating circumstances which have been established, the appropriate period of ineligibility should be two years and nine months.

### Decision

The appeal of Ms Bekele is allowed in part. The decision of the TAF is varied to the extent that Ms Bekele's period of ineligibility shall be for a period of two years and nine months commencing on the date of this award but giving credit for the period of ineligibility already served from 3 April 2012.

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**Arbitration CAS 2013/A/3094**  
**Hungarian Football Federation v.**  
**Fédération Internationale de Football**  
**Association (FIFA)**  
14 January 2014

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**Football; Improper conduct among spectators during a match (racist behavior); Strict liability regulation (Article 67 FIFA DC) not contrary to the principles of Swiss law; Violation of Article 67 FIFA DC; Proportionality of the sanction; Fine**

**Panel**

Mr Mark A. Hovell (United Kingdom),  
President

Mr Bernhard Welten (Switzerland)  
Prof. Ulrich Haas (Germany)

**Facts**

This appeal was brought by the Hungarian Football Federation (the “Appellant”) against the Fédération Internationale de Football Association (the “Respondent” or FIFA).

On 15 August 2012, the Appellant’s national football team played a friendly match against Israel’s national football team in Budapest, Hungary (the “Match”). During the Match a group of the Appellant’s spectators sang anti-Semitic songs and displayed symbols which were considered by the Respondent as anti-Semitic.

On 20 November 2012, the FIFA Disciplinary Committee found the Appellant guilty of a violation of Article 67 para. 1 and 3 of the FIFA Disciplinary Code (FDC) and, in addition, sanctioned the Appellant with the obligation to play its next home match in the preliminary competition for the 2014 FIFA World Cup Brazil without spectators and with

a fine in the amount of CHF 40,000 (the “First Decision”).

On 9 January 2013, the Appellant filed an appeal with the Respondent against the First Decision.

On 25 January 2013, the FIFA Appeal Committee rejected the appeal filed by the Appellant against the First Decision and confirmed the First Decision in its entirety (the “Challenged decision”).

On 25 February 2013, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (CAS) against the Challenged Decision.

The Appellant sought that the decisions rendered by the FIFA Appeal Committee and by the FIFA Disciplinary Committee are set aside.

On 3 May 2013, the Appellant filed an additional written submission, amending its prayers for relief by claiming damages of CHF 607,892, plus interest, from the Respondent for loss of revenues resulting from playing the match on 22 March 2013 behind closed doors.

On 2 July 2013, the CAS Court Office noted that the parties agreed to its suggestion that the matter be split into two procedures: (i) an Appeal Arbitration Procedure, dealing with the original prayers for relief of the Appellant; and (ii) an Ordinary Arbitration Procedure dealing with the damages claim of the Appellant. The CAS Court Office confirmed that the Appeal Procedure would therefore continue dealing with the sanction only and, depending on the outcome of the appeal, the Appellant’s financial claim would either be confirmed, in which case the CAS Court Office would initiate an Ordinary Arbitration Procedure, or it would be withdrawn.

A hearing was convened on 26 July 2013 at the CAS headquarters in Lausanne, Switzerland.

In summary, the Appellant submitted that the strict liability of Article 67 of the FDC is contrary to Swiss Law. Article 67 of the FDC contravenes the fundamental principle of ‘*nulla poena sine culpa*’ – a sanction cannot be imposed without fault. The Appellant submitted that should the CAS sanction the Appellant despite the absence of any fault, the sanctions should be reduced as they are disproportionate.

In essence, the Respondent submitted that according to Article 67 paragraph 1 of the FDC, the home association is liable for improper conduct among spectators, regardless of the question of culpable conduct or culpable oversight, and, depending on the situation, may be fined. Further sanctions may be imposed in the case of serious disturbances. Furthermore, according to Article 67 paragraph 3 of the FDC, “improper conduct” includes “*violence towards persons or objects, letting off incendiary devices, throwing missiles, displaying insulting or political slogans in any form, or uttering insulting words or sounds, or invading the pitch.*” With regard to the uncontested facts of the case, at the Match a group of supporters displayed discriminatory behaviour as well as Nazi symbols, and repeated anti-Semitic chants.

### Reasons

1. The Respondent has sanctioned the Appellant pursuant to Article 67 of the FDC (2011 edition), which states: “*The home association or home club is liable for improper conduct among spectators, regardless of the question of culpable conduct or culpable oversight, and, depending on the situation, may be fined. Further sanctions may be imposed in the case of serious disturbances.*”

The Appellant claims that Article 67 of the FDC, whilst disciplinary in nature, is closer

in nature to criminal procedures than civil, and that the criminal law principle of *nulla poena sine culpa* must apply.

The Panel determines that Article 67 of the FDC is clear and expressly removes any consideration of fault, much in the same way doping regulations expressly included the ability to consider fault, provided certain express conditions are met. Article 67 of the FDC has intentionally been drafted that way. The Panel in this respect follows the reasoning in CAS 2008/A/1583 and CAS 2008/A/1584: although there is a large consensus that the principle of criminal law «*nulla poena sine culpa*» is one of the fundamental legal principles that also applies in the relationship between a sports association and an athlete/club (cf. also CAS 2007/A/1381, no. 99 with numerous authorities), the principle nevertheless does not apply to every measure taken by an association that has a disciplinary character (cf. CAS 2007/A/1381, no. 59 *et seq.*). Thus, the CAS has consistently held that an athlete or club can be disqualified irrespective of fault – even though such disqualification is painful for the person affected (CAS 94/129, Digest of CAS Awards I, p. 187, 193 *et seq.*; CAS 95/141, Digest of CAS Awards I, 2000, p. 215, 220).

The Panel stresses that under Article 67 FDC, clubs assume strict liability for their supporters’ actions. Contrary to the Appellant’s allegation, the Panel recognizes that the rule has a preventive and deterrent effect. Its objective is not to punish the club as such, which may have done nothing wrong, but to ensure that the club assumes responsibility for offences committed by its supporters. The underlying idea of the disciplinary measure, thus, is to influence the behaviour of the fans via the entity that is supported by them in order to ensure that violations of the rules in the context of the

participation of this entity in further competitions are excluded. Such type of measures unlike typical disciplinary sanctions directed at penalising a past behaviour do not require that the addressee of said measure is at fault. Therefore, in conformity with previous CAS panels (cf. CAS 2002/A/423; CAS 2007/A/1217), the Panel confirms that the objective liability foreseen in Article 67 of the FDC is compatible with Swiss public policy.

2. The Panel determines that the events at the Match fall into the category of “improper conduct” and “serious disturbances.” Thus, racist behaviour during a match falls into the category of “improper conduct” and “serious disturbances” and constitutes a violation of Article 67 FIFA DC. As a consequence, having determined that the strict liability aspect of Article 67 of the FDC is applicable, fault is therefore not a consideration and the Appellant must be sanctioned accordingly.
3. The Panel has no hesitation in finding that 200 to 300 people bringing flags that can be interpreted as fascist/racist, chanting anti-Semitic songs or sayings, in particular about the Holocaust, are extremely serious and such actions have no place in society, let alone at a friendly football match. FIFA has no direct means of punishing the perpetrators. Banning all spectators from the next home game undoubtedly effects the perpetrators (they cannot attend the next game), but it also effects the true fans. However, the Panel see that as part of the solution. FIFA needs the good fans to turn on the perpetrators and to help to combat racism by helping the Police and the association identify the perpetrators, so they can be banned. Therefore, whilst a sanction such as playing a game behind closed doors is harsh, the sanction is necessary to combat such a serious offence and to help to

achieve the objective of ridding racism from football. The Panel recognized that the sanction is not the most severe that FIFA could have issued. Thus, FIFA Appeal Committee did take into account the representations of the Appellant, including its clean record. Finally, the Panel considered that this type of racist behaviour is serious enough to warrant a sanction more serious in nature than a fine. Therefore, contrary to the Appellant’s submission, the sanction is proportionate.

4. It appears to the Panel, that the initial sanction should be a fine and the amount of that fine should increase as the seriousness dictates until a “tipping point” is reached, whereby the next harshest sanction should be applied. That would seem to be the game without spectators. Where the harsher sanction is applied, the fine should be “reset” at the lower end of the range and it can be increased where the facts dictate until the sanction might be a large fine and one match without spectators. In the matter at hand, the Panel weighed up the behaviour of the perpetrators and also the actions of the Appellant. The Panel agrees with the Respondent that the Appellant should have been sanctioned with a fine and the harsher sanction of a game without fans, but determined that any such fine should have been “reset” at a lower end of the range available to FIFA. The Panel, therefore, determines that the fine should be reduced to CHF 20,000.

### Decision

The Panel partially dismisses the Appeal and partially upholds the Challenged Decision, confirming the violation of Article 67 of the FDC by the Appellant, the sanction to play its home game against Romania without spectators (which has already been served), but

for the Appellant to pay a fine in the amount of CHF 20,000 to the Respondent.

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**Arbitration CAS 2013/A/3258**  
**Besiktas Jimnastik Kulübü v. Union**  
**Européenne des Associations de Football**  
**(UEFA)**  
23 January 2014

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**Football; Match Fixing; Burden of proof; Standard of proof; Interpretation of a rule; Evidence which can be relied upon; Attempt to influence the outcome of a match**

**Panel**

Mr Fabio Iudica (Italy), President  
Prof. Martin Schimke (Germany)  
Mr Efraim Barak (Israel)

**Facts**

This appeal is brought by Besiktas Jimnastik Kulübü (“the Appellant”, “the Club” or “Besiktas”), against a decision of the Appeals Body (“the UEFA AB”) of the Union Européenne des Associations de Football (UEFA) dated 11 July 2013 (“the Appealed Decision”). The decision excluded Besiktas from the UEFA Europa League 2013-2014, as a result of the alleged implication of the Club’s former coach Tayfur Havutçu and the former board member Serdal Adali in manipulating the final match of the 49<sup>th</sup> Turkish Cup played on 11 May 2011 (“the Match” or “the Cup Final”) opposing Besiktas to the football club I.B.B. Spor (“IBB Spor”).

Besiktas is a Turkish football club, affiliated with the Turkish Football Federation (TFF), which in turn is affiliated with UEFA.

UEFA is an association incorporated under Swiss law with its headquarters in Nyon, Switzerland. UEFA is the governing body of European football, dealing with all questions

relating to European football and exercising regulatory, supervisory and disciplinary functions over its affiliated national associations, as well as their affiliated clubs, officials and players.

One of UEFA’s attributions is to organise and conduct international football competitions and tournaments at European level. In this context, UEFA organises each year the UEFA Europa League tournament (UEL), which is a competition gathering professional football teams from all over the continent.

Besiktas took part, at the time of the relevant events, in the Turkish Süper Lig (“the Super League”), which is the first division Championship in Turkey.

In March 2011, in the context of an investigation related to match fixing, the Turkish police started recording the phone calls and intercepting the text messages of Mr Turanlı, a well-known personality in the Turkish football world and the agent of various players.

The Cup Final was won on 11 May 2011 by Besiktas.

The on-going criminal investigation prompted the TFF to examine all football matches suspected of having been rigged, including the Cup Final played between Besiktas and IBB Spor.

The TFF Ethics Committee (“the EC”) and the TFF Disciplinary Committee (“the DC”) scrutinized the facts. After investigations, the Committees both cleared the Club and its officials, Messrs Adali and Havutçu (“the Officials”), as well as Mr Ahmet Ates, from the reproach of match-fixing activities in connection with the Match. The TFF

Committees reached their resolution on 26 April and 6 May 2012, unanimously.

At the end of the season 2012/2013, Besiktas qualified through the win in the Cup Final to take part in the UEFA Europa League 2013/2014.

On 9 May 2013, the Appellant notified UEFA of the disciplinary proceedings before the TFF and the criminal proceedings before the High Court in which Messrs Adali and Havutçu had been convicted.

On 7 June 2013, the UEFA General Secretary referred the case of the Appellant to UEFA's Control and Disciplinary Body (the "UEFA CDB").

On 21 June 2013, the UEFA CDB decided that it was comfortably satisfied that based on the evidence available, Article 2.08 of the Regulations of the UEFA Europa League 2013/2014 (the "UELR") was engaged and that therefore, the Club was not eligible to participate in the UEFA Europa League 2013/2014.

The Club appealed the decision of the UEFA CDB by notice dated 28 June 2013.

On 15 July 2013, the UEFA Appeals Body (the "UEFA AB") upheld the UEFA CDB's decision.

On 17 July 2013, the Appellant filed an urgent request for provisional measures against the Appealed Decision. Furthermore, the Appellant requested that the present proceedings be dealt with by CAS following an accelerated procedure.

On 20 August 2013, a hearing was held at the CAS Headquarters in Lausanne, Switzerland ("the hearing").

The Appellant's requests for relief are mainly the lift of the decisions of the UEFA Control and Disciplinary Body dated 21 June 2013 and of the UEFA Appeals Body dated 11 July 2013, issued against Beşiktaş JK, and the declaration of Beşiktaş JK eligibility to participate in the UEFA Europa League 2013/2014 (respectively the UEFA Champions League 2013/2014).

The Respondent's requests for relief are mainly the dismissal of the Appeal and the confirmation of the decision of the Appeal Body of UEFA and the exclusion of Besiktas from participating in the next UEFA club competition for which it would be qualified, namely the 2013/2014 Europa League.

The scope of the proceedings is limited to the question of whether the Appellant was directly and/or indirectly involved in activities aimed at arranging or influencing the outcome of a match at national or international level, in particular, the Turkish Cup Final played on 11 May 2011.

### Reasons

1. Under Swiss law, the "burden of proof" is regulated by Article 8 of the Swiss Civil Code (CC) which stipulates that, unless the law provides otherwise, each party must prove the facts upon which it is relying to invoke a right, thereby implying that the case must be decided against the party that fails to adduce such evidence.

Furthermore, the burden of proof not only allocates the risk among the parties of a given fact not being ascertained but also allocates the duty to submit the relevant facts before the court/tribunal (CAS 2011/A/2384 & 2386; ATF 97 II 216, 218 E. 1; BSK-ZGB/Schmid/Lardelli, 4<sup>th</sup> ed 2010, Art 8 no 31; DIKE-ZPO/Glasl, 2011, Art 55 no 15). According to the

jurisprudence and to scholars, it is the obligation of the party that bears the burden of proof in relation to certain facts to also submit them to the court/tribunal. In this regard, the burden of proof to primarily demonstrate that the Appellant was directly and/or indirectly involved in activities aimed at arranging or influencing the outcome of a match lies on the Respondent.

2. Contrary to the Appellant's contention whereby the standard of proof to be applied in the dispute is "beyond reasonable doubt", the Panel found that the standard of proof is expressly provided in Article 2.08 of the Regulations of the UEFA Europa League 2013/2014 (UELR) to be the standard of "comfortable satisfaction".

Under Article 2.08 UELR:

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

CAS jurisprudence is clear that the applicable standard of proof in match fixing

cases is indeed "comfortable satisfaction", even in the presence of a report from the Turkish authorities (CAS 2010/A/2267; CAS 2010/A/2172 and CAS 2011/A/2528). Even if it is true that the Panel enjoyed the important investigatory work of the Turkish authorities, it does not change the nature of the present proceedings, which are fundamentally of a civil nature. The private nature of the proceedings excludes, in principle, the application of the standard of proof applicable in criminal proceedings.

3. As to the "indirect involvement of a club" referred to in Art. 2.08 UELR, the Panel found that it should be interpreted as meaning any direct or indirect involvement of a club. A direct involvement of a club, through its officials, or other persons linked to the club in accordance with Art. 6 DR 2008, means that the club has actually engaged in the prohibited activity, by having, or trying to have, a direct influence on the persons involved in a match, i.e. the players or the referees, with the aim to arrange or to influence the outcome of a match. As to the indirect involvement, the Panel considers that it means any activity in which a club was involved, although not intended to, that might influence the outcome of a match in a non-sportive way, in circumstances where the Club is assumed to be aware whereof. The interpretation of the wording "aimed at" means that it is not necessary to establish that the activity achieved its purpose, or even that it went very far. It is enough that there was an attempt. The reproached activity can be aimed at influencing the outcome of a match even if that is not the only aim, or even the dominant aim of the activity.

In view of the above, the scope of application of Art. 2.08 UELR is broad. In this respect, an activity which might look at

first sight as licit, might breach Article 2.08 UELR, considering all the circumstances of a case, if this activity might have an influence on the outcome of a particular match. This interpretation is also in line with the “*zero tolerance to match-fixing*” which, according to CAS jurisprudence (CAS 2010/A/2267) presents one of the most important values and principles of behaviour in football. The observance of these values and principles is indispensable for the protection and improvement of the integrity of the game.

4. The evidence which is provided in Art. 2.08 UELR to be relevant is “all the factual circumstances and information available to UEFA”. Also specifically provided in this provision is that “*UEFA can rely upon, but is not bound by, a decision of a national or international sporting body, arbitral tribunal or state court*”.

Under art. 2.08 UELR and according to CAS jurisprudence, UEFA has the discretion to rely, or not, on a decision of a national or international sporting body, arbitral tribunal or state court (CAS 2010/A/2172) in match fixing. In the context of sport, it is essential that sport’s governing body should be able to rely on such decisions, as it does not have the same resources and undertake investigations, as CAS held in CAS 2009/A/1920.

However, when doing so, UEFA must give reasons for its choices, and explain the reasons why it relies on certain decisions and not on others, when several decisions are at its disposal.

Furthermore, the Panel agrees with the findings in CAS 2011/A/2528 that an effective fight to protect the integrity of sport depends on prompt action. In this context, CAS, or UEFA, cannot wait until

states proceedings are over, i.e. after all internal remedies have been exhausted, to take its decision. CAS, or UEFA, must be particularly careful when decisions it relies on are not final.

The Panel will therefore, in the present Award, take into consideration all evidence available to it, and pay a particular attention to all decisions rendered by previous authorities, state and sportive, in the case at hand.

5. According to CAS jurisprudence (CAS 2010/A/2267), a relevant consideration in assessing whether match or matches have been fixed by the officials of a club, is the extent and nature of the benefit to the club of winning the particular match or matches.

It cannot be contested that at that point in time, the Appellant had a great sporting, and financial, interest in winning the Cup Final, especially considering that it would allow it to take part in the 2011/2012 Europa League.

In accordance with the above-mentioned CAS jurisprudence, the Appellant could therefore certainly have had an interest in fixing the Cup Final. This of course is not sufficient to conclude that the Appellant attempted to influence the outcome of that Match, but it is a relevant element to be taken into consideration.

Yet, the interest of the Appellant in fixing the match, the existence of an attempt to influence the outcome of the match by a player’s agent, the existence of suspicious telephone calls, the absence of evidence called by the Appellant from the players or the agent, the timing, the Club’s President testimony before the Turkish Football Federation Ethics Committee, the absence of any credible or evidenced motive for the

player's agent to lie, the use of a criminal conviction from a state court as an evidentiary indicator of the correctness of the challenged decision of the UEFA Appeals Body are as many factors allowing the Panel to be comfortably satisfied that the Appellant, through the activities of two of its officials, has been involved in influencing the outcome of a match. Therefore UEFA was entitled to declare the Appellant ineligible to take part in the UEFA Europa League 2013/2014, in accordance with article 2.08 UELR.

### **Decision**

As a result of the above, the appeal filed by the Club against the Appealed Decision is rejected, and the latter decision upheld.

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**Arbitration CAS 2013/A/3260**  
**Grêmio Foot-ball Porto Alegrense v.**  
**Maximiliano Gastón López**  
4 March 2014

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**Football; Loan and subsequent transfer of player; Validity of a unilateral option clause inserted in the employment contract; Time limit to inform the player about the implementation of the option clause; Claim for moral damages**

**Panel**

Mr Rui Botica Santos (Portugal), President  
Prof. Massimo Cocchia (Italy)  
Mr Efraim Barak (Israel)

**Facts**

This matter is related to an appeal filed by Grêmio Foot-ball Porto Alegrense (“Grêmio” or the “Appellant”), a Brazilian professional football club affiliated to the Confederação Brasileira de Futebol (CBF), against the decision rendered by the FIFA Dispute Resolution Chamber (the “FIFA DRC”) on 23 January 2013 (the “Appealed Decision”). The grounds of the Appealed Decision were notified to the Parties on 26 June 2013.

On 17 August 2007, Maximiliano Gastón López (the “Player” or the “Respondent”), an Argentinean professional football player currently playing for the Italian Serie A club Calcio Catania S.p.A. (“Catania”), entered into an employment agreement with the Russian club FC Moscow (the “FC Moscow Employment Agreement”). Under the FC Moscow Employment Agreement, the Player was entitled to receive a monthly salary of EUR [...]. The Panel could not establish the exact term of the FC Moscow Employment

Agreement, but it was clear that it started on or before August 2007 and would remain in force at least up to the course of 2010.

In February 2009, FC Moscow and the Player agreed on the possibility of releasing the Player to another club under certain terms and conditions. Two contracts were signed: on 10 February 2009, FC Moscow and the Player signed a contract wherein, *inter alia*, FC Moscow agreed to release the Player and to transfer him on loan to any club in South America (including Grêmio) up to 31 December 2009 on condition that the Player agreed on the employment terms with such new club no later than 18 February 2009 (the “Private Agreement”); and on 16 February 2009, the Player, FC Moscow and Grêmio signed a loan agreement under which FC Moscow agreed to loan the Player to Grêmio (the “Loan Agreement”).

Under the Private Agreement, the Player also accepted to be permanently transferred from FC Moscow to any other club after 31 December 2009, under the condition that either he or the new club paid FC Moscow a compensation of USD [...]. The relevant parts of the Private Agreement provide as follows: “(...) 5. (...) from December 31 2009 on, in case any football club or any third party wishes to acquire 100% of the federative and 100% of the economic rights of [the Player], then the [Player] should pay a compensation of [...] US Dollars. The obligation to pay the compensation can be undertaken by the football club or by the third party, for which the [Player] wishes to continue his football career. Therefore, the employee obligation to pay the compensation expires at the time a new football club or a third party pays the full amount of compensation. In case the definite acquisition of the rights of the player within the indicated terms does not occur, the former will return to his agreement with the Employer when such loan expires. (...)”.

On 16 February 2009, Grêmio and the Player entered into an employment agreement (the “Employment Agreement”) executed in standard form valid from 16 February 2009 to 31 December 2009 under which the Player was entitled to a monthly salary of [...] Brazilian Reals. The Employment Agreement contained an additional agreement (the “Addendum to the Employment Agreement”) under which the Parties agreed on the following additional conditions: “8. *Grêmio is entitled to enter into a new employment agreement with the Player for a period of 3 years, by paying the Player an amount of domestic currency equivalent to € [...] for a period of 3 years, with an agreed annual remuneration of a maximum of USD [...] for the first year, USD [...] for the second year and USD [...] for the third year. 8.1 In the event Grêmio chooses to enter into a new employment agreement pursuant to item “8” hereon, the player is required to terminate his agreement with FC Moscow as he is allowed to do pursuant to clause “5” of the agreement entered into by and between FC Moscow and the Player on February 10<sup>th</sup> 2009*”.

On 29 December 2009, and with respect to Clause 5 of the Private Agreement, Grêmio asked the Player to be provided with his bank details in order for him to pay FC Moscow and terminate his contract. The Player never provided his bank details to Grêmio. To prove its good faith and the fulfillment of its contractual obligations, Grêmio initiated a judicial procedure before the Brazilian Labour Court of Porto Alegre and deposited the money with the Court.

On 4 January 2010, the Player informed Grêmio that clause 8 of the Addendum to the Employment Agreement, which represents a promise on the part of the Player to sign a future employment agreement with Grêmio (the “Agreement to Conclude an Agreement”) was null and void and that his federative and economic rights had reverted to FC Moscow with effect from 1 January 2010. On 20 January 2010, Catania informed Grêmio that they had

reached an agreement with FC Moscow for the Player’s transfer to Catania. On 20 January 2010, Grêmio informed Catania that they had already exercised the option to sign the Player on a permanent basis for three years in accordance with the Agreement to Conclude an Agreement.

On 15 April 2010, Grêmio filed a claim before the FIFA DRC claiming that the Player had breached clause 8 of the Addendum to the Employment Agreement by failing to sign a definitive employment contract as agreed. On 23 January 2013, the FIFA DRC rendered the Appealed Decision and held as follows: “*The claim of the Claimant, club Grêmio Foot-Ball Porto Alegrense, is rejected*”. The Appealed Decision was based on the following grounds: a) the Player was still under contract with FC Moscow. Therefore, following the expiry of his Employment Agreement with Grêmio, the Player could not have promised or committed himself to sign a new employment agreement with Grêmio without FC Moscow’s consent. Neither Grêmio nor the Player was in a position to contractually agree on a “promise of contract”; b) consequently, clause 8 of the Addendum to the Employment Agreement could not be considered, since a contractual relationship between the Player and FC Moscow still existed at that particular time.

On 16 July 2013, the Appellant filed a Statement of Appeal before the CAS. On 26 July 2013, the Appellant filed its Appeal Brief together with exhibits and a list of witnesses it intended to rely on.

On 27 September 2013, the Respondent filed his Answer together with exhibits he intended to rely on.

On 3 December 2013, a hearing was held in Lausanne, Switzerland.

## Reasons

**1. Is clause 8 of the Addendum to the Employment Agreement valid and binding?**

In the Panel's perception, clause 8 of the Addendum to the Employment Agreement does not represent a standard "unilateral extension clause" under which a player is placed in a weaker position *vis-à-vis* the club. It is true that the Player has granted Grêmio the right to decide on whether or not to implement the Agreement to Conclude an Agreement and that such implementation is subject to a condition precedent which solely lies at Grêmio's discretion. However, this *per se* does not lead to the conclusion that the Player was placed in a weaker position in relation to his freedom of movement or his personality rights, thereby invalidating the clause.

Looking at the FIFA DRC jurisprudence, it is apparent that in order to determine whether or not a unilateral extension clause is valid, the following elements have been taken into consideration: 1) The potential maximal duration of the labour relationship should not be excessive; 2) The option should be exercised within an acceptable deadline before the expiry of the current contract; 3) The salary reward deriving from the option right should be defined in the original contract; 4) One party should not be at the mercy of the other party with regard to the contents of the employment contract; 5) The option should be clearly established and emphasized in the original contract so that the player is conscious of it at the moment of signing the contract; 6) The extension period should be proportional to the main contract; and 7) It would be advisable to limit the number of extension options to one.

The inseparable relationship between the Private Agreement and the Loan

Agreement is crucial in determining the validity of clause 8 of the Addendum to the Employment Agreement. This is because: (i) the Private Agreement entitled the Player to legally terminate the FC Moscow Employment Agreement; and (ii) in case Grêmio was unable to exercise its right to implement the Agreement to Conclude an Agreement either because it was not interested in the Player or lacked the necessary funds, the Player would not remain unemployed because he still had a valid contract with FC Moscow. The Panel's understanding and interpretation of the Loan Agreement, the Private Agreement and the Addendum to the Employment Agreement suggests that the parties' real intention when entering the contractual deal structure at stake was to temporarily transfer the Player to Grêmio on a trial period, which period, if successful, would lead to the implementation of the Agreement to Conclude an Agreement. The trial period would also allow Grêmio to obtain the necessary funds to hire the Player on a permanent basis.

Even assuming that clause 8 of the Addendum to the Employment Agreement was an extension clause, the Panel is not persuaded that its alleged unilateral nature could lead to its invalidity. The Panel shares the views expressed in CAS 2005/A/973, which held that whether or not an extension clause is acceptable must be assessed on a case by case basis, with the deciding body having to not only look at the wordings of the said clause, but also at the factual background and circumstances which contributed to its insertion, in particular the parties' attitude during the negotiations and the performance of the Employment Agreement.

Also speaking in favour of the validity of clause 8 of the Addendum to the

Employment Agreement are the substantial benefits due to the Player under the Agreement to Conclude an Agreement which, if put together, resulted in a significant increase in his remuneration.

In the Panel's view, the mere fact that clause 8 of the Addendum to the Employment Agreement might somehow be vague and unclear for failing to specify how and when these amounts would be paid does not mean that Grêmio's obligation was inadequate to the extent of requiring the Parties to engage in further negotiation. In assessing this issue, the Panel considers the fact that the Parties were already under an employment relationship and any omission would be filled in the same terms and practice of the Employment Agreement.

Furthermore, the Panel notes that under clause 8 of the Addendum to the Employment Agreement, the Player only promised to sign a three-year employment agreement. The Panel deems the proposed three-year period as being reasonable, as it was shorter than the maximum period of five years provided for under Article 18.2 of the FIFA Regulations on the Status and Transfer of Players.

In view of all the foregoing, the Panel finds clause 8 of the Addendum to the Employment Agreement to be valid and binding and consequently dismisses the Player's assertions that it should be declared invalid for being a unilateral extension clause.

## **2. Was the Player obliged to implement the Agreement to Conclude an Agreement?**

The Player states that he was not obliged to implement the Agreement to Conclude an Agreement because Grêmio did not

exercise clause 8 of the Addendum to the Employment Agreement within a reasonably acceptable time frame. In order to determine whether clause 8 of the Addendum to the Employment Agreement was properly exercised, the Panel must assess this issue from a formal and material point of view, *i.e.* whether Grêmio fulfilled the agreed requirements, acted in good faith and in an acceptable manner.

*From a formal point of view.* – It can be concluded from clause 8 of the Addendum to the Employment Agreement, as read together with clause 5 of the Private Agreement, that in order to properly and formally implement the Agreement to Conclude an Agreement, Grêmio had to pay the Player EUR [...] no later than 31 December 2009, in order to give the Player the necessary funds to pay FC Moscow and to free himself.

The Panel finds that from a formal point of view, Grêmio complied with the requirements to implement the Agreement to Conclude an Agreement in a proper manner. It has neither been disputed that on 29 December 2009 Grêmio deposited [...] Reais (approximately EUR [...]) at the Brazilian labour court in favour of the Player nor that the Player and FC Moscow received relevant notices drawing their attention to (i) the said deposit and (ii) Grêmio's decision to hire the Player. Whether or not Grêmio requested the Player to provide his bank account details with a view to transferring the amount of EUR [...] is not crucial. The Panel understands the reason why Grêmio chose to deposit the amount of EUR [...] at the Brazilian labour court instead of transferring it directly to the Player's Brazilian bank account or splitting such payment into two by directly paying FC Moscow USD [...] and transferring the

balance in the Player's Brazilian bank account. The Panel understands Grêmio's position, due in particular to the Player's unclear attitude of, on one hand, confirming his interest and will to continue with Grêmio but, on the other hand, making the necessary travel arrangements to return to Moscow. In any case, the Player knew that this amount was available to him and he could easily have accessed it and paid the relevant sum to FC Moscow.

*From a material point of view* – It has been proven that Grêmio kept the Player well informed regarding its decision to sign him on a permanent basis and also regarding the financial difficulties it was experiencing in relation to securing the required EUR [...]. The Parties confirmed that, in December 2009, they held several meetings and discussions in relation to the implementation of the Agreement to Conclude an Agreement, and that on 27 December 2009 they held another meeting in Buenos Aires (Argentina), where Grêmio reassured the Player that they were still looking for the necessary funds. During the said meeting, the Player assured Grêmio of his availability to sign a three year contract, and never indicated his wish to return to FC Moscow and/or any concern about the timing and delay of a final decision from Grêmio. From the above facts and meetings, it can be concluded that the Player was aware of Grêmio's decision to implement the Agreement to Conclude an Agreement and also knew that Grêmio was working to try and obtain the relevant funds. It can also be concluded that Grêmio was not unreasonably late in deciding to sign the Player. This decision was, at the very latest, made known to the Player at the beginning of December 2009. The only issue which was then holding Grêmio back were difficulties in obtaining the relevant funds, an issue which the Player was aware

of. In the Panel's view, this is an issue which would not affect the Player's professional situation or potentially leave him unemployed, because he could still resort to the FC Moscow Employment Agreement.

In view of the foregoing, the Panel finds that from a material point of view, Grêmio fulfilled its obligations in order to implement the Agreement to Conclude an Agreement.

### 3. Did the Player breach his contractual obligations towards Grêmio?

The Player argues that clause 4 of the Loan Agreement – stating that “[t]he Player is obliged during the period of the employment contract with FC Grêmio not to sign any contracts with other football clubs without FC Moscow's acceptance, and also to fulfill the conditions of the present contract and primarily signed employment contract” – prevented him from signing any other contracts without FC Moscow's consent and that he was obliged to return to FC Moscow as agreed under clause 3 of the Loan Agreement which stated that “[t]he Player is obliged to set out to fulfill his labour abilities in FC Moscow after the expiration of the terms of employment contract with FC Grêmio”.

The Panel is of the view that these provisions did not prevent the Player from implementing the Agreement to Conclude an Agreement because he could exercise clause 5 of the Private Agreement and free himself from the FC Moscow Employment Agreement by paying (or having the interested club pay) to FC Moscow the required amount. The Player knew that he had voluntarily pledged to sign a three-year employment contract with Grêmio after the expiry of the Employment Agreement. This pledge was perfectly in line within the provisions of Article 22 para. 1 CO, which states that “[p]arties may reach a binding

*agreement to enter into a contract at a later date*". After being informed that Grêmio had deposited the funds in his favour at the Brazilian labour court, the Player only had to undertake certain procedural and administrative steps, such as using part of that amount to pay FC Moscow the amount of USD [...] as compensation agreed under clause 5 of the Private Agreement, and then terminating his employment agreement with FC Moscow as agreed under clause 8.1 of the Addendum to the Employment Agreement. This, in the Panel's view, were already acts which the Player had voluntarily undertaken to do in the contracts he signed, and he cannot therefore claim that clause 8 of the Addendum to the Employment Agreement forced him to terminate the FC Moscow Employment Agreement. In addition to the above, the Panel takes note of the fact that both the Player and FC Moscow were clearly not interested in continuing their contractual relationship. This assumption is based on clause 5 of the Private Agreement and the fact that the Player ended up signing an employment contract with the Italian club Catania on 20 January 2010.

It therefore follows that the Player breached his contractual obligations towards Grêmio.

#### **4. Has Grêmio suffered any damages?**

Grêmio seeks compensation from the Player for all the false contractual expectations he created and unilaterally frustrated, basically claiming financial, marketing, sporting and moral damages. The Panel notes that none of the contracts signed by the Parties contains a liquidated damages clause. In this regard, the burden therefore lies on Grêmio to prove that it has suffered damages.

Financial damages – Grêmio requests

financial damages "*corresponding to the stipulated signing-on-fee and all the salaries that were contractually established for the entire period of the parties' definitive employment contract*".

In accordance with CAS jurisprudence, (CAS 2008/A/1519 & 1520 and CAS 2010/A/2145, 2146 & 2147) various elements are considered in determining whether or not a party has indeed suffered damages and is consequently entitled to be compensated in accordance with the principle of positive interest. Among the elements of positive interest which are relevant to this case and can be considered in deciding whether Grêmio is entitled to financial damages, one may include: replacement costs, sponsorship and merchandising losses, image rights losses as well as losses brought about by unsold stadium tickets or loss of a transfer fee. In the present case, based on the evidence submitted by the Appellant in its submissions and during the hearing, Grêmio has failed to prove any financial damages. First of all, Grêmio has neither claimed to have been forced to hire another player at a given cost to replace the Player, nor has it claimed to have hired scouts or agents who were unsuccessful in identifying a suitable replacement. Therefore, Grêmio did not incur any financial expenditure in regards to replacing the Player.

In regard to commercial aspects, Grêmio has not adduced evidence substantiating that it suffered some loss as a result of the Player's breach. No evidence has been adduced of any ongoing or future marketing, merchandising or sponsorship contracts which Grêmio had or would have signed with third parties in exclusive reliance on the Player's stay at Grêmio, and which contracts had to be cancelled following the Player's breach, consequently causing Grêmio to be penalized. Neither

has Grêmio argued or adduced evidence proving that a substantial number of its registered members or fans cancelled their season tickets, or all together declined to buy tickets for the forthcoming season(s) as a result of the absence of the Player from the team's roster. In addition to the above, Grêmio did not claim to have entered into a contract relating to the Player's image rights with a third party, or that it had put everything in place for such a contract to be entered into once the Player fulfilled his obligations under the Agreement to Conclude an Agreement, and that it had to cancel any such contract following the Player's breach.

Finally, Grêmio has not contended that it had or could possibly have entered into an agreement with another club for the Player's transfer, and that the Player's breach ultimately made the Appellant to lose out on a guaranteed and specified future transfer fee.

It therefore follows that Grêmio has not met its burden of proof; accordingly, its request for a financial compensation of USD [...] and EUR [...] is dismissed.

*Moral and sporting damages* – Grêmio further requests “*moral and sporting damages that it has suffered*”. The Panel remarks that other than quoting an amount of USD [...], Grêmio has not substantiated the particulars and/or criteria it has used to arrive at this amount.

As a club, Grêmio's request for moral damages can only be limited to losses brought about by damage to its image and reputation. Looking at the Appellant's submissions, the Panel cannot identify any circumstances which justify and/or give rise to any moral damages suffered by Grêmio, such as contracts which were never concluded because of damage to the club's

status. In addition to the above, Grêmio has failed to establish a *nexus* or causal relationship between the Player's conduct and the alleged moral damages, *i.e.* Grêmio has not proven that the Player's breach was so serious that it led to direct loss of the club's reputation. In any case, the amounts requested are speculative and uncertain and as such, Grêmio has failed to discharge its burden of proof.

In relation to sporting damages, the Panel has also not identified any alleged and/or proven fact or circumstance that could sustain that the Appellant suffered any damages in the sporting realm. Grêmio has not adduced any evidence indicating that their failure to use the Player's services led to poor performances on the field, or that it had a negative impact on the club's sporting results.

It consequently follows that Grêmio's request for moral and sporting damages is dismissed.

*The Appellant's subsidiary request* – Grêmio makes a subsidiary request for a minimum amount of USD [...] as compensation for all the financial, moral and sporting damages in the unlikely event that the Panel finds clause 8 of the Addendum to the Employment Agreement to be invalid. Given the Panel's finding that clause 8 of the Addendum to the Employment Agreement is valid, it follows that Grêmio's subsidiary request is irrelevant and can no longer be considered.

## Decision

The Panel finds clause 8 of the Addendum to the Employment Agreement to be valid and binding. Consequently, the Panel finds that the Player was obliged to fulfil his contractual obligation of signing a three year employment

agreement with Grêmio. However, the Panel finds that Grêmio did not prove any damages as a result of the Player's failure to sign the Agreement to Conclude an Agreement. It therefore follows that Grêmio's appeal is dismissed and the Appealed Decision is confirmed, although for different legal reasons.

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**Arbitration CAS 2013/A/3453  
FC Petrolul Ploiesti v. Union des  
Associations Européennes de Football  
(UEFA)**

20 February 2014 (operative part of 28  
January 2014)

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**Football; Disciplinary sanction due to the violation of the UEFA Club Licensing and Financial Fair Play Regulations; Classification of an entity under the reporting perimeter; Exclusion of the reporting perimeter; Burden of proving that the entity is immaterial; Ban of using third parties to transfer obligations in order to escape monitoring requirements; Review of the measure of the sanction; Combined sanction**

**Panel**

Mr Dirk-Reiner Martens (Germany), Sole Arbitrator

**Facts**

S.C. Fotbal Club Petrolul S.A. (the “Appellant”) is a Romanian football club from Ploiesti, competing in the Romanian First Division. During the 2012/2013 season, the Appellant qualified for the 2013/2014 UEFA Europa League and obtained from the Romanian Football Federation (FRF) the licence necessary to enter UEFA’s club competitions in accordance with the relevant regulations. On 28 September 2012, the Appellant together with three partners founded “LUPII GALBENI 2012”, a community association for the development of sport in Ploiesti (the “Association”). On 21 January 2013, the Association and the City of Ploiesti entered into a *Cooperation Contract No. 1456* under which the City of Ploiesti agreed to

allocate funds from the municipal budget to the Association to be utilized to pay the Appellant’s employees.

On 15 July 2013, the FRF submitted to the Respondent’s Club Financial Control Body (CFCB) the Appellant’s monitoring documentation and financial information as at 30 June 2013, revealing overdue payables of the Appellant in the amount of EUR 244,000. This amount included (i) overdue payables towards other football clubs of EUR 42,000 and (ii) overdue payables towards social/tax authorities of EUR 202,000. On 9 August 2013, the CFCB Investigatory Chamber found that the Appellant was in breach of the “*no overdue payables towards football clubs, employees and social/tax authorities*” requirements under Articles 65 and 66 of the UEFA Club Licensing and Financial Fair Play Regulations (the “UEFA CL & FFP Regulations”).

On 21 August 2013, the Appellant provided evidence that it had paid the overdue payables in the meantime. On the same day, the CFCB Chief Investigator ordered the Appellant to submit updated monitoring documentation for the monitoring period up until 30 September 2013 by no later than 15 October 2013. Between 15 and 18 October 2013, the Appellant, the FRF and the Respondent exchanged correspondence regarding the reporting perimeter under Article 46*bis* of the UEFA CL & FFP Regulations, and whether it was necessary under the relevant regulation for the Appellant to disclose also the payables of the Association (i.e. outstanding performance bonuses in the amount of EUR 200,000) in the reporting data of the Appellant. The Respondent answered said question in the affirmative. On 18 October 2013, the Appellant sent a legal opinion to the Respondent arguing that the Association

should in fact not be included in the reporting perimeter.

On 18 October 2013, the FRF submitted the Appellant's monitoring documentation and financial information (including the Association) as at 30 September 2013, revealing overdue payables in the amount of EUR 519,000. This amount included (i) overdue payables towards other football clubs of EUR 3,000, (ii) overdue payables towards employees of EUR 200,000, and (iii) overdue payables towards social/tax authorities of EUR 316,000. The updated monitoring information of the Appellant also revealed that the Appellant later paid EUR 3,000 of overdue payables towards employees after 30 September 2013. On 11 November 2013, the CFCB Investigatory Chamber found that the Appellant had overdue payables in violation of Articles 65 and 66 of the UEFA CL & FFP Regulations and that it had submitted its monitoring information after the deadline of 15 October 2013. On 18 November 2013, the CFCB Chief Investigator decided to refer the case to the CFCB Adjudicatory Chamber.

On 20 December 2013, the CFCB Adjudicatory Chamber found that FC Petrolul has breached Articles 65 (1), 65 (8), 66 (1) and 66 (6) of the CL & FFP Regulations and decided to exclude it from participating in the next UEFA club competition for which it would otherwise qualify on its results or standing in the next three seasons unless the club is able to prove by 31 January 2014 that the amounts that were identified as overdue payables on 30 September (i.e. five hundred and nineteen thousand Euros €519,000) have been paid (the "UEFA Decision"). In its reasoning the CFCB Adjudicatory Chamber specifically rejected the Appellant's argument that the overdue payables towards employees in the amount of EUR 200,000 were solely

attributable to the Association and thus not imputable to the Appellant.

On 30 December 2013, the Appellant submitted to CAS a Statement of Appeal. Both parties expressed their agreement for an expedited procedure and agreed to have an award rendered on the basis of the submissions, without the holding of a hearing.

### Reasons

1. The Appellant merely challenges the Respondent's determination to include the Association and its overdue payables in the amount of EUR 200,000 in the reporting perimeter when calculating the overall amount of overdue payables. Thus, while ignoring the disputed EUR 200,000 attributable to the Association, it remains undisputed that:

i) as at 30 June 2013, the Appellant had overdue payables in the amount of EUR 244,000. This amount included (i) overdue payables towards other football clubs of EUR 42,000, and

(ii) overdue payables towards social/tax authorities of EUR 202,000; and

iii) as at 30 September 2013, the Appellant had overdue payables in the amount of EUR 319,000. This amount included (i) overdue payables towards other football clubs of EUR 3,000, and (ii) overdue payables towards social/tax authorities of EUR 316,000.

In light of the above, the Appellant, by having (i) overdue payables towards other football clubs of EUR 42,000, and (ii) overdue payables towards social/tax authorities of EUR 202,000 as at 30 June 2013, breached Articles 62 (3), 65 (1) and 66 (1) of the UEFA CL & FFP Regulations. Furthermore, the Appellant, by having (i) overdue payables towards other football

clubs of EUR 3,000, and (ii) overdue payables towards social/tax authorities of EUR 316,000 as at 30 September 2013, breached Articles 65 (8) and 66 (6) of the UEFA CL & FFP Regulations.

2. *The Legality of the UEFA Decision in Light of UEFA's Procedural Regulations*

Article 22 (2) lit. e) of the Procedural Rules Governing the UEFA Club Financial Control Body provides that a decision by the CFCB Adjudicatory Chamber must contain, among others, “*the grounds upon which the decision is based*”. Considering the UEFA Decision, the CFCB Adjudicatory Chamber adequately established the legal reasoning for its decision. The UEFA Decision sets out the law applicable to the case and contains a comprehensive legal assessment of the facts in light of the relevant regulations. It addresses the Appellant’s overdue payables towards other clubs, employees or social/tax authorities on the relevant dates. Especially, with respect to Article 46bis of the UEFA CL & FFP Regulations, the CFCB Adjudicatory Chamber explains in several paragraphs why the Association needs to be included in the reporting perimeter and why overdue payables towards employees are attributable to the Appellant. Regarding the disciplinary measures imposed on the Appellant, the UEFA Decision mentions aggravating and mitigating factors before deciding on the final sanctioning of the Appellant.

3. *The Classification of the Association under the Reporting Perimeter*

According to Article 46bis (2) of the UEFA CL & FFP Regulations the reporting perimeter must include all entities in whose books “*the compensation paid to employees [...] arising from contractual or legal obligations*” is accounted for. In this regard, the Cooperation Contract of 21 January 2013 between the Association and the City of

Ploiesti (and the agreement between the Association and the Appellant as described in the Appellant’s legal opinion of 18 October 2013) provides that the Association was contractually obliged to pay performance bonuses to the Appellant’s employees. Since the performance bonuses are part of the Appellant’s overall employee compensation, it follows that the Association falls under Article 46bis (2) of the UEFA CL & FFP Regulations.

Moreover, according to Article 46bis (4) of the UEFA CL & FFP Regulations an entity may be excluded from the reporting perimeter only if it is “*a) immaterial compared with the overall group made by the licence applicant*” or “*b) its main activity is not related to the activities, locations, assets or brand of the football club*”. The burden of proof to establish the facts which classify the Association as “*immaterial*” rests with the Appellant. It is only under the exceptional circumstances of Article 46bis (4) of the UEFA CL & FFP Regulations that an entity may be excluded from the reporting perimeter. Considering the relationship between the basic rule in Article 46bis (2) and (3) the exception in Article 46bis (4), it is the club who needs to convincingly establish that the presence and activities of the entity are indeed secondary and therefore “*immaterial*”. The Appellant failed to do so.

The term “*immaterial*” in Article 46bis of the UEFA CL & FFP Regulations is sufficiently clear to conclude that the Association falls within the scope of the reporting perimeter. Considering the wording of Article 46bis (4) lit. a) of the UEFA CL & FFP Regulations, the term “*immaterial*” refer in principle to entities that fall within the reporting perimeter but exceed almost no recognizable influence on the operations and activities mentioned in Article 46bis (2) and (3) of the UEFA CL & FFP

Regulations. The term “*immaterial*” must necessarily be interpreted narrowly as it constitutes an exception to the general rule under Article 46*bis* (2) and (3) of the UEFA CL & FFP Regulations. In this respect, an entity charged with the payment of performance bonuses to players in the amount of up to EUR 4,000,000 per season, let alone an overall volume of EUR 20,000,000 for the entire contractual period of five years, cannot be considered “*immaterial*”.

The principal objectives behind the UEFA CL & FFP Regulations are, *inter alia*, to protect the integrity of UEFA Club Competitions, to improve the financial capabilities of clubs, to protect creditors (players, tax authorities and other clubs) of clubs and to introduce more discipline in clubs’ finances. These objectives would be at risk if clubs were allowed to transfer obligations outside the core club structures in order to escape monitoring requirements under the UEFA Club Licensing and Financial Fair Play system. An interpretation of Article 46*bis* of the UEFA CL & FFP Regulations must prevent clubs from attempting to circumvent the rules by using third parties as a means to transfer their obligations in respect of the payment of compensation to employees.

Finally, the Appellant also fails to substantiate with sufficient evidence that the Association’s “*main activity is not related to the activities, locations, assets or brand of the football club*”. In contrast, the founding documents of the Association of 28 September 2012 provide that the Association’s sole purpose is to defend the economic and legal interests of its members, namely the Appellant and three Romanian individuals. The Appellant did not provide any evidence to show that other members of the Association apart from it

also benefitted from the activities of the Association. While the founding documents of the Association also appear to provide for a broad aim of the Association, i.e. to develop sport in general, the actual activities of the Association seem to have been limited to subsidizing the Appellant.

#### 4. *The Proportionality of the Sanctions*

Articles 19, 20 and 21 of the Procedural Rules Governing the UEFA Club Financial Control Body provide for a wide discretion of the deciding body when sanctioning violations of the UEFA CL & FFP Regulations. *Inter alia*, disciplinary measures, such as a fine and a disqualification, may be combined according to the regulations.

In general terms, the measure of a sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence (cf. CAS 2009/A/1870, para. 48, with further references). In light of the above, the sanctions imposed on the Appellant are neither evidently nor grossly disproportionate. The Respondent convincingly explained the concept of a combined sanction as an appropriate means to sanction clubs which do not respect UEFA CL & FFP Regulations. The imposition of a fine alone, which, in order to be a sufficient deterrent, would necessarily have to be very high, would have an adverse effect on the club’s finances and would thus run counter to the objective of the UEFA CL & FFP Regulations. On the other hand, where the exclusion of the club in breach of UEFA CL & FFP Regulations is suspended until payment of the overdue payables by a certain deadline, the imposition of a fine is necessary to deter clubs from abusing the system by regularly delaying payment until a subsequently

imposed deadline. Finally, the fine of EUR 50,000 is also proportionate comparing it to sanctions imposed in other case before CFCB Adjudicatory Chamber.

### **Decision**

The appeal filed on 30 December 2013 by FC Petrolul Ploiesti against the decision rendered by the Adjudicatory Chamber of the UEFA Club Financial Control Body on 20 December 2013 is dismissed. The decision rendered by the Adjudicatory Chamber of the UEFA Club Financial Control Body on 20 December 2013 is confirmed.

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Arbitration CAS 2014/A/3488  
World Anti-Doping Agency (WADA) v.  
Juha Lallukka  
20 November 2014

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**Ski/cross-country; Doping/Human Growth Hormone (hGH); Admissibility of new documents; Burden of proof regarding the reliability both of Growth Hormone test and of the decision limits; Lack of evidence regarding external factors apt to lead to a false positive; Inapplicability of the principle of non-retroactivity to evidence; Absence of aggravating factor leading to a higher sanction; Starting date for disqualification**

#### Panel

Prof. Luigi Fumagalli (Italy), President  
Mr Quentin Byrne-Sutton (Switzerland)  
Mr Philippe Sands Q.C. (United Kingdom)

#### Facts

The World Anti-Doping Agency (WADA) is a Swiss private-law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms.

Mr Juha Lallukka (the “Athlete”), born on 27 October 1979, is of Finnish nationality. He is a cross-country skier of national level and is affiliated to the Finnish Ski Association, which is a member of the International Ski Federation (“FIS”).

The appeal is brought against a decision of the Finnish Sports Arbitration Board, which found that some of the parameters of the test for human growth hormone (“hGH”) abuse as validated by WADA (“WADA’s Growth

Hormone Test”) were unreliable. One of the specificities of this case derives from the fact that the appealed decision is broadly based on a recent award issued by the Court of Arbitration for Sport (CAS 2011/A/2566 *Andrus Veerpalu v. FIS* – the “Veerpalu Case” – rendered on 25 March 2013), which declared the said testing method for hGH to be reliable but nevertheless found that the risk of having false positive tests was too high. As a matter of fact, the CAS Panel in the *Veerpalu Case* held that the disciplinary body, which handled the matter in the lower instance, failed to meet the applicable standard of proof with respect to the procedure followed to set the decision limits.

To detect hGH doping in sport, the WADA accredited laboratories use the “*proportion of hGH isoforms found under normal physiological conditions and those found after recombinant (rec) hGH injection (...). The method is essentially based on the established principle that the normal composition of hGH in blood is a mixture of different isoforms, present at constant relative proportions. In contrast, recGH is only comprised of the 22-KDa molecular form. The administration of exogenous recGH not only leads to an increase in the concentration of the 22-KDa isoform but also causes a reduction of the non-22-KDa concentrations, thus altering the natural ratios established between these hGH isoforms*” (chapter 4, page 3 of the 2010 hGH Guidelines). We note that there is no material change to this approach in the 2014 Guidelines (Chapter 4, page 3 of the 2014 hGB Guidelines). The ratio of the concentrations of recombinant hGH (recGH) versus other “natural derived” isoforms of hGH (pitGH) are measured with two different kits developed specifically to detect the administration of exogenous hGH. The decision limits determine whether the recGH/pitGH ratios in kit 1 and kit 2 qualify as an adverse analytical finding. Any value

above these limits will trigger the report by the laboratory of a positive test.

Under the 2010 hGH Guidelines and as regards to male athletes, the decision limit values for ratios derived from these kits were the following:

- kit 1: 1.81
- kit 2: 1.68.

On 7 September 2011, the Athlete was subject to an out-of-competition doping control in Kouvola, Finland. His blood samples were dispatched in bottles with the code number 441131.

The WADA-accredited “*United Medix Laboratories Ltd.*” in Helsinki, Finland, (the “Laboratory”) was instructed to conduct the analysis of the Athlete’s blood samples.

The Athlete’s A-sample was analysed and tested positive for extraneous hGH at an assays ratio of 3.74 for kit ‘1’ and 2.82 for kit ‘2’. The ratios were greater than the corresponding decision limits (DL) of 1.81 and 1.68, respectively. The Athlete denied having used exogenous hGH or any other prohibited medications. He claimed that the test results could only be incorrect.

On 25 October 2011, the adverse analytical findings were reported to WADA, the Finnish Anti-Doping Agency (FINADA) and to the International Ski Federation (FIS).

On 27 October 2011, the Athlete was provisionally suspended.

The Athlete requested the analysis of the B-sample, which confirmed the result of the A sample.

FINADA Supervisory Board initiated a disciplinary action against the Athlete and was

in charge of adjudicating whether a violation of the applicable anti-doping rules occurred.

On 3 January 2012, the Athlete requested the FINADA Supervisory Board to suspend the proceedings against him until the publication by the Court of Arbitration for Sport (CAS) of its decision in the *Veerpalu Case*. The Athlete’s request was granted.

On 25 March 2013, the final award in the *Veerpalu Case* became public and the proceedings before the FINADA Supervisory Board resumed. During the pendency of his initial charges, the Athlete proceeded to defend his case along the same lines (as per *Veerpalu*). The Athlete successfully defended the charges in his initial hearing against FINADA.

On 18 July 2013, FINADA appealed such case to the Sports Arbitration Board, who then on 5 December 2013 dismissed the appeal on the basis that (as per *Veerpalu*) the WADA detection limits were inaccurate.

On 11 February 2014, WADA appealed such decision to the CAS. As a consequence of *Veerpalu Case*, WADA mandated two independent statistical studies, *i.e.* the McGill Study and a study from Prof. Jean-Christophe Thalabard “*to recalculate the decision limits for hGH based on a larger data set and with the objective of establishing decision limits with a 99.99% specificity i.e. the risk of false positives being less than 1 in 10,000*”. These two studies were merged into a peer-reviewed joint publication paper accepted for publication. These studies establish *inter alia* a) that the decision limits as set by the 2014 hGH Guidelines are reliable and b) that the athlete’s assay ratios measured in the A and B sample can only be explained by the use of exogenous hGH. WADA argued its appeal based on this new research.

The Athlete argued that such studies still leave many questions unanswered and that the

decision limits are still not reliable. Moreover, the Athlete argued that by applying the new decision limits and taking into account the scientific validation to a test conducted in 2011 would amount to an impermissible retroactive application of the law.

On 20 March 2014, the President of the International Council of Arbitration for Sport issued an Order granting the Athlete legal aid sufficient to cover the travel and accommodation costs of the Athlete and his Counsel to a hearing, as well as the costs of any experts, witnesses, or interpreters in connection with a hearing, if necessary.

On 31 July 2014, the Parties were advised that the Panel had decided not to hold a hearing in accordance with Article R57 of the Code.

### Reasons

1. The new documents filed by WADA i.e, the updated 2014 hGH Guidelines as well as the final version of the Joint Publication Paper were only made available to WADA itself after the final deadline for the submission of its appeal brief.

Further, both documents filed are at the core of essential questions raised in these proceedings, as they directly address the findings of the *Veerpalu* Case which form the Athlete's primary line of defence.

Additionally, it is noteworthy that the Athlete not only failed to submit any comments on those documents submitted by WADA - in spite of the fact that he was invited and reminded to do so - but also made no objection to their production as new evidence.

For the above reasons, the President of the Panel found that the circumstances were exceptional and that the documents

presented on 17 June 2014 were of relevance for the issue of the present decision. As a consequence, based on Article R56 of the Code, the Panel considers that the new evidence filed by WADA must be admitted on record.

2. Pursuant to Article 3.1 para. 1 of the Finnish Anti-Doping Rule (ADR), WADA has the burden of establishing that an anti-doping rule violation occurred. The standard of proof shall be whether the anti-doping rule violation has been established to the comfortable satisfaction of the panel, bearing in mind the seriousness of the allegation which is made.

The Athlete claims that the decision limits as determined by WADA are so unreliable that his samples cannot safely be declared as positives. Furthermore, he does not exclude the possibility that "*there is some physiological or scientific explanation for his high test values*".

The Athlete's case is in large part based on the findings of the *Veerpalu* Case. Since this ruling, however, there have been significant developments. In a more recent award, rendered in the *Sinkewitz* Case (2011/A/2479), the CAS ruled that Mr Patrick Sinkewitz's analytical values of assay ratios were so high that there was no borderline situation which might trigger the benefit of uncertainty in favour of the athlete. The *Sinkewitz* Case is of relevance as his ratios values were lower than the Athlete's in the present case. Further, WADA has commissioned new studies, the purpose of which was namely to address the issues raised by the Panel in the *Veerpalu* Case. Finally, the 2010 hGH Guidelines were updated to reflect the latest revised decision limits applicable to the WADA's Growth Hormone Test, following the results of the peer-reviewed Joint Publication Paper.

The Panel recognises that it is not its function to step into the shoes of scientific experts, or to seek to repeat the exercises carried out by those experts. It also recognises that any Tribunal faced with a conflict of expert evidence must approach the evidence with care and with an awareness as to its lack of scientific expertise in the area under examination. Bearing in mind the prescribed provisions as to burden and standard of proof, the Panel considers that its role in applying the applicable standards as an appellate body is to determine whether the experts' evaluations (upon which WADA's case rests) are soundly based on the facts, and whether the experts' consequent appreciation of the conclusion be derived from those facts is equally sound (see also CAS 2010/A/2235, para. 79). In carrying out this task the Panel is bound to form a view as to which of possibly competing expert views it considers to be more persuasive.

In the present case, the Panel recognises a number of pertinent factors. First, the Joint Publication Paper on which WADA relies is the fruit of a collaborative effort by two independent teams of experts, drawn from McGill University in Montreal, Canada, and from the University Descartes in Paris, France. Second, this study is based on a considerable and large dataset, which has been peer-reviewed and accepted for publication. Third, the study is said to establish decision limits with a 99.99% specificity. Having regard to these factors, it is not immediately apparent to the Panel how it could conclude that the Joint Publication Paper may be said to be unreliable. In other words, the Panel is comfortably satisfied that WADA has met its burden of proof as regards the reliability both of its Growth Hormone Test and of

the decision limits contained in the 2014 hGH Guidelines. In view of this finding, the burden is on the Athlete to establish any particular departure or departures that could have led to a false-positive finding (see Article 3.2.1 of the Finnish ADR).

3. In his answer in these proceedings, the Athlete only referred to certain comments made in the McGill Study and offered submissions by way of speculation that they represent a kind of admission by the authors of a lack of reliability of the WADA's Growth Hormone Test. However, the Athlete has not offered any substantiation of his allegations or evidence to support them. Nor has he sought to explain how or whether the comments in question were dealt with in the Joint Paper Publication. In particular, he failed to establish by a balance of probabilities how the points raised in the McGill Study could reasonably have caused a false positive.

In addition, the Panel notes that in spite of the fact that the Joint Publication Paper is based on the evaluation of 21,943 screened blood samples, i.e. considerably more than the Initial and Verification Studies, the revised decision limits (contained in the 2014 hGH Guidelines) are quite close to the decision limits contained in the 2010 hGH Guidelines:

2010 hGH Guidelines: kit 1 = 1.81 (males) and kit 2 = 1.68 (males)

2014 hGH Guidelines: kit 1 = 1.81 (males) and kit 2 = 1.87 (males)

In other words, irrespective of the increase in number of samples considered, the decision limits did not vary in a magnitude that brings them anywhere near the ratio values found on the Athlete, i.e.:

A-sample: 3.74 for kit 1 and 2.82 for kit 2

B-sample: 3.44 for kit 1 and 2.65 for kit 2

The above finding is relevant in light of the *Sinkenitz* Case.

The Panel observes that the Athlete has not submitted any evidence indicating that his ratios of rec/pit hGH could have been affected by individual circumstances (such as extensive exercise, stress, altitude, age, personal biological profile, etc.). Neither has he offered any explanation regarding the difference between his ratio values of September 2011 and those of August 2012. As a result, the Athlete is not in a position to prove to the comfortable satisfaction of the Panel that external factors may have had an impact on his ratio values, which could have led to a false positive. He has not so proven to the comfortable satisfaction of the Panel.

4. The Athlete is of the opinion that applying the new decision limits and their recent scientific validation to a test conducted in 2011 would amount to an impermissible retroactive.

Decision limits are not rules as such, in the sense of defining what an anti-doping violation is. They are described as “Guidelines”, and they merely constitute figures upon which reliance may be placed by means of evidence to determine whether an anti-doping violation has or has not occurred in application of the rules.

Accordingly, the Panel considers that the Joint Publication Paper and the 2014 hGH Guidelines are not to be treated as rules, as such, but as evidence adduced by WADA in support of its appeal, to the effect that the ratio values found in the analysis of the

Athlete’s samples were such as justify the conclusion that had violated the applicable rule against doping. The Joint Publication Paper and the 2014 hGH Guidelines have been admitted as evidence during these proceedings and examined and relied upon as such by the Panel. Their effect has been to confirm that the ratio values found in the analysis of the Athlete’s samples are at a level that violate the applicable rules, irrespective of whether one places reliance on the level set by the 2010 Guidelines or the higher level that later emerged.

In this regard, the Panel notes that the rule against retroactivity does not apply to evidentiary matters (CAS 2000/A/274, *S. v/ FINA*, 405).

Based on the foregoing, the Panel finds that the principle of non-retroactivity is not at stake in this case.

Based on the foregoing, the Panel is comfortably satisfied that the analytical values of assay ratios relating to the Athlete’s samples reveal the presence of recombinant hGH. The Athlete has not advanced and established any valid reason for the Panel to find differently.

Furthermore, it is undisputed that exogenous hGH is a non-specified substance included in the category S2 (a) (“Peptide Hormones, Growth Factors and Related Substances”) on the 2011 WADA Prohibited List, which is applicable (see Article 4.1. of the Finnish ADR). Exogenous hGH is prohibited both in- and outside of competition.

Consequently and in conclusion, the Panel considers that an anti-doping rule violation occurred.

5. The submission according to which the administration of exogenous hGH constitutes an aggravating factor has no foundation in the Finnish ADR, which under its Articles 10.2 or 10.6 does not differentiate between various forms of first offence or suggest that doping with hGH attracts *ratione materiae* a higher sanction than the presence of another prohibited substance. It is the circumstances of the offence, not the offence itself which may aggravate. In the view of the Panel, there are here no facts alleged or substantiated by WADA that by nature are a possible aggravating factor which could lead to a higher sanction than the two years ineligibility for a first offence.

As a result, the Panel considers it appropriate to declare that the Athlete is ineligible for a period of two years. Credit is however to be given to the Athlete for the period of 602 days, in which a provisional suspension has been applied.

Fairness requires (in accordance with Article 10.8 of the Finnish ADR) that the Athlete's results should not be disqualified, including his event medals, his points and prizes, if any, that were obtained in the period before the date of the notification of the present award, in respect to that period during which he was allowed to compete (*i.e.* before the provisional suspension was imposed and after the lifting of such provisional suspension, through the date of notification of the present award).

### Decision

The appeal filed by WADA against the decision issued on 5 December 2013 by the Finnish Sports Arbitration Board is partially upheld. The decision issued on 5 December

2013 by the Finnish Sports Arbitration Board is annulled. Mr Juha Lallukka is found guilty of an anti-doping rule violation and is declared ineligible for a period of two years running from the notification of the present award. The period of provisional ineligibility of 602 days served by Mr Juha Lallukka between 27 October 2011 and 19 June 2013 is credited against the total period of ineligibility to be served. Mr Juha Lallukka's results, including his event medals, his points and prizes, obtained through the commencement of his period of provisional ineligibility (27 October 2011) and in the period from 19 June 2013 to the date of the notification of the present award are not forfeited.

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**Arbitration CAS 2014/A/3665, 3666 & 3667**

**Luis Suárez, FC Barcelona & Uruguayan Football Association v. Fédération Internationale de Football Association (FIFA)**

2 December 2014 (Operative part 14 August 2014)

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**Football ; Assault committed by a player during a match; Club standing to sue; FIFA Disciplinary Committee’s power to launch investigatory proceedings and to sanction the Player on the basis of art. 77(a) of the FIFA DC; Principle ne bis in idem ; Principle nulla poena sine lege certa ; Legal basis of the sanction (Art. 48 para.1 lit. d FIFA DC); Proper exercise by FIFA of the power of discretion provided by art. 39 of the FIFA DC with regard the Appellant’s recidivism and remorse; Proportionality of the sanction;**

#### **Panel**

Mr Bernhard Welten (Switzerland), President  
Prof. Luigi Fumagalli (Italy)  
Mr Marco Balmelli (Switzerland)

#### **Facts**

Luis Alberto Suárez Díaz (the “Player”) is a Uruguayan professional football player who played for the national team of Uruguay in the 2014 FIFA World Cup Brazil™. Since 16 July 2014, Mr Suarez is playing for Fútbol Club Barcelona, Spain.

Fútbol Club Barcelona (“FC Barcelona” or the “Club”) is a football club with its registered seat in Barcelona, Spain.

The Asociación Uruguaya de Fútbol (AUF) is the national football association governing football in Uruguay. The Player, the Club and AUF are jointly referred to as (the

“Appellants”).

The Fédération Internationale de Football Association (the “Respondent” or FIFA) is the international governing body of football on a worldwide level. It is an association under Swiss law, has its registered office in Zurich, Switzerland and exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players, worldwide.

On 24 June 2014, the national team of the AUF played a match against Italy in the 2014 FIFA World Cup Brazil™ (the “Match”). At the 78<sup>th</sup> minute of the Match there was an incident between the Player and Giorgio Chiellini, a player from the Italian national team. Both players fell to the ground, the referee stopped the Match and granted a free kick to Italy. During the action, the Appellant bit Mr Chiellini’s shoulder. The referee as well as the assistant referees and the fourth referee did not mention anything about this incident in their official reports. On the same 24 June 2014, the secretariat of the FIFA Disciplinary Committee asked the referee, the assistant referees and the fourth official if they had seen the incident. All four referees confirmed that they had not seen it.

On 24 June 2014, the FIFA Disciplinary Committee initiated disciplinary proceedings against the Player for having violated art. 48 para. 1 lit. d) and art. 57 of the FIFA Disciplinary Code (the “FIFA DC”).

On 25 June 2014, the FIFA Disciplinary Committee rendered its decision and imposed four different sanctions on the Player: a fine in the amount of CHF 100,000., a match suspension for nine (9) consecutive official matches of the representative team of Uruguay, a four months stadium ban, and a ban on taking part in any football-related activity for four (4) consecutive months for two different infringements: the infringement contemplated by art. 48(1)(d) and the

infringement described in art. 57.

Art. 48 of the FIFA DC provides as follows:

“1.

*... any recipient of a direct red card shall be suspended as follows: ...*

d)

*at least two matches for assaulting (elbowing, punching, kicking etc.) an opponent or a person other than a match official”.*

[...]

2.

*A fine may also be imposed in all cases”.*

Under art. 57 of the FIFA DC, then:

*“Anyone who insults someone in any way, especially by using offensive gestures or language, or who violates the principles of fair play or whose behaviour is unsporting in any other way may be subject to sanctions in accordance with art. 10 ff.”.*

On 30 June 2014, the Player released a statement on his personal website, the media and social networks, in which he recognized his misconduct, expressed his deepest regrets, apologized and promised that nothing like the incident in question would ever happen again.

Against the decision of the FIFA Disciplinary Committee rendered on 25 June 2014 appeals were filed by the Player on 1 July 2014 and by the AUF on 3 July 2014.

On 8 July 2014, the FIFA Appeal Committee rejected the appeals submitted by the Player and the UFA and confirmed the decision of the FIFA Disciplinary Committee taken on 25 June 2014 in its entirety.

On 23 July 2014, the Player, FC Barcelona and the AUF filed separate statements of

appeal with the Court of Arbitration for Sport (CAS) to challenge the decision of the FIFA Appeal Committee of 8 July 2014 (the “Appealed Decision”), pursuant to art. R47 et seq. of the Code of Sports-related Arbitration (the “Code”). By these appeals, in essence, the Appellants sought the setting aside of the Appealed Decision or, the reduction to a milder measure of the sanction thereby imposed on the Player.

The arbitration proceedings so started were registered by the CAS Court Office as follows: CAS 2014/A/3665, *Luis Suarez v. FIFA*; CAS 2014/A/3666, *FC Barcelona v. FIFA*; and CAS 2014/A/3667, *Uruguayan Football Association v. FIFA*.

On 24 July 2014, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided to consolidate the three appeal proceedings in accordance with art. R52 of the Code, and took note of the Parties’ agreement to the expedited calendar.

On 8 August 2014, a hearing was held at the CAS headquarters in Lausanne.

### Reasons

1. While the admissibility of the appeal filed by the Player and by the AUF is not contested, FIFA, in its answer of 6 August 2014, objected to the admissibility of the appeal of FC Barcelona, as the Club was at no stage part of the proceedings in front of the FIFA Disciplinary or the FIFA Appeal Committee and the Club does not have any direct and individual “aggrieved right”.

At the hearing of 8 August 2014, the Player and the AUF confirmed that they do not challenge the FC Barcelona’s standing in these proceedings, and that they agreed to the participation of the Club in this arbitration.

An indication of the conditions under

which FIFA itself recognizes a right of appeal against (first instance) disciplinary decisions can be found at art. 119 para. 1 FIFA DC, 2011 edition, which states that:

*“Anyone who has been a party to the proceedings before the first instance and has a legal protected interest justifying amendment or cancellation of the decision may lodge an appeal with the Appeal Committee”.*

In the view of the Panel it is a fact that the ban of the Player on any football-related activity and from visiting any stadium for four months, does burden the Club in its own direct interests to work with the Player, to promote its brand and activities by taking advantage of the image of the Player, and to include him in the new season’s team. Therefore, in light of the specific circumstances of the case, taking into account the impact of the specific sanction imposed, the Panel finds that the Club is sufficiently affected by the Appealed Decision and that the Club has a tangible interest of financial and sporting nature at stake.

If the conditions stated in art. 119 para. 1 FIFA DC are considered, the only open question is therefore posed by the fact that the Club was not a party to the proceedings before the FIFA disciplinary bodies. The Panel, however, notes that the Player only signed his employment contract with the Club after the FIFA decisions had been adopted. Up to that moment, the Club did not have any direct interest, which became actual only when the employment contract was signed. Therefore, FC Barcelona could not participate in the FIFA proceedings. The Panel is of the view that in a case where the FIFA authorities are issuing a sanction against a player and such sanction affects direct financial interests of a club, such club must have the possibility to appeal such decision in order to be able to protect its legal interests, even if this interests became actual after the challenged

decision was issued.

For this reason and in the specific circumstances of the case at hand, the Panel finds that the Club has a standing to sue, even if it was not a party to the proceedings before the first and second FIFA instance; the direct legally protected interest of the Club justifies its own request for an amendment or cancellation of the Appealed Decision.

As a result, all appeals, including the appeal of FC Barcelona, are admissible.

2. Concerning the contested FIFA Disciplinary Committee’s power to sanction the Player pursuant to art. 77(a) of the FIFA DC which provides that “[T]he Disciplinary Committee is responsible for: a) sanctioning serious infringements which have escaped the match officials’ attention”, the Panel finds that the claim brought by the AUF is admissible, even if it relates to a question not specifically discussed before the FIFA disciplinary bodies. Art. R57 of the Code, in fact, gives this Panel the possibility of unrestricted review, as to the facts and the law, of the dispute between parties. And, in the Panel’s view, there is no reason not to exercise such power in the case at hand, since in any case the contention of the AUF is directly referred to the use by FIFA of its disciplinary supervision on the Match – the issue which is – and has always been – at the heart of the dispute between the Parties.

However, the Panel finds that the claim brought by the AUF cannot be sustained because the conditions indicated by art. 77(a) of the FIFA DC are satisfied. First, there is no doubt that the biting is to be treated as a serious offence under the FIFA DC. Second, the Panel notes that all the officials at the Match declared, and thereafter confirmed, without hesitation or contradictions, that they had not seen the biting by the Player. Such declarations are, pursuant to art. 98(1) of the FIFA DC,

presumed to be accurate, and the AUF has not brought sufficient evidence to disprove their content:

In light of the foregoing, the Panel concludes that the FIFA disciplinary bodies had the power to investigate the events at the Match and sanction the Player pursuant to art. 77(a) of the FIFA DC.

3. Based on the Parties' submissions, it is uncontested that the Player's biting his adversary is considered as "*assaulting*" in accordance to art. 48 para. 1 lit. d) FIFA DC. The question is then whether the actions of the Player at the Match constitute at the same time an "*unsporting behaviour*" to be sanctioned also under art. 57 FIFA DC. The Player and the Club, in fact, claim that the concurrent application of art. 48 para. 1 lit. d) and art. 57 FIFA DC for the Player's assaulting in the case at hand breaches the constitutional principles "*ne bis in idem*" and "*nulla poena sine lege certa*". More in general, the Appellants maintain that the concurrent application of art. 48 para. 1 lit. d) and art. 57 FIFA DC to the same action committed by the Player is wrong, as only of art. 48 para. 1 lit. d) could be applied, to the exclusion of art. 57. The Respondent denies such submissions, and holds that no breach of those fundamental principles was committed.

Regarding the argument relating to the principle of "*ne bis in idem*", the Panel agrees with the Respondent, that the application of two different rules to the same facts involves the different question of the relation between the two applied rules (art. 48 para. 1 lit. d, and art. 57 FIFA DC), in the sense that the application of one of these rules possibly "consumes" the application of the other rule. The principle "*ne bis in idem*", in fact, appears to the Panel to give rise to a kind of *procedural* defence, forbidding a defendant from being tried again on the same (or similar)

charges following a legitimate acquittal or conviction, and does not concern the *substantive* issue of the possible concurrent application by a single hearing body of a plurality of rules to the same and only behaviour. Therefore the Appellants' reproach to the Respondent's bodies to have breached the general principle of "*ne bis in idem*" cannot be supported by the Panel.

4. The Player and the Club further reproach to FIFA Appeal Committee that the Appealed Decision breaches also the principle of "*nulla poena sine lege certa*" in applying the sanctions of art. 48 para. 1 lit. d) and art. 57 FIFA DC to the Player's assaulting committed at the Match. The Appellants' reproach is mainly that it is impossible for players and clubs to anticipate the duration and scope of the sanctions issued: therefore, the Appealed Decision fails to pass the so called "predictability test" and is to be considered arbitrary.

However, the principles of predictability and legality are satisfied whenever the disciplinary rules have been properly adopted, describe the infringement and provide, directly or by reference, for the relevant sanction. The fact that the competent body applying the FIFA DC has the discretion to adjust the sanction mentioned in the rules deemed applicable to the individual behaviour of a player breaching such rules is not inconsistent with those principles.

The Panel therefore finds that the general principle "*nulla poena sine lege certa*" – to the extent applicable for sanctions under the Swiss law of associations – was not breached by the Appealed Decision.

5. As already mentioned, however, the main question is whether the actions of the Player at the Match constitute at the same time a violation of (and can be punished under) both art. 48 para. 1 lit. d) and art.

57 FIFA DC.

Although under civil law and disciplinary regulations it is in abstract possible that one act breaches at the same time more than one rule, and is therefore sanctioned under all those rules, the Player could however be sanctioned, for the infringement he committed at the Match, only on the basis of art. 48 para. 1 lit. d) FIFA DC, being the “*lex specialis*” compared to the general provision set by art. 57 FIFA DC -which contains a mere general clause covering all possible conducts against fair play, which are not yet covered by other articles. Biting, is an “*assault*” for the purposes of art. 48 para. 1 lit. d), and no room is left in this case for the application of the general rule set by art. 57 FIFA DC. The Panel, in any case, finds that in the case at hand any sanction going beyond those allowed by art. 48 para. 1 lit. d) FIFA DC would be inappropriate to the peculiarities of the case and would be disproportionate. As a result, the sanction to which the Panel unanimously agrees hereinafter is issued on the basis of art. 48 para. 1 lit. d) FIFA DC only.

6. Disputed in this arbitration is whether the FIFA disciplinary bodies properly considered all the relevant circumstances and factors in the determination of the kind and measure of the sanction. The Appellants, in fact, contend that the Challenged Decision did not take into account the remorse expressed by the Player; and that, on the other hand, considered the Player a recidivist, while no relevant recidivism could be found under the FIFA DC.

The Panel notes that, in view of art. 39 para. 4 FIFA DC, the bodies pronouncing the sanction for a violation of the FIFA DC shall take into account all relevant factors in the case, as well as the degree of the offender’s guilt.

In relation to the acknowledgement of the Player’s mistake, his remorse –expressed not immediately after the event but after the disciplinary proceedings started and his pledging not to repeat that infringement – as well as recidivism -the Player had already committed in two preceding occasions the very same infringement, the Panel is of the opinion that the FIFA Appeal Committee properly exercised the discretion granted by art. 39 para. 4 FIFA DC.

7. The Appellants are of the opinion that the sanctions imposed on the Player are not proportional and appropriate to the factual scenario and the relevant *ratio legis*. Especially out of the four different sanctions that the Player received, the stadium ban and the ban on every football-related activity for four months is described not to correspond to the infringement for which the Player is responsible. Such sanctions usually apply to officers, employees, managers, or supporters, etc. for breaches of football rules committed outside of the football pitch like, *e.g.* for match fixing.

As already mentioned, the Player is responsible (only) for the violation of art. 48 para. 1 lit. d) FIFA DC. As a result, the Player can be sanctioned only under that provision, which allows the imposition of a match suspension and of a fine. Therefore, different kinds of sanctions cannot be applied to the Player. In other words, the four (4) month ban on taking part in any football-related activity and the prohibition of entering the confines of any stadiums, not allowed for a violation of art. 48 para. 1 lit. d) FIFA DC, could not be applied. However, in the determination of the sanction in a *kind* allowed by art. 48 para. 1 lit. d) FIFA DC, the Panel deems proper to take into account the *measure* of the sanction applied by the FIFA disciplinary bodies, in order to respect the principle of proportionality.

Based on art. 39 para. 4 FIFA DC, all relevant factors and the degree of the Player's guilt shall be taken into account when imposing the sanction.

In this view, it is first of all uncontested that the Player acted with intent when biting Mr Chiellini. Further, it is clear that Mr Chiellini did not provoke the Player, and that there was no immediate chance to score a goal as the ball was at the side line and therefore far away from the Player and the Italian goal. In other words, the action of the Player was fully gratuitous.

In light of all the elements of the case, the Panel finds that, by exercising its powers granted under art. R57 of the Code, it has to replace the sanction of the prohibition on exercising any football-related activity for four (4) months with the sanction of a match ban (applicable to official matches played at any level) for the same period. Such sanction would prevent the Player from playing with the Club within official competitions, but would not prevent him from training and integrating in the Club in order to be able to play effectively in competition after the end of the suspension period.

The Panel concedes that the Player's suspension for nine (9) consecutive official matches of the representative team of Uruguay and the ineligibility to play official matches at any level for a period of four (4) months (combined with the fine imposed by FIFA, to be confirmed) is a tough sanction. However, considering all relevant facts (and chiefly the attitude of the Player and the fact that he had already committed in two different preceding occasions the same infringement), such sanction is not excessive and disproportionate.

### **Decision**

The Panel partially upholds the appeal and sets aside the decision of the FIFA Appeal

Committee of 8 July 2014 and replaces it by a new decision by sanctioning the Player for having committed an act of assault and banning him for nine (9) consecutive official matches of the national team of the AUF, declaring him ineligible to play in official matches at any level for a period of four (4) consecutive months, starting on 25 June 2014, and sanctioning him to pay a fine in the amount of CHF 100,000.

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**Arbitration CAS Ad hoc Division (A.G. Incheon) 2014/03**  
**Tai Cheau Xuen v. Olympic Council of Asia (OCA)**  
3 October 2014

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**Wushu/women's nanquan & nandao; Doping/Sibutramine; Specified Substance; External chain of custody; Departure from the IST**

**Panel**

Judge Catherine Anne Davani (Papua New Guinea), President  
Mr Dong Su Ahn (South Korea)  
Ms Thi My Dung Nguyen (Vietnam)

**Facts**

This claim was brought by the Malaysian wushu athlete Tai Cheau Xuen (the "Athlete" or the "Applicant") against a decision rendered by the Olympic Council of Asia (the "OCA" or the "Respondent") dated 30 September 2014 wherein it was determined that the athlete committed an anti-doping rule violation during the XVII Asian Games (the "Games") in accordance with Article 2.1 of OCA Anti-Doping Rules (the "OCA ADR").

On 20 September 2014 at 17.06hrs, the Applicant was subject to an in-competition doping control urine test after winning the gold medal in the women's nanquan and nandao all-round event which revealed the presence of Sibutramine, a Specified Substance.

The Olympic Council of Malaysia (the "OCM"), on behalf of the Applicant, informed the OCA Disciplinary Commission that the Applicant objected to the discrepancies in her Doping Control and Chain of Custody Forms. More specifically, the OCM questioned the integrity of the external chain of custody following the collection of the Applicant's sample.

On 28 September 2014, the Korea Institute of Science Technology (KIST) tested the Applicant's B Sample, which confirmed the results of the A sample (i.e. the presence of Sibutramine).

The OCA adopted the OCA Disciplinary Committee's report and recommendation in full and issued the decision whereby it decided that:

- a violation of OCA Anti Doping Rules (Art. 2.1) was committed,
- the departure from the procedure linked to the chain of custody was not material enough to invalidate the testing procedure and the analysis,
- the Athlete should be disqualified from the 17<sup>th</sup> Incheon Asian Games 2014; and her accreditation withdrawn; her results in the competition should be annulled and her medal withdrawn,
- public disclosure of this violation will also be made.

On 1 October 2014, the Applicant filed her appeal against this decision.

The Applicant wished to annul the Decision in full and reinstate her gold-medal victory. The Applicant did not challenge the anti-doping testing collection procedure or actual testing of the sample. Instead, her appeal challenged the timeliness of the transportation of the sample.

The Respondent alleged that all chain of custody procedures were handled appropriately and in accordance with WADA protocol.

**Reasons**

*Has there been a departure from the [International Standard for Testing] IST by the 'inordinate extended period' (as alleged by the Applicant) when it took 16 hours for the Athlete's sample to travel from*

the venue to the [Doping Control Command Centre] DCCC, then later to the KIST?

The International Standard for Testing (“IST”) sets out the required practice for the collection, storage, transmission, and analysis of anti-doping tests. The Introduction to the IST states that:

*“The International Standard for Testing, including all annexes, is mandatory for all signatories to the Code.”*

Article 9.0 Transport of Samples and documentation of the IST provides, in part, as follows:

### **9.1 Objective**

- a. *To ensure that Samples and related documentation arrive at the WADA-accredited laboratory or as otherwise approved by WADA in proper condition to do the necessary analysis, and*
- b. *To ensure the Sample Collection Session documentation is sent by the [Doping Control Officer] DCO to the [Anti-Doping Organisation] ADO in a secure and timely manner.*

### **9.3**

#### **Requirements for transport and storage of Samples and documentation**

9.3.1 *The ADO shall authorise a transport system that ensures Samples and documentation will be transported in a manner that protects their integrity, identity, and security.*

#### 9.3.2

*Samples shall always be transported to the WADA-accredited laboratory (or otherwise approved by WADA), using the ADO’s authorised transport method as soon as practicable after the completion of the Sample Collection Session. Samples shall be transported in a*

*manner which minimizes the potential for Sample degradation due to factors such as time delays and extreme temperature variations (emphasis added).*

The Applicant did not challenge the veracity of the sample itself. She had no objection to how the sample was taken or tested. However, her principle and only concern was the duration of time it took for the sample to leave the venue and arrive at the Doping Control Command Centre (DCCC) and finally to the KIST lab. This 16-hour timeframe, according to the Applicant, is a departure from the IST protocols as the time it took to transport the sample was unreasonably long under the circumstances. More specifically, the Applicant alleged that she received no information on the chain of custody concerning her sample, and moreover, where the sample had gone during this timeframe and how the sample was stored. She further alleged that there might have been many things that could have occurred during this timeframe which could have either contaminated her sample or tampered with the integrity of the chain of custody process. Eventually though, she made clear that her sample, upon receipt at the KIST, was in good order.

The Panel held that in the absence of any evidence from the Applicant to prove that the sample was tampered with during its period of transportation and together with the fact that the Applicant did not challenge the veracity of the sample itself, the time period of 16 hours during which the sample was transported to the accredited laboratory cannot constitute a reason on which to make a finding that there has been a violation of the International Standard for Testing (IST).

In this regard, there is no clear requirement in either OCA ADR or the IST with respect to a specific time limit which must be met so as to comply with such regulations. Instead the only requirement is that the sample must be transported « *as soon as practicable* ». In line with CAS 2010/A/2296, the Panel found that the

IST requirement that the sample be transported “as soon as practicable”, was not unreasonable and not in violation of the IST.

### **Decision**

For these reasons, the *ad hoc* Division of the Court of Arbitration for Sport decided to dismiss the application filed by Ms Tai Cheau Xuen on 1 October 2014.

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## Jugements du Tribunal Fédéral\*

## Judgements of the Federal Tribunal



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

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**Judgment of the Swiss Federal Tribunal**

**4A\_93/2013**

**29 October 2013**

**A. Ltd., B. Sàrl & C. Ltd. (appellants) v.  
D. Ltd. (respondent)\***

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*Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 20 December 2012*

**Extract of the facts**

D. Ltd., as licensee, entered into some contracts concerning TV rights with A. Ltd. (on December 1, 2009, and March 9, 2010), with B. Sàrl (on December 9, 2009) and with C. Ltd. (on December 14, 2009) as licensors. The licensee paid only the first two instalments for a total EUR 2'250'000 as per the contracts. On November 22, 2010, the licensors terminated the contracts due to the failure to pay the following instalments and denied impeding the activity of the licensee.

On December 30, 2010, A. Ltd., B. Sàrl and C. Ltd. initiated arbitration proceedings against D. Ltd. in the Court of Arbitration for Sport (CAS). In an award of December 20, 2012, the CAS entirely rejected the licensors' claims while upholding in part the counterclaim of the licensee and ordered the Claimants to pay EUR 2'250'000 for breach of contract.

In a civil law appeal of February 15, 2013, A. Ltd., B. Sàrl, and C. Ltd. submit that the award should be annulled and apply for a stay of enforcement and security as per Art. 104 LTF.

The Appellants argue a violation of public policy and of their right to be heard.

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\* The original decision is in Italian. The entirety of the text is available on the website of the Federal Tribunal [www.bger.ch](http://www.bger.ch).

**Extract of the legal considerations**

**1. The Respondent claims that the parties opted out of any appeal against the award because the contracts they entered into contained an arbitration clause according to which all disputes arising from or connected with such contracts shall be submitted exclusively to the Court of Arbitration for Sport in Lausanne and finally adjudicated in accordance with the Code of Sport Arbitration.**

According to the Respondent, and pursuant to Art. R59 of the Code, the award notified by the Secretariat of the CAS disposes of the dispute finally and is not subject to any appeal to the extent that the parties have neither their domicile, habitual residence or a stable organization in Switzerland and expressly renounced the possibility to appeal in the arbitration clause or in a subsequent written agreement, in particular at the outset of the proceedings. On this basis, relying on Art. 192(1) PILA, the Respondent takes the view that the matter is not capable of appeal.

It must be recalled, first of all, that in the case at hand, the reference to Art. R59(4) of the Code of Arbitration for Sport proves to be irrelevant because the provision concerns appeal proceedings. However, Art. R46(2) of the Code, which indeed refers to ordinary proceedings, has the same contents. Yet, as already pointed out in DTF 133 III 235 at 4.4.1, such provisions merely paraphrase Art. 192(1) PILA and do not prevent the filing of an appeal in the absence of a written agreement excluding such possibility. Moreover, it is sufficient to recall that merely mentioning in the arbitration agreement that the disputes will be decided finally is not a

valid opting-out of the right to appeal. As a matter of principle, the appeal is accordingly admissible.

For these reasons the Federal Tribunal rejected the appeal.

**2. The Appellants rely on Art. 190(2)(e) PILA and argue a violation of public policy with reference to the principle of pacta sunt servanda.**

In the case at hand, the Arbitral Tribunal held that pursuant to Art. 82 CO, the Appellants could not demand performance of the contracts and payment of the remaining instalments from the Respondent because they had breached their contractual obligations. In doing so, it held that the clauses concerning the payment of the instalments and therefore also the consequences of late payment no longer bound the parties. There is accordingly no contradiction at all between the reference to such clauses in the award and the holding that the termination of the contract was unjustified. The argument is accordingly unfounded.

**3. Furthermore, the Appellants rely on Art. 190(2)(d) PILA and argue a violation of their right to be heard because the Arbitral Tribunal totally ignored their principle argument that the Respondent was in default, merely examining the contractual breaches raised by the latter.**

In the case at hand, as the Appellants explicitly acknowledge, the argument that the termination of the contract was justified as a consequence of the Respondent's failure to pay the instalments was mentioned in the award. As already pointed out above with regard to the alleged violation of public policy, the Arbitral Tribunal held that the Respondent's failure to pay the instalments in a timely manner did not justify the termination of the contracts due to the contractual breaches by the licensors. Hence, the Appellants' argument was considered and there is therefore no violation at all of their right to be heard.

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## Arrêt du Tribunal fédéral 4A\_304/2013

3 mars 2014

A. (recourant) v. Z., FIFA et X. (intimés)\*

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*Recours en matière civile contre la sentence rendue le 3 juin 2013 par le Tribunal Arbitral du Sport (TAS)*

### Extrait des faits

X. est un footballeur professionnel guinéen, né le 2 janvier 1985. Z. est un club de football professionnel, membre de la Fédération de football des Emirats Arabes Unis (ci-après: UAEFA), elle-même affiliée à la Fédération Internationale de Football Association (FIFA). A. est un club de football professionnel français, membre de la Fédération Française de Football (FFF), laquelle est affiliée à l'Union des Associations Européennes de Football (UEFA) ainsi qu'à la FIFA.

Le 2 septembre 2010, X., transféré du Stade B., club français de Ligue 1, a conclu avec Z. un contrat de travail valable jusqu'au 30 juin 2014. Les parties sont convenues que le footballeur aurait droit, la première année, à une rémunération totale de 1'200'000 euros comprenant une avance de 240'000 euros, le solde devant être payé par tranches la première semaine de chaque mois. Ces modalités valaient également pour la deuxième année, mais l'avance était portée à 360'000 euros.

Le 24 octobre 2011, Z. a désenregistré X. de la liste des footballeurs étrangers autorisés à jouer pour le club. En date du 31 janvier 2012, X., qui avait quitté définitivement ... sans l'autorisation de Z. le 20 décembre 2011, a signé un contrat de travail avec A.

L'UAEFA a refusé de transmettre le Certificat International de Transfert (CIT) à la FFF au motif que le joueur guinéen était toujours sous contrat avec Z. Cependant, par décision du 9 février 2012, le juge unique de la Commission du Statut du Joueur de la FIFA a autorisé la FFF à enregistrer provisoirement X. en tant que joueur de A.

Le 3 janvier 2012, X. avait assigné Z. devant la Chambre de Résolution des Litiges de la FIFA (CRL) en vue d'obtenir le paiement de 3'400'000 euros. Il reprochait au club des Emirats Arabes Unis d'avoir rompu le contrat de travail en le désenregistrant de son effectif et, au surplus, de ne pas lui avoir versé un acompte de 180'000 fr. qui lui était dû.

Dans sa réponse du 27 avril 2012, Z. a contesté le bien-fondé de ces reproches. Il a conclu, de son côté, à ce que le joueur et A. fussent condamnés solidairement à lui payer un montant de 9'700'000 euros, plus intérêts, pour rupture injustifiée du contrat. Dans une réponse commune du 2 août 2012, les défendeurs reconventionnels se sont opposés à l'admission de cette conclusion. A. a nié, en tout état de cause, avoir incité le joueur à rompre son contrat de travail.

Par décision du 16 novembre 2012, la CRL a admis partiellement la demande principale et condamné Z. à payer le montant de 180'000 euros à X. Admettant aussi une partie de la demande reconventionnelle, elle a condamné solidairement le joueur et A. à payer à Z. la somme de 4'500'000 euros, avec intérêts à 5% l'an dès le 16 novembre 2012. Elle a, de plus, exclu X. de toute participation à des matchs officiels pour une durée de quatre mois, dont à déduire trois mois de suspension déjà purgés. Enfin, elle a interdit à A. d'enregistrer de nouveaux joueurs, au niveau national et international, au cours des deux périodes

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\* L'intégralité du jugement rendu par le Tribunal Fédéral est disponible sur le site web du Tribunal Fédéral [www.bger.ch](http://www.bger.ch)

consécutives d'enregistrement suivant la notification de sa décision.

Le 21 février 2013, A. a saisi le Tribunal Arbitral du Sport (TAS) d'un appel dirigé contre la décision de la CRL (cause CAS/2013/A/3091), appel qui a été rejeté par le TAS par sentence du 3 juin 2013.

Le 10 juin 2013, A. (ci-après: le recourant) a formé un recours en matière civile au Tribunal fédéral, assorti d'une requête urgente d'effet suspensif, à l'encontre de la sentence du TAS dont seul le dispositif avait été communiqué aux parties.

### Extraits des considérants

**1. Dans sa réponse, l'intimé soulève une objection préliminaire. Selon lui, le recourant se prévaudrait de droits strictement personnels appartenant au seul joueur. Or, à l'en croire, la violation de tels droits, étant donné leur nature spécifique, ne pouvait être dénoncée que par leur titulaire. Il en découlerait d'emblée l'irrecevabilité ou, à tout le moins, l'absence de fondement du recours.**

Tel n'est pas le cas. L'art. 17 al. 2 RSTJ institue une responsabilité solidaire, en ce qui concerne le paiement de l'indemnité pour rupture de contrat sans juste cause, entre le joueur professionnel ayant rompu son contrat de travail et le nouveau club de ce joueur. Comme la disposition citée ne règle pas les modalités de cette solidarité passive, la question doit être tranchée au regard du droit suisse, que ce soit en vertu de l'art. 58 du Code de l'arbitrage en matière de sport, l'intimée ayant son siège en Suisse, ou de l'art. 66 al. 2 des Statuts de l'intimée, qui prévoit l'application du droit suisse à titre supplétif (cf. sentence, n. 83 à 86). Or, l'art. 145 du code suisse des obligations (CO) permet à un débiteur solidaire d'opposer au créancier les exceptions qui résultent de la cause de l'obligation solidaire ou, plus précisément, du titre même qui fonde cette obligation.

Le recourant soutient que la sentence attaquée viole l'ordre public matériel et l'ordre public procédural, au sens de l'art. 190 al. 2 let. e LDIP, à maints égards.

**2. Le recourant fait grief à la Formation d'avoir violé les droits de la personnalité (art. 28 CC) et la liberté personnelle (art. 10 al. 2 Cst.) du joueur en le désenregistreur, ce qui aurait eu pour effet de l'écarter durablement de la compétition et de le priver de la possibilité même d'exercer son métier.**

Il est exact que, suivant les circonstances, une atteinte aux droits de la personnalité du joueur peut être contraire à l'ordre public matériel. Vrai est-il aussi qu'un travailleur peut avoir un intérêt légitime à fournir effectivement sa prestation, afin d'éviter de se déprécier sur le marché du travail et de compromettre son avenir professionnel, et qu'il en va ainsi en particulier des footballeurs professionnels. La Formation le reconnaît du reste elle-même en admettant, avec la CRL, que le désenregistrement d'un joueur peut entraîner en soi une violation des droits de la personnalité de ce dernier. Cependant, pour elle, les circonstances du cas concret étaient telles que semblable conclusion ne pouvait pas être tirée. Aussi bien, le caractère provisoire de cette mesure, qui ne devait déployer ses effets que pour cinq matchs au maximum, le fait que le joueur avait continué à s'entraîner avec l'intimé et à percevoir son salaire durant la période de désenregistrement, enfin l'absence de doléances avant le 23 janvier 2012 de la soi-disant victime d'une atteinte aux droits de la personnalité, tous ces éléments interdisaient d'admettre, en l'espèce, la violation alléguée par le recourant.

Pareille appréciation de la situation est marquée au coin du bon sens et échappe, partant, à toute critique. Pour la contester, le recourant en est d'ailleurs réduit, une fois de plus, à s'écarter des faits constatés dans la sentence et à soutenir, notamment, que le

désenregistrement du joueur a été effectué pour une durée indéterminée. Au demeurant, à supposer qu'il eût ressenti sa mise à l'écart temporaire comme une atteinte à sa personnalité, contrairement à ce que l'on peut déduire de son défaut de réaction en temps opportun, le joueur aurait dû commencer par inviter l'intimé à le réenregistrer sur le champ, sous la menace d'une rupture immédiate des rapports de travail. Ce n'est que dans l'hypothèse où cet avertissement préalable serait demeuré vain qu'il eût pu, alors seulement, rompre le contrat avec effet immédiat pour juste cause.

Par conséquent, le recourant fonde à tort son grief de violation de l'ordre public matériel sur la prétendue atteinte aux droits de la personnalité du joueur qu'aurait commise l'intimé.

**3. Les arbitres ont tiré des circonstances susmentionnées ayant entouré le désenregistrement temporaire du joueur la conclusion que ce dernier avait consenti à une telle mesure. Sous l'angle de la violation de l'ordre public, le recourant soutient que cette conclusion résulte d'une méconnaissance des règles sur le fardeau de la preuve et, singulièrement, de l'art. 8 CC.**

De telles règles ne font pas partie de l'ordre public matériel au sens de l'art. 190 al. 2 let. e LDIP. Au demeurant, la Formation s'est forgé une opinion, quant à l'acceptation par le joueur de son désenregistrement temporaire, sur la base de sa propre appréciation des circonstances factuelles pertinentes. Or, lorsque l'appréciation des preuves convainc le juge qu'un fait est établi, la question du fardeau de la preuve devient sans objet.

Par ces motifs, le Tribunal fédéral a rejeté le recours.

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## Arrêt du Tribunal fédéral 4A\_564/2013

7 avril 2014

**X. S.A. (recourant) v. Y. & Fédération Z. (intimés)\***

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*Recours en matière civile contre la sentence rendue le 2 août 2013 par le Tribunal Arbitral du Sport (TAS)*

### Extrait des faits

X. S.A. (ci-après: X. ou la recourante) et Y. (ci-après: Y. ou l'intimée) sont deux clubs de football professionnels affiliés à la Fédération Z. (ci-après: Z.). Le 26 avril 2013, Z. a refusé d'octroyer à X. une licence lui permettant d'évoluer dans le championnat ... de première division en raison d'une procédure de faillite en cours à l'encontre de ce club. Cette décision, confirmée le 10 mai 2013 par l'instance d'appel de Z., est devenue définitive et irrévocable.

Lors de la saison 2012/2013, Y. a terminé à la 15ème place du championnat de première division, ce qui faisait d'elle la meilleure des équipes reléguées en deuxième division.

Dans sa séance du 6 juillet 2013, le Comité exécutif de Z. a approuvé plusieurs modifications du règlement d'organisation de l'activité footballistique (Regulation for the Organization of the Football Activity; ci-après: ROAF). Il a notamment décidé que les éventuelles places laissées vacantes en première division seraient attribuées aux premières équipes figurant sous la barre de relégation. Il a, en outre, décidé que la première division comprendrait 18 équipes pour la saison 2013/2014, quand bien même seuls 17 clubs satisfaisaient aux exigences financières et sportives pour y participer.

Enfin, il a attribué la 18ème place à repourvoir au vainqueur d'un match de barrage qui mettrait aux prises Y. et X. le 13 juillet 2013.

Le match de barrage a été remporté par X. Le 11 juillet 2013, Y. a soumis au Tribunal Arbitral du Sport (TAS) une déclaration d'appel visant à obtenir l'annulation de la décision de Z. d'organiser ce match de barrage.

Le 16 juillet 2013, X. a déposé une demande d'intervention. Y. et Z. ont accepté qu'elle participât à la procédure d'arbitrage.

A l'issue d'une procédure conduite en la forme accélérée d'entente avec les parties, l'arbitre unique désigné pour connaître du litige divisant celles-ci a rendu sa sentence le 2 août 2013. Admettant l'appel, il a annulé la décision de Z. \_\_\_\_\_ d'organiser le match de barrage en question, puis a invité Z. à qualifier et à enregistrer Y. dans le championnat ... de première division pour la saison 2013/2014 en lieu et place de X.

Le 11 novembre 2013, X. a formé un recours en matière civile au Tribunal fédéral en vue d'obtenir l'annulation de la sentence du 10 octobre 2013.

### Extraits des considérants

**1. Invoquant l'art. 190 al. 2 let. d LDIP, la recourante reproche à l'arbitre unique d'avoir omis d'examiner des arguments essentiels qu'elle avait soulevés dans la procédure arbitrale relativement aux différentes décisions du 6 juillet 2013 ainsi qu'au problème de la licence.**

La recourante fait grief à l'arbitre unique de n'avoir pas tenu compte de la séquence

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chronologique des trois décisions prises le 6 juillet 2013 par le Comité exécutif de Z. pour résoudre la question de l'applicabilité des modifications du ROAF. Selon elle, le

Comité exécutif avait décidé, dans un premier temps, de maintenir 18 équipes dans le championnat de première division ..., dans un deuxième temps d'organiser un match de barrage entre X. et Y. pour l'attribution de la 18ème place dans ce championnat et, dans un troisième temps, de modifier le ROAF. A suivre l'intéressée, si l'arbitre unique avait pris en considération cette séquence chronologique, qu'elle avait mise en évidence dans sa réponse à l'appel de Y., il aurait abouti à la conclusion que la seule interprétation possible des décisions litigieuses était d'admettre que le Comité exécutif avait réglé individuellement la question pour la saison 2013/2014 par l'organisation d'un match de barrage et qu'il avait parallèlement pris des mesures applicables les saisons suivantes.

On peine à voir où la recourante veut en venir avec cette argumentation, d'autant plus que, Z. a expressément reconnu, dans sa réponse à l'appel, que les modifications du ROAF décidées le 6 juillet 2013 seraient applicables lors de la saison 2013/2014 déjà. Il n'y avait donc pas d'incertitude quant à l'applicabilité ratione temporis de la réglementation modifiée, ni matière à développer la question non pertinente de la séquence chronologique des décisions prises à la date précitée.

A y regarder de plus près, l'argumentation de la recourante revient, en réalité, à critiquer l'interprétation des décisions du 6 juillet 2013 à laquelle s'est livré l'arbitre unique. Il s'agit donc d'une critique touchant le fond de la sentence, laquelle échappe, comme telle, à l'examen du Tribunal fédéral lorsqu'il statue sur un recours en matière d'arbitrage international.

De toute façon, l'arbitre unique a jugé déterminant le fait que X. n'avait pas obtenu de licence pour disputer le championnat de première division ... lors de la saison

2013/2014. Pareille circonstance rendait ainsi arbitraire, à ses yeux, la décision

d'ordonner un match de barrage, quel que fût par ailleurs le moment où les modifications apportées le 6 juillet 2013 au ROAF entreraient en vigueur. Or, c'est le lieu de rappeler qu'un arbitre n'a pas l'obligation de discuter tous les arguments invoqués par les parties, de sorte qu'il ne peut lui être reproché, au titre de la violation du droit d'être entendu en procédure contradictoire, de n'avoir pas réfuté, même implicitement, un moyen objectivement dénué de toute pertinence. Tel est le cas en l'espèce, s'agissant du moyen relatif à la séquence chronologique des décisions du 6 juillet 2013.

**2. La recourante reproche également à l'arbitre unique d'avoir passé sous silence une sentence rendue le 5 juillet 2013 par le TAS dans une affaire intéressant un autre club ... (V. S.A.), dont elle lui avait pourtant signalé l'existence dans sa réponse à l'appel.**

**La recourante se plaint, en outre, de ce que le TAS ait écarté, sans même s'y référer, son argument faisant état des larges prérogatives dont disposait le Comité exécutif dans le domaine considéré, y compris pour organiser un match de barrage.**

La sentence à laquelle se réfère la recourante n'a pas été publiée par le TAS, contrairement à ce que laissait entendre le communiqué de presse du 5 juillet 2013 émanant de cet organisme. Elle ne figure pas dans le dossier produit par le TAS, et la recourante, qui ne prétend pas en avoir expressément requis l'édition avant la clôture de la procédure arbitrale, ne le fait pas davantage dans ses écritures adressées au Tribunal fédéral, si tant est qu'elle soit recevable à le faire (cf. art. 99 al. 1 LTF). L'élément probatoire sur lequel elle fonde son second argument fait donc défaut, ce qui empêche, en principe, le Tribunal fédéral de vérifier le bien-fondé de celui-ci.

Quoi qu'il en soit, il ressort du communiqué de presse susmentionné que, dans l'affaire V. S.A., le TAS a annulé le refus d'octroyer une licence à ce club parce que la situation financière de celui-ci à la date déterminante ne justifiait pas un tel refus. La sentence citée par la recourante, qui concerne apparemment les critères financiers d'octroi de la licence, ne portait ainsi pas sur le même objet que celui qui caractérise le litige pendant, où il est question de l'application dans le temps des nouvelles dispositions du ROAF. Elle n'avait donc pas valeur de précédent, quoi qu'en dise la recourante, si bien qu'il ne peut pas être reproché à l'arbitre unique de ne pas s'être attardé sur un argument n'ayant pas d'impact sur la solution du litige qui lui était soumis.

Une conclusion similaire peut être tirée quant à l'ultime grief fait à l'arbitre unique par la recourante. Dès lors qu'il concluait à l'incompatibilité entre la décision d'organiser un match de barrage et le refus définitif d'octroyer une licence à X. pour la saison 2013/2014, l'arbitre unique n'avait pas à examiner plus avant si les prétendues larges prérogatives du Comité exécutif de Z. en la matière suffisaient à justifier la décision d'attribuer la 18ème place du championnat de première division ... au vainqueur d'un match de barrage.

Par ces motifs, le Tribunal fédéral a rejeté le recours.

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**Informations diverses**  
**Miscellaneous**



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## Publications récentes relatives au TAS/Recent publications related to CAS

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- Castaños Domínguez D., Control Anti-Doping is mandatory : analyse of award TAS-CAS 2013/A/3279 Victor Troicki v. International Tennis Federation (ITF), Revista Aranzadi de Derecho de Deporte y Entretenimiento, Abril-Junio 2014 Núm. 43, p. 549
- Castillo J., El caso Bangoura/Al NASR : la cancelación del registro del jugador constituye causa justificada para rescindir el contrato ? , Revista Aranzadi de Derecho de Deporte y Entretenimiento, Julio-Septiembre 2014 Núm 44, p.465
- Fuentes Del Campo A., International recognition of the International Olympic Committee (IOC) suitable as a model for international recognition of the Sports arbitration court (TAS/CAS), Revista Aranzadi de Derecho de Deporte y Entretenimiento, Abril-Junio 2014 Núm.43, p. 463
- González Mullin H. La transferencia internacional de menores de edad. El concepto « mudanza de los padres ». Su interpretación en clara protección del menor, Revista Aranzadi de Derecho de Deporte y Entretenimiento, Abril-Junio 2014 Núm. 44, p. 433
- Maisonneuve M., Chronique de jurisprudence arbitrale en matière sportive, Revue de l'Arbitrage, 3/2014, p. 667
- Osvaldo Outerelo N., Laudo Barcelona de Guayaquil c. Delgado Marcelo Alejandro, Revista Aranzadi de Derecho de Deporte y Entretenimiento, Abril-Junio 2014 Núm. 44, p.453
- Proust J., Espoirs déçus à Sotchi :absence préjudiciable de critères de sélection pour les olympiades, Note sous TAS, ch. Ad hoc, 2 février 2014. n°OG 14/01, Les Cahiers de Droit du Sport, n°35 2014, p. 150
- Proust J., La conception extensive de la responsabilité des clubs de football du fait de leurs supporters : le Fener de nouveau condamné devant le TAS, Note sous TAS, 5 décembre 2013, n°2013/A/3139, Les Cahiers de Droit du Sport, n°35 2014, p. 209
- Rechtprechung, Int. Sportschiedsgerichte, CAS : Dopingnachweis mit rekombinantem Wachstumshormon – Fall Sinkewitz, Spurt 4/2014, p. 162
- Rechtprechung, ScheizBG : Verwertung widerrechtlich erlangter Beweise im Rahmen eines CAS Schiedsverfahrens, Spurt 5/2014, p. 192
- Rechtprechung, Ständiges Schiedsgericht für Vereine, Keine Lizenz im Profifussball bei fehlender wirtschaftlicher Leistungsfähigkeit, Spurt 5/2014, p. 200
- Ripoll González E./León lleó A., Comment on the ruling of the case CAS 2012/A/3009 Arsenal FC, Arentina v. Central Español FC, Uruguay, Revista Aranzadi de Derecho de Deporte y Entretenimiento, Abril-Junio 2014 Núm. 43, p. 537
- Schulze G., Fortentwicklung des Schweizer Vertragsrechts und Präklusion bei der inzidenten Anerkennung eines CAS-Entscheids, Spurt 4/2014, p. 139