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Table des matières/Table of Contents

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

Articles et commentaires/Articles and Commentaries	6
Applicable law in football-related disputes	7
- The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law -	
Ulrich Haas	7
A brief review of recent CAS Jurisprudence relating to football transfers	18
Mark A. Hovell.....	
Mediation of sports-related disputes: facts, statistics and prospects for CAS mediation procedures.....	24
Despina Mavromati.....	
Arbitration and the European Convention on Human Rights.....	31
Wilhelmina Thomassen.....	
Jurisprudence majeure/Leading Cases.....	39
CAS 2014/A/3491	40
FC Karpaty v. Leonid Kovel & FC Dinamo Minsk.....	
1 May 2015.....	
CAS 2014/A/3572	44
Sherone Simpson v. Jamaica Anti-Doping Commission (JADCO).....	
7 July 2015	
CAS 2014/A/3647	48
Sporting Clube de Portugal SAD v. SASP OGC Nice Côte d’Azur.....	
CAS 2014/A/3648	
SASP OGC Nice Côte d’Azur v. Sporting Clube de Portugal SAD.....	
11 May 2015	
CAS 2014/A/3652	53
KRC Genk c. LOSC Lille Métropole	
5 juin 2015.....	
CAS 2014/A/3703	57
Legia Warszawa SA v. Union des Associations Européennes de Football (UEFA)	
28 April 2015.....	
CAS 2014/A/3706	62
Christophe Grondin v. Al-Faisaly Football Club.....	
17 April 2015.....	
CAS 2014/A/3710	66
Bologna FC 1909 S.p.A. v. FC Barcelona	
22 April 2015.....	
CAS 2014/A/3759	71

Dutee Chand v. Athletics Federation of India (AFI) & International Association of Athletics Federations (IAAF)	71
24 July 2015	
2014/A/3793	76
Fútbol Club Barcelona v. Fédération Internationale de Football Association (FIFA)	
24 April 2015 (operative part of 30 December 2014)	
CAS 2014/A/3870	81
Bursaspor Kulübü Derneği v. Union des Associations Européennes de Football (UEFA)	
11 June 2015	
CAS 2015/A/3874	85
Football Association of Albania (FAA) v. Union des Associations Européennes de Football (UEFA) & Football Association of Serbia (FAS)	
10 July 2015	
CAS 2015/A/3876	90
James Stewart Jr. v. Fédération Internationale de Motocyclisme (FIM)	
27 April 2015	
Jugements du Tribunal Fédéral/Judgements of the Federal Tribunal	94
Arrêt du Tribunal fédéral 4A_246/2014	
15 juillet 2015	
A. SA (recourant) c. B. et al. (intimés) et Fédération L. (intimée)	
Arrêt du Tribunal fédéral 4A_426/2014	99
6 mai 2015	
Club A. (recourant) c. Club B. (intimé)	
Arrêt du Tribunal fédéral 4A_70/2015	103
29 avril 2015	
A. Sport Club (recourant) c. B. (intimé)	
Informations diverses/Miscellaneous	107
Publications récentes relatives au TAS/Recent publications related to CAS	108

Message from the CAS Secretary General

With almost 500 cases registered, a figure never reached so far, 2015 has been again a busy year for the Court of Arbitration for Sport (CAS). This figure also shows the unfailing growth of the cases treated by the CAS. This tendency should not change in 2016, an Olympic year, and will have some consequences, such as the move to larger office space and the recruitment of additional staff. Nearly 30 new arbitrators and mediators have been appointed on the CAS list this year. Two new CAS ad hoc divisions will be created in 2016: for the Olympic Games in Rio de Janeiro, where for the first time, the CAS delegation will be composed of an equal number of women and men, and for the Asian Beach Games in Nha Trang/Vietnam.

The majority of the so-called “leading cases” selected for this issue reflects the high proportion of football jurisprudence dealt with by CAS Panels in general. Therefore, nine out of the twelve cases included in the Bulletin are football related.

In a contractual context, the case *FC Karpaty v. Leonid Kovel & FC Dinamo Minsk* analyses a breach of a contract of employment, while the principle and the exceptions regarding the obligation to pay a training compensation are examined in *Bologna FC v. FC Barcelone*. Interestingly, in *KRC Genk c. LOSC Lille Metropole*, the entitlement to a training compensation in a case of legal impossibility of the training club to offer a contract to the player and the application of the relevant national law is dealt with. Finally, the issue of the termination of a contract of employment with just cause is addressed in *Christophe Grondin v. Al. Faisaly Football Club*.

More particularly, in the field of transfers of players, the case *Sporting Clube de Portugal SAD v. SASP Nice Côte d’Azur* examines a case of transfer submitted to the fulfilment of

conditions precedent whereas in *FC Barcelona v. FIFA*, the issue of the ban of international transfers of minor players and the interpretation of article 19 FIFA RSTP is dealt with.

In a disciplinary context, the case *Legia Warszawa SA v. UEFA* contemplates the issue of sanctions against a club for fielding an ineligible player while the breach of the UEFA Club Licensing and Financial Fair Play Regulations is addressed in *Bursaspor Kulübü Derneği v. UEFA*. Of particular note is the famous case *Football Association of Albania v. UEFA* and *Football Association of Serbia* which deals with the misconduct of supporters during a match.

The two doping cases selected for this issue deal respectively with the evaluation of the degree of fault of the athlete and of the applicable sanction for the use of a Specified Substance (*Sherone Simpson v. JADCO*) and with the conditions of reduction of the sanction under No Significant Fault or Negligence for an athlete who tested positive before obtaining a TUE (*James Stewart v. FIM*).

For the first time in the history of the CAS, in the well-known *Dutee Chand* case, a CAS Panel addresses the validity of the IAAF Hyperandrogenic Regulations regarding the eligibility of female athletes with hyperandrogenism to compete in women’s competitions.

We are also pleased to publish an article prepared by Ms Wilhelmina Thomassen, ICAS member and former judge at the European Court of Human Rights, analyzing the application of the European Convention on Human Rights in arbitration procedures. Professor Ulrich Haas addresses the issue of the applicable law in football-related disputes while Mr Mark A. Hovell reviews the recent CAS Jurisprudence relating to football transfers. Ultimately the article of Ms

Despina Mavromati deals with the Mediation of sports-related disputes.

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

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

Matthieu REEB
CAS Secretary General

Articles et commentaires
Articles and Commentaries



Applicable law in football-related disputes

- The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law -

Ulrich Haas*

- I. Introduction
 - II. Starting point
 - III. No room for the second alternative in Art. 187 (1) of the PILA in CAS proceedings
 - IV. The relationship between an explicit and an implicit choice of law
 - A. Overview of the current opinions
 - B. The importance of the question of law
 - C. Observation
 - V. Conflict between an explicit choice of law by the parties and the “applicable regulations”
 - A. Overview of the current opinions
 - B. Observation
 - C. Delineation between Swiss law as invoked by Art. 66 (2) of the FIFA Statutes and the law that has been chosen by the parties
 - VI. Summary
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I. Introduction

The majority of the cases brought before the Court of Arbitration for Sport (“CAS”) concern football-related disputes. As a rule these are not disciplinary cases, where the association and the sportsman/sportswoman are on opposite sides. Rather, they generally involve contractual disputes between clubs, a club and players, or agents and clubs. In most cases these disputes are settled before the Appeal Arbitration Division of the CAS; this is because in most of these football-related disputes the CAS typically acts as a kind of “court of second instance”. In the “first instance”, judicial bodies of FIFA rule on these disputes, i.e. either the Dispute Resolution Chamber or else the Players’ Status Committee.

If these disputes end up before the CAS the question often arises as to which law on the

merits applies. A particular problem in this case is establishing the nature of the relationship between the *lex arbitri*, namely the Code of Sports-related Arbitration and Mediation of the CAS (the “CAS Code”), FIFA’s rules and regulations, and any choice-of-law agreement that may exist between the parties. CAS case law on this question is very inconsistent. At best there is agreement insofar as the question is an important and difficult one; as a CAS Panel has put it:¹

“The question as to which system of law governs the substantive issues in the appeal raises issues of interests and complexity”.

Hereinafter, therefore, the question as to the applicable law in football-related disputes in appeal arbitration proceedings before the CAS will be examined in greater detail.

II. Starting point

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This paper was presented at the CAS Arbitrators’ Seminar that was held in Evian on October 8, 2015.

¹ CAS (13.11.2014) 2013/A/3383-3385, no. 42.

The starting point for determining the applicable law in football-related disputes is firstly the *lex arbitri*, i.e. the arbitration law at the seat of arbitration. Since the CAS has its seat in Switzerland (Art. S1, R28 of the CAS Code), Swiss arbitration law is applied. As is well known, this distinguishes between national and international arbitration proceedings. Under Art. 176 (1) of the Swiss Private International Law Act (“PILA”) the latter always apply if the place of residence and/or domicile of at least one party was outside Switzerland at the time of concluding the arbitration agreement. The ensuing examination is based on the assumption that this prerequisite is fulfilled in the case at hand, i.e. that the PILA applies.

For international arbitration proceedings Art. 187 (1) of the PILA stipulates how the applicable law is to be determined in each case. The provision reads as follows:

“The arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such a choice, according to the law with which the action is most closely connected”.

This Article provides for two alternatives, namely where the parties have chosen the applicable law (first alternative) or where such a choice-of-law agreement has not been made (second alternative). In relation to the question of whether the parties have chosen the applicable law, it must be borne in mind

that such a choice can also be made informally. Unlike an arbitration agreement itself, therefore, a choice-of-law agreement is not bound by any formal requirements.² In addition it must also be borne in mind that the parties' choice-of-law-agreement may be explicit or implicit (tacit).³ It is always necessary, however, for there to be specific signs from which it can be inferred that the parties intended to choose a particular law. Therefore if the parties have not specified any choice of law at all, the arbitral tribunal may not second-guess the will of the parties. Thus, according to the unanimous view held in legal literature, the arbitral tribunal cannot assume a choice of law based on the hypothetical will of the parties.⁴ It is, therefore, irrelevant what law the parties would have chosen, if they had known that they had such autonomy.

In terms of content, the autonomy granted to the parties under Art. 187 (1) of the PILA is very wide-ranging. Thus, for instance, the parties can directly determine the applicable law themselves (e.g. “Any dispute arising out of or in connection with this contract shall be settled according to Spanish Law”).⁵ In this context the parties are not limited to choosing a national law. Rather, they can also agree on the application of an a-national law (“rules of law”) (e.g. the “lex sportiva”).⁶ It is also admissible if the parties merely indirectly determine the applicable law by

² CAS (31.1.2007) 2006/A/1024, no. 6.5; Mavromati/Reeb, *The Code of the Court of Arbitration for Sport*, 2015, Art. 58 no. 97; Kaufmann-Kohler/Rigozzi, *Arbitrage International*, 2nd ed., 2010, no. 608; Arroyo/Burckhardt, *Arbitration in Switzerland, The Practitioner’s Guide*, 2013, Art. 187 no. 15.

³ CAS (31.1.2007) 2006/A/1024, no. 6.5; BSK-IPRG/Karrer, 3rd ed. 2013, Art. 187 no. 102; CR-DIP/Bucher, 2011, Art. 187 no. 43; Dutoit, *Commentaire de la loi fédérale du 18 décembre 1987*, 2005, Art. 187 no. 3; Arroyo/Burckhardt, *Arbitration in Switzerland, The Practitioner’s Guide*, 2013, Art. 187 no. 15 et seq.

⁴ CAS (31.1.2007) 2006/A/1024, no. 6.5; Mavromati/Reeb, *The Code of the Court of Arbitration for Sport*, 2015, Art. 58 no. 98; Arroyo/Burckhardt, *Arbitration in Switzerland, The*

Practitioner’s Guide, 2013, Art. 187 no. 16; BSK-IPRG/Karrer, 3rd ed. 2013, Art. 187 no. 107; Kaufmann-Kohler/Rigozzi, *Arbitrage International*, 2nd ed., 2010, no. 609; Berger/Kellerhals, *Domestic and International Arbitration in Switzerland*, 3rd ed. 2015, no. 1388.

⁵ Arroyo/Burckhardt, *Arbitration in Switzerland, The Practitioner’s Guide*, 2013, Art. 187 no. 19 et seq.

⁶ CR-DIP/Bucher, 2011, Art. 187 no. 42; Arroyo/Burckhardt, *Arbitration in Switzerland, The Practitioner’s Guide*, 2013, Art. 187 nos. 9, 29; Berger/Kellerhals, *Domestic and International Arbitration in Switzerland*, 3rd ed. 2015, no. 1396; Haas, in Bernasconi/Rigozzi (Ed) *Sport Governance, Football Disputes, Doping and CAS Arbitration*, 2009, pp. 215, 218.

referring to a conflict-of-law rule on the basis of which the applicable law shall then be determined (“The applicable law shall be determined by the national conflict of law rules at the seat of the arbitral tribunal”).⁷ Finally it must be pointed out that the parties are not confined to choosing just a single applicable law for the legal dispute. Rather, they can declare that various laws are also applicable to different aspects of the dispute or else combine them with one another (“dépeçage”).⁸

III. No room for the second alternative in Art. 187 (1) of the PILA in CAS proceedings

The second alternative of Art. 187 (1) of the PILA only comes to bear if the parties have not made any choice of law, whereupon the arbitral tribunal must apply the law that is most closely connected with the action. If, on the other hand, the parties have made a choice of law, then the arbitral tribunal is bound by the agreement between the parties and may not apply the closest connection test within the meaning of Art. 187 (1) of the PILA.⁹ According to the settled case law of the CAS the second alternative of Art. 187 (1) of the PILA never applies; this is because by agreeing on the jurisdiction of the CAS the parties are declaring – implicitly at least – that they agree with the application of the CAS Code. This in turn, however, in Art. R58 of the CAS Code, contains a conflict-of-

law rule for determining the applicable law on the merits in appeal arbitration proceedings. This provision reads as follows:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such choice, according to the law of the country in which the federation, association or sports-related body has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

Thus the CAS case law generally regards an agreement conferring jurisdiction upon the CAS as an implicit and indirect choice of law by the parties within the meaning of the first alternative of Art. 187 (1) of the PILA, with the result that the closest connection test within the meaning of the second alternative is invariably not applied.¹⁰ The following decision by the CAS is cited as a representative example of this, which summarises this legal view thus:¹¹

“The PILA is the relevant law. ... Art. 187 para. 1 of the PILA provides - inter alia - that ‘the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected’ ... According to the legal doctrine, the choice of law made by the parties can be tacit and/or indirect, by reference to the rules of an arbitral tribunal. In agreeing to arbitrate

⁷ Kaufmann-Kohler/Rigozzi, *Arbitrage International*, 2nd ed., 2010, no. 617; Berger/Kellerhals, *Domestic and International Arbitration in Switzerland*, 3rd ed. 2015, no. 1393; BSK-IPRG/Karrer, 3rd ed. 2013, Art. 187 no. 103.

⁸ Kaufmann-Kohler/Rigozzi, *Arbitrage International*, 2nd ed., 2010, no. 614; Arroyo/Burckhardt, *Arbitration in Switzerland, The Practitioner’s Guide*, 2013, Art. 187 no. 24; Berger/Kellerhals, *Domestic and International Arbitration in Switzerland*, 3rd ed. 2015, no. 1397; see also Mavromati/Reeb, *The Code of the Court of Arbitration for Sport*, 2015, Art. 58 no. 106.

⁹ Arroyo/Burckhardt, *Arbitration in Switzerland, The Practitioner’s Guide*, 2013, Art. 187 no. 35. For the question whether a violation qualifies as a ground to challenge the award according to Art. 190

PILA, see Dutoit, *Commentaire de la loi fédérale du 18 décembre 1987*, 2005, Art. 187 no. 7; Berger/Kellerhals, *Domestic and International Arbitration in Switzerland*, 3rd ed. 2015, no. 1400.

¹⁰ CAS (31.1.2007) 2006/A/1024, no. 6.6: “Once the arbitral tribunal has established the actual intent of the parties, it must enforce their agreement, without examining the merits of the parties’ choice or second-guessing whether this choice is legitimate or appropriate. In particular, the arbitral tribunal may not refuse to apply the chosen law because it is incomplete, surprising or unfair in the circumstances of the contractual relationship”.

¹¹ CAS (17.7.2015) 2014/A/3850, no. 45 et seq.; see also Mavromati/Reeb, *The Code of the Court of Arbitration for Sport*, 2015, Art. 58 no. 101

the present dispute according to the CAS Code, the Parties have submitted to the conflict-of-law rules contained therein, in particular to Article R58 of the CAS Code...”.

This view, that in an agreement on an institutional arbitral tribunal a tacit agreement between the parties is also subject to the conflict-of-law rule for determining the applicable law contained in the rules of arbitration, is the predominant view in the Swiss legal doctrine. According thereto the reference to a set of arbitration rules can be seen as an implicit and indirect choice of law by the parties, leaving no room for the arbitral tribunal to apply the closest connection test in Art. 187 (1) of the PILA.¹²

IV. The relationship between an explicit and an implicit choice of law

The question now is how a CAS Panel should proceed if the parties have made not only an implicit (and indirect) choice of law, but also an explicit choice of law at the same time. The latter situation arises if the parties agree not only on the jurisdiction of the CAS as the arbitral tribunal to decide on the case, and thus implicitly also agree on the application of the CAS Code, but also – for example in the contract – directly and explicitly specify the law that applies to the case. In such a case the question then arises as to the nature of the relationship between the implicit choice of law on the one hand and the explicit choice of law on the other. In particular the question is raised as to whether in such a case any room at all is left

for the application of Art. R58 of the CAS Code.

A. Overview of the current opinions

The overwhelming view in the Swiss legal literature holds that an explicit choice of law always takes precedence over an implicit choice of law.¹³ In this regard Arroyo/Burckhardt are cited as a representative example:¹⁴

“... if the parties ... [only] agree on such a set of arbitration rules, the tribunal has to apply these rules and may not revert to Art. 187 (1) PILA to determine the law with the closest connection. If, however, the parties both directly choose the applicable law and refer to a set of arbitration rules, the direct choice of law prevails and there is no room for determining the applicable law indirectly by using the provisions of the chosen arbitration rules”.

If one subscribes to this view there would be no room for Art. R58 of the CAS Code from the outset in the event of an explicit choice of law by the parties. The provision would be supplanted and one would solely (and directly) arrive, under Art. 187 (1), at the law (explicitly) chosen by the parties. The CAS case law does not for the most part subscribe to this view. Even if the parties have made an explicit choice of law (e.g. in their contract), CAS Panels primarily apply the conflict-of-law rule in Art. R58 of the CAS Code and thus – at first glance at least – oppose the unanimous legal opinion in the Swiss legal doctrine.¹⁵ As a rule CAS Panels

¹² BSK-IPRG/Karrer, 3rd ed 2013, Art. 187 no. 124; Kaufmann-Kohler/Rigozzi, Arbitrage International, 2nd ed., 2010, no. 618 et seq.; Arroyo/Rigozzi/Hasler, Arbitration in Switzerland, The Practitioner's Guide, 2013, Art. R58 nos. 3, 7; Berger/Kellerhals, Domestic and International Arbitration in Switzerland, 3rd ed. 2015, no. 1393; Arroyo/Burckhardt, Arbitration in Switzerland, The Practitioner's Guide, 2013, Art. 187 nos. 22, 35; Haas, in Bernasconi/Rigozzi (Ed) Sport Governance, Football Disputes, Doping and CAS Arbitration, 2009, pp. 215, 218; contra Dutoit, Commentaire de la loi fédérale du 18 décembre

1987, 2005, Art. 187 no. 4: questionable whether there is still consent.

¹³ BSK-IPRG/Karrer, 3rd ed. 2013, Art. 187 no. 123; Berger/Kellerhals, Domestic and International Arbitration in Switzerland, 3rd ed. 2015, no. 139; see also Mavromati/Reeb, The Code of the Court of Arbitration for Sport, 2015, Art. 58 no. 101.

¹⁴ Arroyo/Burckhardt, Arbitration in Switzerland, The Practitioner's Guide, 2013, Art. 187 no. 22.

¹⁵ See Haas, in Bernasconi/Rigozzi (Ed) Sport Governance, Football Disputes, Doping and CAS

do not give any reasons¹⁶ for this course of action or sometimes only give reasons that are hard to follow. Thus, for example, CAS Decision 2014/A/3848 states as follows:¹⁷

“... the Club submits that the Employment Contract is 'regulated by laws of ... Kazakhstan ...'. The Panel finds that primarily the various regulations of FIFA shall be applied ... [according to R58 of the CAS Code] since this is a dispute of an international nature ...”.

Why the “international nature” of the arbitration proceedings should allow the parties' explicit choice of law to be ignored and/or the implicit (and indirect) choice of law to take precedence over the explicit and direct choice of law is not readily understandable, nor does it have any basis in law.

Another CAS award, for instance, states as follows:¹⁸

“The Panel notes that ... the Mandate ... also refers to ... the existing laws applicable in the territory of the federation. ... The Panel ... finds that it should be restrictive in applying national provisions other than Swiss law. ... Consequently, the Panel will ... [in application of R58 of the CAS Code] primarily apply the rules and regulations of FIFA ... Italian and Serbian laws and regulations are in principle not applicable ...”.

The CAS Panel does not give any comprehensible reasons whatsoever for its view that the national laws agreed on by the parties are to be applied only “restrictively” or not at all when Swiss law is not involved.

B. The importance of the question of law

The question of whether or not a direct choice of law that has been made by the parties (for example in the contract) prevails over Art. R58 of the CAS Code could be left open if Art. R58 of the CAS Code and Art. 187 (1) of the PILA are ultimately identical in terms of content. This is because in that case the outcome would invariably be the same regardless of whether the law applying to the case is derived directly from Art. 187 (1) of the PILA or else is determined circuitously under Art. R58 of the CAS Code. The question would then be of purely academic interest.

Like Art. 187 (1) of the PILA, Art. R58 of the CAS Code also distinguishes between whether or not the parties have made a choice of law. In the absence of a choice of law, Art. R58 of the CAS Code stipulates that the Panel shall apply *“the law of the country in which the federation, association or sport-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate”*. This approach is basically no different from the closest connection test provided for in the second alternative of Art. 187 (1) of the PILA. To this extent the two provisions are almost identical.¹⁹

In the event that the parties have made a choice of law, however, the question of law is different, since in this regard Art. R58 of the CAS Code stipulates that this choice of law is relevant only “subsidiarily”. Consequently Art. R58 of the CAS Code serves to restrict the autonomy of the parties, since even where a choice of law has been made, the “applicable regulations” are primarily applied, irrespective of the will of

Arbitration, 2009, p. 215, 222; however, für einen Vorrang einer explicit choice gegenüber einer tacit choice, see CAS (31.1.2007) 2006/A/1024, no. 6.7.

¹⁶ See e.g. CAS (31.3.2015) 2014/A/3746, no. 111 et seq.: “The Second Contract contains the following provision ... 'the validity ... of this Contract ... shall be governed ... with the ... Sudan Football Federation Association Rules, ... CAF and FIFA constitution and rules'. ... After analysing the

arguments ... and taking account of Art. R58 of the CAS Code ... the Sole Arbitrator considers that the present dispute shall be decided according to ...”.

¹⁷ CAS (31.7.2015) 2014/A/3848, no. 37 et seq.

¹⁸ CAS (7.4.2015) 2014/A/3742 no. 38 et seq.

¹⁹ Mavromati/Reeb, The Code of the Court of Arbitration for Sport, 2015, Art. 58 no. 85.

the parties. These are the (autonomous) rules of the association that made the first-instance decision that is being contested in the appeals arbitration procedure.²⁰ Since in football-related disputes this is the FIFA, under Art. R58 of the CAS Code – regardless of the parties' choice of law – the rules and regulations of FIFA apply accordingly. In summary, it must therefore be concluded that there are indeed differences between Art. R58 of the CAS Code and Art. 187 (1) of the PILA and therefore the question (which is dealt with differently by the Swiss legal doctrine and the CAS case law) as to the nature of the relationship between an explicit and an implicit choice of law cannot be left open.

C. Observation

The correct view is that the CAS case law is to be followed, whereby the implicit reference to Art. R58 of the CAS Code takes precedence over an explicit choice of law by the parties. Namely if one looks at the reasons given by the Swiss legal doctrine as to why an explicit choice of law by the parties prevails over an implicit choice of law contained in the arbitration rules of an institutional arbitral tribunal, then in this regard it states as follows:²¹

“... the explicit choice of the applicable law by the parties must take preference over the implicit and indirect choice of law contained in the arbitration rules of the arbitral institution, because the explicit choice ‘is more specific’ ... [and because] – in the rules of most arbitral institutions nothing can be found that restricts the parties' autonomy in respect of the choice of law”.

Therefore the decisive question is whether the CAS Code intends to curtail the parties'

autonomy with regard to the choice of law in appeal arbitration proceedings. If that is the case, then Art. R58 of the CAS Code takes precedence over an explicit choice of law by the parties. That is to say the parties' autonomy exists only within the limits set by the CAS Code. If the parties want the proceedings to be administered by the CAS, then they can only derogate from the legal framework prescribed by the CAS Code where the latter allows it. The fact that Art. R58 of the CAS Code restricts the parties' freedom to choose the applicable law is undisputed. As explained above, the provision impacts the parties' freedom of choice of law, since they can merely determine the subsidiarily applicable law. However, priority is given – regardless of the will of the parties – to the “applicable regulations”. The question is whether this model is compulsory, i.e. whether the CAS Code intends to exclude the parties from derogating from the provisions of Art. R58 of the CAS Code. Now and again the CAS case law understands Art. R58 of the CAS Code in precisely this way. Thus, for example, CAS award 2014/A/3527 states as follows:²²

“Art. R58 of the Code indicates how the Panel must determine which substantive rules/law are to be applied to the merits of the dispute. This provision recognizes the pre-eminence of the 'applicable regulations' to the 'rules of law chosen by the parties', which apply only subsidiarily. Art. R58 of the Code does not admit any derogation and imposes a hierarchy of norms...”.

This legal view must be followed. A certain overall effect is – in principle – typical of appeal arbitration proceedings. After all the subject of these proceedings concerns the contested “decisions” or “resolutions” of an international sports organisation. The

²⁰ CAS (23.4.2015) 2014/A/3626, no. 76: “... in the present case the 'applicable regulations' for the purpose of Article R58 of the Code are, indisputably, the FIFA's regulations, because the appeal is directed against a decision issued by FIFA ..”; CAS (31.10.2014) 2014/A/3523, no. 55.

²¹ BSK-IPRG/Karrer, 3rd ed. 2013, Art. 187 no. 12.

²² CAS (31.7.2015) 2014/A/3527, no. 57; likewise CAS (17.7.2015) 2014/A/3850, no. 51; (22.1.2015) 2013/A/3309, no. 70; (20.6.2014) 2013/A/3407, no. 66; TAS (3.12.2014) 2013/A/3401, no. 50 et seq.; CAS (23.6.2014) 2013/A/3398, no. 47; (13.11.2014) 2013/A/3383-3385, no. 43: “the applicable regulations prevail over the law chosen by the parties”.

purpose of concentrating appeals against decisions of an international sports organisation with the CAS is not least the desire to ensure that the rules and regulations by which all the (indirect) members are bound in equal measure are also applied to them in equal measure. This can only be ensured, however, if a uniform standard is applied in relation to central issues. This is precisely what Art. R58 of the CAS Code is endeavouring to ensure, by stating that the rules and regulations of the sports organisation that has issued the decision (that is the subject of the dispute) are primarily applicable. For good reason Art. R58 of the CAS Code grants the parties scope for determining the applicable law, and thus scope for changing the legal basis underlying the decision, only subsidiarily. This objective of establishing the most uniform legal standard possible in appeal arbitration proceedings, which underlies Art. R58 of the CAS Code, is, for instance, clearly expressed in the following CAS decision:

“La formation arbitrale considère à cet égard que le sport est par nature un phénomène transcendant les frontières. Il est non seulement souhaitable, mais indispensable que les règles régissant le sport au niveau international aient un caractère uniforme et largement cohérent dans le monde entier. Pour en assurer un respect au niveau mondial, une telle réglementation ne doit pas être appliquée différemment d’un pays à l’autre, notamment en raison d’interférence entre droit étatique et réglementation sportive. Le principe de l’application universelle des règles de la FIFA ... répond à des exigences de rationalité, de sécurité et de prévisibilité juridique”.

[Free translation : “The arbitral tribunal considers in this regard that sport by its very nature is a phenomenon that transcends national frontiers. It is not only desirable, but in fact indispensable that the rules that govern sport at an international level are of a uniform character and largely coherent worldwide. In order to ensure the uniform application at an international level, such rules and regulations must not be applied differently from one country to the other, in particular with respect to the

interference of national laws with the rules and regulations of the sport. The principle of universal application of the FIFA rules ... follows the requirements of rationality, legal security and predictability”.]

To summarise, it must therefore be concluded that Art. R58 of the CAS Code – because its intention is to mandatorily restrict the parties' freedom of choice of law – always takes precedence over any explicit (direct or indirect) choice of law by the parties. Hence any choice of law made by the parties does not prevail over Art. R58 of the CAS Code, but is to be considered only within the framework of Art. R58 of the CAS Code and consequently affects only the subsidiarily applicable law.

V. Conflict between an explicit choice of law by the parties and the “applicable regulations”

If the “applicable regulations” within the meaning of Art. R58 of the CAS Code are the FIFA regulations, then an additional conflict may arise with the law that has been explicitly chosen by the parties. Namely the FIFA regulations themselves in turn – “additionally” – refer to Swiss law. In this context Art. 66 (2) of the FIFA Statutes states as follows:

“The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.

Therefore the question arises as to the nature of the relationship between the reference in Art. 66 (2) of the FIFA Statutes to Swiss law and the explicit choice of law – contained in the contract for example – made by the parties.

A. Overview of the current opinions

CAS case law on this question is extremely inconsistent.²³ The question is sometimes left open if the (subsidiarily applicable) law chosen by the parties and Swiss law do not differ from one another in terms of content.²⁴ Other CAS Panels ignore the reference to Swiss law in Art. 66 (2) of the FIFA Statutes on the grounds that under Art. R58 of the CAS Code an explicit choice of law takes precedence.²⁵ On the other hand most CAS formations ignore the (explicit) choice of law of the parties and focus solely on Swiss law as the subsidiarily applicable law.²⁶ This outcome is sometimes substantiated by the argument that the reference in Art. 66 (2) of the FIFA Statutes contains an (a posteriori) implicit choice of law by the parties, which supersedes the choice of law made previously.²⁷ Sometimes the law that has been explicitly chosen by the parties is also denied recognition on the grounds that the legal dispute is of an international nature, which is not compatible with the subsidiary application of any law other than Swiss law.²⁸ On other occasions a differentiated solution is advocated, according to which there is co-existence between Swiss law referred to in Art. 66 (2) of the FIFA Statutes and the law chosen by the parties.²⁹ One CAS formation summarised this as follows:³⁰

“Against this background ... the Panel finds that ... CAS [must] apply Swiss law subsidiarily to the primary application of the various regulations of FIFA ... Nevertheless, the Panel finds that the law chosen by the parties is not to be wholly ignored, ... The Panel finds that the law chosen by the parties is ... a distinct set of rules, applied in addition ... to the various regulations of FIFA and/or Swiss law”.

B. Observation

This view, which ignores the reference in Art. 66 (2) of the FIFA Statutes, is contradicted by the clear wording of Art. R58 of the CAS Code. In appeal arbitration proceedings this provision assumes that the federation regulations take precedence. Consequently, the rules and regulations of a federation also take precedence over any legal framework chosen by the parties – e.g. – in their contract. If, therefore, the federation rules provide that Swiss law is to be applied additionally (to the rules and regulations of FIFA) then this must be complied with by the Panel. To this extent the Swiss law referred to in Art. 66 (2) of the FIFA Statutes is part of the – according to Art. R58 of the CAS Code – mandatorily applicable rules and regulations of the federation.³¹

²³ Cf. Kleiner, *Der Spielervertrag im Berufsfussball*, 2013, p. 291 seq.; Haas, in Bernasconi/Rigozzi (Ed) *Sport Governance, Football Disputes, Doping and CAS Arbitration*, 2009, pp. 215, 222.

²⁴ CAS (20.6.2014) 2013/A/3407, no. 69; TAS (3.12.2014) 2013/A/3401, no. 56.

²⁵ In this sense apparently CAS (20.5.2005) 2004/A/678, no. 5.3 et seq.; see also CAS (19.11.2013) 2013/A/3160, no. 71 et seq.

²⁶ See also references in Kleiner, *Der Spielervertrag im Berufsfussball*, 2013, p. 292; in principle also CAS (8.5.2015) 2014/A/3577, no. 89; (8.5.2015) 2014/A/3582, no. 134; (5.3.2015) 2014/A/3547, no. 101 et seq.; (27.2.2015) 2014/A/3679, no. 64 et seq.; (28.1.2015) 2014/A/3640, no. 7.5; (11.5.2015) 2013/A/3647&3648, no. 94 et seq.; (7.3.2014) 2013/A/3314, no. 43; (4.5.2015) 2014/A/3757, no. 45: “... the Sole Arbitrator accepts that the FIFA regulations apply and in addition Swiss Law. In case both cannot provide a sufficient source of law (sic!)

and the need to fill a gap arises, the applicable law shall be determined under the principles of International Private Law including respective Treaties”.

²⁷ CAS (24.4.2007) 2006/A/1180, no. 7.9 et seq.

²⁸ CAS (7.4.2015) 2014/A/3742, no. 47.

²⁹ CAS (18.12.2006) 2005/A/1123&1124, no. 69 et seq.

³⁰ CAS (13.11.2014) 2014/A/3383-3385, no. 49 seq.; in diesem Sinne auch Kleiner, *Der Spielervertrag im Berufsfussball*, 2013, p. 296 seq.; CAS (31.7.2015) 2014/A/3527, no. 56 et seq.; see also CAS (11.3.2015) 2014/A/3634, no. 37; (13.1.2015) 2013/A/3364, no. 77; (22.1.2015) 2013/A/3309, no. 73; (31.3.2014) 2013/A/3207, no. 42.

³¹ See also Haas, in Bernasconi/Rigozzi (Ed) *Sport Governance, Football Disputes, Doping and CAS Arbitration*, 2009, pp. 215, 222 seq.

However, a view that ignores the explicit choice of law of the parties is not convincing either. Under no circumstances does an implicit choice of law in favour of Swiss law exist. The assumption that an agreement on the jurisdiction of the CAS as the arbitral tribunal to decide on the case contains an – implicit – agreement by the parties to (indirectly) determine the law that is applicable to the case under Art. R58 of the CAS Code is still plausible. But if one were to assume that the intent of the parties also includes the application of the FIFA rules, via the reference in Art. R58 of the CAS Code, as well as the application of Swiss law in addition, via the reference in Art. 66 (2) of the FIFA Statutes, this would cause the intent of the parties to degenerate into pure fiction. Such a chain of double references is no longer supported by any implicit intent by the parties.³² This applies all the more if the parties have previously chosen a different law, trusted in the existence of this choice of law and hence have generally not been aware of any a posteriori choice of law either.

The view that ignores the choice of law by the parties by referring to the international nature of the litigation is not convincing either. Admittedly, with a view to the equal treatment of all the (indirect) members of a sports association, it is true that there is a need for a uniform legal standard. This need, however, has already been transposed into Art. R58 of the CAS Code, in that this provision stipulates that – regardless of the intent of the parties – the “applicable regulations” always apply to the dispute and the choice of law by the parties acquires only an auxiliary function, namely specifying the subsidiarily applicable law. This small amount of autonomy that the parties retain under Art. R58 of the CAS Code cannot now, contrary to the clear wording of the provision, be completely eroded by the remark that the dispute is of an “international nature”. This just leaves the

legal view whereby, in addition to the “applicable regulations”, both Swiss law and the law chosen by the parties apply to the dispute (“dépeçage”). This view presupposes, however, that the scope of application of both laws can be rationally delineated from one another.

C. Delineation between Swiss law as invoked by Art. 66 (2) of the FIFA Statutes and the law that has been chosen by the parties

FIFA lays down the standard for a particular sports industry in its rules and regulations. This applies, for instance, in the case of the Regulations on the Status and Transfer of Players (“RSTP”). The purpose of these RSTP is – as set out in Art. 1 RSTP – to “*lay down global and binding rules³³ concerning the status of players, their eligibility to participate in organized football, and their transfer between clubs belonging to different associations*”. The RSTP lay down uniform standards for these questions of law at global level. Where Art. 66 (2) of the FIFA Statutes “additionally” refers to Swiss law, such a reference only serves the purpose of making the RSTP more specific. In no way is the reference to Swiss law intended to mean that in the event of a conflict between the RSTP and Swiss law, priority must be given to the latter. Rather, the reference to the “additionally” applicable Swiss law is merely intended to clarify that the RSTP are based on a normatively shaped preconception, which derives from having a look at Swiss law. Consequently the purpose of the reference to Swiss law in Art. 66 (2) of the FIFA Statutes is to ensure the uniform interpretation of the standards of the industry. Under Art. 66 (2) of the FIFA Statutes, however, issues that are not governed by the RSTP should not be subject to Swiss law. Swiss law does govern, for example, the question of methodology as to FIFA rules and regulations (including the RSTP) should be interpreted³⁴ or how, in the

³² See in this respect Kleiner, Der Spielervertrag im Berufsfussball, 2013, p. 295.

³³ Emphasis added.

³⁴ See e.g. Belott/Nettle/Haas, in Lewis/Taylor (Ed) Sport: Law and Practice, 3rd ed., 2014, E 3.121.

event of a conflict, one should proceed when faced with a choice between a subordinate set of an association's rules and regulations (e.g. the RSTP) and a superordinate one (e.g. the FIFA Statutes). The question as to whether a party acquires standing to sue or standing to be sued in disputes governed by the RSTP and, if so, which party, is also a question of substantive law which, although assumed in Art. 22 of the RSTP, is nevertheless not defined, with the result that this question must likewise be clarified under the “additionally” applicable Swiss law.³⁵ The same applies to the question of who, in connection with the application of the RSTP, bears the burden of proof for particular issues. This is also a question of substantive law, which must be derived directly from the RSTP or – in the absence of any explicit provision³⁶ – is subject to Swiss law under Art. 66 (2) of the FIFA Statutes.³⁷ In addition the RSTP touch on a large number of legal concepts, which are neither defined in the “definition section” of the RSTP nor are conclusively clarified in the FIFA Statutes. For instance, where a case raises the question of whether a “contract in writing” exists (as the definition of a “professional player” within the meaning of the RSTP assumes), it is necessary to refer to Swiss law for a definition of “in writing”.³⁸ By way of another example, Art. 14 of the RSTP specifies that “*a contract may be terminated by either party without consequences of any kind ... where there is just cause*”. But for the question of under what conditions a “just

cause” can be assumed, the Panel must then refer to Swiss law. This is the only way in which a uniform interpretation and application of the provision can be ensured.³⁹ The same applies to the calculation of the damage under Art. 17 (1) of the RSTP. Here too – where questions of interpretation are concerned – recourse must be made to Swiss law, such as for calculating the damage⁴⁰, or else for determining whether and to what extent the amount of the damage should be reduced due to contributory negligence⁴¹.

This leaves a clear, but small scope of application for the subsidiary applicable law chosen by the parties. In fact this affects all matters that are not addressed in the FIFA rules and regulations and that are therefore not regulated. However, such matters do not require the globally uniform application of the law and thus – since they are not part of the standards of the industry set by FIFA – they can be left to the autonomy of the parties. In relation to these questions of law it would be intolerable if – against their will – a different law were to be subsequently imposed upon the parties. Matters that are subject to the parties' autonomy include, for instance, whether and under what conditions a contract materialises,⁴² in accordance with which principles this is to be interpreted, whether and under what conditions the fulfilment of a contractual term can be feigned,⁴³ whether a valid representation exists in connection with concluding the

³⁵ CAS (17.7.2015) 2014/A/3850, no. 62 et seq.; so ausdrücklich auch BSK-IPRG/Karrer, 3rd ed. 2013, Art. 187 no. 110.

³⁶ However, see also Art. 12(3) of FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, see in this respect, (31.3.2014) 2013/A/3207, no. 48 et seq.

³⁷ CAS (7.4.2015) 2014/A/3742, no. 59 et seq.; (31.7.2015) 2014/A/3527, no. 67.

³⁸ CAS (31.3.2014) 2013/A/3207, no. 61.

³⁹ See CAS (31.7.2015) 2014/A/3527, no. 64 et seq.; (27.7.2006) 2006/A/1062, no. 8.3; (23.6.2014) 2013/A/3398, no. 55 et seq.; (15.11.2006) 2006/A/1100, no. 8.2.4; (24.4.2007) 2006/A/1180,

no. 26; (4.5.2015) 2015/A/3757, no. 56; (20.6.2014) 2013/A/3407, no. 78 et seq.; see also CAS (22.1.2015) 2013/A/3309, no. 93 et seq.; Haas, in Bernasconi/Rigozzi (Ed) Sport Governance, Football Disputes, Doping and CAS Arbitration, 2009, pp. 215, 227 seq.

⁴⁰ See CAS (31.7.2015) 2014/A/3527, no. 77 et seq.; (23.6.2014) 2013/A/3398, no. 67; (19.5.2009) 2008/A/1519&1520, nos. 156, 176.

⁴¹ CAS (28.1.2015) 2014/A/3640, no. 9.12.

⁴² CAS (22.1.2015) 2013/A/3309, no. 84 et seq.; (11.5.2015) 2013/A/3647&3648, no. 101 et seq.

⁴³ CAS (11.5.2015) 2013/A/3647&3648, no. 113 et seq.

contract, under what conditions and in what amount interest can be awarded,⁴⁴ or under what material conditions offsetting against a claim can be declared.⁴⁵ If the parties have not chosen a subsidiarily applicable law, then with respect to the following matters the arbitral tribunal must apply the law within the meaning of Art. R58 of the CAS Code that is most closely connected. This will often not be the law at the seat of the sports organisation that made the decision in the proceedings of first instance.⁴⁶

VI. Summary

- (1) The starting point for determining the applicable law is Art. 187 (1) of the PILA. This provision distinguishes between whether or not the parties have made an agreement on the applicable law.
- (2) In CAS proceedings the parties have invariably made a choice of law, since the agreement on the CAS as the court of arbitration always also entails an implicit (and indirect) agreement in relation to the provision of Art. R58 of the CAS Code.
- (3) This implicit agreement on Art. R58 of the CAS Code takes precedence over any explicit choice of law by the parties (for example in the contract), since the purpose of Art. R58 of the CAS Code is to restrict the autonomy of the parties. This Article provides for a mandatory hierarchy of the applicable legal framework, which the parties cannot change. Consequently the parties are entitled to freedom of choice of law solely within the limits set by Art. R58 of the

CAS Code, with the result that they can only determine the subsidiarily applicable law. In contrast, under Art. R58 of the CAS Code the “applicable regulations” always primarily apply, regardless of the will of the parties.

- (4) If for their part the “applicable regulations” contain a reference to a national law (see for example Art. 66 (2) of the FIFA Statutes), then the scope of application of the national law thus invoked must be delineated from the law chosen by the parties. Swiss law as invoked in Art. 66 (2) of the FIFA Statutes does not prevail over the choice of law made by the parties. Rather, this gives rise to a co-existence of the “applicable regulations”, Swiss law and the law chosen by the parties.
- (5) The application of Swiss law is confined to ensuring uniform application of the FIFA regulations. Art. 66 (2) merely clarifies that the FIFA regulations are based on a normative preconception, which is borrowed from Swiss law. Therefore if questions of interpretation arise over the application of the FIFA regulations recourse must consequently be made to Swiss law in this regard.
- (6) Accordingly any other issues (regarding interpretation and application) that are not addressed in the FIFA regulations, i.e. for which FIFA has not set any uniform standards of the industry, are subject to the law that has been chosen by the parties.

⁴⁴ CAS (31.7.2015) 2017/A/3864, no. 105; (31.7.2015) 2014/A/3848, no. 117 et seq.; (4.5.2015) 2015/A/3757, no. 69; CAS (19.5.2009) 2008/A/1519&1520, no. 182 seq.

⁴⁵ CAS (31.7.2015) 2014/A/3848, no. 81 et seq.

⁴⁶ Contra CAS (31.7.2015) CAS 2017/A/3864, no. 105 et seq.

A brief review of recent CAS Jurisprudence relating to football transfers

Mark A. Hovell*

- I. Introduction
 - II. What is a transfer?
 - III. What if... (Three examples of recent transfer cases)
 - A. CAS 2014/A/3588 Bursaspor v. Nancy
 - B. CAS 2014/A/3508 Lokomotiv v. FUR and Nika
 - C. CAS 2014/A/3647 – 48 Sporting v. Nice
 - VII. Conclusion
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I. Introduction

This is a huge area of work for the Court of Arbitration for Sport. There are dozens and dozens of cases each year on this topic but in this article I am just going to pick on a few of the more interesting cases of the last 12 months. This, of course, is extremely subjective. But I tend to read such awards by reviewing the facts and the first instance decision, then skipping straight to the last page to see if the Panel allowed or rejected the appeal. It's when my initial view is wrong that I read the whole award! So whilst these 3 might not be the most famous cases in this area over the last 12 months, these are ones I enjoyed reading and learning from and were the ones I presented to the CAS Conference held in October 2015 in Evian.

II. What is a transfer?

Perhaps the best way to understand what a transfer is in professional football is to take a real life example. Everybody will be familiar with the Portuguese player Ronaldo. At one stage he was playing for Manchester United and the two of them were parties to a contract of employment which bound them to each other. In addition Manchester United held his registration through the English Football Association.

As we know, Real Madrid were interested in acquiring his services so they entered into negotiations with Manchester United, as Ronaldo's contract with Manchester United was still ongoing. The two clubs agreed a fee and Real were able to speak to the player about offering him a new contract of employment with them. Real and Ronaldo agreed personal terms. Manchester United and Real then enter into the transfer agreement, Manchester United and the player terminate their contract of employment and the player and Real enter into their new contract of employment. Real applied for the player's international transfer certificate from the English Football Association via the Spanish Federation and then register him there. All details go through FIFA's transfer matching system (FIFA TMS) and Manchester United get €80m.

In essence this is a football transfer. It appears simple, so what could go wrong?

III. What if ...

Well in reality football transfers are rarely that straightforward. Disputes tend to come out when the drafting is poor or requires interpretation or where one party doesn't honour the transfer agreement and payments aren't made. However, additional complications arise if the player is under 23

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and training compensation or solidarity payments are required; if there are conditional payments or bonuses; is there a condition precedent that has to be fulfilled; if there are "bridge" transfers, a phenomenon that is common in South America; likewise if there are third party ownership issues; what happens to transfer windows are narrowly missed; what happens if it's loan rather than a transfer; or if there are sell on; etc, etc.

This article will focus on 3 recent cases that cover bonus payments, sell on clauses, loans dressed up as transfers, condition precedents and missing transfer windows and we will look at how the CAS Panels assigned with these cases dealt with the disputes at hand.

A. CAS 2014/A/3588 Bursaspor v. Nancy

This case was a classic interpretation case regarding the transfer of the Senegalese player Alfred N'Diaye for €2.1m from Nancy to Bursaspor before the 2011/12 Season.

There was an additional clause in the transfer agreement that would result in Bursaspor paying more, should it qualify for Europe and the player play a requisite number of games. The clause in question says:

"In addition to the main transfer fee the following bonus payments are to be added:

- should Bursaspor participate in the Europa League and should the player participate in at least 20 (twenty) official games during the season, Bursaspor shall pay EUR 150,000.00 according to the modalities as stipulated in article 5".

Bursaspor had finished third in the 2010/11 season of Super Lig, and had therefore qualified for the 2011/12 UEFA Europa League. The Club played in the initial stages of the 2011/12 competition but got knocked out in the qualifying stages before the group stages. They then went on to play the 2011/12 season of Super Lig with the Player playing 20 games.

At the end of that season Nancy said that Bursaspor had "participated in the Europa

League" and that the Player had played 20 games "during the Season", so it was entitled to the money. On first reading that may look correct, but Bursaspor argued that it hadn't participated in the actual Europa League and that the Player hadn't contributed anything that resulted in Bursaspor qualifying for the initial stages either.

As such, the Panel had to consider what is the Europa League and which season does the Player have to play his 20 games in for this clause to be triggered.

The Panel started with UEFA's own Regulations and noted that the drafting within Article 1 and Article 7 of the UEFA Europa League Regulations seem to contradict each other as Article 1 defined the Europa League as including the qualifying phase and the play off phase, whereas Article 7 had the Europa League only starting after the play offs had been concluded.

The Panel ultimately had to interpret the contractual clause and in this case had to use the laws of the contract itself, i.e. French law, as there was nothing in UEFA's or FIFA's own Regulations on how to interpret contracts.

The French Civil Code states that in cases where there is a discrepancy between the literal wording of an agreement and the common intention of the parties, the latter prevails. As such the Panel had to look behind the literal wording and look at the parties' intentions. This means that CAS Panels can look at emails, hear evidence from those involved in the transfer etc. In this case the Panel was satisfied that leading up to the transfer Nancy wanted more money than Bursaspor would pay for the Player so it was agreed that if Bursaspor got into UEFA's Competitions to a stage where extra money was made (i.e. the Group stages) then that extra money could pay more to Nancy as a bonus, but only if the player played his part on the pitch in the qualifying season hence the 20 games.

In this case Nancy were looking for money when both parties knew that Bursaspor had already qualified for the Europa League, without the Player's assistance (as his 20 games were after it had qualified) and the Panel determined that Bursaspor didn't actually make it through to relevant stage of the Europa League competition (i.e. the Group stage) having been knocked out of the qualifying rounds where the intention was that any money would only be paid if the Club advanced as far as the Group stages. As such the Panel determined that the common intention was that the clause wouldn't be triggered at this stage.

This is a classic interpretation case where the CAS panel went behind the literal wording to find the right result.

B. CAS 2014/A/3508 Lokomotiv v. FUR and Nika

The second case regards the transfer of the Russian player Denis Glushakov from FC Nika to FC Lokomotiv in 2005. In addition to their being a transfer fee there was also a sell on clause and a bonus in case the player played 5 games in the Russian Football Championship for Lokomotiv.

The relevant clauses said:

“2.FC Lokomotiv undertakes to pay FC Nika 15% of the amount received for the transfer of D.B.Glushakov from FC Lokomotiv to another football club.

3. FC Lokomotiv shall pay FC Nika USD 250,000 in Rubles at the exchange rate as at the date of payment in case if the Player included in official protocols for 5 matches of the Russian Football Championship as a player representing FC Lokomotiv”.

Again, clause 2 would appear to be a fairly standard sell on clause, but that is rarely the case in the world of football. Looking at the chronology the original transfer of the Player from Nika to Lokomotiv took place in December 2005. Just over 6 months later the Player is transferred by Lokomotiv to FC SKA, but for no transfer fee. Only 5 months

after that the Player and SKA mutually terminate his playing contract and the day later in November 2006 the Player re-joins Lokomotiv. By the 2008/9 season the Player has broken into the first team of Lokomotiv and plays the 5 games which results in Lokomotiv paying \$250,000 to Nika in accordance with the original transfer agreement. The Player becomes a success at Lokomotiv and in June 2013 Lokomotiv transfer him to Spartak Moscow for a transfer fee of €8m.

Nika claim 15% of the €8m i.e. €1.2m but Lokomotiv point to the fact that the sell on clause had already been triggered back in 2006 when the Player was transferred to FC SKA. As such Nika were only entitled to 15% of zero i.e. €0.

The case came to CAS and Nika raised the argument that the sell on clause had two conditions: that there had to be a permanent transfer of the Player to a third club; and that Lokomotiv must receive a fee. Lokomotiv on the other hand said that the only condition was the permanent transfer.

So again, there was an interpretation issue for the Panel to determine, this time using Russian law which was the law of the contract. Under Russian law if the literal meaning of the words are vague, then the Panel must look for the actual common will of the parties, which can be determined by looking at correspondence, the behaviour of the parties and what is customary practice in football. In this case the Panel concluded that there was never a guarantee that there would be a fee received when transferring the Player on. Sell ons are never guaranteed, it is more a sharing of risk, players can get injured, they may not be a success and may not be sold on at a profit. Ultimately the Panel did not find there was this second condition.

The Panel then looked at the “transfer” to SKA in more detail. When they looked at the paperwork they noticed that it was labelled as a transfer, albeit for no fee, they noticed that the Player's contract with Lokomotiv came to

an end and that he signed a new contract of employment with SKA, they also noted that the Player's workbook recorded the transfer and the change of employer, in addition there was no right to get the Player back once his employment with SKA ended.

However, if the Player had definitively transferred then why did Lokomotiv continue to honour clause 3 of the original contract and pay Nika \$250,000 when the Player signed with Lokomotiv for the second time and made his 5 appearances? Why would Lokomotiv transfer a player for free having just paid \$300,000 for him 6 months earlier?

The Panel were able to hear evidence that the former President of Lokomotiv and from the Player himself and it was noted that there was an extremely close relationship between Lokomotiv and SKA and that there were Russian Football Regulations that put a limit on the number of loan players a club could take on in a season. Lokomotiv have already loaned two other players to SKA and SKA had run out of players that it could take on loan. It was therefore felt that what Lokomotiv and SKA had done was dressed up a loan as a transfer.

Using Swiss law to assess the true nature of the move as a loan resulted in two consequences. Firstly the transfer to SKA was invalid and did not trigger the sell on, rather, secondly, the subsequent transfer to Spartak did and therefore Nika got their 15% of that transfer fee.

C. CAS 2014/A/3647 – 48 Sporting v. Nice

This is an interesting case regarding a failed transfer of the Portuguese player Djalo from Sporting Lisbon to Nice in 2011. It is particularly topical as the reason it failed was because the transfer just missed the Summer transfer window closing. This is exactly what happened with David De Gea's failed move between Manchester United and Real Madrid this year. The events in question all took place on the 31 August 2011. It appeared that Nice

and Sporting had agreed on a €1m transfer fee with a sell on for the transfer of the Player from Sporting to Nice. At 15.30 that day the transfer agreement between the two clubs was agreed.

The Player arrived at Nice at 16:00 that day to negotiate his personal terms with Nice however a difficulty arose in that he wanted paying gross of tax and not net of tax. The negotiations broke down but at 22:30 that evening the President of Nice and the Player started to renegotiate. In order to find more money for the Player, Nice determined to reduce the sell on percentage by 10% and as such a second transfer agreement was produced and sent by Nice to Sporting at 23:50.

At 23:59 Sporting returned the signed transfer agreement and at 00:04 Nice uploaded it into FIFA's TMS. At 00:05 the French Football Federation requested the ITC from the FIFA TMS, but as the transfer window had closed it was not issued.

The actual transfer agreement contained a number of condition precedents (1) that Nice and the Player signed an employment contract; (2) that the ITC was obtained; and (3) that the new employment contract was admitted by the French Football League.

Having had no luck with the FIFA TMS system the French Football Federation asked FIFA direct to issue an ITC but its Player Status Committee refused to issue the ITC.

The Player had remained at Nice and played some warm up games and had a practice with the team whilst this was all going on. Nice and the Player appealed to CAS requesting provisional measures, but these were not granted.

At this stage Nice changed tactics and asked the French Football League to deny the request of the Player to admit the playing contract and it also withdrew its CAS appeal. A little later as Nice had never paid the Player, the Player terminated its contract with Nice.

When the winter transfer window opened Sporting uploaded the original transfer agreement but Nice didn't make a counter instruction in TMS and just as the window was closing the Player, who had got fed up of waiting, joined Benfica.

So at this stage it is interesting to note that neither Nice had the Player nor has Sporting the transfer fee, rather Benfica had the Player without paying a transfer fee! As such Sporting appealed a claim to FIFA and FIFA awarded them the sum of €1m plus interest from Nice. Both parties appealed this decision to the CAS. It should be noted that as the ITC was never produced and as the French Football League did not admit the playing contract two of the condition precedents weren't met. As such Nice said there was no contract to enforce and therefore no transfer fee to pay.

In this case, as it was an appeal from FIFA, the Panel looked at FIFA's Regulations and at Swiss law to fill any lacuna or any gaps in those Regulations. FIFA's Regulations were silent as to how condition precedents were to be dealt with whereas there are three exceptions under Swiss law regarding condition precedents.

These are to be found in the Swiss Code of Obligations.

Article 151.2 says that *"the contract takes effect as soon as the condition precedent occurs, unless the parties clearly intend otherwise"*.

Sporting tried to argue that as the Player had played and trained with Nice then it was clear that Nice did not intend to enforce the condition precedents. The Panel, however, felt that the Player was merely training whilst the appeals against FIFA were ongoing. It wasn't a clear intention to dispense with the conditions precedents.

Article 156 of the Swiss Code of Obligations deals with where one party acts in "bad faith". But here the Panel didn't feel that Nice's actions had gone against good faith so Article

156 was not invoked either. However Article 152.1 was relevant. This says that:

"Until such time as the condition precedent occurs the conditional obligor must refrain from any act which might prevent the due performance of his obligations".

The Panel noted here that Nice were the ones that conducted the last minute negotiations on the transfer window day; it was the one that withdrew the CAS appeal; it was the one that asked the French Football League not to admit the playing contract; it didn't pay the Player which resulted in the Player terminating the playing contract; and it refused to upload the counter request on TMS when the transfer window reopened in the winter.

The Panel noted that there was no time limit in which to complete the actual condition precedents and that the transfer could have been concluded in the winter transfer window so Nice should have safeguarded this possibility.

The Panel considered that if Nice had fulfilled its obligations under Article 152.1 of the Swiss Code of obligations then Sporting would have received a transfer fee of €1m. Sporting had also claimed sporting damages and for a loss of chance on the sell on clause, but the Panel were not convinced by either of these claims.

Finally, the Panel did look at Sporting's own actions. It had actually terminated its contract with the Player and could have made such termination conditional too and therefore retained the services of the Player. As such invoking Article 44.1 of the Swiss Code of Obligations the sum awarded was reduced by 20% to reflect Sporting's contributory behaviour.

III. Conclusion

As stated above these are just three examples of recent transfer cases out of the hundreds

of transfer disputes that have found their way to the Court of Arbitration over the years.

It is a fast moving area of law as the amounts at stake are increasing and the level of technical arguments being brought by the parties' lawyers improves.

Mediation of sports-related disputes: facts, statistics and prospects for CAS mediation procedures

Despina Mavromati*

- I. CAS Mediation: Facts and Figures
- II. Conduct and characteristics of a CAS mediation procedure
- III. Developing CAS mediation – work at different levels
- IV. Arguments in favour of a more expanded use of mediation in sports disputes

Annexes

- A. Sample Model of a CAS Settlement Agreement
 - B. Statistics in CAS mediation procedures
-

I. CAS Mediation: Facts and Figures

Sporting disputes – and in particular football-related disputes – bear numerous particularities compared to other commercial or personal disputes. The same applies to the mode of resolution for sports-related disputes, which are typically resolved through arbitration: in this respect, the Court of Arbitration for Sport (CAS) is widely-known for its sports arbitration mechanism, developed upon the initiative of the former IOC President J. A. Samaranch thirty two years ago. To date, CAS has registered over 4300 procedures, with an average of almost 400 registered procedures per year since 2011.

CAS mediation was first initiated in 1999 and has registered approximatively 50 mediation procedures. Interestingly and notwithstanding the low number of procedures, many different types of disputes were resolved through mediation and the success rates (i.e. cases in which the parties signed a settlement agreement) were, until now, very high.¹

Logically - and similar to arbitration procedures, football is the protagonist in CAS mediation procedures. However, CAS mediation has also registered cases from many other disciplines, like cycling (mostly contracts and sponsorship agreements), boxing, motocross and motorcycling disputes, swimming, triathlon, gymnastics, judo and basketball. All these figures show a pattern that will probably remain similar even with the potential expansion of CAS mediation.

It must be noted that more than a 60% of the football disputes that have been brought before CAS in mediation relates to transfer disputes, whereas a 35 % concerns contractual disputes between clubs, players, agents and coaches. Interestingly, and as the exception confirming the rule that disciplinary disputes are excluded from mediation,² another 5% was about a dispute of disciplinary nature.

What is the success rate of CAS mediation procedures? Approximatively 35 % of the overall registered mediation proceedings results in a successful settlement agreement, while another 35% of the cases is resent to

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¹ See the statistics at the end of this paper.

² See Article 1 of the CAS Mediation Rules. See also below.

arbitration, and a 25% of cases is withdrawn at an early stage of the proceedings (i.e. even before a mediation meeting is held). Therefore, in cases where the parties had a mediation meeting, the success rate of mediation is almost 50 %. What is more, the procedures brought before CAS mediation in the last two years show that nearly 90% of success in the cases where a mediation meeting could be held.

The costs of a mediation procedure vary between 2000 and 6000 CHF, and they comprise the hourly fees of the mediator, the travel and accommodation fees and the holding of a mediation meeting. The International Council of Arbitration for Sport (ICAS) is currently in the process of searching alternative ways to render mediation a more attractive option for small-value disputes. One idea would be to establish a maximum fee for disputes of a value up to 150'000 CHF, comprising e.g. 10 hours with a mediator and the holding of a mediation meeting. Another, simpler idea is to cap the mediator's fees to a specific number of hours per case, in the event of a limited disputed value.

The average duration of a CAS mediation procedure is 3.5 months, and this is the time sometimes needed to schedule a mediation meeting where all parties, their counsel and the mediator are available. In the vast majority of cases, by the end of the mediation meeting, the parties have either reached an agreement or not. Rarely, the parties may wish to continue with a second mediation meeting in order to discuss the details of reaching an agreement.

II. Conduct and characteristics of a CAS mediation procedure

³ The CAS Mediation Rules are available online, see www.tas-cas.org.

⁴ See the first Article of the CAS Mediation Rules.

⁵ See Article 1 (in fine) of the CAS Mediation Rules.

What is CAS mediation? According to the definition provided by the first article of the CAS Mediation Rules “*CAS mediation is a non-binding and informal procedure, based on an agreement to mediate in which each party undertakes to attempt in good faith to negotiate with the other party with a view to settling a sports-related dispute. The parties are assisted in their negotiations by a CAS mediator.*”

The procedure according to the CAS Mediation Rules³ is very flexible and gives the opportunity to the parties to opt for other rules if they both agree to do so. One of the main particularities of the CAS system is that most of the mediation procedures arise out of a suspended arbitration. When opening an ordinary procedure, the parties may decide to suspend the arbitration and opt for mediation. If unsuccessful, the arbitration will automatically resume. If successful, the arbitration proceedings are terminated.

At the current stage, and in accordance with the CAS Mediation Rules, CAS mediation is available for the resolution of contractual disputes.⁴ Disciplinary matters, such as doping issues, match fixing and corruption, are in principle excluded from CAS mediation. However, in certain exceptional cases and following the express agreement of both parties, disputes related to other disciplinary matters may be submitted to CAS mediation.⁵

When a mediation arises out of a clause in the contract or the statutes of the federation, the parties file the request for mediation along with an administrative fee of 500 CHF for each party. Then, the parties are invited to appoint a mediator out of the CAS mediators' list.⁶ If no agreement is reached, the mediator is chosen by the CAS President, upon consultation with the parties.⁷ In practice, the

⁶ The list, along with a short bio of each mediator, is available online under <http://www.tas-cas.org/en/mediation/list-of-mediators.html>. The mediators are selected for a renewable period of four years, see also Article 5 of the CAS Mediation Rules.

⁷ See Article 6 of the CAS Mediation Rules.

parties are informed of the intention of the president to appoint one among three CAS mediators and they are invited to provide any objections they might have.

Once appointed, the mediator will decide how to conduct the mediation. In their current version, the Rules do not define a specific way of conducting the mediation.⁸ They only provide for specific principles that have to be complied with. The ICAS is currently in the process of establishing detailed guidelines and/ or a code of conduct for all the individuals involved in a mediation: The guidelines and the code of conduct will provide more transparency as to how a mediation is conducted and what the parties should expect – and do- when involved in a CAS mediation.

The communications between the mediator and the parties go through the Court Office, but it is also possible for the mediator to contact the parties directly and inform the CAS Court Office, if both parties so agree. The role of the counsel is to monitor the procedure and to ensure that the Rules and the Guidelines are complied with at all times. Like the mediator and the parties, CAS counsel is bound by the duty of confidentiality and must remain independent of the parties, which is the basic principle of CAS mediation.⁹

Another principle of CAS mediation is that all views or admissions made by a party

cannot be used as evidence in any other subsequent arbitral or judicial proceedings (i.e. the mediation is without prejudice to any subsequent arbitral or judicial proceedings).¹⁰ This is of key importance for the mediation procedure because the parties can feel free to negotiate knowing that they will not lose anything from their initial positions.

The mediator's duty of confidentiality is twofold: The mediator should not disclose anything during or after the mediation, and he should not disclose anything said by one of the parties in a separate meeting to the other party without its explicit consent.¹¹

The settlement agreement has the power of a private contract signed by both parties according to Swiss law.¹² In case of non-compliance with the terms of the agreement, the parties may have either recourse to CAS expedited procedure¹³ or recourse to other state courts. In Switzerland, there is no automatic enforceability of mediation settlement agreements, nor is it possible to request the mediation to acquire such enforceability from the state authorities (like e.g. in certain European countries having adopted the "EU Mediation Directive" of 2008). Usually, the CAS settlement agreement provides for recourse to expedited CAS arbitration (and a sole arbitrator) in case of non-respect of the terms of the settlement agreement.¹⁴

⁸ The role of the CAS mediator is described in Article 9 of the CAS Mediation Rules, which reads as follows : "The mediator shall promote the settlement of the issues in dispute in any manner that he believes to be appropriate. To achieve this, he will: a. identify the issues in dispute; b. facilitate discussion of the issues by the parties; c. propose solutions. However, the mediator may not impose a solution of the dispute on either party".

⁹ See Article 10 of the CAS Mediation Rules.

¹⁰ See Article 10 of the CAS Mediation Rules.

¹¹ See the first and the third paragraph of Article 10 of the CAS Mediation Rules.

¹² See more about the settlement agreement in Articles 11 para. a and 12 of the CAS Mediation Rules.

¹³ See the CAS Arbitration Rules (the CAS Code), Article R44 (for ordinary procedures) and Article R49 (for appeal procedures). See also Mavromati / Reeb, The Code of the Court of Arbitration for Sport : Commentary, Cases and Materials, Kluwer Law International, 2015, pp. 339 and 463.

¹⁴ See an indicative model settlement agreement at the end of the paper. See the CAS Arbitration Rules, Article R44 (for ordinary procedures) and R52 (for appeal procedures). See also Mavromati / Reeb, The Code of the Court of Arbitration for Sport : Commentary, Cases and Materials, Kluwer Law International, 2015, pp. 339 ff. and 463 ff.

Overall, we can say that a CAS mediation procedure differs from a CAS arbitration procedure in many respects: Unlike arbitration, mediation is a voluntary process and can be stopped by the parties at any time during the proceedings since it needs the agreement of both parties throughout the procedure. This means that the parties remain at all times in control and mediation is not binding until settlement. Moreover, the mediation rules are very flexible and the mediator can also opt for different rules if the parties so agree. The most important difference between CAS arbitration and mediation is that the parties in mediation cannot use the arguments raised during the proceedings as evidence in any subsequent judicial or arbitral proceedings.

On the other side, CAS arbitration proceedings are similar to court proceedings and all statements and submissions bind the parties that filed them. Once the procedure has started and the CAS Panel declares itself competent on the basis of a valid arbitration agreement or clause, the Panel remains in control of the procedure until the final award (unless all parties otherwise agree and request the termination of the proceedings). Finally, a CAS arbitration procedure will most often result in a binding arbitral award, enforceable under the New York Convention, whereas in CAS mediation the parties can reach a settlement, which is a private contract under Swiss law.

III. Developing and expanding CAS mediation – work at different levels

At institutional level, the ICAS has shown its willingness of ICAS to promote mediation for sports disputes. Apart from reviewing the CAS Rules and updating the list of CAS mediators, the ICAS is now preparing numerous sample documents on the conduct of the mediation, in order to render mediation more user-friendly and clarify the procedural steps.

As to the costs, capping the mediators' fees for small-value disputes can also lead to increased use of mediation when the parties know at the outset the maximum cost of the mediation procedure. Furthermore, recourse to online mediation (which is also an efficient mechanism to reduce procedural costs) is not prohibited and even strongly recommended in some cases.

Until recently, mediation was only proposed to the parties in ordinary arbitration. Since 2014, a standard paragraph on the possibility to have recourse to mediation is systematically sent to the parties in all appeal cases before CAS. We should note that when an appeal is filed with the CAS, there is already a decision (the decision appealed against): This means that, at least in theory, the prevailing party in the previous instance would be less inclined to have recourse to mediation and discuss the case with a view to achieving a settlement, since such party has already obtained a favourable decision. Inversely, however, having to wait for a long time for a first-instance decision and then a decision in appeal may exhaust the parties who would like to find a solution as soon as possible. This may explain the fact that the success rates of the appeal cases brought to mediation so far are high, notwithstanding the minor obstacle mentioned above.

Due to the large number of football cases brought before CAS, focus should be laid on raising awareness to bring more football-related cases to mediation. FIFA handles approximately 2000 procedures per year (including claims for training compensation and the solidarity contribution), where FIFA acts as the decision-making body (of first instance) without interest in the outcome of the procedure.¹⁵ This type of disputes could be seen as well-fitted for mediation. Even if some parties to football-related disputes are "litigation prone", they fear of dilatory tactics by the counterparty or they are afraid of the

¹⁵ Numbers and data given by Mr. Omar Ongaro (FIFA's Head of the Players' Status and

Governance), at the 1st CAS Conference on Mediation at the Olympic Museum in May 2014.

“double work” in case of a failed mediation, mediation remains a good option and should be promoted and developed already at the stage of FIFA proceedings, in order to give parties before FIFA the possibility to have recourse to CAS mediation even before the parties’ claim to the FIFA instances.

In this case, recourse to mediation should be offered at a limited cost (a cap according to the disputed value) and the proceedings should take place in an expedited manner in order to raise the attractiveness of mediation to its prospective users.

IV. Arguments in favour of a more expanded use of mediation in sports disputes

The main particularity of the sports sector is the short professional life of athletes: in this respect, quick and efficient resolution of disputes becomes crucial. Another characteristic of sports is that the sports world is small: parties often wish to continue relationship or want to avoid “losing face”. There are also some reputation issues involved: athletes or clubs may not want to damage their reputation in front of other clubs. Resolution through mediation is completely confidential.

Moreover, a lot of sports-related disputes are not “purely” financial. The mediator may ideally determine the interests of both parties and make them go towards a common solution. We also have some specific, hybrid categories of disputes in sports: some disputes are particularly well adapted to mediation, like political or policy issues, elections and other similar cases.

Although arbitration and mediation should be kept separately, CAS mediation could be the ideal solution as institutional mediation in

sports disputes for a number of reasons: first, CAS has been established as the supreme court for sports disputes, it is a tribunal with extensive experience in sports disputes. In this context, and although the two sectors should be kept separately, mediation could take place as a step prior to arbitration and, if successful, replace arbitration proceedings. Second, and even if in-house counsel in sports federations can prove to be very efficient in negotiations prior to bringing claims to arbitration or litigation, parties still need the institutional and neutral context of an external mediation institution.

A parallel concept is to further promote and develop the already existing concept of conciliation in CAS arbitration proceedings.¹⁶ In this respect, focus should be laid on CAS arbitrators, so as to promote the amicable settlement of the parties’ dispute where this could be feasible and direct parties towards the settlement / conciliation. According to the CAS Rules, *“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 of the parties”*. Such an arbitral award constitutes a “consent award” and the advantages obtained thereby are similar to the ones of mediation, with the additional benefit of having the enforceability of an arbitral award under the New York Convention of 1958.

Overall, mediation can be a very efficient dispute resolution mechanism for athletes, clubs and sports associations. Mediation can accommodate the particularities of the sports sector, which include the short professional life of athletes and the desire to maintain a business relationship in a small sports world. It responds to the aforementioned characteristics by offering a quick, flexible, economic and confidential resolution of the dispute between the parties.

¹⁶ See the CAS Arbitration Rules (the CAS Code), Article R42 (for ordinary procedures) and Article R56 (for appeal procedures). See more on the concept and the statistics on consent awards in CAS proceedings in Mavromati / Reeb, *The Code of the*

Court of Arbitration for Sport : Commentary, Cases and Materials, Kluwer Law International, 2015, pp. 305-310 (for ordinary procedures) and pp. 495-499 (for appeal procedures).

Annexes

A. Sample Model of a CAS Settlement Agreement

CAS 20__ MED __, Party A & Party B

The present settlement agreement of [date] _____ is made

Between

Party A _____ [name, domicile, phone and fax number, e-mail address]

and

Party B _____ [name, domicile, phone and fax number, e-mail address]

(jointly “The Parties”)

Background

1. The present dispute was about [brief summary of the dispute: disputed value, object, causes].
2. The aforementioned dispute that has arisen between the parties was referred to mediation to the CAS, in accordance with the CAS Rules on Mediation (“The CAS Rules”) and the CAS Mediation Guidelines.
3. The Parties have in good faith agreed to settle their dispute which:
is being the object of a suspended arbitration procedure before the Court of Arbitration for Sport (CAS) [Reference CAS 20__/_/3__] (“the arbitration”)
has been the subject of a CAS mediation procedure (date) (“the CAS Mediation”)

Terms

Both parties agree as follows:

-

4. [If the present mediation procedure has arisen out of a suspended arbitration procedure before CAS:] The parties agree that such suspended CAS arbitration proceedings will remain suspended and will only be terminated until the final and full compliance with the terms of the settlement agreement.
[Alternatively:] The parties agree to terminate the suspended CAS arbitration proceedings. In case of non-compliance with the terms of the settlement agreement, the dispute will be referred to CAS to be resolved in an expedited manner (according to articles R44.4 or R52.2 of the CAS Code).
5. In accordance with article 14 of the CAS mediation rules, each party will pay its own mediation costs. The final cost of the mediation, which include the CAS fees, the fees of the mediator calculated on the basis of the CAS fees scale and a contribution towards the costs of CAS will be borne by the parties in equal measures.
6. This Agreement is a final settlement of any causes of action whatsoever which the Parties have against each other.
7. This agreement supersedes all previous agreements between the parties.
8. Confidentiality agreement: The Parties will keep confidential and not use for any collateral or ulterior purpose the terms of this Agreement, except insofar as is necessary to implement and enforce any of its terms.
9. Both the present agreement and the mediation procedure are governed by the law of Switzerland and Swiss courts shall have exclusive jurisdiction on any matters linked to the present mediation procedure.

Lausanne, [date]

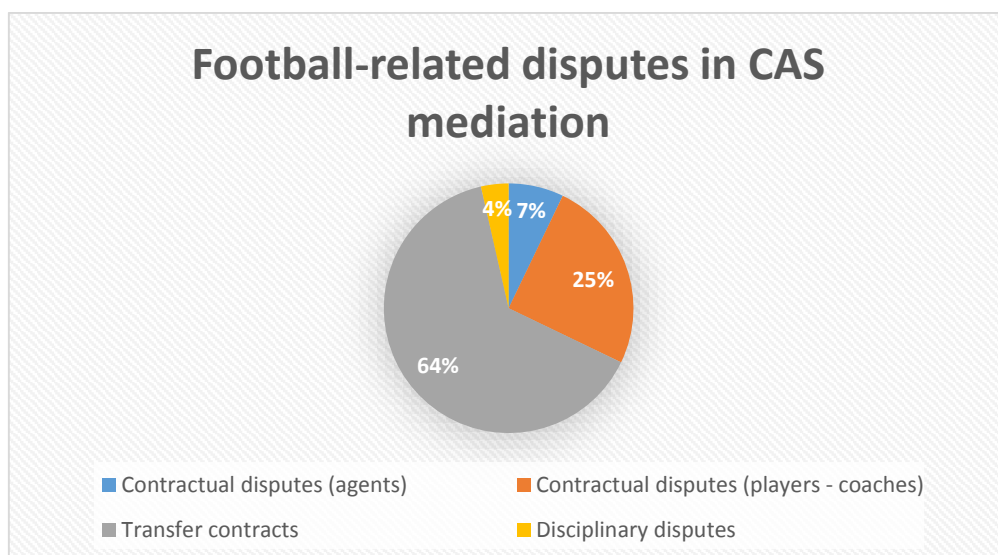
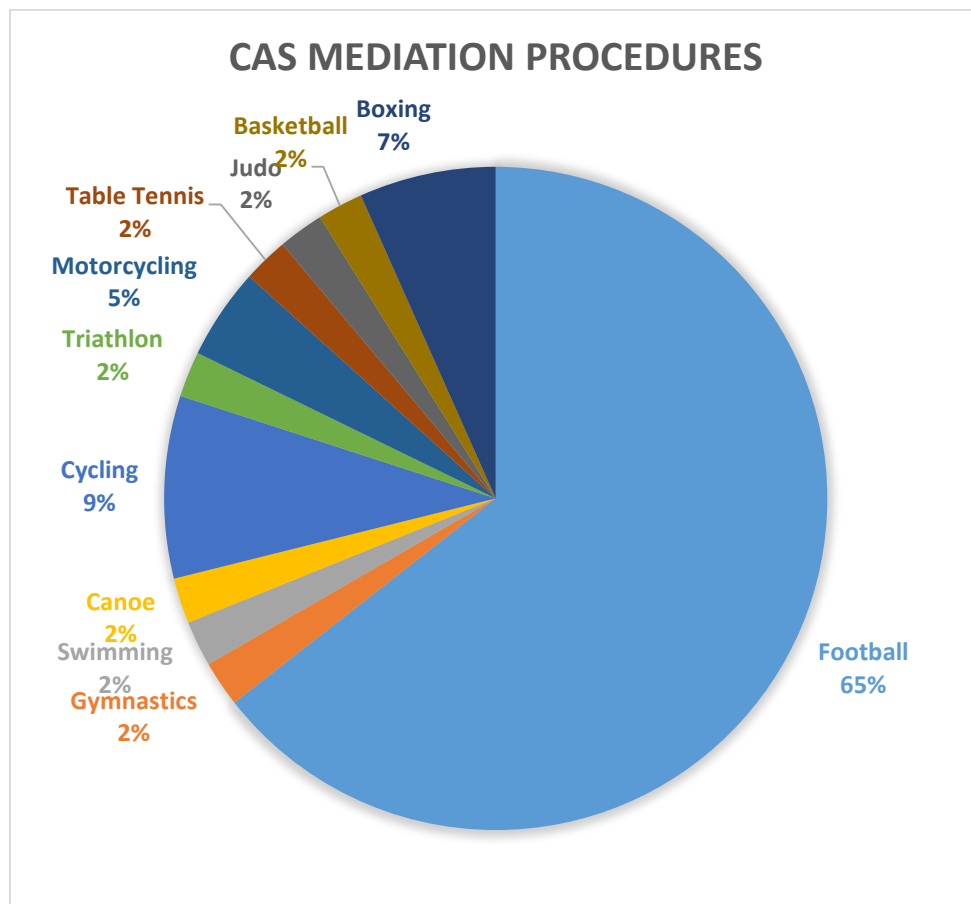
Signed

For Party A

For Party B

The CAS Mediator

B. Statistics in CAS mediation procedures



Indicative data until September 2015

Arbitration and the European Convention on Human Rights, General principles

Wilhelmina Thomassen*

- I. Introduction
 - II. The European Human Rights enforcement system
 - III. Art. 6 of the European Court of Human Rights
 - IV. Art. 6 ECHR is applicable in arbitration proceedings
 - V. Elements of art. 6, para 1, ECHR
 - VI. Equality of arms and adversarial process
 - VII. Effective access to justice
 - VIII. A reasoned decision within a reasonable time
 - IX. Independence and impartiality of the tribunal
 - X. Public hearing
 - XI. Restrictions and waiver
 - XII. The cases Mutu and Pechstein
 - XIII. What arbitrators should remember
-

I. Introduction

Two questions recurring in the legal debate on the relation between arbitration and the European Convention on Human Rights and Fundamental Freedoms (also ‘ECHR’ or ‘Convention’) are whether the ECHR is applicable to arbitration at all, and if so to what extent.

What are the rights which can conceivably come into play in the context of an arbitration? The provision that immediately comes into mind is art. 6 ECHR, defining certain procedural rights and ensuring a fair trial in both civil and criminal cases.

I will argue that art. 6 ECHR, including the case law of the European Court of Human Rights (‘ECtHR’ or ‘Court’), is, directly or indirectly, applicable to arbitration, and that

the scope of art. 6 ECHR can be found in this case law.

But first I’ll give you a short explanation of the Convention system, even if many of you will be more or less familiar with it. After that I will discuss the different fair trial requirements derived by the Court from art. 6 ECHR and explain them with some examples. At the end of my presentation I will summarize what arbitrators should remember when dealing with disciplinary cases.

II. The European Human Rights enforcement system

The European Convention on Human Rights is an international treaty to protect human rights and fundamental freedoms in Europe. It was a follow up of the Universal Declaration of Human Rights proclaimed by

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been a member of the bar. She has also been a Professor in international human rights law at the Erasmus Law School in Rotterdam.

This article is the written version of a presentation given on the occasion of the CAS Seminar october 2015 in Evian, France.

the General Assembly of the United Nations on 10th December 1948. An important feature of its protection system is the establishment of the European Court of Human Rights to ensure the observance of the engagements undertaken by the State Parties in the Convention.

The European Court of Human Rights is a regional human rights judicial body based in Strasbourg, France. The Court is a body of the Council of Europe, *not* an organ of the European Union. It should not be confused with the European Court of Justice in Luxembourg that, indeed, is an organ of the EU. The ECtHR began operating in 1959.

The Court has jurisdiction to decide complaints (“applications”) submitted by individuals concerning violations of the Convention, which principally concerns civil and political rights. Complaints submitted to the Court must concern violations of the Convention allegedly committed by a State Party to the Convention. As of March 2014, 47 States have ratified the Convention, meaning that 800 million people fall under the “jurisdiction” of the Court. The Court has 47 judges, one from each Member State.

To be declared admissible, an application to the Court must, among other things, meet the criteria of exhaustion of domestic remedies and has to be directed against a State party to the Court.

States are bound by the decisions of the Court and must execute them accordingly, if needed by amending their legislation or State

practice to ensure that the violation does not continue to occur.

The Committee of Ministers of the Council of Europe is responsible for enforcing the Court’s judgments.

III. Art. 6 of the European Court of Human Rights

Due to the limited time available for my intervention, I will concentrate on art. 6 ECHR, in particular art. 6, para 1, that contains the general principles of a fair trial, both in civil and in criminal matters. I will not examine further the other Convention rights which might be applicable in arbitration, such as the right to respect for private life (art. 8 ECHR), and the entitlement to the peaceful enjoyment of one’s possessions (art. 1 of Prot No. 1).

Art. 6 para 1, ECHR reads, as far as relevant, as follows:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly ...”¹.

Art. 6, para 2 and para 3, ECHR, contain specific extra procedural requirements for criminal cases such as the presumption of innocence and the right to have adequate facilities for the preparation of the defence².

The Courts’ interpretation of the notions

¹ “...but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.

² “2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in

detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court”.

‘civil rights and obligations’ and ‘criminal charge’ extends beyond the traditional notions ‘civil law’ and ‘criminal law’. Whether or not a right is to be regarded as civil or criminal in the light of the Convention must, according to the ECtHR, be determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the State concerned. Art. 6, para 1, ECHR is applicable to a wide range of interests³, including disciplinary proceedings before professional bodies where the right to practise the profession is at stake⁴.

Decisive for the assessment of a ‘criminal charge’ is not only the classification in domestic law but also the nature of the offence and the severity of the penalty that the person concerned risks incurring, even if the case would not be classified as criminal in domestic law⁵.

In the case of disciplinary proceedings resulting in the compulsory retirement of a civil servant, the Court has found that such proceedings were not “criminal” within the meaning of Article 6, in as much as the domestic authorities managed to keep their decision within a purely administrative sphere⁶. It has also excluded from the criminal head of Article 6 a dispute concerning the discharge of an army officer for breaches of discipline⁷.

IV. Art. 6 ECHR is applicable in arbitration proceedings

Even if the right of access to State Courts contained in art. 6 ECHR is, in principle,

³ Art. 6 ECHR under its civil rights branch covers for example the permission to sell land³, the running of a private clinic³, a building permission³, the ownership and use of a religious building³, the administrative permission in connection with requirements for carrying on an occupation³, a licence for serving alcoholic beverages³, a dispute concerning the payment of compensation for a work-related illness or accident³, social security (all these being issues with a pecuniary dimension) and also to environment issues, the fostering of children and children’s schooling arrangements.

excluded in arbitration, arbitration takes undoubtedly place in the shelter of the judicial system. Citizens of states governed by the rule of law who participate in arbitration can be confident that if needed the law will be present because arbitration produces decisions that are enforceable by government compulsion.

In annulment proceedings and in enforcement proceedings Memberstates of the Council of Europe are bound by art. 6 ECHR, and their courts’ decisions can be challenged before the ECtHR. This applies also to the judgments of the Swiss Federal Tribunal concerning CAS awards. So yes, art. 6 ECHR, including the Court’s case law concerning this provision, is applicable in arbitration, normally under its civil heading⁸. Consequently knowledge of the ECtHRs’ case law on art. 6 ECHR is not only useful but can also be crucial.

V. Elements of art. 6, para 1, ECHR

Under the case law of the ECtHR the following elements of fairness can be distinguished:

- 1 equality of arms
- 2 adversarial process
- 3 independence and impartiality of the tribunal
- 4 Effective access to justice
- 5 A reasoned decision within a reasonable time
- 6 A public hearing

In fact, these requirements are fundamental principles of procedural law, common to

⁴ *Le Compte, Van Leuven and De Meyere v. Belgium*, judg. 23061981, appl.no.7238/75, A43.

⁵ *Engel and Others v. the Netherlands*, judg. 08061976, §§ 82-83, appl.no.(a.o.) 5100/71, A22.

⁶ *Moulet v. France*, dec.130392007, appl.no.27521/04.

⁷ *Suküt v. Turkey*, dec.11092007, appl.no.59773/00.

⁸ see also footnote 5.

legal systems governed by the rule of law, not only in Europe. They can also be found in art. 14 of the International Covenant on Civil and Political Rights (ICCPR), the UNCITRAL Rules and Model Law, and the Treaty of New York. Moreover, they are reflected in the CAS Procedural Rules.

VI. Equality of arms and adversarial process

Two crucial elements of a fair trial as identified by the Court's case law are the principles of *equality of arms* and *adversarial process*. These two procedural guarantees are often overlapping each other.

The principle of *equality of arms* between the parties, means "*that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent*"⁹. This seems obvious but can come into play if a judge or an arbitrator, already sure about the final result, would be inclined to limit a party in adducing evidence to prove his case.

The principle of *adversarial process* implies the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party.

Examples from the ECtHRs' case law:

Where courts refuse requests to have witnesses called, they must give sufficient reasons and the refusal must not be tainted by arbitrariness: it must not amount to a disproportionate restriction of the litigant's ability to present arguments in support of his case¹⁰.

⁹ Dombo Beheer judg. 2710 1993 Series A, no. 274.

¹⁰ Wierzbicki v. Poland, judg. 18062002, appl.no.24541/94, § 45.

¹¹ Mantovanelli v. France, judg. 18031997, § 36, appl.no.21497/93, Rep. 2005-V, Storck v. Germany, judg. 16062005, § 135, appl.no.61603/00.

A medical expert report pertaining to a technical field that is not within the judges' knowledge is likely to have a preponderant influence on their assessment of the facts; it is an essential piece of evidence and the parties must be able to comment effectively on it¹¹.

In criminal cases Article 6, para 1, ECHR requires that the prosecution authorities disclose to the defense all material evidence in their possession for or against the accused¹². Exceptions are only permitted under certain conditions. I'll come back to that later.

VII. Effective access to justice

Effective access to justice implies that access should not be hindered by high costs which are not affordable for an individual. Effective access can be impaired if costs are disproportionate in relation to the weight of the case. Article 6 § 1, ECHR may compel to provide for free legal aid and the free assistance of an interpreter when such assistance proves indispensable for an effective access to court¹³, even if these rights are explicitly mentioned only in art. 6, para 2, ECHR. This should be taken into consideration in CAS cases where the suspension of an athlete, in particular a suspension for life, is at stake.

VIII. A reasoned decision within a reasonable time

Reasoned decisions serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part.

¹² Rowe and Davis v. the United Kingdom, GC judg. 16022000, § 60, appl.no.28901/95, Rep. 2000-II.

¹³ The Court derived from art. 6, para 1, ECHR, the right to free legal aid in Airey v. Ireland, judg. 09101979, § 26, appl.no. 6289/73, A32.

With its requirement that cases have to be heard within a “reasonable time”, the Convention underlines the importance of administering justice without delays which might jeopardise its effectiveness and credibility¹⁴.

The reasonableness of the length of proceedings as assessed by the ECtHR depends on the particular circumstances of each case¹⁵. The Court takes into account the complexity of the case¹⁶, the conduct of the applicant, and, what was at stake for the applicant in the dispute. The latter implies for example that employment disputes by their nature call for expeditious decision¹⁷.

IX. Independence and impartiality of the tribunal

Art. 6, para 1, ECHR stipulates the independence and impartiality of the tribunal. This is indeed, a basic element of a fair trial. If this right has been violated, the Court will not even examine possible other breaches of the fair trial rights of the applicant.

Independence refers to the relation between the arbitrator and the parties. An arbitrator who is an employee of one of the parties cannot be considered as independent. Even appearances may be of importance¹⁸. Where a tribunal’s members include a person who is in a subordinate position, in terms of his duties and the organisation of his service, vis-à-vis one of the parties, litigants may entertain a legitimate doubt about that person’s independence, even if the member concerned was not biased at all.

The existence of *impartiality* is determined on the basis of a *subjective and an objective test*¹⁹. The *subjective test* has regard to the personal conviction and behavior of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case. The *objective test* ascertains whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality. An example: a lawyer, representing the applicant’s opponents subsequently was a judge in the applicant’s case. This objectively justifies misgivings as to the impartiality of the tribunal. Also in this respect even appearances may be of a certain importance or, in other words, “justice must not only be done, it must also be seen to be done”²⁰. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality, must withdraw.

In verifying whether a tribunal is independent, the Court uses three criteria: the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressure, and whether the body presents an appearance of independence. In its review on whether a tribunal is impartial, the Court would also look into the internal organization of the tribunal. Among other things clear rules regulating the withdrawal and challenging of judges are relevant for its final conclusion.

X. Public hearing

Another element of art. 6, para 1, ECHR is publicity. The public hearing protects

¹⁴ H. v. France, judg. 24101989, § 58, appl.no.10073/82, A162-A, Katte Klitsche de la Grange v. Italy, judg. 19091994, § 6.1, appl.no. 21/1993/416/495, A293-B.

¹⁵ Frydlender v. France, GC judg. 27062000, § 43, appl.no. 30979/96, Rep. 2000-VII.

¹⁶ Neumeister v. Austria, judg. 27061968, § 20, appl.no. 1936/63, A8.

¹⁷ Vocaturo v. Italy, judg. 24041991, § 17, appl.no. 28/1990/219/281, A206-C.

¹⁸ Langborger v. Sweden, judg.22061989, § 32, § 190, appl.no. 11179/84, A155. Kleyn and Others v. the Netherlands GC judg. 06052013, appl.no. (a.o.) 39343/98, Rep. 2003-VI.

¹⁹ Micallef v. Malta GC 15102009, §§ 93, appl.no. 17056/06, Rep. 2009.

²⁰ Examples of cases regarding the dual role of a judge: Mežnarić v. Croatia, judg. 15072005, § 36, appl.no.71615/01. Wettstein v. Switzerland, judg. 21122000, § 47, appl.no.33958/96, Rep. 2000-XII.

litigants against the administration of justice in secret with no public scrutiny. Rendering the administration of justice visible contributes to the achievement of the aim of Article 6 § 1, namely a fair trial²¹. It appears from the case law of the ECtHR that the right to a *public* hearing can be validly waived even in court proceedings²². The same applies, *a fortiori* to arbitration proceedings, one of the very purposes of which is often to avoid publicity. However, we need to be aware that in our societies of today ‘transparency’ is a democratic value of growing importance.²³ An oral hearing *as such* is considered to be a crucial element of a fair trial. A decision not to hold a hearing can only be justified in exceptional circumstances, for example if no issues of credibility or contested facts which necessitate a hearing, are present. In any case a litigant must have the possibility of requesting an oral hearing.

XI. Restrictions and waiver

Art. 6 ECHR is not of an absolute character. **Restrictions** can be justified for legitimate aims if foreseeable and proportionate. It may be necessary to withhold certain evidence from the defense so as to preserve the fundamental rights of another individual, in particular his or her physical safety. However, only such measures restricting the rights of the defense that are strictly necessary are permissible under article 6, para 1, ECHR²⁴. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defense by a limitation on its rights must be sufficiently counterbalanced by the

procedures followed by the judicial authorities²⁵, meaning that the proceedings have to meet the adversarial principle²⁶. The accused must have the possibility to rebut the evidence given by an anonymous witness. Moreover, the admission of testimonies of anonymous witnesses as evidence requires a solid motivation in a court’s final decision.

In arbitration the parties have waived their right under art. 6, para 1, ECHR to bring their case before the state courts. Such a **waiver** is effective for Convention purposes, if it is established in an unequivocal manner. In 2007 the Swiss Federal Tribunal²⁷ concluded that “the waiver of the right to bring setting aside proceedings, when it emanates from an athlete, will obviously not rest in a free will, as a general rule”²⁸. The Swiss Court considered that such a waiver by an athlete appears to be questionable under art. 6, para 1, ECHR.

A valid arbitration agreement should not necessarily be considered to amount to a waiver of all the rights under Article 6. According to the ECtHR’s case law, any waiver of art. 6 ECHR must be attended by minimum safeguards equivalent to its importance. In addition, a waiver must, according to the same case law, not run counter to any important public interest²⁹.

The ECtHR’s case law containing further directives in this respect is not very abundant. However, if the fair trial requirements of art. 6 ECHR are respected in arbitration proceedings, the scope of a waiver may be

²¹ Diennet v. France, judg.31081995, § 33, appl.no. 25/1994/472/553. Martinie v. France GC judg. 12042006, § 39, appl.no. 58675/00, Rep. 2006-VI.

²² Håkansson and Stureson v. Sweden, judg. 21021990, pp. 20-21, §§ 66-67, Series A no. 171.

²³ Claudia Pechstein, in her application to the ECtHR, claims that the CAS panel denied her request of a public hearing and that this denial has violated art. 6 ECHR.

²⁴ Van Mechelen and Others v. the Netherlands, judg. 23041997, § 58, appl.no. 21363/93 a.o., Rep. 1997-III.

²⁵ Doorson v. the Netherlands, judg. 26031996, §72, appl.no. 20524/92, Rep. 1996-II, Van Mechelen and Others v. the Netherlands, § 54.

²⁶ We can see here that the ECtHR tries to combine best practices from common law and civil law.

²⁷ Decision of 22 March 2007.

²⁸ The award is therefore “tainted *ab ovo* by reason of the compulsory consent”, Nora Krausz in Journal of International Arbitration 28(2): 162, 2011.

²⁹ Hermi v. Italy GC judg. 18102006, § 73, appl.no. 18114/02, Rep. 2006-XII, Sejdic v. Italy GC judg. 01032006, § 86, appl.no. 56581/00, Rep. 2006-II.

less important. Even if any arbitration clause could be interpreted as renouncing for example the adversarial principle, the arbitration panel would be wise to respect it nevertheless.

XII. The cases Mutu and Pechstein

Two cases are pending before the ECtHR in which the Court is invited to take some important decisions on the applicability of the ECHR on the CAS and its proceedings.

One is the case of Mutu³⁰, a professional football player, who was suspended by his footballclub Chelsea because he had been convicted for doping and then committed himself to play for another footballclub. He was convicted to pay an indemnity of 17.173.990 Euros to Chelsea because of a unilateral breach of contract. The CAS and thereafter the Swiss Federal Tribunal dismissed his complaints.

Mutu claims that the CAS panel was not independant and impartial, firstly because its President was employed as a lawyer in the lawfirm that represents the interests of the owner of Chelsea, and secondly, because another member of the panel had been the President of the CAS panel which had already decided an earlier case of the applicant, related to the present one.

The applicant claims also that his rights under art. 4³¹, art. 8³² and art. 1 of Protocol no. 1, ECHR³³, have been violated because he will not be able to pay the indemnity of 17.173.990 Euros. This amounts to his 'civil dead', which means that he will not be able to exercise his profession for the rest of his life (art. 8) and that he will have to work his whole life to buy his freedom from Chelsea (art. 4) . He will not be able to have any possessions of himself (art. 1 Protocol no. 1).

The second case is that of Claudia Pechstein³⁴. She claims before the Court that the CAS is not independent and impartial because the IOC has a decisive influence on it. Moreover, she did not get a public hearing, nor before the disciplinary commission, the Swiss Federal Tribunal or the CAS. Furthermore she challenges the fact that no Swiss court has examined the full facts of her case, the Swiss Federal Tribunal having a very limited jurisdiction. At last, Pechstein claims that the presumption of innocence, guaranteed under art. 6, para 2 ECHR, has been violated.

In its decisions on these cases the Court will have to answer in the first place the preliminary question whether and if so to what extent art. 6 ECHR applies to the proceedings.

XIII. What arbitrators should remember

Arbitrators should give effect to art. 6 ECHR in different ways.³⁵

First, by applying and interpreting the parties' arbitration agreement and any applicable arbitration rules in a way that makes them in conformity with art. 6 ECHR. If, in a rather imaginary example, an arbitration agreement would contain the clause that the parties renounce to all the procedural rights embodied in art. 6 ECHR, the arbiter shall nevertheless take care to respect the principles of equality of arms and adversarial process.

Secondly, by applying and interpreting the law of the arbitration in accordance with art. 6 ECHR.

Moreover, art. 6 can create positive duties for the arbitrators, when neither the law of the

³⁰ Mutu c. Suisse, appl.no. 40575/10

³¹ The prohibition of slavery and forced labour.

³² The right to respect for private life.

³³ The protection of property.

³⁴ Pechstein c. Suisse, appl.no. 67474/10.

³⁵ See also Petrochilos, Procedural Law in International Arbitration, Oxford Private International Law Series.

arbitration nor the parties' arbitration agreement contains any guidance.

And at last, art. 6 may create an obligation to disregard a provision of the law of arbitration.

Let me give you an example on how to use art. 6 ECHR as a guideline for a decision in such cases. If a party claims that it is impossible to make out his case without having access to relevant documents which are in the possession of the other party and requests the tribunal to order the other party to produce a document, the requirement of a fair hearing will be a relevant consideration for the decision of the arbitrators. If the applicable rules, the national law of arbitration or the arbitration agreement do not provide for such an order, the arbitrators should take art. 6 ECHR into consideration to determine it. If they are convinced that such an order would be required to give effect to the notion of a fair hearing in the sense of art. 6 ECHR, in particular the requirements of equality and adversarial process, they should give the order, even if the law were to be interpreted as not allowing such an order.

Let's remember also that the parties have a certain responsibility for their own fair trial. They must be encouraged to give notice of any perceived procedural impropriety in order to allow the tribunal to remedy any

such impropriety before rendering the award. If the panel, at the close of the proceedings and before an award is made, asks the parties to confirm their complete satisfaction with the procedure, and a party expresses no objections, she is to be taken as having waived the right to challenge the award on the basis of any irregularity that could have been brought to the attention of the tribunal but was not. In other words, that party is then be estopped from challenging an award on such a basis.

At last we should remember that the upholding of the generally recognized fair trial standards embodied in the ECtHRs' case law under art. 6 ECHR contributes to the confidence of athletes in the CAS proceedings and that the compliance with those standards prevents applicants to take their cases to the courts and the courts to annul awards.

Art. 6 ECHR should not be feared by arbitrators, nor is it a threat to arbitration itself. The CAS Code reflects more or less the same kind of principles as embodied in art. 6 ECHR. The richness of the ECtHR's case law however is a source of inspiration for the interpretation of the rules, especially where the rules give arbitrators a discretionary power. An updated overview of the ECtHR's case law is a useful instrument in the toolbox of arbitrators³⁶.

³⁶ ECtHR's decisions and judgments can be found in the Courts' database HUDOC: www.hudoc.echr.coe.int. An alternative way of searching is using GOOGLE, putting in the name of

the case (f.e. 'Pechstein c. Suisse') and the application number.

Jurisprudence majeure* Leading Cases



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

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

CAS 2014/A/3491

FC Karpaty v. Leonid Kovel & FC Dinamo Minsk

1 May 2015

Football; Compensation for the breach of a contract of employment; “New club” in the sense of Article 17(2) of the FIFA Regulations; Application of Swiss law in order to expand the circle of parties under Article 17(2) of the FIFA Regulations; Purpose of Article 17 of the FIFA Regulations; Positive interest for the calculation of compensation; Remuneration and other benefits for the calculation of compensation; Distinction between the federative- and the economic rights of the player; Specificity of sport and Article 17 of the FIFA Regulations;

Panel

Mr Manfred Nan (The Netherlands), President

Mr Olivier Carrard (Switzerland)

Mr Sofoklis Pilavios (Greece)

Facts

FC Karpaty (“Karpaty” or the “Appellant”) is a football club with its registered office in Lviv, Ukraine. Mr Leonid Kovel (the “Player”) is a professional football player of Ukrainian nationality. The Player was previously registered with Karpaty and subsequently with FC Dinamo Minsk, FC Saturn Ramenskoye and again with Karpaty. FC Dinamo Minsk (“Minsk”) is a football club with its registered office in Minsk, Belarus.

On 26 February 2007, Minsk and Karpaty concluded a loan agreement (the “Loan Agreement”), by means of which the Player would be temporarily registered with Karpaty until 31 December 2007. The Loan Agreement contained a buying option for Karpaty. In November 2007, Karpaty exercised the buying option contained in the Loan Agreement and

paid the due amount of USD 430’000 to Minsk. On 26 November 2007, the Player and Karpaty concluded an employment contract (the “Employment Contract”) for a period of four years, valid as from 1 January 2008 until 31 December 2011. On 3 January 2008, Minsk and the Russian football club F.C. Saturn Ramenskoye (“Saturn”), with its registered office in Moscow, Russian Federation, concluded a transfer agreement in order to transfer the Player to Saturn for an amount of EUR 500’000, equivalent to USD 735’000. On 3 January 2008, the Player and Saturn concluded an employment contract for a period of five years, valid as from 4 January 2008 until 31 December 2012.

On 6 February 2008, Karpaty lodged a claim in front of FIFA against the Player, Saturn and Minsk, because it was of the view that it had validly exercised the buying option and that it had thus concluded a valid employment contract with the Player. Karpaty therefore argued that the Player could not have been transferred to Saturn by Minsk and the Player could not have concluded an employment contract with Saturn.

On 21 August 2008, the FIFA Dispute Resolution Chamber (the FIFA DRC) issued a decision, establishing that a valid contractual relationship still exists between Karpaty and the Player until 31 December 2011. The FIFA DRC also noted that any claims of Karpaty against Minsk would, in accordance with article 22(f) of the FIFA Regulations, have to be considered by the FIFA Players’ Status Committee (the FIFA PSC) upon a respective investigation.

In October 2008, Karpaty accepted the repayment of the amount of USD 430'000 by Minsk that was previously paid in order to exercise the buying option in the Loan Agreement dated 26 February 2007. On 15 October 2009, upon an appeal being filed against the decision of the FIFA DRC by the Player, CAS issued an arbitral award (CAS 2008/A/1741), partially reversing the FIFA DRC decision and finding that the Player terminated unlawfully his employment contract with FC Karpaty and the consequences shall have to be determined, upon request of the parties, by the FIFA DRC in an ulterior proceeding.

On 16 February 2010, Karpaty lodged a new claim before the FIFA DRC against the Player, Saturn and Minsk with reference to the aforementioned CAS award. In particular, Karpaty requested that the Player be sentenced to pay compensation for breach of contract in the total amount of USD 3'607'839,62, that Saturn and Minsk be declared jointly and severally liable 50% each to pay the amount of compensation and that sporting sanctions be imposed on the Player as well as on Saturn and Minsk.

On 17 January 2011, the Player signed a new employment contract with Minsk, according to which he was to receive a monthly salary of USD 372. On 2 February 2011, after having obtained information that Saturn had ceased its existence as a professional football club, Karpaty amended its petition of 16 February 2010 by directing its claim against the Player and Minsk only, i.e. that the Player be condemned to pay the compensation for breach of contract, that Minsk is to be held jointly and severally liable for such payment, and to impose sporting sanctions on the Player and Minsk.

On 25 April 2013, the FIFA DRC rendered its decision (the "Appealed Decision"), admitting and partially accepting the claim and

establishing the compensation payable by the Player to USD 667,000, of which the amount of USD 430,000 has already been received.

On 3 February 2014, Karpaty filed a Statement of Appeal, pursuant to Article R48 of the CAS Code of Sports-related Arbitration (the "CAS Code"), with the Court of Arbitration for Sport, requesting, in essence, the partial annulment of the FIFA decision and the de novo ruling by the CAS, that would hold Leonid Kovel and FC Dinamo Minsk as jointly and severally liable to pay FC Karpaty USD 1,648,258, plus interest of 5% as from 1 January 2008.

Reasons

1. Can Minsk be held jointly and severally liable for the payment of compensation to Karpaty? There are two relevant contracts that may give rise to issues of liability in the present matter, the Loan Agreement concluded between Karpaty, Minsk and the Player and the Employment Contract concluded between Karpaty and the Player. The FIFA DRC is of the view that Minsk is not the "new club" in the sense of article 17(2) of the FIFA Regulations and that Karpaty could have lodged a claim against Minsk in proceedings before the FIFA PSC on the basis of article 22(f) of the FIFA Regulations. In order to be compensated for a breach of the Loan Agreement, Karpaty could indeed have lodged a claim with the FIFA PSC. On the basis of the information in front of it, the Panel finds that there is no objective justification why Karpaty did not take any individual legal action against Minsk for such breach.
2. Karpaty's failure to do so cannot be remedied by requesting to hold Minsk jointly and severally liable for the breach of the Employment Contract by the Player, to which Employment Contract Minsk was not a party. There is no gap in the FIFA

Regulations that would require the subsidiary application of Swiss law. As such, the facts of the case are not of an exceptional nature and do not call for the need to expand the circle of parties that may be held jointly and severally liable to pay compensation to Karpaty for the breach of the Employment Contract by the Player. Consequently, Minsk cannot be held jointly and severally liable for the payment of compensation towards Karpaty.

3. To what amount of compensation is Karpaty entitled? In the absence of any contractual provision determining the consequences of unilateral breach, article 17(1) of the FIFA Regulations determines the financial consequences of terminating a contract without just cause. Previous CAS jurisprudence which established that the purpose of article 17 of the FIFA Regulations is basically nothing else than to reinforce contractual stability, i.e. to strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player.
4. In respect of the calculation of compensation in accordance with article 17(1) of the FIFA Regulations and the application of the principle of “positive interest”, the Panel follows the framework as set out by a previous CAS Panel, establishing the damage suffered by the injured party, taking in consideration the circumstances of the single case, the arguments raised by the parties and the evidence produced. As it is the compensation for the breach or the unjustified termination of a valid contract, the judging authority shall be led by the principle of the so-called positive interest (or “expectation interest”), i.e. it will aim at determining an amount which shall basically put the injured party in the position that the

same party would have had if the contract was performed properly, without such contractual violation to occur. The fact that the judging authority when establishing the amount of compensation due has a considerable scope of discretion has been accepted both in doctrine and jurisprudence.

The principle of the “positive interest” shall apply not only in the event of an unjustified termination or a breach by a player, but also when the party in breach is the club. The judging authority will have to apply the same degree of diligent and transparent review of all the objective criteria, including the specificity of sport, as foreseen in art. 17 FIFA Regulations.

5. Remuneration and other benefits: It is a recurrent practice of the FIFA DRC and CAS to value the loss of services of a player on the basis of the total amount of remuneration to be received by the player under his new employment contract, minus the total amount of remuneration that the player would have received under his old employment contract should this contract not have been terminated prematurely. However, this would lead to an unfair result in the present case, i.e. to a disproportionally high amount of compensation. Article 17(1) of the FIFA Regulations provides it with a large discretion to establish the amount of compensation to be paid and that it is not bound by strict rules as to which value shall be attributed to a player’s salary under the old and the new contract and that it is therefore free to determine the amount of compensation as it deems fit.
6. As maintained in CAS jurisprudence, a distinction can be made between the federative rights of a player and the economic rights. In accordance with this distinction, while a player’s registration may

not be shared simultaneously among different clubs – a player can only play for one club at a time –, the economic rights, being ordinary contract rights, may be partially assigned and thus apportioned among different right holders.

7. Replacement costs: replacement costs can indeed be an important indication of a player's value on the transfer market. However, in the present matter, there are more precise indications since the Player's value was determined in the Loan Agreement and because he was transferred shortly before the breach. Since these transfer fees are already good indications of the value of the Player, there is no need to resort to the replacement costs of the Player to obtain a clear picture of the Player's value. Consequently, the replacement costs of the Player for Karpaty shall not be taken into account to calculate the damages incurred.
8. Specificity of sport: The fact that the breach took place within the protected period is in principle a circumstance specific for sport that could lead a panel to the conclusion to increase the amount of compensation to be awarded for a breach of contract. The fact that the breach took place within the protected period is a circumstance that, objectively, does not always lead to a higher damage, but it is a circumstance that makes

the breach more severe, as enshrined in the FIFA Regulations.

Contrarily, the fact that the Employment Contract effectively never entered into force is a mitigating circumstance. The breach took place within a transfer period, which made it easier for Karpaty to immediately replace the Player. More importantly, there is no joint liability of a "new club" in the sense of article 17(2) of the FIFA Regulations. Because of this, the Player will have to pay the entire amount of compensation to Karpaty by himself. Finally, the Panel deems it important that Karpaty, i.e. the club the Player will have to pay compensation to, currently employs the Player again.

Consequently, the Panel finds that the Appealed Decision shall be confirmed and that the Player shall pay compensation for breach of contract to Karpaty in the amount of USD 237'000.

Decision

The majority of the Panel decided that Minsk cannot be held jointly and severally liable for the payment of compensation by the Player towards Karpaty and dismissed the appeal.

CAS 2014/A/3572

Sherone Simpson v. Jamaica Anti-Doping Commission (JADCO)

7 July 2015

Athletics; Doping (Oxilofrine); Scope of the ground of appeal of a party (ultra petita); Requirements for the application of a reduced period of ineligibility for the use of a Specified Substance; Source of the Prohibited Substance in the Athlete's body; No intent to enhance sport performance; Assessment of the degree of fault;

Panel

Judge Hugh Fraser (Canada), President

Mr Jeffrey Benz (USA)

Mr Michael Beloff QC (United Kingdom)

Facts

The Appellant, Sherone Simpson, is an internationally renowned Athletics sprinter who won a silver medal in the women's 100 meters at the Beijing Olympics in 2008, and was a member of Jamaica's 4 x 100 meter gold medal relay team at the 2004 Olympic games.

The Respondent, Jamaica Anti-Doping Commission (JADCO) is the independent organization responsible for Jamaica's anti-doping programme. JADCO is charged with implementing the World Anti-Doping Agency Code ("WADA" Code"), as well as directing the collection of samples and conducting results management and hearings at the national level.

From June 21, 2013 to June 23, 2013, the Jamaican National Senior Championships in Athletics were held at the National Stadium in Kingston, Jamaica. On June 21, 2013 Simpson participated in the 100 meter event finishing second. Following the completion of her event she was notified that she had been selected for

doping control and she agreed to provide a urine sample for the said purpose.

Analysis of the urine sample taken from Simpson revealed an adverse analytical finding for the substance Oxilofrine.

Oxilofrine is identified as a Category S6 substance in the WADA prohibited Substance List and is therefore considered a "Specified Substance". As such there is a presumptive two year period of ineligibility for anyone testing positive for such a substance.

Simpson requested analysis of her "B" sample which confirmed the presence of Oxilofrine.

On August 14, 2013, Simpson's attorneys-at-law, wrote to the JADCO advising that Simpson was admitting the Anti-Doping Rule violation and that she would accept a provisional suspension.

At the time of the events, Simpson was treated for her hamstring injury by Chris Xuereb who was recommended by Dr. Carmine Stilo, a Canadian chiropractor who was himself unavailable at the time.

Xuereb recommended seven (7) supplements for Simpson, one of them being Epiphany D1. Simpson asked Xuereb if the supplements were "clean" and stated that Xuereb replied, "*I am not here to dope you up, I don't want you to take anything illegal*".

Simpson conducted more than fourteen (14) hours of research over three days on her tablet to satisfy herself that the supplements were clean. She "Googled" each individual

ingredient on the Epiphany D1 label because she was not familiar with them. Simpson saw nothing on the Epiphany D1 bottle that appeared on the WADA Prohibited List for 2013, which she also searched. Simpson also went to the Epiphany D1 website where she read about the ingredients which she recalled spoke mainly about plants and how they helped with the brain. After completing her independent research, Simpson felt assured that Epiphany D1 was safe for her to take.

When she completed the Doping Control Form that evening, Simpson did not list all of the supplements that she had been taking including Epiphany D1.

On April 8, 2014, the Jamaica Anti-Doping Disciplinary Panel handed down its oral decision which rendered Simpson ineligible to compete for a period of eighteen (18) months from the date of sample collection, June 21, 2013.

Based on the totality of the evidence the Panel accepted Simpson's assertions on a balance of probability that Oxilofrine entered her body as a result of the ingestion of Epiphany D1. The Panel found that Simpson's evidence, established to their comfortable satisfaction that Simpson did not intend to enhance her sport performance by knowingly ingesting Oxilofrine. The Panel found that although she took some steps to meet the due diligence requirement, she could have done much more.

The Panel concluded that Simpson's degree of fault and negligence was similar to that found in the cases of *Oliveira v. USADA*, CAS 2010/A/2107, and *Knauss v. FIS*, CAS 2005/A/847, therefore an eighteen (18) month period of ineligibility was imposed.

On, April 22, 2014, Simpson filed an appeal at the Court of Arbitration for Sport ("CAS") against the decision of the Jamaican Anti-

Doping Disciplinary Panel rendered April 8, 2014, pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code").

On April 23, 2014, Simpson filed her appeal brief.

On May 22, 2014, the Respondent filed its answer.

On June 11, 2014, Simpson filed a request for a stay of execution of the appealed decision, in accordance with Article R37 of the Code. The request was granted by the CAS Panel on June 18, 2014 until a final determination of the Appeal was made by CAS.

A hearing was held at the American Arbitration Association offices on July 8, 2014.

Reasons

The principal issue for the Panel to decide was the appropriate period of ineligibility for Simpson's undisputed doping violation. The parties disagreed as to whether Simpson was entitled to a reduction of the presumptive two-year period of ineligibility.

Simpson mainly submitted that her lack of intent to use a prohibited substance, her reasonable explanation as to how the prohibited substance entered her body, and her efforts to ensure that the nutritional supplements that she used did not contain any prohibited substances, should result in a sanction significantly less than eighteen months.

The Respondent submitted that Simpson would have to satisfy this Panel on a balance of probabilities as to how the substance entered her system and that Epiphany D1 was in fact the source of the positive test before any

reduction of the presumptive two-year period of ineligibility could be considered.

1. The CAS Panel agreed that since this is a *de novo* appeal, Simpson would be required to establish the source of the Oxilofrine and also to establish the absence of an intent to enhance performance.

However, the Panel did not agree that the Respondent could properly invite it to impose a sanction as high as two years. That would amount to seeking a different order rather than upholding the same order on different grounds and would be *ultra petita*. (See *Bucci* 2010/A/2283 at para. 14.30). CAS rules provide strict time limits and formalities with regards to Appeals with a perceptible and proper purpose of ensuring that the parties know at the earliest opportunity what issues can be raised before a CAS panel. It results from the Respondent's omission to take the course contemplated by the CAS rules that it cannot seek an increased sanction over and above that ordered by the Jamaica Anti-Doping Disciplinary Panel having rendered the challenged decision. A party cannot take advantage of its own procedural omission albeit unintentional, as doing so would unfairly countenance consideration of a penalty that is the product of procedural unclean hands. That would be *ultra petita*.

2. Then the CAS Panel reminded the rule applicable to Specified Substances. In order to prove her entitlement to any reduced period of ineligibility under article 10.4 of the JADCO Anti-Doping Rules which incorporates the WADA Code, the athlete must establish: 1) how the specified substance entered her body on a balance of probability; and 2) that the specified substance was not intended to enhance her sport performance. The athlete must also produce corroborating evidence in addition

to her word which establishes to the comfortable satisfaction of the Panel the absence of an intent to enhance sport performance. If these requirements are satisfied, the athlete's "degree of fault" will be considered to determine whether the presumptive two-year period of ineligibility should be reduced –in the present case as explained above eighteen months-, and if so, by what period of time.

3. Considering the source of the Specified Substance, Simpson contended that Oxilofrine entered her body after she ingested Epiphany D1 capsules, which she had taken as a nutritional supplement following the recommendation of Mr. Xuereb. The Panel found that the evidence of the test results from the HFL Sport Science Inc. lab of Lexington, Kentucky, USA, on another bottle of Epiphany D1 taken from a batch purchased by Xuereb for Simpson, as well as the evidence of the testing done by USADA on a bottle of Epiphany D1 independently obtained which established that some Epiphany D1 capsules contained Oxilofrine is sufficient to establish that the Epiphany D1 purchased for Simpson was the source of the Oxilofrine which was found in Simpson's urine sample. As a consequence, the Athlete established the source of the Oxilofrine in her body.
4. With regard the absence of an intent to enhance performance, Simpson having satisfied the first criteria has asked the Panel to find that there could be no intent to enhance performance when she did not know that the substance she was ingesting (Epiphany D1) contained Oxilofrine and did not even know what Oxilofrine was. The Panel found that while Simpson should have listed Epiphany D1 on her doping control form, her failure to do so is but one factor to be considered in determining

whether she intended to enhance her performance. The Panel found that Simpson's testimony relating to the use of capsules as a nutritional supplement along with the other corroborating evidence i.e. the absence of any meaningful cross examination by the Respondent and the fact that the nature of the Specified Substance would not have been beneficial to the athlete (see the examples given by the commentary to the WADA Code Article 10.4), establish to its comfortable satisfaction that she did not intend to enhance her sport performance by unknowingly ingesting Oxilofrine (or indeed by knowingly ingesting Epiphany D1).

5. Finally, the Panel underlined that the athlete's degree of fault was a key issue. In this respect, it reminded that the prior clean record of the athlete are irrelevant to the issue of degree of fault. Moreover it is always the athlete's personal duty to ensure that no prohibited substance enters his/her body. It is indeed incumbent upon any international level competitor to at the very least be aware of the risk of supplement use. Simpson in this case made no check on the credential of the person recommending the supplement to her. The Panel found that while it would be unreasonable to expect an athlete to go to the lengths of having each batch of a supplement tested before use, there are other less onerous steps that could be taken, such as making a direct inquiry to the manufacturer and seeking the advice of professionally qualified doctors. However, the Panel recognized that he research of the ingredients of the supplement, the check of the supplement's website and the Google search engine made by the Athlete constitute some significant steps to minimize any risk associated with the taking of the specified substance. The fact that there is no way short of a laboratory test in

which the substance could have been identified as one of the ingredient of the supplement was also taken into account to assess the athlete's degree of fault.

Decision

By reference to the specific facts of the case, the Panel considered that an eighteen-month period of ineligibility was excessive and should be replaced by a six months ineligibility.

CAS 2014/A/3647

Sporting Clube de Portugal SAD v. SASP OGC Nice Côte d'Azur

CAS 2014/A/3648

SASP OGC Nice Côte d'Azur v. Sporting Clube de Portugal SAD

11 May 2015

Football; Transfer not concluded due to the non-fulfillment of two conditions precedent; Exception with respect to the intention of the parties; Negative and positive obligations with respect to the fulfillment of the condition precedent; Bad faith; Compensation for loss of a chance; Compensation for loss in sporting image; Reduction of the compensation;

Panel

Mr Michael Gerlinger (Germany), President

Mr Michele Bernasconi (Switzerland)

Mr Alasdair Bell (United Kingdom)

Facts

In August 2011, Sporting Clube de Portugal SAD and SASP OGC Nice Côte d'Azur entered into negotiations regarding the transfer of the player Y. from Sporting to Nice. After having agreed on the terms for the transfer, Nice sent a draft transfer agreement to Sporting in the morning of 31 August 2011 by email. Sporting signed the transfer agreement and sent the signed document via email to Nice at 12:14. Nice then asked by email at 13:17 for the agreement to be signed again (erasing the name of the Player on the front page). Sporting then sent the new agreement at 15:32 by email (the "First Transfer Agreement"). The First Transfer Agreement (Article 2) was subject to the following conditions: a) the signing of an employment contract between OGC Nice and the player; b) the issuance of the player's international Transfer Certificate by the Portuguese football association; and c) the

approval by the new club's Football Association of the contract between OGC Nice and the player. Should any of these conditions not be met, the agreement was to be automatically terminated and ineffective.

Later that day and for the reasons described further below, the Parties renegotiated Article 4 of the First Transfer Agreement, which contained a "Sell-on" clause relating to future transfers of the Player. Nice sent the draft of the so modified agreement to Sporting by email at 23:50, which was received by Sporting at 23:53. In addition, the modified agreement (the "Second Transfer Agreement") also contained a change in Article 5, which in the First Transfer Agreement read "*OGC NICE undertakes to take all necessary steps to obtain the International Transfer Certificate required for the qualification of the player*". The modified agreement instead read "*SPORTING PORTUGAL undertakes to take all necessary steps to obtain the International Transfer Certificate required for the qualification of the player*". Sporting returned the signed document at 23:59. Nice uploaded the Second Transfer Agreement at 0:04 into the electronic transfer system of the FIFA TMS, and the International Transfer Certificate (ITC) was requested at 0:05 on 1 September 2011 by the FFF. Since the ITC request occurred after midnight of 31 August 2011, the ITC was not issued by the FIFA TMS, because 31 August was the last day of the summer transfer period.

Notwithstanding the above, the Player started training with Nice. On 2 September 2011, Nice

requested the FFF to obtain the ITC from FIFA. The issuance of the ITC was denied by the FIFA Players' Status Committee (PSC) by decision of 23 September 2011, on the basis that the transfer instruction had not been completed before the transfer period closed.

On 28 September 2011, Nice and the Player appealed against the aforementioned decision to CAS, requesting provisional measures. On 11 October 2011, CAS rejected the request for provisional measures due to the fact that the appeal did not have the necessary likelihood of success on the merits. On 17 October 2011, Nice withdrew its appeal to CAS.

On 25 October 2011, the French League (LFP) took a formal decision refusing to "homologate" the employment contract of the Player and on 28 October 2011 the FIFA administration informed the FFF that the Player could not be registered with Nice. The club offered to execute the transfer in the winter transfer period. In several emails in November 2011, Sporting informed Nice that the transfer will or needed to be effected in the winter transfer period. By letter of 25 November 2011 the Player terminated his employment contract with Nice due to the fact that he had not been paid.

On 20 December 2011, Sporting commenced another transfer instruction for the Player in the FIFA TMS, whereas no counter-instruction was made by Nice. At the end of the winter transfer period 2012, the Player signed an employment contract with and then joined the Portuguese club SL Benfica.

On 15 February 2012, Sporting lodged a claim against Nice with FIFA, maintaining that Nice had breached the Second Transfer Agreement by not completing the transfer. Sporting asked for an amount of EUR 1,000,000, corresponding to the transfer fee, plus 5 % interest as from the date of its claim, as well as

a certain amount as per the "Sell-on" clause, and EUR 1,000,000 as "*damages into sporting image*". By response dated 23 March 2012, Nice rejected the claim, arguing that the conditions precedent set out in the Second Transfer Agreement had not been fulfilled. Nice further argued that it only received the signed document shortly before midnight and, therefore, was not responsible for the delay.

On 19 March 2014, the Bureau of the FIFA PSC partially accepted the claim of Sporting and held that Nice had to pay the amount of EUR 1,000,000 plus 5 % interest p.a.

On 1 July 2014, Nice filed a Statement of Appeal with the CAS, requesting that the decision issued by the Bureau of the FIFA PSC be set aside.

Also on 1 July 2014, Sporting filed a Statement of Appeal with the CAS, requesting that the decision rendered by the Bureau of the FIFA DRC be reviewed and Nice be ordered to pay additional amounts with regards to the damages caused by that entity's illicit conduct, more specifically a) non payment of the transfer compensation in the amount of EUR 1.000.000; b) non payment of conditional compensation, as stated in clause 4 of the transfer contract; and c) damages into Sporting image evaluated on EUR 1.000.000.

On 23 January 2015, a hearing was held at the CAS Court Headquarters in Lausanne Switzerland.

Reasons

1. Sporting's first request for relief concerned the payment of the transfer sum under the Second Transfer Agreement. Nice submitted that such payment was not due, since the Second Transfer Agreement did not come into force, because two of the conditions precedent were not fulfilled,

namely, delivery of the ITC and homologation of the employment contract.

The Panel found that it was not disputed by the Parties that the ITC was not delivered and that the employment contract was not homologated by the LPF. Therefore, and as a general rule according to Article 151 para. 2 of the Swiss Code of Obligations (CO), the contract could not take effect. Indeed, according to article 151 para. 2 CO, *“The contract takes effect as soon as this condition precedent occurs, unless the parties clearly intended otherwise”*.

However, Sporting rather argued that exceptions to the general rule applied, namely: 1) according to Article 151 para. 2 CO, the Second Transfer Agreement took effect under the exception that the Parties *intended otherwise* by effecting the agreement without the conditions having been fulfilled; 2) Nice breached Article 152 para. 1 CO, because it committed several acts that prevented the due performance of Nice’s obligation; and 3) the conditions should be deemed fulfilled according to Article 156 CO, because Nice acted in bad faith. Therefore, the Panel had to examine, whether one or more of the exceptions applied to the present case.

As regards the *exception with respect to the intention of the parties*, the Panel found that it referred to situations in which the Parties actually intended that rights and obligations should arise already before the condition is fulfilled. Sporting argued that the Player had started training and played friendly matches with Nice, such that Nice essentially effected the transfer agreement before the conditions were fulfilled. However, the Panel was not convinced that the training of the Player constituted an “other intention” under Article 151 para. 2 CO. This provision required a “clear” intention of

both parties. In this respect, the intention of Nice to execute the Second Transfer Agreement prior to the issuance of the ITC was, at least, not “clear”. While trying to obtain the ITC after 1 September and, therefore, hoping to be able to register the Player, it made sense for Nice to let the Player train with the team. However, no convincing evidence had been provided by Sporting that the rather informal inclusion of the Player in the training sessions of Nice or in some friendly matches could represent a form of amendment to the Transfer Agreement that was expected to bring, legally, the player to the new club, in the sense that Nice had consciously waived its conditional nature. Article 151 para. 2 CO was therefore not applicable.

2. As regards the *alleged breach of obligations under Article 152 para. 1 CO*, according to which *“[u]ntil such time as the condition precedent occurs, the conditional obligor must refrain from any act which might prevent the due performance of his obligation”*, the Panel found that the wording of this provision not only provided for a negative obligation to “refrain” from specific acts, but also established positive duties of the parties to do what was appropriate to safeguard the prospect of the fulfilment. In this respect, the provision required the parties to act positively in a way that was expected from them in good faith. In the present case, the Panel concluded that, taken cumulatively, the following arguments showed that Nice had not done all that could have been expected from it in good faith to safeguard the fulfilment of the condition precedent.
 - First, although the club had tried to complete the transfer despite complication had arisen after the Player had raised the issue of a net versus gross salary payment, and had tried to finalize new terms for the employment contract as well as for the Second Transfer

Agreement prior to midnight, re-negotiations could not start before approximately 22:30 on 31 August 2011 because the President of Nice was attending a match in Toulouse.

- Second, it could have been expected from Nice to continue the appeal against FIFA's decision to deny the ITC, as it is not clear whether the CAS had been aware of the fact that the Player had raised issues leading to re-negotiation of the agreements. This argument could have been made before CAS, with some chance of success.
 - Third, as in the present case, and contrary to more established practice, the Second Transfer Agreement (drafted by Nice) had neither established a specific date or registration period for the transfer nor explicitly required the transfer to take place in the summer transfer window, and as Nice, by its own subsequent conduct, had admitted the possibility that the transfer could be executed in winter, Nice should have safeguarded the possibility to also complete the transfer in the winter transfer window and should have discussed and/or proposed an interim solution with the Player until then.
 - Fourth, Nice had not attempted to convince the Player to sign a potential new employment agreement nor approached the Player in any other way with a view to completing the transfer in winter, for example, by seeking a compromise with respect to the termination of the employment agreement.
3. As regards the alleged *bad faith* of Nice, the Panel did not consider that Nice's behaviour was conflicting with Article 156 CO, according to which a condition is

deemed fulfilled where one of the parties has prevented its fulfilment by acting against good faith. For the Panel, Article 156 CO required more than Article 152 para. 1 CO, *i.e.* that the party preventing the fulfilment acted against good faith "in a gross manner". In the present case, the Panel believed that the individual acts and omissions of Nice mentioned above could not be qualified as "*acting against good faith in a gross manner*", since they in particular also included the aspect of protecting own interests, e.g. when Nice had referred to the invalidity of the agreements concluded with Sporting and the Player and acted accordingly.

The Panel then recalled that the legal consequence of non-compliance with Article 152 para. 1 CO was a liability for damages under Article 97 *et seq.* CO. According to the Panel, compensation for breach of an obligation shall generally be based on the principle of *positive interest* meaning that the amount shall be determined that puts the injured party in the position that the same party would have had the obligation been performed properly, a principle recognized by CAS in particular in *CAS 2008/A/1519-1520*, para. 86. Had the obligation to safeguard the fulfilment been executed properly, the condition could have been fulfilled in the winter transfer window and the transfer fee would have been paid. The Panel considered that a causal link between the potential fulfilment of Nice's obligation under Article 152 para. 1 CO and the fulfilment of the condition could be established. In such a case, Sporting would have received a transfer compensation of EUR 1,000,000. Consequently, Nice was held liable for damage of EUR 1,000,000.

4. With respect to the "Sell-on" clause, Sporting argued that there was a *chance* that the Player might have been transferred by

Nice later on and Sporting might have received a participation in the transfer compensation. The Panel recalled that, under Swiss law, there had to be a *logical nexus* between the damage allegedly suffered and the lost chance, for example, if there was a concrete offer capable of acceptance by the parties (*CAS 2008/A/1519-1520*, para. 117 and 118). In this case, the Panel was not satisfied that such concrete circumstances were present and held that Nice was not liable for any lost chance relating to the “Sell-on” clause.

5. With respect to the loss in sporting image, the Panel recalled that similar considerations applied. For the Panel, it was the Player’s decision to sign with the sporting rival Benfica that had triggered the alleged loss and not Nice’s. Since the previous club could not influence the choice of next club for a free agent player, there was no sufficient nexus between the non-performance and the alleged loss. Consequently, Nice could not be held liable for the alleged loss in sporting image.
6. Having determined the damage to be compensated by Nice, the Panel next examined if there were circumstances attributable to Sporting that helped to give rise to or increase the damage and if, as a consequence provided for in Article 44 para. 1 CO, compensation could be reduced. It found that Sporting, knowing the difficulties around the transfer activities on 31 August 2011, could and should have taken precaution with respect to the termination agreement that it had signed with the Player on 11 October 2011, for example, by agreeing with the Player that the termination was to take place at a later point of time or agreeing on condition of validity of the termination, like for instance the existence of a valid ITC and the homologation of the employment contract

with Nice. By doing so, Sporting could have kept the federative transfer rights with respect to the Player and mitigated the damage. It also held that, although Sporting had urged Nice to complete the transfer in the winter transfer window in several communications in November 2011, it had not contacted Nice and/or the Player again in the following weeks and had only addressed FIFA for help shortly before the end of the winter transfer window on 27 January 2012. The (missing) efforts by Sporting in the winter transfer window therefore also constituted a circumstance under Article 44 para. 1 CO.

Considering that Nice had clearly laid the grounds for the damage but that Sporting, on the other hand, had two circumstances justifying a reduction of the compensation, the Panel found that a reduction of 20% was appropriate.

Decision

The appeal filed by Nice was partially upheld, while the appeal filed by Sporting was dismissed. The Decision issued on 19 March 2014 by the Bureau of the FIFA PSC was confirmed, except for the amount of damage that Nice had to pay to Sporting, which was reduced from EUR 1,000,000 to EUR 800,000.

CAS 2014/A/3652

KRC Genk c. LOSC Lille Métropole

5 juin 2015

Football; Indemnité de formation dans le cadre d'un transfert de joueur; Prise en compte du droit national pertinent; Droit à une indemnité de formation selon l'Article 6 al. 3 Annexe 4 RSTJ FIFA; Intérêt légitime et de bonne foi à conserver un joueur en cas d'impossibilité légale d'offrir un contrat au joueur;

Formation

Prof. Petros Mavroidis (Grèce)

Me Olivier Carrard (Suisse)

Prof. Jean-Pierre Karaquillo (France)

Faits

L'Appelant, le KRC Genk, est un club de football professionnel situé à Genk (Flandre), en Belgique. Le KRC Genk est un club évoluant en première ligue en Belgique – et affilié à la Fédération belge de football.

L'Intimé, le LOSC Lille Métropole, est un club de football professionnel situé à Camphin-en-Pévèle, en France, et évolue actuellement dans le championnat de France de Ligue 1.

Le KRC Genk a formé Monsieur Divock Origi, né le 18 avril 1995, en qualité d'amateur pendant les saisons sportives 2006-2007, 2007-2008, 2008-2009 et 2009-2010, soit les saisons du 12^{ème} au 15^{ème} anniversaire du joueur.

Le 29 avril 2010, M. Divock Origi a signifié à l'Appelant sa démission du club belge, conformément à la procédure prévue à cet effet dans le Règlement de l'Union Royale Belge des Sociétés de Football-Association ("le Règlement URBSFA"). A cette date-là, le joueur avait atteint l'âge de 15 ans.

Suite à l'introduction par le club LOSC Lille Métropole d'une deuxième demande de transfert international concernant le joueur, la Sous-Commission du Statut du Joueur a approuvé, le 3 août 2011, ledit transfert, permettant ainsi l'émission du Certificat de Transfert International (CTI) le même jour. M. Divock Origi est ainsi formellement employé depuis cette date par le LOSC Lille Métropole sous contrat professionnel en tant que joueur en formation, désigné contrat "aspirant", selon la terminologie adoptée par la Fédération Française de Football, par la Charte du football professionnel français (Ligue de Football Professionnel).

Le 14 février 2012, KRC Genk s'est adressé au LOSC Lille Métropole pour faire valoir une demande relative aux indemnités de formation suite à l'engagement du joueur Divock Origi, pour un total de EUR 300'000, ceci sur la base des dernières informations en sa possession.

Le 1^{er} mars 2012, LOSC Lille Métropole a répondu avoir également procédé à un certain nombre de vérifications et s'est opposé au paiement d'une indemnité de EUR 300'000 faisant par la même occasion valoir un calcul subsidiaire arrivant à un total de EUR 38'301.

A défaut d'accord avec le LOSC Lille Métropole, le KRC Genk a introduit, le 30 août 2012, une plainte devant la Chambre de Résolution des Litiges de la FIFA en vue d'obtenir le paiement par le LOSC Lille Métropole d'une indemnité de formation d'un montant de EUR 300'000.

Par décision du 27 février 2014, la Chambre de Résolution des Litiges de la FIFA a rejeté la demande du KRC Genk et condamné celui-ci aux frais de la procédure. Cette décision a été notifiée aux parties en date du 7 juillet 2014.

Le 10 juillet 2014, le KRC Genk a déposé une déclaration d'appel auprès du Tribunal arbitral du Sport (TAS) contre le LOSC Lille Métropole, à l'encontre de la décision prononcée par la Chambre de Résolution des Litiges de la FIFA en date du 27 février 2014.

Une audience s'est tenue le 22 octobre 2014 au siège du TAS, à Lausanne.

Considérants

1. La Formation arbitrale relève que la version applicable du Règlement du Statut et du Transfert des Joueurs de la FIFA est celle de 2010. En effet, le RSTJ FIFA est la version applicable à la date de la signature du contrat litigieux, c'est-à-dire le contrat professionnel conclu entre le LOSC Lille Métropole et le joueur M. Divock Origi, intervenu en août 2011.

La Formation note que l'article 25 al. 6 du RSTJ FIFA prévoit, concernant le droit applicable, que *“la Commission du Statut du Joueur, la Chambre de Résolution des Litiges, le juge unique ou le juge de la CRL (selon le cas) appliqueront, lors de la prise de décisions, le présent règlement tout en tenant compte de tous les arrangements, lois et/ou conventions collectives applicables existant au niveau national, ainsi que de la spécificité du sport”* (mise en relief ajoutée par la Formation). Ainsi, en vertu de cette disposition, la CSJ et la CRL se doivent d'appliquer les règlements de la FIFA, tout en tenant compte du droit national notamment.

La Formation relève à cet égard que la prise en compte du droit national en application

de l'article 25 al. 6 RSTJ FIFA ne se retrouve pas à l'article 66 des Statuts de la FIFA, celui-ci commandant au TAS d'appliquer les règlements de la FIFA et le droit suisse à titre supplétif. La Formation regrette une telle divergence entre les règles procédurales édictées par la FIFA. Bien que l'article 25 al. 6 RSTJ FIFA semble ne s'appliquer que pour la CSJ et la CRL et non pour le TAS, une telle interprétation aboutirait à une incohérence avec le droit appliqué par le TAS en vertu de l'article 66 des Statuts de la FIFA qui ne fait aucunement référence au droit national. Ainsi, aux yeux de la Formation, ne pas tenir compte du droit national là où son application est pertinente pour trancher le litige reviendrait à accepter une contradiction entre les diverses règles procédurales édictées par la FIFA, ce que la Formation du TAS ne peut accepter.

En l'espèce, le joueur était, au moment où il a notifié sa démission à l'Appelant, encore à un âge où le droit belge interdit à l'Appelant, sous peine de sanctions pénales, de l'employer ni même de lui proposer utilement tout contrat de travail, élément de nature décisive, en vertu du RSTJ FIFA, pour l'octroi d'une indemnité de formation. La Formation en déduit que le droit belge présente donc en l'espèce des particularités qui ont un impact sur la résolution du litige, et que sa prise en compte s'imposait donc à la CRL. Etant donné que la CRL aurait dû tenir compte du droit belge dans la présente affaire, la Formation considère qu'il serait inapproprié qu'elle n'en tienne pas compte dans son appréciation de l'affaire portée en appel. Une telle prise en compte du droit belge par la Formation est d'ailleurs conforme à l'article R58 du Code, celui-ci prévoyant que la Formation statue, subsidiairement aux règlements et à défaut de choix des parties, selon *“les règles de droit dont la Formation estime l'application appropriée”*.

La prise en compte du droit national ne s'impose en revanche pas dans un cas où, que ce soit devant la CSJ, la CRL ou le TAS, le droit national n'a pas d'impact sur la résolution du litige.

2. La question de l'indemnité de formation est régie par l'article 20 du RSTJ FIFA ainsi que l'Annexe 4 dudit Règlement. Celui-ci prévoit :

“Des indemnités de formation sont redevables à l'ancien club ou aux anciens clubs formateur(s) : (1) lorsqu'un joueur signe son premier contrat en tant que joueur professionnel, et (2) lors de chaque transfert d'un joueur professionnel jusqu'à la saison de son 23^{ème} anniversaire. L'obligation de payer une indemnité de formation existe que le transfert ait lieu pendant ou à la fin du contrat. Les dispositions concernant l'indemnité de formation sont détaillées dans l'annexe 4 du présent règlement”.

L'Annexe 4 du RSTJ FIFA contient, à son article 6, des dispositions spéciales pour le cas où le transfert du joueur intervient au sein de la zone de l'Union européenne ou de l'Espace Economique Européen. En particulier, le paragraphe 3 de l'article 6 de l'Annexe 4 du RSTJ FIFA prévoit :

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

L'article 6 de l'Annexe 4 du RSTJ FIFA, et en particulier son paragraphe 3, est

susceptible d'application en l'espèce, étant donné que le transfert international du joueur M. Divock Origi est intervenu entre deux clubs relevant d'Etats membres de l'Union Européenne.

En application de cette disposition, le droit à l'indemnité de formation est en principe conditionné au fait que le club formateur propose au joueur un contrat. Toutefois, en vertu de la première phrase de l'article 6 al. 3 précité, même si le club formateur n'a pas proposé au joueur un contrat, il peut encore justifier le droit à une telle indemnité. Selon la jurisprudence du TAS, le club formateur justifie son droit à obtenir une indemnité de formation en l'absence de toute proposition de contrat s'il démontre un intérêt sincère et de bonne foi à conserver le joueur. (voir CAS 2009/A/1757 para. 7.16 et CAS 2006/A/1152). Afin de pouvoir se déterminer quant à l'interprétation et l'application de l'article 6 al. 3 de l'Annexe 4 du RSTJ FIFA, il convient de tenir compte des dispositions spécifiques du droit belge.

3. Dans un contexte où le club formateur était dans l'impossibilité légale, en raison de l'âge du joueur, d'employer celui-ci en tant que sportif rémunéré ou même de faire toute proposition de travail au joueur en vue de son acceptation par celui-ci, et ce, sous peine de sanctions pénales ou administratives prévues par le droit national applicable, l'existence de rapports d'évaluation du joueur faisant une appréciation crescendo de ce dernier ainsi que des sélections en équipe nationale démontrent à suffisance que le club formateur avait un intérêt sincère et de bonne foi à conserver le joueur en son sein.

Décision

L'appel formé par le KRC Genk contre la décision de la Chambre de Résolution des Litiges de la FIFA du 27 février 2014 est recevable et fondé tandis que ladite décision est annulée. Le LOSC Lille Métropole doit verser à KRC Genk une indemnité de formation d'un montant de EUR 300'000, à augmenter d'un intérêt de retard de 5% par an.

CAS 2014/A/3703

Legia Warszawa SA v. Union des Associations Européennes de Football (UEFA)

28 April 2015

Football; Sanctions against a club for fielding an ineligible player; Interpretation of the rules of an association in relation to (indirect) members that did not participate in drafting them; Eligibility needed to serve a suspension; *Ratio legis* of the rule; Excessive formalism; Appropriateness to suspend a sanction of forfeit; Nature of Art. 21.2 of the UEFA Disciplinary Regulations;

Panel

Mr Manfred Nan (The Netherlands), President

Mr Ulrich Haas (Germany)

Mr Fabio Iudica (Italy)

Facts

On 13 February 2014, the UEFA Control and Disciplinary Body issued a decision suspending the Legia Warszawa player Bereszynski Bartosz for the next three (3) UEFA competition matches for which he would be otherwise eligible.

At the end of the 2013/2014 football season, the Club qualified for the second qualifying round of the UEFA Champions League in the 2014/2015 season. The Club provided UEFA with the list of players participating in the second qualifying round of the UEFA Champions League, listing only 23 of the possible 25 players, thus leaving two places empty. The Player was not listed. On 16 and 23 July 2014, the Club played its home and away ties against St. Patrick's Athletic FC in the second qualifying round of the UEFA Champions League. The Player did not participate in either of these matches.

On 24 July 2014, the Club provided UEFA with the list of players participating in the third qualifying round of the UEFA Champions League. The Player was one of the players listed. On 30 July 2014, the Club played its home tie against Celtic FC in the third qualifying round of the UEFA Champions League. The Player did not participate in this match. On 6 August 2014, the Club played its away tie against Celtic FC. The Player did participate in this match, entering the pitch as a substitute in the 86th minute.

On 7 August 2014, the UEFA Control, Ethics and Disciplinary Body (the "UEFA CEDB") opened disciplinary proceedings against the Club for allegedly having fielded a player serving a disciplinary suspension, *i.e.* for violating article 18 of the UEFA Champions League Regulations (UEFA CLR) and article 21 of the UEFA Disciplinary Regulations (UEFA DR). On 8 August 2014, the UEFA CEDB rendered a decision declaring the match Celtic FC vs. Legia Warszawa as forfeit. Legia Warszawa was deemed to have lost the match 3:0.

On 12 August 2014, the Club lodged an appeal against the decision of the UEFA CEDB with the UEFA Appeals Body. On 14 August 2014, the UEFA Appeals Body dismissed the appeal (the "Appealed Decision").

On 15 August 2014, the Club filed a combined Statement of Appeal/Application for Provisional Measures with the CAS. On 18 August 2014, the Deputy President of the CAS Appeals Arbitration Division dismissed the Request for Provisional Measures. On 3

September 2014, the Club filed its Appeal Brief, submitting, amongst others, the following requests for relief: “*Declare that the sanction – a match lost by forfeiture – imposed on LEGIA WARSZAWA SA was unlawful*” or, alternatively, “*Declare that the sanction imposed on LEGIA WARSZAWA SA – a match lost by forfeiture – was disproportionate*” and “*Declare that any sanction imposed on LEGIA WARSZAWA SA should have been suspended in accordance with art. 20 UEFA Disciplinary Regulations*”. In any event, the Club also requested to “*Order UEFA to pay to LEGIA WARSZAWA SA the amount of EUR 1,854,385 plus interest at 5% as of 5 September 2014*”.

On 3 November 2014, following a request to this effect from UEFA, to which the Club agreed, the CAS Court Office informed the parties on behalf of the Panel that the parties were granted an opportunity to file a second round of submissions strictly limited to the question of the claim for damages filed by the Club.

On 28 January 2015, a hearing was held in Lausanne, Switzerland.

Reasons

1. The Panel observed that the dispute between the parties mainly centred around the question whether it was compulsory for the Club to list the Player on “List A” that had to be submitted to UEFA before the home and away ties in the second qualifying round of the UEFA Champions League in order to duly serve the suspension.

The Panel recalled article 18 of the UEFA CLR:

“18.01 In order to be eligible to participate in the UEFA club competitions, players **must be registered with UEFA** within the requested deadlines to play for a club and fulfil all the conditions set out in the following provisions. **Only**

eligible players can serve pending suspensions [emphasis added by the Panel].

[...]

18.04 Each club is responsible for submitting an A list of players (List A) and a B list (List B), duly signed, to its association for verification, validation, signature and forwarding to UEFA.

These lists must include the name, date of birth, shirt number and name, nationality and national registration date of all players to be fielded in the UEFA club competition in question

[emphasis added by the Panel], as well as the surname and first name of the head coach. In addition, the lists must include the confirmation by the club’s doctor that all players have undergone the requested medical examination; the club’s doctor is solely responsible for ensuring that the requested players’ medical examination has been duly performed.

18.05 The club bears the legal consequences for fielding a player who is not named on list A or B, **or who is otherwise not eligible to play** [emphasis added by the Panel].

[...]”.

The Panel further observed that UEFA Circular letter no. 13/2014 (dated 17 April 2014) determined that “*Before the beginning of the season, the UEFA administration will send each national association a list of players and coaches who have pending suspensions to be served during the 2014/2015 season. [...]. Please also note that only players that are duly registered with the UEFA administration can serve pending UEFA suspensions*” [emphasis added by the Panel].

The Panel found that the regulatory framework of UEFA needed to be interpreted because it lacked clarity. According to its understanding of the principles applicable to the interpretation of rules and regulations of an association, rules

and regulations of an association had to be construed in an objective way in case their application was at stake in relation to (indirect) members that did not participate in drafting them. In the absence of a clear and unequivocal wording, the question was how the (indirect) member should have reasonably understood the rules and regulations considering the facts and information that it reasonably had at its disposal. An objective interpretation of rules and regulations, according to Swiss law, included the general practice in relation to a certain rule, *i.e.* if a rule was applied over a longer period of time in a certain manner this might establish a common understanding, and it was permissible to make recourse to facts and circumstances outside the concrete rules but that facilitated an objective interpretation of the rules. In this particular case, UEFA Circular letter no. 13/2014 was such an objective element of interpretation that the Club reasonably had at its disposal and that could thus be taken into account in interpreting the regulatory framework.

2. For the Panel, article 18.04 of the UEFA CLR was particularly confusing because it specifically determined that *“all players to be fielded in the UEFA club competition in question”* needed to be listed, which could be understood in the sense that suspended players should not be listed because they would not be fielded. This was all the more true in light of the provision in article 18.05 that started from the presumption that one could be ineligible even though registered with UEFA. Thus, it appeared that the word “eligible” in the context of article 18 of the UEFA CLR had in effect different meanings. The Panel however found that UEFA Circular letter no. 13/2014 was very clear and provided an objective interpretation of the rules, explaining that *“only players that are duly registered with the*

UEFA administration can serve pending UEFA suspensions”.

On this basis, the Panel found that the word “eligibility” in the last sentence of article 18.01 of the UEFA CLR referred to a player’s “eligibility to play” in an UEFA competition, rather than a player’s “eligibility to be fielded” in a specific match of an UEFA competition. As such, even if a player was not “eligible to be fielded” in a specific match because of a pending suspension, he still needed to be registered with UEFA by means of the A list in order to be “eligible to play” in the UEFA competition in general, for him to serve his suspension. Consequently, it was compulsory for the Club to list the Player in “List A” in order for him to serve his suspension.

The Panel then examined if the Club’s failure to list the Player in “List A” should have led to disciplinary measures. It found that, contrary to the Club’s assertion, the requirement of UEFA that suspended players needed to be registered with UEFA by means of List A was no excessive formalism, as excessive formalism only existed where there were rigorous formalities without any objective reason, where formal requirements were applied with exaggerated severity or where excessive prerequisites were applied to party submissions, thereby preventing access to justice in an undue manner.

3. The Panel adhered with UEFA that a player without club, or a player employed by a club not qualified for the UEFA Champions League or the UEFA Europa League, could not serve a suspension in matches of the European competitions of UEFA. This was why a player, in order to indeed serve a UEFA sanction, had to be registered on the respective player list of a club qualified for

and participating in an UEFA competition. Indeed, the administrative task of UEFA to ensure that suspensions are properly served was clearly aided by the fact that only eligible players (*i.e.* players that are registered with UEFA by means of List A or B) could serve pending suspensions.

4. UEFA's requirement that only listed players could serve pending suspensions was therefore no excessive formalism and the Club's violation of this requirement – although regrettable for the Club in view of the severe consequences – constituted a disciplinary infringement justifying the imposition of a disciplinary sanction.
5. Turning then its attention to the question whether declaring the second match against Celtic FC lost by forfeit was disproportionate, the Panel found that although it was true that article 20.1 of the UEFA DR determined that *"All disciplinary measures may be suspended, with the exception of: a) warnings; b) reprimands; c) bans on all football-related activities"*, it was not appropriate to suspend a sanction to declare a match lost by forfeit. Article 21.2 of the UEFA DR, according to which *"[a] match is declared forfeit if a player who has been suspended following a disciplinary decision participates in the match"*, in itself did not provide the decision-making body with any latitude as to the severity of the sanction to be imposed. Furthermore, it was Celtic FC that had suffered the direct consequences of the illegal fielding of an ineligible player. If the sanction was to be suspended, the result of the match would remain unaffected and it is not Celtic FC but another random team that would potentially benefit from the forfeit, in case the Club would commit a subsequent disciplinary offence.

The Panel also recalled that it was a general principle in the context of sports law that

sporting results should, in principle, be left unturned, *i.e.* the sporting result should be determined on the field and not by a court after the particular match or competition and that in this respect, CAS had consistently applied a restrictive approach. For the Panel, although a rule determining that a match is to be declared forfeit if a suspended player participates therein was not a "rule of the game" in strict terminology, it was crucial that article 21.2 of the UEFA DR was a regulatory exception to the sanctity of the match result, *i.e.* the rule contemplated that the match result is amended in case an ineligible player was fielded and did not distinguish between an intentional violation of the rules or a violation committed due to negligence – similar to for example the invalidation of results following an anti-doping rule violation. It was in this respect that the Panel considered article 21.2 of the UEFA DR to be akin to a "rule of the game" and that a restrictive approach of CAS in overturning such rule was appropriate.

It was also irrelevant, as the Panel recalled, that the Player's influence on the result of the match against Celtic FC had been insignificant due to the fact that he had only been fielded in the 86th minute when Celtic FC was trailing 6-1 on aggregate and that Celtic FC thus had not really suffered from the fielding of the Player.

Decision

In light of the above, the Panel found that it was compulsory for the Club to list the Player in order for him to serve his suspension, that the Club had to be sanctioned for fielding an ineligible player in the second match against Celtic FC, and that UEFA's decision to declare the Club's match against Celtic FC to be lost by forfeit was not disproportionate. As such,

the Panel did not deem it necessary to address the Club's claim for compensation.

The appeal filed by Legia Warszawa was therefore dismissed and the Decision issued on 14 August 2014 by the Appeals Body of the UEFA confirmed.

CAS 2014/A/3706

Christophe Grondin v. Al-Faisaly Football Club

17 April 2015

Football; Termination of a contract of employment with just cause; Existence of just cause for the player to unilaterally terminate the contract; General principles of good faith in a contract between a player and a club; Legal consequences of Termination with Cause under Swiss law;

Panel

Mr. Olivier Carrard (Switzerland), Sole Arbitrator

Facts

Mr. Christophe GRONDIN (the “Player” or the “Appellant”) is a French professional football midfielder player. The Al-Faisaly FC (the “Club” or the “Respondent”) is a Saudi Arabian football team based in Harmah City.

On July 1st, 2012, Mr Christophe Grondin and Al Faisaly FC signed an employment contract (the “Contract”) of a duration of two years, valid as of the date of signature until June 30th, 2014. The Contract specifies at its article 19 that the Club would provide the Player, among others, with the following: A monthly salary of USD 18’333.- payable at the end of each month; Transportation allowance; moreover, the Club had to provide the Player with “two tickets travel in case of approval of the first party” as well as “one round ticket for family in case of coming to Saudi Arabia”. The remuneration of the Player for the second year had to be set in the same manner as for the first year.

After returning to France in June 2013 for a few days off and without having convened

with the Respondent of any timeline for the resumption of training sessions nor for the beginning of season 2013/2014, the Appellant contacted the Respondent either by fax or e-mail, on June 11th, 14th, 17th and 28th 2013, asking for information regarding the start of pre-season training and for a return flight ticket. Moreover, in his correspondence of June 28th, 2013, the Appellant indicated that his visa expired on June 27th, 2013 and asked for all necessary documentation in order to fulfil his contractual obligations. On June 29th, 2013, the Respondent answered stating that it received the Appellant’s last fax, that it tried to contact the Appellant several times and that it had been informed by the Appellant’s agent of his intention to terminate the contract.

The Appellant replied on July 2nd, 2013 insisting that the agent referred to did not represent him, that he did not receive any communications from the Respondent, that he had no intention to terminate the contract and that he still awaited the necessary documentation in order to travel to the Kingdom of Saudi Arabia, in particular the training program, a flight ticket and a valid visa. On this occasion, the Appellant warned the Respondent that he would have recourse to a lawyer if the Club did not provide him with the requested documents or did not answer his letter within the allowed timeframe.

By e-mail dated July 15th, 2013, the Respondent informed the Appellant that a specific training program had been prepared for him since he had been absent from a pre-season camp in Rome. The Respondent added that it would have been surprised that the Appellant failed to come back before the

expiry of his visa as he was given a vacation of thirty five days as it proceeded with all professional football players.

On July 20th, 2013, the Appellant addressed a default notice to the Respondent, requesting the payment of alleged unpaid “signing fees” by no later than July 22th, 2013. On July 23th, 2013, after not having received any reply from the Club, the Player lodged a claim before FIFA against the Club, requesting the imposition of sporting sanctions as well as a total amount of USD 290’000- since he would have terminated the Contract with just cause. By decision dated April 25th, 2014, the Dispute Resolution Chamber (DRC) rejected the claim stating that the Player was not entitled to any compensation since he breached the Contract without just cause by terminating it on 28 June 2013 and that the Respondent was not to be held liable for said termination.

The Player filed, on August 18th, 2014, his Statement of Appeal at the Court of Arbitration for Sport (CAS) against the DRC decision, requesting a total amount of USD 270’000-. He essentially requested the CAS to declare that the Player terminated the employment contract with just cause and order the payment of the requested amount.

Reasons

1. According to Article 14 of the 2012 Regulations on the status and transfer of players (“FIFA Regulations”) a contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause. Article 14 of the FIFA Commentary underscores that just cause is established based on the merits of each particular case. Behavior that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause.
2. According to Article 19 of the Contract, the Respondent was contractually responsible to pay to the Appellant every year contractual year “two tickets travel to the second party [the Appellant] in case of approval of the first party [the Respondent]” and “one round ticket for family in case of coming to Saudi Arabia”. Even if Article 19 of the Contract is drafted in a manner which does not allow to precisely determining its scope, it still helps to highlight the responsibility of the Club to

Only if the violation persists for a long time or numerous violations are cumulated over a certain period of time, is it probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally. The FIFA Commentary specifies that a just cause for the termination of a contract by one party is usually the consequence of a violation of the contract by the other party.

Article 14 of the FIFA Regulations does not define when there is a “just cause” to terminate a contract. One must therefore fall back on Swiss law. Pursuant to this, an employment contract which has been concluded for a fixed term, can only be terminated prior to expiry of the term of the contract if there are “valid reasons” or if the Parties reach mutual agreement on the end of the contract. According to Swiss case law, whether there is “good cause” for termination of a contract depends on the overall circumstances of the case. Only a breach which is of a certain severity (based on objective criteria) justifies termination of a contract without prior warning. Should the breach be of a minor severity, Swiss jurisprudence is of the opinion that it can still lead to an immediate termination but only if it was repeated despite a prior warning.

pay tickets and not simply to reimburse them afterwards if approved by the Club as it has been proposed. Based on the above, the Appellant was legitimately entitled to request flight tickets to travel to the Kingdom Saudi Arabia and the Respondent showed bad faith in systematically refusing it.

As per the Player's visa renewal, it was also the responsibility of the Respondent, as employer of the Appellant, to provide this last with all the necessary documents. Indeed, general principles of good faith states that if a party has clearly shown that it is willing to rely upon a signed contract by performing its contractual obligations, as in casu returning to the Kingdom of Saudi Arabia and resuming training with the Club, it may legitimately expect the counterparty to behave in good faith and to do its utmost in order to have said contract performed. If it can be evidenced that the Respondent has systematically ignored the Appellant's request in order to avoid his timely return to Kingdom of Saudi Arabia -, the Respondent lacked of willingness to prevent the present conflict, acting as a consequence with such negligence as to constitute clear bad faith. As a consequence of this bad faith and lack of interest for the Player, the Club breached the Contract by breaking the Appellant's trust, which constitutes an essential element of an employment contract. Consequently, the Sole Arbitrator concludes that the Respondent's behavior gave the Appellant "just cause" for termination of the contract.

3. Regarding the legal consequences of termination with cause, Article 14 of the FIFA Regulations does not fully address the consequences of a unilateral termination of the employment contract. It only states that the injured party can terminate the contract without consequences of any kind in the

case of just cause but leaves open to interpretation what the consequences for the other party of the contract are. Due to the fact that Article 14 RSTP is silent on the calculation of the due compensation and as Article 17 RTSP expressly refers only to termination of a contract without just cause, principles of Swiss employment law and previous CAS jurisprudence apply.

Firstly, Article 97 of the Swiss CO requires that the injured party receives an integral reparation of his damages. Article 337b of the Swiss CO, article which deals with the consequences of justified employment termination. Furthermore, Article 337c para. 1 of the Swiss CO deals with the consequences of unjustified employment termination. As it can be appreciated from the wording of both articles, article 337b is less specific than article 337c with regard to the scope of the damages that the injured party is entitled to. According to Swiss legal doctrine, the injured party is entitled to integral reparation of its damages pursuant to the general principles set forth in article 97 of the Swiss CO. Thus, the damages taken into account are not only those that may have caused the act or the omission that justify the termination but also the positive interest. The positive damages of the employee are the salaries and other material income that he would have had if the contract would have been performed until its natural expiration. Nevertheless, since the law does not say this explicitly, article 337c applies by analogy.

Furthermore, the CAS case law agrees that "in principle the harmed party should be restored to the position in which the same party would have been had the contract been properly fulfilled". For these reasons, the Sole Arbitrator rules the Player should therefore be entitled to claim payment of the entire amount he could have expected,

and compensation for the damages he would have avoided, if the Contract had been implemented up to the end of the contract.

Decision

The Sole Arbitrator partially upheld the appeal and set aside the Decision of the FIFA Dispute Resolution Chamber and ordered the Club Al-Faisaly FC to pay to Mr Christophe GRONDIN the total amount of USD 259'827.- plus interests at the annual rate of 5%.

CAS 2014/A/3710

Bologna FC 1909 S.p.A. v. FC Barcelona

22 April 2015

Football; Training compensation; Principle and exceptions regarding obligation to pay training compensation; Proof of the real intention to continue the employment relationship; Offer made in bad faith; Regulatory right of the training club to offer a renewed contract to a player; “Genuine interest” requirement; Effects of the loan of a player on the chain of the training period when calculating the training compensation; Categorisation of clubs for the calculation of the training compensation; Role of the player passport for the categorisation of clubs;

Panel

Mr Efraim Barak (Israel), President

Prof. Massimo Coccia (Italy)

Mr Michael Gerlinger (Germany)

Facts

M. is a professional football player of Spanish nationality, born in 1991, who was registered with FC Barcelona since 29 October 1999, when he was 8 years old. On 27 August 2010, at the age of 19, the Player signed his first professional employment contract with FC Barcelona, valid until 30 June 2012. On 13 January 2011, the Player was loaned to SSV Vitesse until 30 June 2011, after which the Player returned to FC Barcelona.

On 9 January 2012, Bologna FC issued a letter to FC Barcelona informing it that it wished to enter into negotiation with the Player to offer a contract for the next sporting season, which letter remained unanswered by FC Barcelona. On 18 January 2012, the Player and Bologna

FC concluded, using the Italian FA’s official forms, a contract headed “*preliminary agreement valid for the sport season 2012/2013*” (the “Preliminary Agreement”) for a period of four seasons, *i.e.* valid until 30 June 2016.

On 26 April 2012, FC Barcelona sent an offer to the Player for the extension of his employment with FC Barcelona, which offer remained unanswered.

On 1 July 2012, the Player was registered by Bologna FC as a free agent in accordance with the Preliminary Agreement.

On 18 June 2013, FC Barcelona lodged a claim against Bologna FC with the FIFA DRC. FC Barcelona maintained that it was entitled to receive training compensation in the amount of EUR 535,000, plus 5% interest *p.a.* as of 1 September 2012 and the procedural costs, from Bologna FC on the ground that the Player was transferred as a free agent from FC Barcelona to Bologna FC before the end of his 23rd birthday, while it had offered the Player a renewed employment contract.

On 27 February 2014, the FIFA DRC rendered its decision (the “Appealed Decision”), partially accepting the claim of FC Barcelona. It held that Bologna FC had to pay the amount of EUR 535,000 plus 5% interest *p.a.* on said amount as of 1 September 2012 until the date of effective payment.

On 25 August 2014, Bologna FC lodged a Statement of Appeal with the CAS. On 26 September 2014, Bologna FC filed its Appeal Brief. Bologna FC challenged the Appealed Decision, submitting, among others, the

following requests for relief: *“in first instance: to declare that Barcelona shall not be entitled to receive any training compensation”; “in second instance: to calculate the training compensation for Barcelona pursuant to Bologna’s scheming (...); “in third instance: being disproportionate the training compensation acknowledged by FIFA DRC, to calculate the amount following equal and justice principles due to the specific case (...).”*

On 27 January 2015, a hearing was held in Lausanne, Switzerland.

Reasons

1. The Panel first examined whether FC Barcelona had complied with the formal regulatory requirements to safeguard its right to receive training compensation from Bologna FC for the transfer of the Player.

Referring to the pertinent provisions (Art. 20 and Annex 4, in particular its Art. 6) of the FIFA Regulations on the Status and Transfer of Players (RSTP), the Panel held that training compensation was due, even after an employment contract had expired and regardless of whether a new contract had been offered to the player by the training club. However, for the specific category of *“players moving from one association to another inside the territory of the EU/EEA”*, no training compensation was payable to the player’s training club if the player had been transferred at the end of his contract and if the training club had not offered the player a “new” contract before expiry of his current contract. As an exception to the exception provided for the EU/EEA territory, even if the player’s former club had not offered a “new” contract to the player, the training club could still *“justify that it is entitled to such compensation”*.

Applying the above general framework to the matter at hand, the Panel found that the

regulatory requirements for a training club to ensure its entitlement to receive training compensation in respect of a specific player were clear. A new contract needed to be offered in writing via register post 60 days before the expiry of the current contract and this offer needed to be of at least an equivalent value to the current contract. The Panel further observed that it was not disputed that FC Barcelona had formally complied with these requirements.

2. The Panel then examined whether, as Bologna FC argued, FC Barcelona had offered a renewed employment contract to the Player in bad faith.

The Panel found that the clear wording of article 6(3) of Annex 4 RSTP was unequivocal in stating that offering a renewed contract to a player was *per se* a demonstration of the training club’s “real intention” to continue its employment relationship with him.

3. Even if specific circumstances, linked to a training club’s act or conduct of misrepresentation, would in one particular case justify the proposition that a training club’s offer to a player would be in bad faith and, as such, ineffective vis-à-vis the interested player and/or another club, there would be no need to resort to an interpretation of article 6(3) of Annex 4 RSTP which would find no basis in the language of the rule, as a party in good faith would anyway be protected by Swiss legal principles such as the prohibition of *venire contra factum proprium* and the doctrine of *“apparence efficace”*.
4. In the case at hand, however, FC Barcelona had done nothing – or, at least, there was no evidence that it had done something – that could have been interpreted by the Player and Bologna FC as showing that FC

Barcelona did not have a “real interest” in continuing its relationship with the Player. In other words, there was no evidence of an act or conduct of misrepresentation attributable to FC Barcelona. The Panel was of the view that, whenever the training club had not performed any such act or conduct of misrepresentation and had simply stayed silent (as occurred in the case at hand), the interested player and the third club had to take into account in their negotiations, as well as in the clauses of any agreement they might sign, that the player’s training club might decide to offer the player a new contract until 60 days before expiry of his current contract. Determining otherwise would have meant that a training club that had done nothing which could be seen as a waiver of its regulatory right to offer a renewed employment contract to the player would be unfairly deprived of such right and of the benefits deriving therefrom. More importantly, holding that the conclusion of an employment contract by the player with a third club would have precluded the training club from offering a new employment contract to the player in good faith would have contravened the spirit of the regulations, which was to encourage the training of young players and to create a stronger solidarity among clubs by awarding financial compensation to clubs that had invested in training young players.

5. The Panel also recalled that in any event, article 6(3) of Annex 4 RSTP only required, as a condition to obtain training compensation, that the training club offered an employment contract at least 60 days prior to the expiry of the current contract, and did not require that the training club showed a genuine interest in the Player. The “genuine interest” requirement, which derived from CAS jurisprudence (see CAS 2006/A/1152),

was only relevant *when no contract was offered* and, therefore, did not apply in the case at hand.

6. The Panel then turned its attention to the calculation of the amount of training compensation due. In this respect, Bologna FC was submitting that, based on article 10(1) RSTP in conjunction with article 3(1) of Annex 4 RSTP, the loan of the Player from FC Barcelona to Vitesse in the 2010/2011 football season had to be considered as a definitive transfer and that the amount of training compensation to be paid was therefore only to be calculated as from 30 June 2011, *i.e.* the date the Player had returned to FC Barcelona.

The Panel observed that this issue of segmentation of training periods had been dealt with by CAS in two recent CAS awards, CAS 2012/A/2908 and CAS 2013/A/3119. On the one hand, a CAS panel in CAS 2012/A/2908, para. 165-167, had determined that, as had also been held in CAS 2007/A/1320-1321, the correct interpretation of article 3(1) of Annex 4 RSTP was *“that the calculation of the training compensation should be made in respect to the former club only for the period of the last cycle of registration with that club”*. On the other hand, a CAS Panel in CAS 2013/A/3119, para. 112-113, had determined that the view that a loan does not break the chain was *“consistent with CAS jurisprudence, such as CAS 2011/A/2559”*, and that ***“[t]o hold that the loan of a player would interrupt the training period could (...) deter training clubs from loaning players”*** in the sense that ***“if the making of such loan would entail the consequence that the training club would thereby waive its entitlement to training compensation, the training club might decide not to loan the player to another club merely in order to secure***

its entitlement to training compensation”.

The Panel further noted that the issue of segmentation of training periods had also been debated in legal literature and that the solution reached in CAS 2012/A/3119 had been deemed preferable (MONBALIU, Training: Dundee United case and ‘chain of entitlement’, World Sports Law Report, Volume 12, Issue 10, October 2014, p. 3-5; THOMAS, ‘The on-going football dispute over training compensation and player loans II: Dundee Utd -v- Club Atletico Velez, LawinSport, 14 January 2015).

The Panel fully endorsed the views expressed in CAS 2013/A/3119 and in legal literature, which views also appeared to be in conformity with the consistent approach of FIFA on this matter. Consequently, it found that the loan of the Player from FC Barcelona to Vitesse was not to be considered as a permanent transfer in the sense of the FIFA Regulations and that the amount of training compensation that FC Barcelona was entitled to receive had to be calculated as from the player’s first registration with FC Barcelona until the date of his definitive transfer to Bologna FC, provided that the period during which the player was loaned to Vitesse was to be excluded.

7. Regarding the amount of training compensation, Bologna FC maintained that, on the basis of the player passport, FC Barcelona was to be regarded as a category II, and not a category I, club.

The Panel observed that the FIFA Regulations and FIFA’s circular letters consistently referred to “categorisation of clubs” and that a distinction had therefore to be made between a “club” and a “team”. Whereas a club had multiple teams, every team was part of only one club. The

calculation of the amount of training compensation due in international transfers was based on the categorisation of the club in question, and thus not on the particular team within such club.

The Panel further noted that FIFA circular letters had consistently determined that Spanish clubs were to be divided in four different categories, *i.e.* category I, II, III and IV. FIFA circular letter no. 1249 (dated 6 December 2010) had determined that clubs belonging to category I were “*all first-division clubs of member associations investing on average a similar amount in training players*”. For the Panel, considering FIFA circular letters, Bologna FC should have been aware of the fact that FC Barcelona was a category I club at the time of the transfer of the Player. The fact that the Player usually played for FC Barcelona B and that FC Barcelona B participated in the second-highest level in Spain was not relevant for the calculation of the training compensation due.

8. Furthermore, although the player passport played an important role in the calculation of the amount of training compensation due, it was not decisive with regard to the category of the club.

Starting from season 2002/2003 (the season of the Player’s 12th birthday) until season 2011/2012 and deducting half of the season 2010/2011 (loan to SSV Vitesse), the Panel established that the total amount of training compensation that FC Barcelona was entitled to receive was EUR 535,000, plus interest at a rate of 5% *per annum* as from 1 September 2012 until the date of effective payment.

Decision

The appeal filed by Bologna FC against the Decision issued on 27 February 2014 by the FIFA DRC was therefore dismissed and said Decision confirmed

CAS 2014/A/3759

Dutee Chand v. Athletics Federation of India (AFI) & International Association of Athletics Federations (IAAF)

24 July 2015

Athletics; Eligibility of Females with Hyperandrogenism to compete in Women's competition; CAS jurisdiction; Burden and Standard of proof; Discrimination of the Hyperandrogenism Regulations on a prima facie basis; Scientific basis for the Hyperandrogenism Regulations; Invalidity of the Hyperandrogenism Regulations as a proportionate means of attaining a legitimate sportive objective; Nature of the Hyperandrogenism Regulations;

Panel

Judge Annabelle Claire Bennett (Australia),
President

Prof. Richard McLaren (Canada)

Mr Hans Nater (Switzerland)

Facts

Dutee Chand is a 19 year-old female athlete of Indian nationality. During her career to date she has won a number of national junior athletics events in India. In addition, she won gold medals in the women's 200 metres sprint and the women's 4 x 400 metre sprint relay at the Asian Junior Track and Field Championships in Taipei in May 2014.

The Athletics Federation of India (AFI) is the national governing body for the sport of athletics in India.

The International Association of Athletics Federations (IAAF) is the international governing body of the sport of athletics, recognised as such by the International Olympic Committee. It has its seat and

headquarters in Monaco. The IAAF recognises the AFI as its member federation for India.

Following a medical examination conducted in Delhi in June 2014, the Athlete travelled on to a Sports Authority of India (SAI) training camp in Bangalore and was subjected to further medical examinations by the SAI. The Athlete stated that those tests included blood tests, clinical tests by a gynaecologist, karyotyping, an MRI examination and a further ultrasound examination.

According to the Athlete, on 13 July 2014 Dr Sarala of the SAI notified her that she would not be permitted to compete in the forthcoming World Junior Championships and would not be eligible for selection for the Commonwealth Games because her "*male hormone*" levels were too high.

On 22 August 2014, the Director-General of the SAI Mr Thomson wrote to the President of the AFI, about the Athlete's case. The letter explained that the SAI's tests had concluded that the Athlete had hyperandrogenism and the SAI therefore recommended that she should be excluded from competing in female events.

On 31 August 2014, the AFI delivered a letter to the Athlete informing her that she was provisionally suspended from participating in any athletics events with immediate effect (the "Decision Letter").

Following certain medical tests, it was ultimately determined that the Athlete had hyperandrogenism, which meant that her naturally produced testosterone exceeded the

permitted threshold of 10 nmol/L. As a result, the Athlete was forced to follow the HA Regs and medical processes to maintain her athletics eligibility.

Instead, she chose to challenge the regulations.

This case concerns a challenge to the validity of the IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition (the "Hyperandrogenism Regulations"). The Hyperandrogenism Regulations place restrictions on the eligibility of female athletes with high levels of naturally occurring testosterone to participate in competitive athletics. The case raises complex legal, scientific, factual and ethical issues. The parties' submissions draw upon a diverse range of expert scientific evidence, factual accounts of the evolution of the Hyperandrogenism Regulations and the experiences of female athletes who were subjected to their "gender testing" and "sex verification" predecessors, and philosophical arguments about the meaning of fairness in sport.

On 26 September 2014, the Athlete filed her Statement of Appeal with the CAS Court Office pursuant to Article R48 of the Code of Sports-related Arbitration (the "CAS Code").

On 6 October 2014, the Athlete's legal representative wrote to the CAS stating that the appeal "*raises important issues of public interest and general application*" and that the Athlete therefore did not agree to the arbitration proceedings being confidential (save in respect of her personal medical records, which she wished to remain private).

On 25 November 2014, the Athlete filed a request for provisional relief with the CAS Court Office. The Athlete sought an order permitting her to compete in athletics events until a decision was rendered in her appeal.

On 3 December 2014, the CAS wrote to the parties stating that, in light of the Respondents' agreement to permit the Athlete to compete in national-level events, the Athlete was permitted to compete at all national-level events pending the issuance of a Final Award in the proceedings.

A Four-day hearing took place at the CAS Court Office between 23-26 March 2015.

The Athlete's Statement of Appeal asks the CAS to declare the Hyperandrogenism Regulation invalid and void; to set aside the Decision Letter be set aside and to declare the athlete eligible to compete.

Five legal questions arose which would determine whether the HA Regs were, indeed, valid:

- (1) Which party bears the burden of proof in relation to establishing the validity/invalidity of the HA Regs?
- (2) Are the HA Regs *prima facie* discriminatory?
- (3) Is there a scientific basis for the HA Regs?
- (4) Are the HA Regs proportionate to attain a legitimate sporting objective? And
- (5) Are the HA Regs an impermissible doping regulation?

Reasons

1. In its Answer Brief, the IAAF stated that the IAAF's statutes and regulations do not provide for a right of appeal to the CAS in the present case. The decision under challenge is a decision of the AFI at national level, not a decision of the IAAF. According to the IAAF, the Athlete does not fall within the definition of an International Athlete, namely an athlete "*who is in the*

Registered Training Pool...or who is competing in an International Competition under Rule 35.7". Consequently, the IAAF submits that the Athlete's right of appeal against the AFI's decision should have been exercised before a national-level body in India.

Notwithstanding this position, the IAAF stated that it wished to ensure that the Athlete received a fair hearing and that it wanted the validity of the Hyperandrogenism Regulations to be determined by an independent tribunal with the necessary sport-specific expertise. It therefore agreed to the *ad hoc* submission of the dispute to the jurisdiction of the CAS.

The AFI has not expressly consented to or objected to the jurisdiction of the CAS in relation to this matter. However, according to Article 178(2) of the Swiss Federal Code on International Private Law, if an objective appraisal of all the facts establishes a mutual intention to subscribe to arbitration by the CAS -such as an implicit acceptance of the athlete's offer to submit the dispute to the *ad hoc* jurisdiction of the CAS- then the CAS has jurisdiction to determine the case for the purposes of Swiss Federal law. In the present case, the Athlete delivered pleadings that positively asserted the existence of the CAS's jurisdiction over the AFI. The Panel concludes that the Athlete's actions constituted an implicit offer to arbitrate before the CAS. While the AFI took a largely passive stance in the proceedings, it did engage with the CAS on a number of procedural issues that indicated an implicit acceptance of the CAS's power to determine the Athlete's appeal. In particular, the AFI requested the IAAF to pay its share of the advance costs and expressly confirmed that it did not object to an extension of time for the IAAF to file its Answer Brief. The position is reinforced by the AFI's participation in the process of

nominating an arbitrator for the hearing. In all the circumstances of this case, the CAS Panel is satisfied that the AFI's actions in engaging with the CAS without raising any jurisdictional objection established an implicit acceptance of the Athlete's offer to submit to the *ad hoc* jurisdiction of the CAS. The Panel is therefore satisfied that it has jurisdiction over the AFI.

2. Considering the burden of proof issue, the Panel stressed that during the course of the hearing the parties agreed that the Athlete bore the burden of proving that the Hyperandrogenism Regulations are invalid. If the athlete establishes that the Hyperandrogenism Regulations are *prima facie* discriminatory by reference to a higher ranking rule or otherwise, on the balance of probabilities, the burden then shifts to the IAAF to establish that they are justifiable as reasonable and proportionate to justify the discrimination. The requisite standard to justify discrimination of a fundamental right, which includes the right to compete as recognized in the Hyperandrogenism Regulations, should be to a level higher than that of the balance of probabilities.
3. The Panel found that the Athlete has established that it is *prima facie* discriminatory to require female athletes to undergo testing for levels of endogenous testosterone when male athletes do not. In addition, it is not in dispute that the Hyperandrogenism Regulations place restrictions on the eligibility of certain female athletes to compete on the basis of a natural physical characteristic (namely the amount of testosterone that their bodies produce naturally) and are therefore *prima facie* discriminatory on that basis too. Moreover, the IOC Charter, the IAAF Constitution and the laws of Monaco all provide that there shall not be discrimination and that these provisions are

higher-ranking rules that prevail. Accordingly, the Panel found that unless the Hyperandrogenism Regulations are necessary, reasonable and proportionate, they will be invalid as inconsistent with those regulations.

4. The fact that testosterone is not a material causative factor in athletic ability or sports performance has not been established by the athlete, on the balance of probabilities. Nor has the athlete met her onus, on the balance of probabilities, of establishing that exogenous testosterone has a different effect on athletic performance than endogenous testosterone. This was important because the Athlete accepted that exogenous testosterone has performance enhancing effects on the athletic performance of male and female athletes. As there is a significant difference in the testosterone levels of normal populations of males and females, the Panel was satisfied, to the requisite standard of proof, that there is a scientific basis in the use of testosterone as a marker for the purposes of the Hyperandrogenism Regulations. In other words, such a difference in average testosterone levels is a marker that can be relied on for the purposes of differentiating male and female populations.
5. The Panel has accepted that testosterone is a key causative factor in the increased Lean Body Mass (LBM) in males. The Panel accepted that increased Lean Body Mass (LBM) confers a competitive advantage. The Panel accepted the evidence that male athletes have a competitive advantage over female athletes of the order of 10 - 12% and that separation between male and female athletes is therefore justifiable in the interests of fair competition. There is, however, an assumption involved in the Hyperandrogenism Regulations as a proportionate justification for

discriminating between females. The assumption is that an endogenous testosterone level within the male range + virilisation (indicating sensitivity to the high level of testosterone) = a degree of competitive advantage over non-hyperandrogenic females of commensurate significance to the competitive advantage that male athletes enjoy over female athletes.

On the present evidence, the Panel could not be satisfied on the balance of probabilities that this assumption is valid. The Panel has accepted that testosterone is the best indicator of performance difference between male and female athletes. However, the evidence does not equal the level of testosterone in females with a percentage increase in competitive advantage. In particular, the IAAF failed to provide sufficient scientific evidence establishing the quantitative relationship between high testosterone levels and improved athletic performance among hyperandrogenic athletes. According to the evidence reported by the IAAF, the competitive advantage that men have over women is approximately in the range of 10 to 12% while that the one enjoyed by hyperandrogenic athletes over other women would be between 1 and 3%. This advantage is not sufficient to justify a separation in the category of female athletes since many other factors such as nutrition, coaching, other genetic and biological variations have an impact on athletic performance.

The HA Regs are therefore not proportionate. Where the evidence is unavailable, the onus of proof remains.

6. The Athlete contended that the Hyperandrogenism Regulations constitute an impermissible ban on “*endogenous doping*”

since they effectively seek to add naturally occurring testosterone to the WADA Prohibited List of banned substances. The IAAF strongly disputed this characterisation of the Regulations. The IAAF submitted that the Hyperandrogenism Regulations are an eligibility rule, not a doping sanction, and there is no question of hyperandrogenic female athletes being subjected to any punishment or censure as a result of the natural state of their bodies.

The Panel considered that Hyperandrogenism Regulations are an eligibility rule establishing objective condition that regulate the ability of individual athletes to participate in particular categories of athletics competition and not a form of doping control purport to modify, supplement or expand the WADA Prohibited List.

Decision

The appeal filed by Ms Dutee Chand was partially upheld. The Hyperandrogenism Regulations were suspended for a period of no longer than two years from the date of this Interim Award. In the interim, Ms Dutee Chand was permitted to compete in both national and international-level athletics events. The International Association of Athletics Federations may, at any time within two years of the date of this Interim Award, submit further written evidence and expert reports to this Panel addressing the Panel's concerns concerning the Hyperandrogenism Regulations as set forth in this Interim Award and, in particular, the actual degree of athletic performance advantage sustained by hyperandrogenic female athletes as compared to non-hyperandrogenic female athletes by

reason of their high levels of testosterone. In the event that no evidence is filed, or in the event that the International Association of Athletics Federations confirms in writing to the CAS Court Office that it does not intend to file any such evidence, the Hyperandrogenism Regulations shall be declared void.

2014/A/3793

Fútbol Club Barcelona v. Fédération Internationale de Football Association (FIFA)

24 April 2015 (operative part notified on 30 December 2014)

Football; International transfer of minor players; Definition of the “association” responsible for the registration of minors under the RSTP; Obligation of the clubs to observe the ban on transfer of minor players; Principles of interpretation of a provision; Transfer of players under the age of 12; Sanctions on the clubs that reached an agreement for the transfer of a minor player; Obligation of the club to report players attending its academy; Obligation of the club to initiate and comply with the procedure aiming at obtaining an ITC; Proportionality of the sanction;

Panel

Prof. Petros Mavroidis (Greece), President

Mr Efraim Barak (Israel)

Prof. Ulrich Haas (Germany)

Facts

In January 2013, the Department of Integrity and Compliance of the FIFA Transfer Matching System (TMS) was made aware of a potential breach committed by Fútbol Club Barcelona (FCB) of the FIFA Regulations on the Status and Transfer of Players (RSTP) with regard to the transfer of a player, namely A. (“player 1”), registered with the Federació Catalana de Fútbol (FCF) on 23 September 2011.

In view of the above, on 4 February 2013, the FIFA TMS sent a letter to the Real Federación Española de Fútbol (RFEF) and FCB requesting information about this player. FCB

provided the FIFA TMS with an answer by a letter dated 15 February 2013. In the same letter, FCB provided information about B., another player in its ranks (“player 2”).

On 11 March 2013, the FIFA requested from the RFEF to provide information on all minor foreign players registered with FCB and possibly attending its academy. On 14 March 2013, the RFEF replied by stating that player 1 and player 2 were not “*registered with or authorized by*” the RFEF and, consequently, that it could not provide information on their participation in official competitions organized under its aegis.

On 25 March 2013, the FIFA TMS requested from the RFEF to provide additional information on player 1 and player 2, and on other players as well, namely, C. (“player 3”), D. (“player 4”) and E. (“player 5”). On 1 April 2013, the RFEF replied by stating that players 1-5 were neither registered with, nor authorized to play by the RFEF, and that, accordingly, it could not provide any information/documentation on them, including information regarding their International Transfer Certificate (ITC).

On 6 May 2013, the FIFA TMS requested from FCB and the RFEF to provide information on the following players: players 3-5; F. (“player 6”); G. (“player 7”); H. (“player 8”); I. (“player 9”); J. (“player 10”); K. (“player 11”); L. (“player 12”); M. (“player 13”); N. (“player 14”); O. (“player 15”); P. (“player 16”);

Q. (“player 17”). On 16 May 2013, the RFEF submitted to the FIFA TMS information on the registration of the players at issue.

On 16 May 2013, FCB provided the FIFA TMS with information on players 3-17 and on the following players: R. (“player 18”); S. (“player 19”); T. (“player 20”); U. (“player 21”); V. (“player 22”); W. (“player 23”); X. (“player 24”); Y. (“player 25”); Z. (“player 26”); AA. (“player 27”); BB. (“player 28”); CC. (“player 29”); DD. (“player 30”); EE. (“player 31”).

On 24 May 2013, the FIFA TMS requested from the RFEF to provide information about the players 18-31. The requested information was submitted by the RFEF on 30 May 2013. Meanwhile, *i.e.* in the period between February-June 2013, the FIFA TMS had been collecting information on the transfer/registration of the players referred to above from their respective national federations/associations.

On 25 September 2013, the FIFA Disciplinary Committee informed FCB, via the RFEF, that disciplinary proceedings against FCB had been opened with regard to various breaches of the RSTP allegedly committed when transferring/registering the 31 players mentioned above to/with FCB. On 28 November 2013, the FIFA Disciplinary Committee issued its decision which found, in particular, that:

- FCB had violated Art. 19.1 RSTP with respect to players 1-5, 14, 20, 27 and 30;
- FCB had violated Arts. 19.1 and 19.3 RSTP in the case of player 31;
- FCB had violated Art. 19.4 RSTP, read in conjunction with Annex 2 RSTP, with respect to players 1-5 and 20 and Art. 19.4 RSTP, read in conjunction with Annex 3

RSTP with respect to players 1, 2, 4, 5 and 20;

- FCB had breached Art. 19-bis.1 RSTP in the cases of all thirty-one (31) players involved;
- FCB had breached Art. 9.1 RSTP with respect to players 1-5 and 20, all under-aged but over 12 years old;
- FCB had breached Art. 5.1 RSTP with respect to all thirty-one (31) players involved, since these players had been registered with the FCF and not with the RFEF.

On 11 April 2014, FCB filed an appeal against the decision with the FIFA Appeal Committee. On 19 August 2014, a hearing was held before the FIFA Appeal Committee. Following the hearing, the FIFA Appeal Committee issued a decision (the “Appealed Decision”) by means of which the appeal filed by FCB was dismissed.

On 22 October 2014, FCB filed a Statement of Appeal with the CAS against the Appealed Decision. On 3 November 2014, FCB filed its Appeal Brief.

A hearing took place in Lausanne on 5 December 2014. On 22 December 2014, the CAS Court Office submitted, on behalf of the Panel, a written question to Mr Kepa Larumbe Beain (Legal Director of the RFEF, who had appeared as witness at the hearing before the Panel). The question aimed to clarify information that had been submitted during the hearing regarding the Spanish regulation and practice as far as Arts. 5 and 19-bis RSTP were concerned. Both Parties were allowed to file their comments and observations on the content of Mr Larumbe’s statement.

Reasons

1. The Panel followed the definition of the term “association” in the FIFA Statutes, to which the RSTP make explicit reference, throughout this award. The FIFA Statutes define the term “association” as “*a football association recognized by FIFA. It is a member of FIFA, unless a different meaning is evident from the context*”. A regional association which is a separate entity that was established and operates under a national sport structure is not a member of FIFA and, thus, is not an “association” under the terms of the FIFA Statutes. Furthermore, the basis and the rationale of the RSTP is, *inter alia*, to govern the international transfer of players in between national federations. Therefore, the “association” that should maintain not only the responsibility, but also the actual control and the registration of minors under the RSTP is the national association and not its affiliated regional association.
2. The Panel then found that Art. 19 para. 1 RSTP is clear in that it, in principle, bans transfers of under-aged players. Since only clubs can initiate the process of the transfer of players, the clubs must primarily observe this ban. To underscore this point, Art. 19 para. 4 RSTP explicitly states that “associations” must ensure that clubs behave in accordance with the prescription embedded in this provision. Under these circumstances, FCB was under the direct and primary obligation to avoid transferring under-aged players, unless it could demonstrate that one of the statutory exceptions embedded in Art. 19.2 RSTP had been met. FCB could not attempt to hide behind the violations of the rules apparently committed by the RFEF and the FCF since from the beginning FCB did not even try to request the transfers based on any one of the exceptions. FCB should have been aware of the simple fact that the FCF

or the RFEF could not register the minors in any legitimate way under the RSTP. In other sectors of law, such behaviour is known as “wilful ignorance” or, more colloquially, “deliberate shutting of eyes”, and might lead to the imposition of legal responsibility to a specific way of conduct made under such circumstances.

3. As for Players 27, 30 and 31, minors but also below the age of 12, the Appellant was claiming that the joint reading of Art. 19 RSTP with Art. 9.4 RSTP (Edition 2010) should have led to the conclusion that there were no prohibition for the transfer of players under the age of 12. The Panel came to the conclusion that as a matter of the right and proper interpretation of the rules it could not accept this argument. The scope of Art. 19 RSTP is different from that of Art. 9 RSTP. Whereas Art. 19 RSTP imposes a general prohibition of the transfer for all minors under the age of 18, Art. 9.4 RSTP (Edition 2010), refers to the (absence of) an obligation to issue an ITC for players below the age of 12. Absent this provision (Art. 9.4 RSTP), an ITC would have to be issued even for transfers of players below the age of 12. The issuance (or lack) of an ITC does not however, eliminate the obligation to observe the in principle transfer ban for under-aged players.

For the Panel, an interpreter, like this Panel, had to privilege the interpretation that allowed the various provision in a statute to coexist, and could not interpret one provision so as to eliminate the scope of another one (*ut regis valeat quam pereat*).

This maxim, therefore, led to the following construction: no ITC was required when the transfers occurred for players below the age of 12; their transfer nevertheless, could only be lawful if it complied with the

requirements embedded in Art. 19.2 RSTP. In this way, both provisions (Art. 9.4 and Art. 19.2 RSTP) could enjoy their scope.

4. With regard to the breach of Art. 19 para. 4, the Panel noted that this provision calls for the imposition of sanctions also on the clubs *“that reached an agreement for the transfer of a minor”*. It found however, that, as many of the international transfers of minors were made without the agreement of the players’ former club, it was unreasonable to limit the applicability of Art. 19 para. 4 RSTP to cases of “agreements between clubs” only. The interpretation of the word “agreement” had to be wider, and include also agreements concluded between the registering club and the player himself, his parents, agents, etc.
5. FIFA had considered, in the Appealed Decision, that “La Masia”, the centre of training for youth of FCB, was an academy, and, as FCB had not “reported” information regarding the development of youth there, that FCB was in violation of Art. 19-bis RSTP. The Appellant however maintained that since Art. 19-bis RSTP imposed on clubs that operate an academy the obligation to report minors attending the academy to the *“association upon whose territory the academy operates”*, FCB had, in any case, complied with this obligation, since all its players had been duly registered with the FCF.

The Panel found that the obligation imposed by Art. 19-bis RSTP on clubs to report minors attending an academy to the relevant association was a further, and different, obligation than the one concerning the registration of the players. In other words, it could not be considered that by registering a player a club automatically complied also with the obligation to “report” players who are

attending its academy. For the Panel, it was highly likely that players attending an academy were no longer living with their families but were hosted and educated at the premises of the academy, and could require additional attention. Art. 19-bis RSTP thus required additional information regarding the attendance of the academy regardless of the question whether players had been registered with the relevant association or not. In the light of these considerations, even assuming, as the Appellant had submitted, that the FCF would have been the competent association for the registration of the players, FCB had not provided this kind of additional information with regard to any of the players. The breach by FCB of Art. 19-bis RSTP was therefore established for all of the thirty-one (31) players involved.

6. Art. 9 para. 1 RSTP states that international transfers cannot take place without an ITC. Pursuant to Annex 3 of the RSTP, it is the new club which has to initiate the procedure aiming at obtaining an ITC, by submitting a request to the competent association, to be filed by the club using the FIFA TMS. As the Appellant never initiated the procedure for the issuance of the ITC for players 1-5 and 20, this omission resulted, in the eyes of the Panel, in a breach of Art. 9.1 RSTP in the six cases mentioned.

The FIFA Appeals Committee had found that Art. 5 RSTP had been breached because all thirty-one (31) players had been registered with FCF and not with RFEF. The Appellant submitted that it had no choice but to register all thirty-one (31) players with the FCF, since they were playing only at a regional level and, therefore, by virtue of Spanish law, could not be registered directly with the RFEF. At the hearing, as well as in his written response to the questions asked by the

Panel, Mr Kepa Larumbe Beain confirmed that the only way to register a player participating at a competition at regional level was through a request to the regional authority, which is the authority enjoying exclusive competence to organize competitions at regional level. The Panel therefore held that since FCB could not register players 1-31 with the RFEF, it could not be held liable for breaching Art. 5 RSTP.

7. The Appeals Committee had punished FCB by banning all transfers to the club for two consecutive transfer seasons. The Appellant had alleged that this sanction was disproportionate and incongruent.

The Panel started its review with the claim by the Appellant to the effect that the sanction imposed would not meet the goal of congruence. For the Panel, were one to follow this argument, one could only punish violations regarding transfer of under-aged players with a ban in transfer of under-aged players. The Panel found that such restriction of the authority of FIFA to punish violations was totally unsupported by both textual as well as contextual elements. Indeed, nowhere did the Statutes make such a link. What FIFA had to observe when sanctioning violations was the principle of proportionality.

As far as this principle was concerned, the Panel held that it was well-known, but at the same time elusive as well, for proportionality required a benchmark, a “comparator”. Although various benchmarks were relevant, and indeed were used in various legal orders, there were three benchmarks that most legal orders agreed between them that had anyway to be accounted for when measuring a “proportional” sanction: the gravity of the

illegal act; the power to dissuade the offender from repeating the same illegality in the future; the importance of the rule of law that is being protected. For the Panel, one could not overstate the importance of “protection of minors”. Art. 19 RSTP aimed to strike a balance between the requirement to train at a young age, and the risks that this requirement might comport when football is practiced away from home, and especially in a foreign country. Violations of Art. 19 RSTP, thus, had to be taken seriously. By imposing a sanction, arguably a mid-level sanction, the FIFA Disciplinary Committee wanted to send a strong signal not only to FCB but to other potential violators of this provision. A “lighter” sanction, a reprimand for example, might have imposed “reputation costs” on FCB but would hardly have been dissuasive enough. The Panel therefore confirmed the sanction imposed by the FIFA Disciplinary Committee against FCB, as it did not consider it as disproportionate.

Decision

The appeal filed by FCB was dismissed and the decision issued by the FIFA Appeal Committee as well as the sanction imposed on FCB confirmed.

CAS 2014/A/3870

Bursaspor Kulübü Derneği v. Union des Associations Européennes de Football (UEFA)

11 June 2015

Football; Breach of the UEFA Club Licensing and Financial Fair Play Regulations; Jurisdiction of a UEFA internal adjudicatory body to give effect to a suspension imposed by a CAS decision; Scope of review of the CAS and of the UEFA internal adjudicatory body; Start/Finish of the qualification period;

Panel

Mr Mark Hovell (United Kingdom), President
Mr Manfred Nan (The Netherlands)
Mr João Nogueira da Rocha (Portugal)

Facts

Bursaspor Kulübü Derneği “Bursaspor” or the “Appellant”) is a football club with its registered office in Bursa, Turkey. The Appellant is registered with the Turkish Football Federation (TFF), which in turn is affiliated to the Fédération Internationale de Football Association (FIFA).

Union des Associations Européennes de Football (UEFA or the “Respondent”) is the administrative body for association football in Europe with its registered office in Nyon, Switzerland. It is one of six continental confederations of FIFA.

On 24 February 2012, the UEFA Control and Disciplinary Body (the UEFA CDB) found that Bursaspor had breached the UEFA Club Licensing and Financial Fair Play Regulations (2010 edition) because it had overdue payables towards other football clubs. A fine of €200,000 and an exclusion from UEFA club competitions for which it qualifies in the next

four seasons was imposed on Bursaspor. The exclusion was suspended for a probationary period of three years (CDB Decision).

On 30 May 2012, the UEFA Appeals Body (the UEFA AB) issued a decision excluding Bursaspor from one UEFA club competition and imposing a fine of EUR 50,000 suspended for three years (the AB Decision).

On 1 June 2012, the UEFA Club Licensing and Financial Fair Play Regulations (2012 edition) came into force (the “UEFA Regulations”). Article 66 of the UEFA Regulations provides that the licensee must prove that as at 30 June of the year in which the UEFA club competitions commence it has no overdue payables towards its employees and/or social/tax authorities that arose prior to 30 June.

On 22 June 2012, the Court of Arbitration for Sport (the CAS) annulled the AB Decision and replaced it with its own decision following the CDB Decision in case reference CAS 2012/A/2821 (the “CAS Decision”). The CAS Decision excluded Bursaspor from one UEFA club competition for which it qualifies in the next four years knowing that his exclusion is suspended for a probationary period of three years and fined Bursaspor with EUR 250,000.

Busapor qualified for UEFA’s Europa League competition for Season 2014/15.

On 13 November 2014, UEFA’s Club Financial Control Body’s (the CFCB) Investigatory Chamber issued a decision finding that Bursaspor had breached Article

66(1) of the UEFA Regulations as a result of having overdue payables toward employees as at 30 June 2014 and Article 66(6) as a result of having overdue payables towards employees at 30 September 2014. In light of the findings the CFCB Chief Investigator suggested that the CFCB Adjudicatory Chamber imposed, in accordance with Article 27(c) of Procedural Rules Governing the UEFA Financial Control Body (2014 Edition) (“the Procedural Rules”), disciplinary measures consisting of an exclusion from the next UEFA club competition which Bursaspor qualifies on sporting merit in the next three seasons unless Bursaspor was able to prove, by 31 January 2015, that it had paid the overdue payables due to employees as at 30 September 2014 and a fine, to be determined by the CFCB Adjudicatory Chamber at its discretion (the “Investigatory Chamber Decision”).

On 19 December 2014, the CFCB Adjudicatory Chamber held that Bursaspor had breached the UEFA Regulations because it had overdue payables towards employees of EUR 3,433,000 as at 30 June 2014 and EUR 1,191,000 as at 30 September 2014 (the “Appealed Decision”). The Appealed Decision provided:

- the exclusion imposed in the 2012 Decision shall come into immediate effect and Bursaspor is therefore excluded from participating in the next UEFA club competition for which it would otherwise qualify in the next four (4) seasons
- as a consequence of the breaches of Articles 66(1) and 66(6) of the CL&FFP Regulations in the present case, a further exclusion shall be imposed on Bursaspor (i.e. for a different season to the season in which the immediate exclusion applies) from participating in a UEFA club compensation for which it would otherwise qualify in the next four (4) seasons, unless the Club is able to prove by 31 January 2015 that it has paid

the amounts that were identified as overdue payables on 30 September 2014.

- the imposition of a fine of one hundred thousand Euros (€100,000) on Bursaspor.

On 25 December 2014, Bursaspor filed a Statement of Appeal with the CAS in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the “CAS Code”) against the Appealed Decision of 19 December 2014.

In summary, Bursaspor submitted that the CFCB Adjudicatory Chamber erred in reaching its decision as it had no jurisdiction to impose the sanction that was suspended in the CAS Decision. The CFCB Adjudicatory Chamber based its decision on the wrong set of facts and therefore the CAS should set aside the sanction or at least impose a milder sanction that is proportionate to the circumstances of the violation.

Bursaspor has made a number of payments of overdue payables in 2014. Bursaspor committed to pay the remaining EUR 861,000 by 15 December 2014 and completely paid these amounts by this deadline.

In summary, UEFA submitted that enforcement of the UEFA Regulations has, over time, fallen under the jurisdiction of several bodies. Initially cases were handled by the UEFA Club Financial Control Panel (the CFCP) in conjunction with the UEFA Disciplinary Bodies, the UEFA CDB and the UEFA AB. Recently, in 2012, UEFA decided to restructure its disciplinary process under the UEFA Regulations and the CFCB was established to carry out the functions previously handled by the CFCP and the UEFA Disciplinary Bodies.

The existence of the overdue payables giving rise to Bursaspor’s breach of the UEFA Regulations has been well established and has

even been accepted by Bursaspor. The payment of overdue amounts after the assessment deadlines does not cure such breaches.

The CFCB Adjudicatory Chamber is bound to consider the CAS Decision. To not do so would run contrary to established legal principles and also common sense. The Appealed Decision to enforce the suspended exclusion imposed by the CAS Decision, relates entirely to Bursaspor's failure to comply with the UEFA Regulations within the 3 year probationary period. It is not possible for Bursaspor to reopen an appeal against a disciplinary measure imposed in 2012, which was upheld by the CAS.

Reasons

1. The Panel noted that the main issue to be considered is whether the CFCB Adjudicatory Chamber was entitled or, indeed, obliged to lift the suspension attached to the ban contained in the CAS Decision.

The Panel noted that the suspension, relating to previous overdue payables in 2012, was contained in the CAS Decision. The CDB Decision had been replaced by the AB Decision, which in turn had been replaced by the CAS Decision. The Panel noted that UEFA submitted that it and its CFCB Adjudicatory Chamber are obliged pursuant to UEFA's Statutes to recognise and enforce the Decisions of CAS. Indeed, the Panel noted the clear wording of Article 11.2(e) of UEFA's Disciplinary Regulations that UEFA's general principles of conduct would be breached by anybody assigned by UEFA to exercise a function (such as the CFCB Adjudicatory Chamber is pursuant to the UEFA Regulations) should it disregard a decision of the CAS.

The Panel noted the transition of the UEFA Regulations from the 2010 edition to the 2012 edition saw the transfer of responsibilities to enforce the same from the CFCP to the CFCB. An integral part of such transition was the role of the UEFA CDB and UEFA AB which were transferred to the CFCB Investigatory Chamber and the CFCB Adjudicatory Chamber. The Panel was satisfied that the result of this transition was that the CFCB Adjudicatory Chamber now is the appropriate body within UEFA to deal with any suspended sanctions arising from the 2010 edition of the UEFA Regulations, whether those sanctions came from decisions of the UEFA CDB, the UEFA AB or from the CAS.

There was no dispute between the parties that Bursaspor reoffended within the 3 year period set out in the CAS Decision dated 10 July 2012, when on 15 July 2014, by Bursaspor's own declaration, it had EUR 3,443,000 of overdue payables to its employees in breach of Article 66 of the UEFA Regulations. This new offence lifted the suspensive effect of the competition ban in the CAS Decision and the Panel determined that the CFCB Adjudicatory Chamber had jurisdiction to consider the CAS Decision and to confirm the competition ban contained within the CAS Decision.

2. Bursaspor challenged the proportionality of the Appealed Decision.

Bursaspor is attempting to argue that this CAS Panel should rehear the 2012 breaches in light of more recent jurisprudence of UEFA. Unfortunately for Bursaspor, this is not within the Panel's scope of review, the CAS Decision is final and binding – its 2012 breaches have been fully determined by that CAS Panel, which it should be noted,

actually overturned the AB Decision, in Bursaspor's favour, and provided it with a second chance.

Finally, whilst the Panel was impressed by all the actions Bursaspor has taken under the leadership of its new President, as UEFA put it – these actions have “no bearing”. They may well have had a bearing on the leniency the CFCB Adjudicatory Chamber showed in relation to the 2014 breaches, but all the CFCB Adjudicatory Chamber could do is lift the suspension in the CAS Decision and confirm the competition ban should Bursaspor qualify for UEFA's Club competitions “in the next 4 years”.

3. The Panel notes the “carrot and stick” approach to sanctioning by UEFA. In the case at hand, Bursaspor had no overdue payables until 2 years later, so the suspended disciplinary sanction (the stick) had some positive effect on Bursaspor.

In conclusion, the Panel considered that in the context of a CAS decision giving a suspended ban on a club regarding the seasons 2012/2013, 2013/2014, 2014/2015 and 2015/2016, if that suspension is lifted and the club then qualifies for a UEFA Club competition, the club would be excluded from the next competition it qualified for in such remaining seasons as referred to in the CAS decision. Indeed, to start the suspension running from the date of reoffending would show no “reward” for any period of compliance of a club with the UEFA Club Licensing and Financial Fair Play Regulations and would be contrary to the “carrot and stick” approach to sanctioning by UEFA.

Decision

The Panel therefore partially allowed the Appeal and rather than annulling paragraph 1 of the Appealed Decision, replaced it as follows, to clarify matters:

“The exclusion imposed in the 2012 Decision shall come into immediate effect and Bursaspor is therefore excluded from participating in any 2015/2016 UEFA Club Competition, should it qualify for the same”.

CAS 2015/A/3874

Football Association of Albania (FAA) v. Union des Associations Européennes de Football (UEFA) & Football Association of Serbia (FAS)

10 July 2015

Football; Misconduct of supporters during a match; Separate proceedings and right of access of the party to one proceedings to the submissions of the other proceedings; Racist and discriminatory chants as they are perceived by any reasonable onlooker; Standing to appeal decisions rendered by the UEFA bodies; Drone and illicit banner incidents during a match and principle of strict liability ; Identification of a drone carrying a banner with nationalistic symbols; Resort to a presumptive approach for the attribution of supporters' misconduct to either team; UEFA's full discretionary power to impose a sanction and principle of proportionality; Conditions for the CAS to review a field-of-play decision;

Panel

Prof. Massimo Coccia (Italy), President
Mr Philippe Sands QC (United Kingdom)
Mr Martin Schimke (Germany)

Facts

The Appellant, the Football Association of Albania, is the football governing body in the Republic of Albania. The Respondent, the Union des Associations Européennes de Football (UEFA or the "Respondent"), is the governing body of European football and one of the six continental confederations of FIFA. It has its headquarters in Nyon, Switzerland. The Intervening Party, the Football Association of Serbia (the "Intervening Party" or the FAS), is the football governing body in the Republic of Serbia.

The present case centers on incidents that occurred during a qualifying match, held in Belgrade on 14 October 2014, for the 2016 UEFA European Championship between the Serbian and Albanian national football teams, including the abandonment of said match. This appeal was brought by the Football Association of Albania (the "Appellant" or FAA) against a decision of the UEFA Appeals Body dated 2 December 2014 (the "Appealed Decision") upholding (i) the decision of the UEFA Control, Ethics and Disciplinary Body (also the CEDB) against the FAA dated 23 October 2014, which sanctioned that association with a 0:3 forfeit of the aforementioned match and with a fine of EUR 100,000, and (ii) the decision of the CEDB against the Football Association of Serbia also dated 23 October 2014, which sanctioned that association with a deduction of three points in the 2016 UEFA European Championship qualifying round, two home matches behind closed doors and a fine of EUR 100,000.

The relevant part of the Decision of the CEDB against the FAS (the "CEDB Serbia Decision") provides as follows: *"Regarding the nature of the above infringements [including the chants "Kill, Kill the Albanians" and "Kill Slaughter the Albanians until they are exterminated" and other illicit chants and banners], the [CEDB] cannot comply with the assertion of the complainant as it is not comfortable with the view that the above incidents have a xenophobic background. It has been comprehensively demonstrated in previous paragraphs that all the incidents occurred during the above mentioned match are based on political reasons. Therefore, the [CEDB] is not able to conclude to its comfortable satisfaction that some of the attitudes showed by the [FAS] had*

xenophobic connotations, at least on the basis of the complaint, the FARE report and the UEFA official reports. In this regard, the complainant fails to specify in which extent those attitudes insult the human dignity in accordance with Article 14 DR, as well as it did not provide any evident that may lead the [CEDB] to deal with them on this basis”.

Based on the above reasoning, the CEDB deemed the FAS to have infringed Article 16 para. 2(e) DR and not Article 14 DR. For this and a multitude of other infringements, as previously mentioned, the CEDB sanctioned the FAS with a deduction of three points in the 2016 UEFA European Championship qualifying round, two matches behind closed doors and a fine of EUR 100,000.

On 2 December 2014, the UEFA Appeals Body adopted the decision now in appeal before the CAS. On 22 December 2014, the same body issued the grounds for its decision, summarized below, confirming the CEDB’s decision. First, the UEFA Appeals Body held as inadmissible the FAA’s appeal lodged against the parts of the CEDB Serbia Decision not related to the responsibility of the Match being abandoned. Second, the UEFA Appeals Body considered the FAA’s responsibility for the drone and illicit banner. Third, the UEFA Appeals Body addressed the abandonment of the Match. On this issue, the UEFA Appeals Body was comfortably satisfied that the Match Referee communicated to the Albanian national team his decision to resume the Match, once safety was restored. Further, the UEFA Appeals Body found that the FAA refused to restart the match, even before having assessed the safety and security conditions of the match. Finally, the UEFA Appeals Body assessed the issue of sanctions.

On 30 December 2014, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (CAS) to challenge the Appealed Decision. In essence, the Appellant

requested the annulment of the Appealed Decision and the sanctioning of the FAS for racist and discriminatory conduct of its supporters. On 3 February 2015, following the FAS’s application to intervene in the present arbitration, the President of the CAS Appeals Arbitration Division notified its decision to allow the FAS to participate as Intervening Party in accordance with Article R41 of the CAS Code.

Reasons

1. In case that proceedings are considered as being separate, a party to the first proceedings does not have a right of access to the submissions in the other proceeding. Moreover, absent the consent of the concerned parties, the arbitrators appointed in the other proceedings are in principle prevented from disclosing to such party the submissions filed in that proceeding. This is in keeping with Article S19 of the CAS Code, under which arbitrators must keep CAS arbitral proceedings confidential from third parties.
2. As regards the racist and discriminatory chants, the Panel has prima facie formed the view that hateful chants calling for the killing or extermination of one national or ethnic group would be perceived by any reasonable onlooker as an insult to the human dignity of a group of persons on grounds of ethnic origin. However, as the Respondent and the Intervening Party disputed the FAA’s standing to appeal in relation to this matter, the Panel is allowed to review the CEDB’s legal qualification of those chants only if this Appellant’s grievance is admissible under the relevant UEFA rules. Pursuant to Article 47 DR, the UEFA Statutes stipulate which decisions taken by disciplinary bodies may be challenged before the CAS, and under which conditions.

3. According to Article 62 para. 2 of the UEFA Statutes, only parties directly affected by a decision may appeal to the CAS against a decision rendered by UEFA. In order to determine whether the Appellant's request to sanction the FAS under Article 14 DR for racist and discriminatory chants is admissible, the Panel must assess whether the Appellant is "directly affected" by the relevant decision. The Panel held that, first, the Appellant is not the direct addressee of the CEDB Serbia Decision and, second, the Appellant is not "directly affected" by the measures that may have been reasonably applicable for an infringement of Article 14 DR. In light of the foregoing, the Panel finds that the Appellant lacks standing to appeal the limb of the Appealed Decision linked to the CEDB Serbia Decision's dismissal of Article 14 DR charges. It dismisses that part of the Appellant's appeal in its entirety and may not review this limb of the Appealed Decision. However, the chants from the Serbian supporters appear to be relevant in relation to the assessment of the issue of responsibility for the Match not being continued.
4. As to the drone and illicit banner incident, Articles 8 DR and 16 DR provide that national associations and clubs are strictly liable for the misbehaviour of their supporters. CAS jurisprudence has already attested to the lawfulness of such rules under Swiss law, taking into account the principle that strict liability for the behaviour of supporters is a fundamental element of the current football regulatory framework. According to CAS jurisprudence, the term "supporter" is an open concept that is intentionally undefined. It must be assessed from the perspective of a reasonable and objective observer. It is not linked to race, nationality or the place of residence of the individual, nor is it linked to a contract which an individual has concluded with a national association or a club in purchasing a match ticket. There is further no UEFA provision that makes a distinction between 'official' and 'unofficial' supporters of a team.
5. The main issue in this matter is to assess whether the drone carrying the "Greater Albania" banner with various Albanian nationalistic symbols, which undoubtedly influenced the smooth running of the Match, is to be considered as having been prepared and operated by one or more supporters of the Albanian side, in the eyes of a reasonable and objective observer. No conclusive evidence has been brought before the CAS Panel in order to attribute the use of the drone to any identified Albanian supporter. However, a reasonable and objective observer would conclude that a drone carrying a banner depicting Albanian extremely nationalistic and patriotic symbols was highly likely to be operated by one or more Albanian supporters inside or outside the stadium.
6. The attribution of the deployment of the drone and banner to Albanian supporters is based on a presumptive approach. Swiss law accepts the resort to such an approach, as long as it is based on reasonable and objective criteria and is rebuttable by the other party. The attribution of supporters' misconduct to either team typically arises from symbols supporting a certain team worn or held by one or more individuals (shirts, hats, etc.), by the nature of the chants or slogans voiced by some spectators, by the location of the relevant individuals within the stadium, or, as is the case here, by the parading of a banner showing symbols and words clearly supporting one of the competing sides. All these elements can be considered to be

reasonable and objective criteria. In light of the foregoing, the majority of the Panel is comfortably satisfied that the drone carrying the illicit banner was controlled by one or more Albanian supporters. This gives rise to the responsibility of the Appellant.

7. Although the CEDB and UEFA Appeals Body have full discretionary power when it comes to imposing a sanction, they must also consider the objective and subjective elements of an offence, and take into account the aggravating and mitigating circumstances. Among the disciplinary measures that may be imposed on member associations for the infringements committed is a fine, which must be within in the range of EUR 100 and EUR 1,000,000. The UEFA Appeals Body concluded that the EUR 100,000 fine was legitimate and proportionate due to the sophisticated method (it is extremely difficult to prevent such an intrusion) and in order to discourage supporters from using similar methods. The majority of the Panel agrees with the UEFA Appeals Body's reasoning, and with the fine of EUR 100,000, even if it appears quite severe when compared to the fine imposed for other incidents involving political banners and/or disrupting the match.

According to Article 27.01 CR: *"If an association refuses to play or is responsible for a match not taking place or not being played in full, the UEFA Control and Disciplinary Body takes a decision in the matter". Pursuant to Article 21 DR, which covers forfeits, "If a match cannot take place or cannot be played in full, the member association [...] responsible forfeits the match"*.

With regard to the disciplinary consequences, there may be situations where a shared responsibility should be attributed to both clubs or associations and

that, were such the case, the adjudicatory body might have a discretion under Swiss law in interpreting and applying the UEFA rules so as to devise a fair and reasonable solution to a specific case. In reading Law 5 LG, the following is clear to the Panel: (i) only the referee has the duty and power to decide that a suspended match must be restarted or abandoned; (ii) the referee, and only the referee, must clearly indicate that a suspended match must be restarted; (iii) such indication must take the form of a direct – in the sense of coming personally from the referee and being addressed directly to the players – and unconditional order to the concerned players, exactly as any other decision that the referee must take “regarding facts connected with play”.

8. In this connection, the Panel notes the considerable protection afforded to referees' field-of-play decisions, as reflected in long-established CAS jurisprudence. Thus, the CAS will not review a field-of-play decision unless there is persuasive evidence that there has been arbitrariness or bad faith in arriving at such decision, even when that decision is recognized as being wrong, with the benefit of hindsight. Therefore, for an association to be sanctioned with a 0:3 forfeit for its refusal to play after an interruption of the match, it is necessary to have been a direct, clear and unconditional order by the referee to the players to play.

The Panel notes the apparent lack of clarity as to the division of powers and responsibilities between the Match Referee, the UEFA Match Delegate and the UEFA Security Officer. Furthermore, the Panel has been unable to ascertain to its comfortable satisfaction, on the basis of the official reports and the testimony of the Match Referee, the UEFA Match Delegate and the UEFA Security Officer, that the

Match Referee took a clear, definite and unconditional decision that safety had been assured so that the Match could resume. The Panel considers that such an approach is entirely reasonable, on the basis of the evidence before it as to the circumstances that pertained at the time. If the Panel had been provided with clear evidence that the Match Referee did in fact directly and unconditionally order the teams to continue to play the Match, then it might have concluded that the Appellant had refused to continue to play in circumstances that would give rise to a violation of Article 27.01 CR. However, the record discloses no such evidence.

The Panel must consider whether, notwithstanding the fact that the evidence does not reveal that the Appellant refused to play following an order issued by the Match Referee that it do so, it might nevertheless be responsible for the Match not being played in full in violation of Article 27 CR. The Panel finds that the Appellant is not so responsible. Rather, the fact that the Match was not played in full was due to the totality of the circumstances that pertained and, in the Panel's view, these are the responsibility not of the Appellant but of the Intervening Party. The Panel notes that when the drone incident occurred the Match had already been stopped, in the 42nd minute. The match had been stopped because of the unruly behaviour of the fans in the stadium, who had thrown objects at Albanian players and staff before the Match began, and continued to do so once it had started.

The Panel understands why the totality of circumstances might have caused the Match Referee to hesitate to conclude that the safety of the players had been ensured and

would continue to be ensured. The FAS bears the exclusive responsibility for the outrageous acts of violence on the Albanian players by the Serbian supporters. The drone incident certainly did not assist in calming matters down, but in all the circumstances it is these other appalling acts of behaviour which are the significant factors in causing the Match to be abandoned. As such, the Panel holds that the FAS and not the Appellant must be considered as responsible for the Match not being played in full. In light of the foregoing, the Panel overturns this limb of the Appealed Decision and grants the Match forfeiture of 0:3 in favour of the Appellant. It follows that the issues the Appellant raised regarding state of necessity and fault are moot and the Panel needs not discuss them.

Decision

The Panel partially upheld the Appeal, it dismissed the FAA's request to impose Article 14 DR sanctions on the FAS for lack of standing, confirmed the fine of EUR 100,000 imposed on the FAA and set aside the UEFA Appeals Body's decision of 2 December 2014.

CAS 2015/A/3876

James Stewart Jr. v. Fédération Internationale de Motocyclisme (FIM)

27 April 2015

Motorcycling; Doping (Adderall); Range of the period of ineligibility under No Significant Fault or Negligence; Proportionality of the sanction; Consequence of the sanction on the results obtained during the provisional suspension;

Panel

Mr James Robert Reid QC (United Kingdom), President
Mr Michele Bernasconi (Switzerland)
Prof. Ulrich Haas (Germany)

Facts

Mr James Stewart, Jr. (“Mr Stewart”) is a professional motocross and supercross rider.

The Fédération Internationale de Motocyclisme (FIM) is the international body governing the sport of motorcycle racing in its various different forms. Its registered seat is in Mies, Switzerland.

In 2012, Mr Stewart was diagnosed as suffering from Attention Deficit Hyperactivity Disorder (ADHD) as a result of which he was prescribed the medication “Adderall” to treat his condition. Since then (subject only to a brief period when an unsuccessful attempt was made to substitute another medication) he has taken Adderall in accordance with the prescription twice a day.

Adderall contains amphetamine which is, and has at all material times been, a prohibited substance under the heading “S6 Stimulants” of the FIM Anti-Doping Code (FIM ADC).

On 12 December 2013, Mr Stewart ordered his FIM/AMA licence for the year 2014. The licence was issued to him. The licence provides for the Rider to sign it under undertakings which include *“I also attest in particular that I am cognisant with the FIM Anti-Doping Code currently in force and agree to submit to it unreservedly”*.

On 17 January 2014, Mr Stewart signed a Medical History Form as provided by Appendix A of the FIM ADC. In it he replied “No” to the question *“Do you take any medicine or drugs regularly?”* The form contained the following statement: *“I declare that the information that I have given is the truth”*.

Mr Stewart participated in the 2014 AMA Supercross FIM World Championship on 12th April 2014. As a part of the routine In-Competition doping control, Mr. Stewart's urine sample was collected and subsequently analysed by a WADA accredited laboratory. Mr. Stewart's sample contained an AAF for Amphetamine, which is prohibited under “S.6 Stimulants” of the FIM ADC.

On 17 June 2014, FIM provisionally suspended Mr Stewart.

On 18 June 2014 Mr Stewart sought to file and have processed immediately a TUE form and also sought a lifting of the provisional suspension on the grounds *inter alia* that Mr. Stewart had been diagnosed as suffering from ADHD and that the positive test for Amphetamine had been caused by his prescribed medication, Adderall, in respect of which he would have been granted a TUE if he had known he needed to apply for one.

Notwithstanding his provisional suspension, Mr Stewart competed in the final rounds of the Lucas Motor Oil Series of races on 28 June 2014. Mr Stewart did so on the basis that these were events promoted by MX Sports Pro Racing (“MX Sports”), the regulatory body of which is AMA Pro Racing, and were not AMA or FIM events. MX Sports permitted Mr Stewart to compete on the basis that, while it would recognise a penalty of Ineligibility imposed by FIM, Mr Stewart was not at that time subject to a period of Ineligibility but only to a period of Provisional Suspension, and FIM could only impose a Provisional Suspension on events under its jurisdiction. The view expressed by MX Sports was that there was no basis on which it could enforce FIM’s Provisional Suspension against Mr Stewart in respect of any of its events.

On 15 October 2014, the FIM TUE Board granted Mr Stewart a prospective TUE in respect of his use of Adderall.

By its detailed and fully reasoned decision dated 12 December 2014, the FIM International Disciplinary Court (CDI) determined that Mr Stewart committed an anti-doping rule violation under Article 2.1 of the FIM ADC and therefore, he was sanctioned with a period of 16 months ineligibility commencing on the date of the collection of the sample. Mr Stewart was disqualified from the AMA Supercross FIM World Championship in the round held at Century Field Link, Seattle Washington, USA on 12th April 2014, and the rounds of the Lucas Motor Oil Series of races: Blountville, Tennessee, on 28 June 2014, Buchanan, Michigan, on 5 July 2014, Mechanicsville, Maryland, on 12 July 2014, and Millville Minnesota on 19 July 2014.

By a Statement of Appeal dated 2 January 2015, Mr Stewart appealed to the Court of Arbitration for Sport (the CAS) in accordance with Article R47 *et seq.* of the Code of Sports-

related Arbitration (the “Code”) requesting that the decision of the CDI of 12 December 2014 be annulled and.

On 3 February 2015, following extensions of time granted with the consent of, or without opposition from, FIM, Mr Stewart filed his Appeal Brief in accordance with Article R51 of the Code.

After a variety of extensions granted to FIM without objection from Mr Stewart, FIM filed its Answer on 27 March 2015 in accordance with Article R55 of the Code.

A hearing was held on 30 March 2015 at the CAS Court Office in Lausanne, Switzerland.

Reasons

1. In the present case, it is accepted by Mr Stewart that he was guilty of an anti-doping rule violation. He also accepts that he cannot rely on Article 10.5.1 (No Fault or Negligence). He asserts, however, that he has established that he bears “No Significant Fault or Negligence” and is accordingly eligible to have any period of ineligibility reduced, though such reduction could not be to less than one half of the otherwise applicable sanction. His further contention is that even if the period of ineligibility were reduced to that minimum (namely one year’s ineligibility) such sanction would in the circumstances of the case be disproportionate, so that the Panel should impose a lesser sanction than the minimum provided by the applicable rules.

Subject to the question of whether the minimum sanction for a case where there is “No Significant Fault or Negligence” is in the circumstances of the present case disproportionate, the Panel has to consider what in the range between 12 months to 24 months Ineligibility (taking into account,

however, that FIM is precluded by its failure to appeal to seek a longer period of Ineligibility than the 16 months period imposed by the FIM CDI) is the proper sanction to be imposed on Mr Stewart.

The period of ineligibility available in a case of “No Significant Fault or Negligence” ranges between 12 months up to 24 months. Generally speaking, this range can be split into a sub-range” for “normal fault” going from 18 to 24 months and “light fault” ranging from 12 to 18 months. The FIM CDI has qualified the present case as one of “light fault”. This Panel concurs with this view. In particular, the Panel finds that in a case in which an athlete got a prescription from a doctor for a medication and later on actually obtained a TUE from the competent sports organisation to use the medication, only “light fault” can be attributed to the athlete in case he tests positive before actually obtaining the TUE. As to the question raised by the Athlete, namely, whether within the range applicable to him the period of ineligibility should be fixed at the lowest end (i.e. at 12 months) the factors indicated above and the totality of the material placed before the Panel show that this is not a case in which the minimum sanction of 12 months Ineligibility is appropriate. Taking into account that the Athlete had anti-doping information available to him and that – in essence – he did not take any precautions whatsoever to avoid the adverse analytical finding, the Panel finds that this is a case that is situated rather at the atop of the lower end of the “light fault” range. Thus, the Panel concludes that the imposition of a period of 16 months ineligibility by the FIM CDI was indeed the proper period to fix.

2. That conclusion disposes of the argument as to proportionality. The question of

proportionality would only have arisen if the Panel had taken the view that the appropriate penalty, applying the rules, was the minimum available, but that even that minimum penalty was excessive.

3. So far as the consequential matters are concerned, the disqualification from the FIM competitions with the resulting consequences including forfeiture of any medals, points and prizes stands.

Regarding the effect of the sanction on the participation of Mr Stewart to the Lucas Motor Oil Series of races which were events promoted by MX Sports Pro Racing, in the Panel’s view, FIM has the authority and power to say that inasmuch as its competition schedule is concerned (FIM calendar), it will disqualify the results. A completely different question is the effect of the disqualification and whether the results still count outside the auspices of the FIM, since it appears that a rider may participate in these events with or without a FIM licence. It may be perfectly right – from the event organizer’s perspective – that because it is independent of the FIM, the results are still valid. But for its own purposes, FIM is perfectly entitled to say that within its jurisdiction the results will not be recognised. It follows that the FIM CDI had the power to make an order for the disqualification of those results, so far as FIM is concerned, with any effects which that might entail, but that it is a matter for the event organiser, MX Sports, and its governing authority, AMA Pro Racing, to determine the extent, if any, to which they recognise and give effect to the disqualification.

In conclusion, as to the competitions organized outside the auspices of the FIM during the provisional suspension ordered by the FIM, the disqualifications have effect

only so far as FIM has jurisdiction or so far as other authorities recognise the disqualifications.

Decision

The decision rendered on 12 December 2014 by the International Disciplinary Court of the Fédération Internationale de Motocyclisme is confirmed except that it is determined that the disqualifications of Mr James Stewart, have effect only so far as Fédération Internationale de Motocyclisme has jurisdiction or as so far as other authorities recognise the disqualifications.

Jugements du Tribunal Fédéral* **Judgements of the Federal Tribunal**



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

Arrêt du Tribunal fédéral 4A_246/2014

15 juillet 2015

A. SA (recourant) c. B. et al. (intimés) et Fédération L. (intimée)

Recours en matière civile contre la sentence rendue le 7 mars 2014 par le Tribunal Arbitral du Sport (TAS)

Extrait des faits

A. SA (ci-après: A.) est un club de football professionnel basé à X. et affilié à la Fédération L. (ci-après: L.). De juin 2010 à septembre 2011, A. a conclu des contrats de travail avec chacun des neuf footballeurs professionnels ... suivants, tous domiciliés en Y.: B. (ci-après: le joueur 1), C. (ci après: le joueur 2), D. (ci-après: le joueur 3), E. (ci-après: le joueur 4), F. (ci-après: le joueur 5), G. (ci-après: le joueur 6), H. (ci-après: le joueur 7), I. (ci-après: le joueur 8) et J. (ci-après: le joueur 9). Ces contrats avaient pour particularité de lier le versement des salaires mensuels entiers à la condition que les footballeurs jouent 70% du nombre total de minutes que représentaient les matchs disputés par le club pendant le mois considéré.

Les 13 mars et 3 avril 2013, les joueurs ont déposé des requêtes auprès de la Chambre de Résolution des Litiges de L. (ci-après: la CRL) en vue d'obtenir le paiement de salaires en souffrance et de faire reconnaître qu'ils avaient valablement résilié leurs contrats de travail pour juste cause.

Par décision du 23 avril 2013, la CRL a reconnu le droit des joueurs de résilier leurs contrats de travail avec effet à la même date et condamné le club à verser divers montants à chacun des joueurs à titre de salaires impayés.

A. a attaqué ces décisions devant la Commission d'appel de L. (ci-après: la Commission). Statuant les 4 juin et 11 juillet 2013, celle-ci a déclaré tardifs les appels interjetés le 18 juin 2013 contre les décisions

relatives aux joueurs 1 à 7. Elle a partiellement réduit le montant octroyé au joueur 8 à titre de salaire impayé et a confirmé la décision concernant le joueur 9.

Le club ... a saisi le Tribunal Arbitral du Sport (TAS) d'appels visant toutes les décisions rendues par la Commission. Les causes ont été jointes. Un arbitre unique a été désigné en la personne d'un avocat londonien. Par sentence du 7 mars 2014, il a prononcé la clôture des procédures concernant les joueurs 6 et 9, rejeté les appels déposés par A. en rapport avec les sept autres joueurs et confirmé les décisions de la Commission y relatives.

Le 16 avril 2014, A. (ci-après: le recourant ou le club) a formé un recours en matière civile dénonçant une violation de la règle ne infra petita (art. 190 al. 2 let. c LDIP), de son droit d'être entendu (art. 190 al. 2 let. d LDIP) et de l'ordre public procédural (art. 190 al. 2 let. e LDIP).

Extrait des considérants

1. Dans un premier moyen, le recourant, se fondant sur l'art. 190 al. 2 let. c LDIP, reproche à l'arbitre d'avoir omis de se prononcer sur un des chefs de la demande.

Il appert de la relation des faits procéduraux pertinents, lesquels lient la Cour de céans, que le recourant donne au contenu de ses courriers des 14 et 17 janvier 2014 une portée allant bien au-delà de celle qui a été retenue par l'arbitre. Ce dernier y a vu l'indication, par le club, de ce que les joueurs 6 et 9 se retireraient de la procédure, ce que K., qui représentait tous les joueurs devant le TAS, avait expressément confirmé. Aussi, en prenant acte, sous ch. 1 du dispositif de sa sentence, du fait que les causes concernant les

joueurs 6 et 9 avaient pris fin et en les rayant du rôle, l'arbitre n'a-t-il nullement statué *infra petita*.

Au demeurant, la Cour de céans peut faire siennes les considérations émises par le TAS en ce qui concerne le défaut d'intérêt actuel digne de protection du club à l'admission de son recours relativement aux joueurs 6 et 9. Elle est d'autant plus encline à le faire que l'existence d'une procédure disciplinaire en cours contre le club en question en rapport avec ces deux joueurs est une allégation qui ne peut pas être prise en considération pour les motifs sus-indiqués.

2. Dans un deuxième moyen, divisé en trois branches, le recourant se plaint de la violation de son droit d'être entendu.

Le recourant expose, dans la première branche du moyen examiné, avoir démontré, devant le TAS, que les décisions de la CRL relatives aux joueurs 1 à 7 ne lui avaient pas été valablement notifiées avant le 13 juin 2013 et que, de ce fait, les appels, adressés par lui le 18 du même mois à la Commission, avaient été déposés dans le délai de cinq jours prévu par les règlements de L.

Quoi qu'il en soit, il ressort, à tout le moins implicitement, du passage de la sentence cité par lui (n. 69), que le recourant, par la voix de son représentant M., a eu l'occasion d'exposer, lors de l'audience d'instruction tenue par l'arbitre, le motif pour lequel les bons de paiement n'étaient prétendument pas disponibles devant les deux instances précédentes. Le moyen pris de la violation du droit d'être entendu du recourant n'est donc pas fondé dans sa première branche.

Dans la deuxième branche du même moyen, le recourant fait grief à l'arbitre de ne pas avoir traité les questions qu'il avait soulevées en rapport avec le joueur 2, d'une part, et avec les joueurs 1 et 3, d'autre part.

Le double grief de violation du droit d'être entendu formulé par le recourant dans cette deuxième branche apparaît fondé.

Effectivement, on cherche en vain, dans la sentence attaquée, le passage où l'arbitre aurait réfuté les arguments du recourant, en particulier celui qui a trait au joueur 2 et qui est expressément relaté dans le chapitre de la sentence consacré à l'exposé des positions des parties. Or, l'argumentation touchant ce footballeur était tout à fait spécifique en ce qu'elle remettait en cause l'existence même de la créance de l'intéressé en raison de son incapacité de travail. L'arbitre aurait dû indiquer, à tout le moins, s'il jugeait inapplicable, dans le cas d'un empêchement de travailler causé par une blessure, la clause du contrat de travail liant la rémunération mensuelle de ce joueur à la condition qu'il jouât un pourcentage déterminé du nombre total de minutes que représentaient les matchs disputés par le club pendant le mois considéré. Il aurait dû également traiter la question de la prise en charge des frais médicaux, expressément soulevée par le recourant.

Pour ce qui est des joueurs 1 et 3, il ressort des passages de l'appel au TAS cités dans le recours que le recourant avait dûment contesté la manière dont la CRL avait appliqué la susdite clause de pourcentage figurant dans les contrats de travail de ces deux joueurs (cf. *appeal brief* du 9 septembre 2013, n. 70/71 et 86/87). Or, du sort réservé à cet argument dépendait le montant même de la créance de salaire dont chacun de ceux-ci était titulaire, indépendamment du point de savoir si les montants déjà versés par l'employeur avaient suffi ou non à éteindre ladite créance. Partant, l'arbitre ne pouvait pas passer cette question sous silence sans porter atteinte au droit d'être entendu du recourant.

La troisième branche du moyen étudié concerne le refus de l'arbitre de prendre en considération les bons de paiement que le recourant avait produits devant lui afin de démontrer que les joueurs, hormis le joueur 2 à qui il prétend ne rien devoir, avaient reçu l'entier de leurs salaires pendant la période entrant en ligne de compte.

Selon le recourant, l'arbitre se serait contenté d'écarter ces éléments de preuve, sur la base de l'art. 317 du Code de procédure civile suisse (CPC; RS 272) et de l'art. R57 du Code de l'arbitrage en matière de sport (ci-après: le Code), au motif que l'appelant n'avait pas valablement expliqué pourquoi les bons de paiement n'avaient pas pu être produits en première ou en deuxième instance déjà. Le recourant reproche à l'arbitre, par surabondance, de ne pas l'avoir interpellé formellement avant d'interpréter l'art. R57 du Code à la lumière de l'art. 317 CPC, alors que lui-même ne pouvait pas se douter que cette dernière disposition serait appliquée - pour écarter la production de preuves prétendument nouvelles - dans une procédure arbitrale dirigée contre une décision d'une fédération sportive qui n'avait absolument rien à voir avec la procédure d'appel prévue par les art. 308 ss CPC.

En l'espèce, l'arbitre retient que le recourant, chargé du fardeau de la preuve sur ce point, ne démontre pas pour quelle raison il lui était impossible de produire les bons de paiement devant la CRL, puis devant la Commission, ni n'explique, de manière un tant soit peu convaincante, pourquoi il n'aurait pas pu produire une copie de ces pièces, dont les originaux étaient prétendument indisponibles pour cause d'enquête fiscale en cours. Aussi juge-t-il inadmissible le dépôt des pièces en question (sentence, n. 69 et 70). La constatation touchant l'absence d'explications plausibles quant à la tardiveté de la production des moyens de preuve litigieux relève du domaine des faits et lie le Tribunal fédéral. La conclusion qu'en a tirée l'arbitre est conforme à la jurisprudence précitée selon laquelle le droit de faire administrer des preuves doit avoir été exercé en temps utile.

Le recourant plaide en vain l'effet de surprise. Certes, la référence, faite par l'arbitre à la page 15 in fine de sa sentence, à l'art. 317 CPC paraît assez singulière, s'agissant d'un différend opposant un club de football ... à des joueurs de nationalité ... et domiciliés en Y. Toutefois, l'arbitre a également appliqué

l'art. 57 al. 3 du Code (sentence, n. 68), qui suffit à lui seul à justifier le refus de prendre en considération les pièces en question et dont le texte, comparable dans son principe à la disposition de droit procédural suisse précitée, énonce ce qui suit: "*La Formation peut exclure des preuves présentées par les parties si ces dernières pouvaient en disposer ou si elles auraient raisonnablement pu les découvrir avant que la décision attaquée ne soit rendue...*". Or, il va de soi que l'existence de cette disposition, qui constitue un élément-clé de la réglementation régissant la procédure d'appel devant le TAS, ne pouvait être ignorée par le recourant, lequel était assisté d'un avocat spécialisé dans les litiges en matière de sport.

En tout état de cause, l'arbitre a jugé les pièces litigieuses - c'est-à-dire les bons de paiement produits par le recourant - inaptes à établir le fait contesté, à savoir le versement de l'intégralité des salaires dus aux joueurs, dès lors que les paiements censés avoir été effectués d'après ces pièces ne paraissaient pas correspondre aux sommes dues en application des contrats liant les parties. Il a refusé d'admettre, en outre, que le recourant était libre, selon les termes des contrats de travail, de payer différentes sommes quand il pourrait disposer des fonds nécessaires et pour autant qu'il le pût. Pour lui, au demeurant, il n'était pas possible d'établir un rapport direct entre les versements opérés et les contrats de travail respectifs des joueurs sur le vu des pièces produites (sentence, n. 71).

Il s'agit là d'une argumentation subsidiaire qui suffit, à elle seule, à justifier le refus de prendre en compte les bons de paiement produits par le recourant, l'eussent-ils été en temps utile. Cette argumentation subsidiaire relève de l'appréciation anticipée des preuves et lie, partant, le Tribunal fédéral. Le recourant cherche en vain à la remettre en question en se limitant à lui opposer des arguments sans rapport avec la violation de l'ordre public.

3. Dans un ultime moyen, le recourant soutient que la sentence attaquée viole

l'ordre public procédural. Selon le recourant, l'interprétation restrictive de l'art. R57 al. 3 du Code équivalait à un refus d'exercer son plein pouvoir d'examen et, partant, privait le recourant du droit d'accès à un juge indépendant et impartial garanti notamment par l'art. 6 al. 1 CEDH.

L'art. 6 par. 1 CEDH ne s'oppose pas à la création de tribunaux arbitraux afin de juger certains différends de nature patrimoniale divisant des particuliers, pour autant que la renonciation de ceux-ci à leur droit à un tribunal en faveur de l'arbitrage soit libre, licite et sans équivoque (arrêt 4A_238/2011 du 4 janvier 2012 consid. 3.2 et l'arrêt de la Cour européenne des droits de l'homme cité). Une fois le choix de ce mode de règlement des litiges valablement opéré, une partie à la convention d'arbitrage ne peut pas se plaindre directement, dans le cadre d'un recours en matière civile au Tribunal fédéral formé contre une sentence, de ce que les arbitres auraient violé la CEDH, même si les principes découlant de celle-ci peuvent servir, le cas échéant, à concrétiser les garanties invoquées par elle sur la base de l'art. 190 al. 2 LDIP. Du reste, il est loisible aux parties de régler la procédure arbitrale comme elles l'entendent, notamment par référence à un règlement d'arbitrage (art. 182 al. 1 LDIP), pour peu que le tribunal arbitral garantisse leur égalité et leur droit d'être entendues en procédure contradictoire (art. 182 al. 3 LDIP). C'est ce qu'elles ont fait en l'espèce en se soumettant à la juridiction du TAS, démarche qui rendait le Code applicable ipso iure (cf. art. 27 al. 1 du Code), y compris son art. 57 al. 3. Aussi, malgré qu'en ait le recourant, ne saurait-on intégrer dans la notion d'ordre public procédural, visée par l'art. 190 al. 2 let. e LDIP, l'obligation faite au tribunal arbitral de traiter en toute hypothèse les causes qui lui sont soumises avec un plein pouvoir d'examen. Une fois la procédure étatique régulièrement écartée, il est tout à fait concevable et admissible que les parties s'accordent, directement ou par le biais de leur soumission à un règlement d'arbitrage, pour limiter la cognition du tribunal arbitral,

qu'il s'agisse de l'objet de son examen et/ou de la profondeur de celui-ci.

Quoi qu'il en soit, ainsi que le relève à bon droit le TAS dans sa réponse, on ne voit pas en quoi le refus de tenir compte d'un élément de preuve n'ayant pas été présenté conformément aux règles de procédure applicables équivaldrait à une restriction du pouvoir d'examen du tribunal arbitral.

Par conséquent, l'arbitre n'a nullement méconnu l'art. 190 al. 2 let. e LDIP en ne tenant pas compte des bons de paiement litigieux, déposés tardivement, pour trancher le différend opposant les parties.

Par ces motifs, le Tribunal fédéral a partiellement admis le recours, l'arbitre ayant violé le droit d'être entendu du recourant dans les causes divisant ce dernier d'avec les joueurs 1, 2 et 3.

Arrêt du Tribunal fédéral 4A_426/2014

6 mai 2015

Club A. (recourant) c. Club B. (intimé)

Recours en matière civile contre la sentence rendue le 8 mai 2014 par le Tribunal Arbitral du Sport (TAS)

Extrait des Faits

Le 24 novembre 2004, Club B., un club de football professionnel xxx, et C. Ltd, une société enregistrée à Londres, ont conclu un accord de partenariat (joint venture agreement; le JVA) par lequel le premier a octroyé à la seconde une licence sur les droits lui appartenant et lui a confié le soin de gérer ses départements de football amateur et professionnel.

Par contrat du 17 décembre 2004, Club A., un club de football professionnel yyy, a transféré à B. le footballeur professionnel D. (le joueur) pour un prix de 16'000'000 USD. La clause 7 dudit contrat énonce ce qui suit: *“en cas de futur transfert du joueur par B. à un autre club ou société sportive, A. aura le droit d'obtenir 20% du montant excédant le prix de USD 35'000'000. Dans l'hypothèse où le transfert est (sic) conclu pour un montant inférieur à USD 35'000'000, A. n'aura pas le droit de recevoir aucun montant”*.

En vertu de la clause 8 du contrat de transfert, B., pour permettre l'application de la clause précédente, devait renseigner par écrit A. au sujet des termes et conditions du transfert subséquent avant d'effectuer celui-ci.

En date du 13 janvier 2005, B. et le joueur ont signé un contrat de travail valable jusqu'au 13 janvier 2007. Une clause de ce contrat fixait à 100'000'000 USD la peine conventionnelle à payer au club xxx en cas de transfert du joueur avant l'échéance du contrat.

Le 28 août 2006, les parties au contrat de travail y ont mis fin d'un commun accord.

Deux jours plus tard, soit le 30 août 2006, le club de football professionnel E. signait un contrat de travail d'une durée de quatre ans avec le joueur et les sociétés C. et D. Inc.

Le 25 octobre 2007, A. a assigné B. devant la Commission du Statut du Joueur (la CSJ) de la Fédération Internationale de Football Association en vue d'obtenir la condamnation du club xxx au paiement de 4'000'000 USD au titre de la violation du contrat de transfert. Statuant le 26 mars 2012, le juge unique de la CSJ a rejeté la demande.

Le 26 novembre 2012, A. a adressé une déclaration d'appel au Tribunal Arbitral du Sport (TAS). Le club yyy concluait à l'annulation de la décision du juge unique de la CSJ et, partant, à l'allocation du montant réclamé dans sa demande, voire d'une somme à fixer conformément à l'art. 42 al. 2 CO. A titre de mesures d'instruction, il requérait la production de tout accord passé le 17 décembre 2004 ou ultérieurement entre B., C. et/ou une autre société au sujet du joueur.

Dans sa réponse du 8 février 2013, B. a conclu à la confirmation de la décision attaquée.

Une Formation de trois arbitres a été constituée. Le 23 mai 2013, elle a invité B. à produire les pièces requises par l'appelant. Cependant, l'intimé n'a pas donné suite à cette invitation, motif pris de ce qu'il avait déjà produit tous les contrats dans lesquels il apparaissait comme partie.

La Formation a rendu sa sentence le 8 mai 2014. Elle a rejeté l'appel, confirmé la décision du 26 mars 2012 et mis les frais de la

procédure arbitrale pour 85% à la charge de l'appelant et pour 15% à celle de l'intimé, chaque partie supportant ses propres frais d'avocat.

Le 7 juillet 2014, A. (ci-après: le recourant) a formé un recours en matière civile au Tribunal fédéral en vue d'obtenir l'annulation de la sentence du 8 mai 2014. Il y dénonce la violation de son droit d'être entendu (art. 190 al. 2 let. d LDIP) et soutient que la sentence attaquée est incompatible avec l'ordre public matériel (art. 190 al. 2 let. e LDIP).

En date du 30 octobre 2014, B. (ci-après: l'intimé) a formulé une demande de sûreté en garantie de ses dépens, laquelle a été rejetée par ordonnance présidentielle du 27 novembre 2014. Dans sa réponse du 5 janvier 2015, l'intimé a conclu au rejet du recours.

Extrait des considérants

1. Dans un premier moyen, le recourant reproche au TAS d'avoir violé son droit d'être entendu au motif qu'il n'aurait pas tenu compte de l'argumentation subsidiaire qu'il lui avait soumise dans son mémoire d'appel.

En l'occurrence, il ne va pas de soi que l'argumentation dénommée “subsidiaire” par le recourant mérite ce qualificatif. A considérer la structure du mémoire d'appel du 26 décembre 2002 - il a été rédigé par un avocat ... et un avocat ..., alors que le recours émane d'un avocat suisse -, de sérieux doutes peuvent être émis à ce sujet. Aussi bien, sous le titre marginal C. Legal Analysis de ce mémoire, le recourant présente son argumentation juridique, dans le cadre d'un premier sous-chapitre intitulé a) Prevention by the Respondent of the fulfillment of clause 7 of the Agreement (n. 24 à 35), en limitant son analyse à l'applicabilité de l'art. 156 CO relativement à la clause 7 du contrat de transfert. Puis, dans un second sous-chapitre intitulé b) Compensation in favor of A. (n. 36 à 69), il s'emploie à démontrer le montant du préjudice imputable, selon lui, à l'intimé. Cette démonstration revêt une

double forme. En premier lieu, le recourant explique que la valeur du joueur sur le marché des transferts s'élevait à 55'000'000 USD en 2006, si bien que l'application de la clause 7 du contrat de transfert lui donne droit à un supplément de 4'000'000 USD (i.e. [55'000'000 USD - 35'000'000 USD] x 20%; n. 36 à 51). En second lieu, le recourant se propose d'établir que l'on peut aboutir au même résultat en analysant le cas sous un angle différent. C'est précisément ici qu'il développe ce que son nouveau conseil appelle une “argumentation subsidiaire”. Il y indique que la valeur effective du joueur en 2004 était supérieure à 20'000'000 USD; que, de ce fait, il n'avait accepté l'offre de l'intimé que parce que ce dernier avait consenti à lui restituer une partie du montant qu'il toucherait lors d'un transfert ultérieur du joueur; qu'ayant toutefois été trompé par l'intéressé quant à la possibilité d'exécuter la clause 7 du contrat de transfert, il s'estimait en droit de lui réclamer la différence entre le montant précité et celui du prix de vente du joueur (16'000'000 USD), soit 4'000'000 USD (n. 52 à 67). Enfin et à titre subsidiaire, le recourant invitait la Formation à faire application de l'art. 42 al. 2 CO (n. 68 à 69). On constate, par-là, que le prétendu argument de droit subsidiaire avancé par lui ne constituait, dans son esprit, qu'une autre manière de calculer le préjudice que lui aurait causé l'intimé. C'est du reste bien ainsi que la Formation a compris les explications du recourant: reprenant la systématique du mémoire d'appel, elle résume l'argumentation “subsidiaire” de l'appelant (sentence, n. 46 à 52), non pas sous le chapitre consacré au fondement juridique de la prétention litigieuse (sentence, n. 28 à 36), mais sous celui traitant du montant du préjudice (sentence, n. 37 à 52). Or, elle n'a pas du tout examiné la question du montant du préjudice, expressément soulevée par elle (sentence, n. 92 ch. 2), parce qu'elle a jugé que l'intimé ne pouvait se voir imputer une violation du contrat de transfert (sentence, n. 121). Il suit de là que le recourant est malvenu de lui reprocher de ne pas avoir traité, en tant que fondement juridique spécifique, l'argument de droit qu'il avait en quelque sorte dissimulé,

fût-ce inconsciemment, dans son exposé touchant le calcul du dommage. Le devoir minimum d'examiner et de traiter les problèmes pertinents, que la jurisprudence relative au droit d'être entendu impose aux arbitres, ne va pas jusqu'à leur commander d'interpréter le contenu du mémoire pour tenter d'y découvrir un argument de droit sous-jacent. C'est à l'auteur de l'écrit de rédiger celui-ci de manière suffisamment claire pour que le tribunal arbitral puisse identifier d'emblée la ou les causes juridiques invoquée(s) à l'appui de sa prétention. Si la Formation n'a pas réussi à individualiser son argumentation "subsidaire", le recourant ne peut donc s'en prendre qu'à lui-même. Le premier moyen soulevé par lui tombe, partant, à faux.

2. A suivre le recourant, la sentence attaquée serait encore incompatible avec l'ordre public matériel à un double titre, car elle violerait tant le principe de la fidélité contractuelle que le principe de la bonne foi.

Le principe de la fidélité contractuelle, rendu par l'adage *pacta sunt servanda*, au sens restrictif que lui donne la jurisprudence relative à l'art. 190 al. 2 let. e LDIP, n'est violé que si le tribunal arbitral refuse d'appliquer une clause contractuelle tout en admettant qu'elle lie les parties ou, à l'inverse, s'il leur impose le respect d'une clause dont il considère qu'elle ne les lie pas. Le processus d'interprétation lui-même et les conséquences juridiques qui en sont logiquement tirées ne sont pas régis par le principe de la fidélité contractuelle, de sorte qu'ils ne sauraient prêter le flanc au grief de violation de l'ordre public.

Selon le recourant, la Formation aurait violé le principe de la fidélité contractuelle en admettant que l'intimé était lié par la clause 7 du contrat de transfert et qu'il avait usé d'un procédé qualifié par elle de "peu usuel", tout en niant la violation des règles de la bonne foi imputée à l'intéressé et en laissant, de manière contradictoire, une partie des frais de l'arbitrage à la charge de ce dernier. En argumentant de la sorte, le recourant

méconnaît totalement la notion spécifique de fidélité contractuelle, telle qu'elle a été précisée par la jurisprudence susmentionnée. Il l'utilise, en réalité, comme un biais pour tenter de détourner l'interdiction de critiquer l'application du droit matériel dans un recours en matière civile dirigé contre une sentence arbitrale internationale. Ce qui seul importe, en l'occurrence, et que l'intéressé feint d'ignorer, c'est de constater que la Formation a rejeté la demande après avoir nié que les conditions d'application de l'art. 156 CO, nécessaires à son admission, fussent réalisées dans le cas concret.

Il n'importe, au demeurant, que la Formation ait laissé une partie, du reste faible, des frais de l'arbitrage à la charge de l'intimé, en dépit du fait que celui-ci avait obtenu entièrement gain de cause devant elle. Outre que le recourant n'a pas d'intérêt à ce que la Cour de céans annule la sentence attaquée et la renvoie à la Formation pour qu'elle lui fasse supporter l'intégralité des frais et dépens de la procédure arbitrale, il ne faut pas perdre de vue que le sort des frais et dépens de toute procédure, qu'elle soit étatique ou arbitrale, est une question qui obéit souvent à des règles propres faisant largement appel au pouvoir d'appréciation du juge ou de l'arbitre, voire à des motifs d'équité. Tel est le cas de l'art. R64.5 du Code qui invite la Formation à tenir compte, lors de la condamnation aux frais d'arbitrage et d'avocat, de la complexité et du résultat de la procédure, ainsi que du comportement et des ressources des parties. Aussi le recourant tente-t-il en vain de mettre en évidence une contradiction entre son déboutement et sa libération partielle des frais de l'arbitrage. D'ailleurs, s'il devait y avoir une incohérence intrinsèque entre les considérants de la sentence relatifs au fond et celui qui se rapporte aux frais et dépens de l'arbitrage, un tel vice n'entrerait pas dans la notion de l'ordre public matériel (arrêt 4A_150/2012 du 12 juillet 2012 consid. 5.2.1).

Selon la jurisprudence, les règles de la bonne foi et l'interdiction de l'abus de droit doivent être comprises à la lumière de la jurisprudence rendue au sujet de l'art. 2 CC

(arrêt 4A_600/2008 du 20 février 2009 consid. 4.1).

En l'espèce, le recourant, sous le couvert du grief en question, tente de remettre en cause la manière dont la Formation a appliqué l'art. 156 CO aux circonstances du cas concret et le rejet par elle du reproche fait à l'intimé d'avoir agi au mépris des règles de la bonne foi. Or, la violation du principe de la bonne foi, invoquée au titre de l'incompatibilité de la sentence avec l'ordre public matériel, qui n'a semble-t-il, encore jamais été admise par le Tribunal fédéral à ce jour, ne doit pas servir à remédier à l'absence de démonstration du comportement contraire aux règles de la bonne foi imputé à la partie intimée sous l'angle d'une disposition légale dont le principe de la bonne foi forme un élément constitutif, sauf à vouloir faire du recours en matière d'arbitrage international un moyen de droit s'apparentant à un appel.

C'est pourtant ce que le recourant cherche à obtenir lorsqu'il s'emploie à démontrer que, même si les preuves d'un comportement contraire aux règles de la bonne foi adopté par l'intimé font défaut, la mauvaise foi de cette partie devrait être déduite de l'enchaînement des circonstances. Il n'y a pas lieu de le suivre sur ce terrain-là. Dès lors, le moyen pris de la violation de l'ordre public matériel se révèle, lui aussi, infondé dans ses deux branches.

Le Tribunal fédéral a rejeté le recours.

Arrêt du Tribunal fédéral 4A_70/2015

29 avril 2015

A. Sport Club (recourant) c. B. (intimé)

Recours en matière civile contre la sentence rendue le 23 décembre 2014 par le Tribunal Arbitral du Sport (TAS)

Extrait des faits

B. est un footballeur professionnel retraité ayant évolué au sein de clubs européens de renommée internationale en dépit d'une déficience cardiaque dont il a souffert durant toute sa carrière. A. Sport Club (le club) est un club de football professionnel sis à X. et affilié à l'Association C. Par contrat du 25 juin 2010, le club a engagé le prénommé pour la période comprise entre le 1er juillet 2010 et le 31 mai 2012. Au printemps 2011, il a pris l'initiative de mettre un terme à cette relation contractuelle, ce que le footballeur n'a pas accepté.

Le 12 août 2011, B. a assigné le club devant la Chambre de Résolution des Litiges (CRL) de la Fédération Internationale de Football Association (FIFA), y faisant valoir diverses prétentions fondées sur le contrat précité. Le défendeur s'est opposé à l'admission de la demande et a pris des conclusions reconventionnelles. Par décision du 28 juin 2013, la CRL a condamné le club à verser au joueur 91'000 euros à titre de salaire pour le mois de mai 2011 et 670'000 euros à titre d'indemnité pour rupture du contrat sans juste cause. Elle a rejeté la demande reconventionnelle.

En date du 15 décembre 2013, le club a saisi le Tribunal Arbitral du Sport (TAS) d'un appel dirigé contre la décision de la CRL. Une Formation de trois membres a été constituée pour traiter l'appel du club. Par sentence du 23 décembre 2014, le TAS a rejeté l'appel et confirmé la décision attaquée. En résumé, la Formation a considéré que, contrairement à

ce que soutenait l'appelant, le contrat de travail le liant à l'intimé n'avait pas pris automatiquement fin le 1er mai 2011, date à laquelle le joueur avait reçu un avis médical confirmant son incapacité définitive d'exercer le métier de footballeur professionnel. Elle a estimé, en outre, que l'état de santé du joueur ne constituait pas non plus un motif autorisant le club à résilier unilatéralement le contrat de travail de l'intimé. Pour argumenter ainsi, la Formation s'est fondée sur l'art. 18 al. 4 du Règlement du Statut et du Transfert des Joueurs (RSTJ), en vertu duquel la validité d'un contrat ne peut dépendre du résultat positif d'un examen médical, disposition qu'elle a jugée applicable tout au long de la relation contractuelle. Ecartant encore un second motif avancé par le club pour se séparer de son joueur, les arbitres sont arrivés à la conclusion que le contrat litigieux avait été résilié sans juste cause, au sens de l'art. 17 RSTJ. Ils se sont alors fondés sur cette disposition et la jurisprudence y relative, de même que sur les clauses du contrat de travail, pour calculer l'indemnité à verser par le club à son ancien joueur.

Le 2 février 2015, le club (ci-après: le recourant) a déposé un recours contre ladite sentence qui lui avait été notifiée le 21 janvier 2015. Soutenant que le TAS a violé le principe de la contradiction (art. 190 al. 2 let. d LDIP) et rendu une sentence incompatible avec l'ordre public (art. 190 al. 2 let. e LDIP), il conclut à l'annulation de la sentence attaquée.

Extrait des considérants

1. Dans un premier moyen, le recourant dénonce une violation du principe de la contradiction, garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, lequel exige que chaque partie ait la faculté de se

déterminer sur les moyens de son adversaire, d'examiner et de discuter les preuves apportées par celui-ci et de les réfuter par ses propres preuves.

Le recourant expose que, sans nouvelles de Me Y. depuis le 7 mars 2014, il n'a eu vent de la tenue de l'audience du 13 mai 2014 que par le fax qui lui a été adressé le 10 juin 2014 par le greffe du TAS, si bien qu'il n'a pas eu la possibilité de faire entendre ses témoins, de procéder au contre-interrogatoire des témoins de l'intimé et de plaider sa cause. La faute en incombe, selon lui, à son premier mandataire, qui a fait la sourde oreille à réception des divers avis et injonctions reçus du TAS. Toutefois, selon le recourant, la Formation aurait eu la possibilité de compléter l'instruction de la cause, sur la base des art. R44.2 et R44.3 du Code de l'arbitrage en matière de sport (ci-après: le Code). N'ayant pas fait usage de cette faculté, elle aurait violé le principe du contradictoire, créant une inégalité entre les parties dans la défense de leurs droits, et violé de la sorte l'ordre public suisse.

Tel qu'il est présenté, le premier moyen du recourant ne peut pas être admis. C'est le lieu de rappeler, à titre liminaire, que la partie qui s'estime victime d'une violation de son droit d'être entendue ou d'un autre vice de procédure doit l'invoquer d'emblée dans la procédure arbitrale, sous peine de forclusion. En effet, il est contraire à la bonne foi de n'invoquer un vice de procédure que dans le cadre du recours dirigé contre la sentence arbitrale, alors que le vice aurait pu être signalé en cours de procédure.

En l'espèce, le nouveau mandataire du recourant s'était certes insurgé, dans sa première communication adressée au TAS le 28 juillet 2014, contre le fait que son mandant n'avait pas été représenté à l'audience du 13 mai 2014 et n'avait ainsi pas été mis en mesure d'y exercer ses droits de partie. Il avait même requis formellement la tenue d'une nouvelle audience. Cependant, après avoir été informé, le 6 août 2014, du rejet de cette requête,

l'avocat portugais avait adopté un comportement beaucoup moins tranché. En effet, dans son fax du 22 août 2014, il n'évoquait déjà plus qu'à titre préliminaire et en quatre lignes seulement la question de l'audience, sans formuler d'ailleurs de conclusion expresse, à la fin de cette écriture, en rapport avec le prétendu vice ayant affecté gravement ses droits procéduraux. De surcroît, il n'était plus du tout question du vice de procédure dénoncé précédemment dans la dernière écriture adressée par l'intéressé au TAS, le 5 novembre 2014, même s'il est vrai que celle-ci portait sur un objet bien délimité. Toujours est-il que l'on eût pu attendre du nouveau mandataire de l'appelant qu'il maintînt jusqu'à la fin de la procédure d'instruction son opposition formelle et catégorique au prononcé de la sentence avant la tenue d'une nouvelle audience et qu'il mît tout en œuvre pour contraindre la Formation à revenir sur la décision négative qu'elle avait prise à cet égard. Au lieu de quoi, l'avocat portugais donne l'impression d'avoir préféré garder en réserve le vice dénoncé pour ne l'invoquer, au besoin, qu'une fois connu le sort de l'appel formé par son client. On peut également s'étonner, dans ce contexte, que le recourant ait laissé s'écouler un mois et demi, dès la réception de la lettre du TAS du 10 juin 2014 lui indiquant que son avocat bruxellois n'avait plus donné signe de vie depuis le 7 mars 2014, avant de répondre au TAS par le truchement d'un nouvel avocat.

Cette question de forclusion mise à part, le moyen soulevé par le recourant n'apparaît pas fondé. Selon l'art. 57 al. 4 du Code, si l'une des parties, bien que régulièrement convoquée, ne se présente pas à l'audience, la Formation peut néanmoins tenir l'audience. En l'espèce, le recourant ne conteste pas que les diverses invitations à participer à l'audience du 13 mai 2014 aient été valablement adressées à Me Y., conformément à l'art. R31 al. 1 du Code, ni que son ex-mandataire les ait reçues. Sans doute n'est-il pas exclu que le recourant soit de bonne foi lorsqu'il affirme n'avoir appris

l'existence de l'audience tenue le 13 mai 2014 qu'à réception du fax du TAS du 10 juin 2014. Peut-être ne se trompe-t-il pas non plus de cible lorsqu'il impute à son ancien mandataire la responsabilité de son défaut à cette audience. Il s'agit là, toutefois, de circonstances qui intéressent, l'une, la partie elle-même, l'autre, l'exécution du contrat de mandat ayant lié cette partie et son ancien mandataire, lesquelles circonstances sont étrangères à la partie adverse, i.e. l'intimé, et ne revêtent pas un caractère décisif en l'occurrence. C'est le lieu de rappeler qu'en droit de procédure civile suisse, par exemple, le défaut du représentant d'une partie à accomplir un acte de procédure ou à se présenter à une audience est imputé à la partie représentée qui doit en assumer elle-même les conséquences (ATF 118 II 86 consid. 2; 114 II 181 consid. 2; ADRIAN STAEBELIN, in Kommentar zur Schweizerischen Zivilprozessordnung (ZPO), Sutter-Somm/Hasenböhler/Leuenberger [éd.], 2e éd. 2013, n° 4 ad art. 147 CPC et n° 7 ad art. 148 CPC; NINA J. FREI, in Commentaire bernois, vol. I, 2012, n° 1 ad art. 147 CPC et n. 25 ad art. 148 CPC).

Certes, le droit suisse n'est applicable - à titre subsidiaire, en l'espèce, la décision soumise au TAS ayant été rendue par un organe juridictionnel de la FIFA, association dont le siège est à Zurich - qu'au fond d'après le titre même de l'art. R58 du Code. Cependant, dans le silence du Code et en l'absence de règles de droit spécifiques adoptées par les parties, rien ne s'oppose à ce que la Cour de céans s'inspire du principe sus-indiqué tiré de ce droit-là pour trancher la question litigieuse, d'autant que ledit principe se greffe sur une relation contractuelle - le mandat liant une partie et son avocat - qui relève assurément du droit de fond. Force est, dès lors, d'admettre que le recourant ne pouvait pas se prévaloir, à l'endroit du TAS et encore moins vis-à-vis de l'intimé, de la prétendue incurie de son ancien mandataire en vue d'obtenir la tenue d'une nouvelle audience. Le cas échéant, c'est à cet ex-mandataire qu'il devra s'en prendre afin de démontrer que l'issue de la procédure d'appel

eût été différente si, dûment averti par lui de la tenue de l'audience du 13 mai 2014, il avait pu participer à celle-ci afin d'y faire administrer ses moyens de preuve et d'y présenter ses arguments à la Formation.

Le recourant se réfère, par ailleurs, aux art. R44.2 et R44.3 du Code, auxquels l'art. R57 al. 3 du Code renvoie pour la procédure arbitrale d'appel. Il cite le passage suivant de l'art. R44.3 al. 2 du Code: *“La Formation peut en tout temps, si elle l'estime utile pour compléter les présentations des parties, requérir la production de pièces supplémentaires, ordonner l'audition de témoins, commettre et entendre des experts ou procéder à tout autre acte d'instruction”*. Selon lui, la Formation aurait violé le principe de la contradiction en n'utilisant pas cette possibilité en l'espèce. Tel qu'il est présenté, cet argument tombe à faux. D'abord, la disposition citée n'énonce qu'une faculté accordée à la Formation et laissée à son appréciation, même s'il est vrai que cette faculté ne peut pas être assimilée dans tous les cas à un pouvoir discrétionnaire (arrêt 4A_274/2012, précité, consid. 3.2.1). Il serait donc faux d'y voir un droit accordé à la partie défaillante d'écarter indirectement les conséquences de son défaut ou de celui de son mandataire et d'être replacée dans les mêmes conditions que si elle s'était conformée d'emblée aux injonctions de la Formation. Ensuite, le recourant n'expose pas, fût-ce de manière sommaire, quels éléments de preuve ni quels arguments de fait et/ou de droit pertinents il aurait pu présenter à celle-ci au cas où la tenue d'une nouvelle audience aurait été ordonnée. Enfin et surtout, il omet de signaler que la Formation lui a accordé, à titre exceptionnel, la faculté de présenter par écrit les arguments qu'il aurait pu faire valoir devant elle s'il avait participé à l'audience du 13 mai 2014.

Cela étant, le moyen pris de la violation de l'art. 190 al. 2 let. d LDIP se révèle infondé, si tant est que le recourant ne soit pas déjà forclos à l'invoquer.

2. Dans un second moyen, le recourant fait grief au TAS d'avoir rendu une sentence incompatible avec l'ordre public au sens de l'art. 190 al. 2 let. e LDIP. Concrètement, il reproche à la Formation de n'avoir pas tenu compte du fait que le contrat de travail est un contrat bilatéral synallagmatique et d'avoir ainsi alloué à l'intimé des prestations fondées sur le contrat du 25 juin 2010, bien que ce travailleur se trouvât dans l'incapacité permanente de fournir ses services à son employeur.

Une sentence est contraire à l'ordre public matériel, qui entre seul en ligne de compte dans la présente cause, lorsqu'elle viole des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l'ordre juridique et le système de valeurs déterminantes. S'il n'est pas aisé de définir positivement l'ordre public matériel, de cerner ses contours avec précision, il est plus facile, en revanche, d'en exclure tel ou tel

élément. Cette exclusion touche, en particulier, l'ensemble du processus d'interprétation d'un contrat et les conséquences qui en sont logiquement tirées en droit, ainsi que l'interprétation faite par un tribunal arbitral des dispositions statutaires d'un organisme de droit privé. De même, pour qu'il y ait incompatibilité avec l'ordre public, notion plus restrictive que celle d'arbitraire, il ne suffit pas que les preuves aient été mal appréciées, qu'une constatation de fait soit manifestement fausse ou encore qu'une règle de droit ait été clairement violée (arrêt 4A_304/2013 du 3 mars 2014 consid. 5.1.1). Le recourant méconnaît cette jurisprudence lorsqu'il cherche à démontrer que la Formation a mal interprété la notion de contrat de travail et qu'elle a fait une application erronée d'une disposition réglementaire de la FIFA ainsi que d'un article du CO. Son grief fondé sur l'art. 190 al. 2 let. e LDIP est, partant, voué à l'échec.

Par ces motifs, le recours est rejeté.

Informations diverses

Miscellaneous



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- Von Westphalen F., Die Sportschiedsgerichtsbarkeit vor den Schranken der Klausel-Richtlinie 93/13/EWG – der Fall Pechstein, Spurt 5/2015, p. 186
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