



Bulletin TAS CAS Bulletin

2016/1



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT

Bulletin TAS
CAS Bulletin
2016/1

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Message from the CAS Secretary General

The first semester of 2016 is of major importance in the history of CAS.

In March 2016, the Executive Board of the IOC decided to delegate all cases involving alleged anti-doping rule violations arising during the Olympic Games to a new Anti-Doping Division of the CAS, set up to handle doping cases from the Rio Olympic Games onwards. The CAS Anti-Doping Division (ADD) will substitute to the IOC Disciplinary Commission to hear and decide doping-related cases at the Olympic Games. This is a major step forward to make the procedures concerning alleged anti-doping rule violations more independent. Thus, the International Council of Arbitration for Sport (ICAS) has created a CAS Anti-Doping Division for the XXXI Olympiad which will take place in Rio de Janeiro, Brazil, from 5 to 21 August 2016. The Anti-Doping Division will be headed by Ms Carole Malinvaud, France, President, and by Justice Ivo Eusebio, Switzerland, Co-President. It will be composed of six arbitrators: Mr Juan Pablo Arriagada Aljaro, Chile, Mr Efraim Barak, Israel, the Hon. Michael Beloff QC, United Kingdom, the Hon. Hugh Fraser, Canada, Prof. Michael Geistlinger, Austria, the Hon. Tricia Kavanagh, Australia.

The ICAS has also established a “regular” ad hoc Division (AHD) for the Rio Games the function of which is to provide for the resolution by arbitration of any dispute arising on the occasion of, or in connection with, the Olympic Games. Contrary to the CAS ADD, which will rule on doping-related matters as a first instance, the CAS AHD will act as an appeals court and will examine requests for arbitration directed against decisions pronounced generally by the IOC, an NOC, an International Federation or the Organising Committee for the Olympic Games. The ad hoc Division will be headed by Mr Michael Lenard, USA, President, and by Justice Ellen Gracie Northfleet, Brazil, Co-President. It will be composed of twelve

arbitrators: the Hon. Justice Annabelle Bennett, Australia, Ms Andrea Carska-Sheppard, Canada/Slovakia, Justice Catherine Davani, Papua New Guinea, Ms Margarita Echeverria, Costa Rica, Prof. Dr. Ulrich Haas, Germany, Mr Mark Hovell, United Kingdom, Mr Francisco Mussnich, Brazil, Mr Jinwon Park, Korea, Mr José Juan Pinto, Spain, Dr Mohamed Abdel Raouf, Egypt, Ms Carol Roberts, Canada, Ms Rabab Yasseen, Iraq/Switzerland.

In 2009, the CAS issued an award in the arbitration between the German speed-skater Claudia Pechstein and the International Skating Union (ISU). Seven years later, after various procedures before the Swiss Federal Tribunal (which has confirmed the CAS ruling) and the German courts, the judicial saga had a remarkable development when, on 7 June 2016, the German Federal Tribunal (GFT) confirmed that Claudia Pechstein had a fair trial, not only before the CAS but also before the Swiss Federal Tribunal (SFT), and that the judgment of the SFT, which still remains in force, settled this matter definitively in 2010. It is also the confirmation that the CAS arbitration clauses inserted in the regulations of sports organizations are valid (as it was already decided by the SFT earlier). More importantly, like the SFT did in 1993 and 2003, the GFT has emphasized that the CAS is a “genuine arbitration tribunal” in the sense of German law. It added that such sports jurisdiction was necessary for the uniformity in sport. The GFT also noted that the CAS procedural rules guarantee the impartiality and independence of the parties and do not create any imbalance between athletes and sports federations.

In this regard, we are pleased to publish an article prepared by Despina Mavromati, Counsel to the CAS, entitled “The Legality of the Arbitration Agreement in favour of CAS under German Civil and Competition Law” followed by an English translation of the German judgement related to the Pechstein case. Furthermore, an interesting analysis by Francisco González de Cossío related

to moral damages and CAS arbitration as well as an article prepared by Professor Luigi Fumagalli reviewing CAS jurisprudence regarding jurisdiction and admissibility are also included in this issue.

The trend observed in previous years is confirmed as the number of cases before the CAS at this time of the year continues to rise compared to previous years. This tendency is not likely to be reversed since 2016 is an Olympic year.

As usual, 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.

In the field of transfer of players, the case *Real Federación Española de Fútbol v. FIFA* deals with the transfer of minors and especially with the role and liability of the national federation in the protection of minors. In both cases *Ascoli Calcio 1898 S.p.A v. Papa Waigo N’diaye & Al Wahda Sports and Cultural Club* and in *Khazar Lankaran FC v. FIFA*, the termination of an employment contract without just cause is examined. Finally, the issue of training compensation is addressed in *CD Nacional SAD v. CA Cerro*.

In a disciplinary context, the case *Fédération Royale Marocaine de Football c. CAF* examines the disciplinary sanction against a federation for having waived the organisation of a championship for sanitary reasons.

Always in a football context, the case *FC Gelsenkirchen-Schalke 04 v. UEFA* interprets and analyses article 38 of the UEFA Safety and Security Regulations whereas in *Panathinaikos v. UEFA*, the eligibility of a club to participate in a UEFA competition is addressed.

The doping case selected for this issue deals with sanctions following an anti-doping rule violation under the amended 2015 WADC (*Demir Demirev et al. v. IWF*).

Finally, in the case *Indian Hockey Federation v. IHF*, the principle of autonomy of an association to accept or refuse application for membership is analysed.

Other CAS awards continue to be published on the CAS website. The recent decisions appear on the main website while the older decisions are published in the new CAS database, accessible through the CAS website, section jurisprudence.

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

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

Articles et commentaires
Articles and Commentaries



Moral damage and sports arbitration

Francisco González de Cossío *

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Moral damage is one of those legal concepts that has mystified many for quite some time. Until recently, in the sports realm the subject remained theoretical: even though it had been claimed, it had never been awarded. This has changed: a case recently granted a significant award for moral damage.¹ The case has attracted attention. Some view it as an anomaly; others as a welcome development. In this essay I wish to take the view that *moral damage is a concept that deserves serious consideration*. It provides tutelage for an important realm (immaterial rights) which admittedly is apt to be misused – even abused. An adroit use of the concept therefore requires knowledge and discernment – but not outright rejection (as is often seen). Doing so would not only be an incorrect use of the legal concept, but

would perpetuate sub-compensation and invite regrettable conduct. To explain why I shall briefly address the elements of the notion (§I); controversial issues (§II); and finalize with a warning (§III).

I. Elements

I shall focus on three elements: determination (§a), demonstration (§b), and quantification (§c).

A. Determination

Assessing whether a specific fact-pattern raises moral damage issues requires an understanding of the concept, what its goals are, and –importantly- the notion adopted

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¹ TAS/A/3871 and TAS/A/3882, award of 28 July 2015.

by the applicable law- which varies markedly.

1. Different notions and approaches

The notion of “moral damage” varies. A quick survey of the field displays (sometimes radically) different notions of the concept. And the difference extends not only to concept but also technique: whilst some laws adopt open textures, other engage in rule-based *numerus clausus* drafting of the notion and scope.

To illustrate, the United States does not have the concept ‘moral damage’ as such. The subject-matter is characterized differently: as pain and suffering. But when one studies what other jurisdictions address under the heading “moral damage” one finds that equating “pain and suffering” with “moral damage” is inexact. Depending on the specific applicable law, ‘moral damage’ may encompass much more than ‘pain and suffering’. Take for instance the case of Mexico: moral damage is defined as:²

“affecting the feelings, affections, beliefs, decorum, honor, reputation, private life, physical aspects and configuration, or the consideration that others have of the victim. The law assumes that that moral damage exists when the liberty, physical security or psyche of persons is injured”.

Contrast said view with the general reference found in Article 1835 of the Paraguay Civil Code, which is confined to

indicating that the general duty to repair extends to moral damage, without advancing a definition.³ In a similar vein, the Peruvian Civil Code posits the general principle that moral damages deserves compensation,⁴ without defining what it means.⁵ Yet another salient example is Article 49 of the Swiss Code of Obligations, which provides that infringement of “personality rights” entitles money by way of satisfaction. And within these extremes, one finds all sorts of positions along the spectrum.

The above review is cursory. It does not seek to exhaust, but illustrate: the notion of ‘moral damage’ is diverse. Whilst some laws provide for ample notions, others simply allude to the concept without defining it. And yet others offer detailed descriptions. And the cornucopia of views is not restricted to statutory texts. When one consults doctrine or discusses the topic with salient minds of different legal traditions, one finds that the approaches vary even more. To some, the matter is of theoretical interest only. To others, it is a concept deserving careful analysis—on pain of failing to achieve an important goal of liability law: *restitutio in integrum*.

2. CAS experience

Given said kaleidoscopic backdrop, the CAS experience becomes relevant not only for (obvious) precedential reasons,⁶ but also

in the context of damages for the opposition to a marriage; 351 in the context of compensation of the innocent spouse in the divorce context; 414 in the context of damages for an extramarital paternity determination.

⁵ Article 1322, entitled “Compensation for moral damage” (*Indemnización por daño moral*).

⁶ Albeit CAS decisions have no formal precedential (*stare decisis*) effect, their consideration is apposite

² Article 1916 of the Federal Civil Code.

³ “Existirá daño, siempre que se causare a otro algún perjuicio en su persona, en sus derechos o facultades, o en las cosas de su dominio o posesión. La obligación de reparar se extiende a toda lesión material o moral causada por el acto ilícito. La acción por indemnización del daño moral sólo competirá al damnificado directo. Si del hecho hubiere resultado su muerte, únicamente tendrán acción los herederos forzosos.”

⁴ References to the concept are sprinkled across the Peruvian code nonetheless. For instance: Article 257

because the internationality of CAS allows it to serve as an interesting laboratory of international experience. As a rich fermentation barrel of legal concepts. And when one looks at the CAS experience one finds only one case where the concept had been considered: CAS case 2013/A/3260 which award explains it as follows:

“... moral damages are commonly understood as the damages sustained by an individual who has suffered personal harm as result of conduct, acts or omissions which severely damage the personality or reputation of the injured party, causing physical, mental or psychological suffering”.

To my knowledge, no other case has tackled the matter.

3. An (inchoate?) notion

Research displays quite diverse definitions of the concept. One that I have found particularly insightful is Professor Chappuis': “welfare diminution” (*diminution du bien-être*).⁷ I wish to propose that the legal concept “moral damage” is the way the law provides tutelage for immaterial rights. It is an open texture encompassing several no tangible but important aspects deserving protection. It safeguards features of an intimate, sometimes “inner”, nature which is difficult to *quantify*, but important to *qualify*. For instance, *praetium doloris*, loss of a loved one, reputation injury, emotional shock, aesthetic injury,⁸ functional injury, to name a few.

B. Demonstration

Having surmounted the conceptual hurdle, the evidentiary one becomes apparent: how

both to procure a *jurisprudence constant* and progress in the application of legal concepts.

⁷ CHAPPUIS C., *Le Tort Moral En Question*, Schulthess, Université de Genève, Geneva, 2013, p. 13.

do you determine if injury of an immaterial right exists? The obstacle has dumbfounded many. To address it, I shall begin by describing the challenge (§1), advancing a solution (§2), and proposing a standard (§3).

1. The challenge

Proof of moral damage has been a constant source of concern: how to demonstrate immaterial damage? Some have even advocated that it is not possible to prove immaterial damage. Others take the view that it may be *assumed*, rather than proved.

2. A solution

I wish to propose three rules to tackle the challenge:

- a) Material evidence of immaterial injury need not exist;
- b) It should not be *assumed*, but *inferred*; and
- c) The inference should be strong.

I shall address each.

- a) Material evidence of immaterial injury need not exist

Asking for *material* evidence of *immaterial* injury *may*⁹ provoke a *probatio diabolica*, condemning the legal concept to theory. And this has (regrettably) occurred in several legal systems. My research displays several jurisdictions taking this approach – including my own home jurisdiction. In the (odd) case that one finds a trier of fact reaching the conclusion that a moral damage *could* (theoretically) exist, the *dispositif* recants

⁸ Such as the loss of an organ or a bodily function.

⁹ I say ‘may’ inasmuch as, depending on the type of moral damage, one could find material evidence. For instance, an aesthetic injury.

pointing to the absence of concrete evidence as a reason not to make an award. And I find this to be more frequent than the opposite outcome.

This is not only an anticlimax; it is intellectually unsound. An injury to an intimate field may not leave a record in the material world. Therefore, asking for material evidence would, in my opinion, be a less than adroit use of evidence theory.

Acknowledging the *analytical* problem begs a *practical* question however: does this mean that immaterial injury does not need evidence. My answer: 'of course not'. Immaterial injury, like all injury, need be proven - which leads us to the next prong of my proposition.

b) Immaterial injury should not be assumed, but inferred

When speaking of immaterial injury some have advanced the view that it should be *assumed*. That the fact pattern need be such that the trier of fact may *assume* that it exists. Principles such as *res ipsa loquitur* or *in re ipsa* are cited in favor of said view.¹⁰ I would propose that injury to an immaterial right may not be *assumed*; it need be *inferred*. And the inference must not only be *valid*, but a *natural* even *obligated* one. Put otherwise, it must not be a forced conclusion.

When I enter this caveat I observe some believe it to be a nuance. A question of semantics. A matter of secondary importance perhaps reflecting stubbornness. It is not. It is rather an important distinction I wish to underscore. To "assume" is to think that something is true or probably true without knowing that it *is* true. To "infer" is an entirely different exercise. "Inference" as a verb is the process

of reaching a conclusion about something from known facts or evidence. An "inference" as a noun is a conclusion or opinion that is formed because of known facts or evidence.

The distinction makes all the difference. Saying that the injury may be *assumed* relieves the claimant of its burden of proof, perhaps reversing it against defendant – quite an unfortunate outcome given the nature of the subject-matter. Saying that the injury may be inferred keeps the onus where it should lay: in the shoulders of the party alleging its existence. Claimant will need to advance sufficient evidence to persuade the trier of fact that the injury exists, even if at an immaterial plane.

c) The inference should be strong

Inferences vary in their strength. They range from weak to strong to obligated, and within such poles one finds degrees. I would propose that, for the injury to be validly proven, the inference should be "strong". It should be such that the trier of fact believes it to be acceptable. In the words of common law evidence standards: beyond a reasonable doubt. It should be such that a reasonable person would find it to exist when presented with a specific set of circumstances.

Evidencing damage *and* causality need occur for the claim to succeed. However, what is peculiar about moral damage is that the demonstration is not material, it is immaterial.¹¹ This means that the proof will be at a conceptual level. Injury which is *in natura* internal need not be demonstrated by *external* (material) means. Doing so would

¹⁰ See for instance, MONTERO PIÑA F., *El Daño Moral*, Impresión Gráfica del Este, S.A., San José, Costa Rica, 2002, p. 55.

¹¹ See generally GÓMEZ POMAR F. and MARTÍN GARCÍA I., *El Daño Moral Y Su Cuantificación*, Ed. Bosch, Wolters Kluwer, Barcelona, 2015.

provoke a *probatio diabolica* – condemning the concept to poetry.¹²

Adopting the foregoing view implies a more subtle conception. A sophisticated use of the legal concept requires accepting that it vests trust in the judge or arbitrator to exercise discernment. To evaluate –feel-the circumstances and reach a conclusion as to whether it is not only *possible*, but *probable*, that injury of an immaterial right existed. Causality analysis does exist in moral damage; however, it is conceptual. The fact pattern must *in itself* communicate injury - *res ipsa loquitur*: the thing must *talk*. In fact, it should *scream!*

3. A standard

The above canvassed three-prong solution should be tied-in with a standard. And it should be a high one. I would propose that two requirements need be met to be in the presence of conduct actionable for inflicting moral damage: it must be “exceptional” and it must be “grave”. As case 3871& 3882 defined said adjectives as follows:

- Exceptional: not just any set of circumstances justifies. They must be outside of what is considered “acceptable” in the locus¹³ in question; and
- Grave: the fact pattern extant need be “serious”. Surprising. Such that the trier of fact would find it to be outrageous.

¹² As assertively criticized by PIZARRO R., Daño Moral, Prevención. Reparación. Punición. El daño moral en las diversas ramas del Derecho, Ed. Hammurabu, DEPALMA J.-L., 2ª ed., Buenos Aires, Argentina, 2004, p. 417.

¹³ Be it a society, a field, or any other form of milieu. What should occur is that the facts be compared to the applicable social norms it finds context with.

¹⁴ As emphasized in the award in cases 3871 & 3882, para.99.

The collective purpose of both elements is discerning. Avoiding abuse. Put otherwise, the nebulous concept of “moral damage” is not a shortcut to fortune. It is a way to provide tutelage to immaterial rights.¹⁴

C. Quantification

Assuming the (high) threshold canvassed above has been reached, what remedy should ensue? How much to award?

The answer to this question has received different responses in comparative law. Ranging from mere declaratory remedies, to monetary awards. In the first case the rationale has been *difficulty* tied with the *fear* of speculation. In the second, the idea is that recognition of the injury may in and of itself suffice to remedy. It may be sufficient to restore the victim to the position it had.

What I would propose is that the purpose of a moral damage award is not to restitute (*indemnify*) but to *compensate* – altogether different concepts.¹⁵ **Indemnification** has as its goal *restitutio in integrum*: putting the victim in the position it had before the unlawful act: *status quo ante*. **Compensation** does not have at its lodestar restituting but conferring an amount *as an equivalent*. Not because it *rectifies*, but because it avoids leaving victims empty handed. Inasmuch as *restitutio* is impossible, it seeks to provide an amount so as to avoid that the victim suffer the injury with empty hands.

¹⁵ A semantical/comparative-law note is apposite. A lot of English doctrine speaks of “compensation” as a synonym of “indemnification” or “restitution”. And international law remedies conceive “compensation” in the way I propose herein. For purposes of the idea I wish to advance in this essay, I wish to use “indemnification” as seeking the purpose of damages-law: *restitutio in integrum*. In the same manner, I speak of “compensation” as money-damages seeking to give an equivalent. Not to make whole, but not to leave empty-handed.

Therefore, whilst *restitutio* seeks *status quo ante*, *compensation* seeks reparation by equivalent.¹⁶

Given the nature of some of the injuries visible in the open text “moral damage” compensation *-in lieu* of indemnification- is a remedy which caters to the nature of the problem avoiding laconic or myopic and thence regrettable outcomes. For instance, it may be factually impossible to erase a scar off a face, or expunge anxiety imposed on a victim, or strike a calumnious news column from readers’ minds.

Not taking this view would instill pyrrhic victories -sometimes adding insult to injury. And what is more important, failing to confer consequences to unlawful conduct.

II. Controversial issues

I wish to briefly comment on three difficulties associated with the subject: the nature of the award (§a); the need for patrimoniality (§b); and what some call “contractual moral damage” (§c).

A. Nature

Difference exists as to the nature and purpose of moral damage. While some understand it to be a *punishment* for unlawful conduct, others see in it simply as a way to *repair* injury inflicted upon a victim.

I wish to propose that the nature and goal of the legal institution is not to *punish*; it is to compensate. To grant by equivalence. To confer upon the victim something so as to not have a finding of unlawful conduct become an anticlimax which will only incentivize that more unlawful conduct exist inasmuch as it goes unpunished.

The exact remedy will depend on the type of moral damage. If for example the damage

relates to defamation, a mere finding may suffice – coupled perhaps with an order to publish a retraction. If the injury is medical, shouldering costs may suffice. And if the injury is aesthetic, *praetio doloris*, anguish or loss of pleasure, the award may be of a monetary type.

B. Patrimoniality

A (civil law) view exists that posits that the law of obligations should be confined to patrimonial relations. Insofar as moral damage relates to rights *other* than the patrimonial sphere of persons, it should be left outside the purview of scope of the *droit des obligations*. Immaterial injury does not warrant material (monetary) remedy.

I wish to argue against this view. Accepting it would condemn the law of obligations to a lesser scope of activities than it could — and should— encompass. More importantly, it would leave without tutelage and important part of human intercourse. The law of obligations is not only sufficiently robust, but conceptually ideal, to include said field within its realm. After all, the purpose and goals of the law of liability need not be unnecessarily amputated.

This last point deserves emphasis. The *leitmotif* of civil liability law is to repair injury. To make whole victims of unlawful conduct. To the extent that *restitutio in integrum* is the goal, taking views as the one commented above run in the opposite direction. For that reason, unnecessarily restrictive approaches should be discarded.

C. Contractual moral damage

Some consider that moral damage is anathema to contractual relations. After all, it is an extra-contractual source of obligations.

¹⁶ See DOMINGUEZ HIDALGO C., El Daño Moral, Editorial, Jurídica de Chile, Santiago, Chile 2000, p. 93.

In my opinion, the better view is that these coexist. A set of circumstances may trigger moral damage liability to the extent they injury an immaterial right – and vice-versa. That the relation is *ab origine* contractual is irrelevant.

III. Final comment: a warning

That moral damage has been suboptimally handled is not without a reason. And it is its proclivity for abuse. The trier of fact must at all times bear this in mind and have it permeate all its reasoning and findings. This includes being aware of the need of having a high standard for its determination, but also bearing it in mind when assessing quantum. Otherwise the pendulum may swing too far.

Review of CAS jurisprudence regarding jurisdiction and admissibility

Luigi Fumagalli*

- I. Introduction: identification of issues and preliminary assumptions
 - II. Issues of jurisdiction
 - III. Issues of admissibility
 - IV. Final remarks
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I. Introduction: identification of issues and preliminary assumptions

Issues of jurisdiction and questions of admissibility arise every time an arbitrator is called to decide a dispute under the CAS Code of sports-related arbitration (the Code).¹ In fact, a CAS Panel is authorized to deal with the merits of the claim brought before it only if the Panel has jurisdiction over the parties and the dispute, and if the claim is admissible. This is made evident by a simple review of every published award: the section dealing with the legal evaluation of the parties' claims is always opened by some paragraphs discussing the "preliminary" questions of jurisdiction and admissibility, even in those cases in which they are not problematic.

Indeed, this occurrence corresponds to the reality of every arbitration, even regarding commercial disputes, and is not a peculiarity of sports arbitration. A position with regard to jurisdiction and admissibility is always implied in every decision in the merits of a dispute: since issues relating thereto may give rise to a bar to the Panel's ability to decide a case, whenever the arbitrators decide a dispute in its merits, they imply that no preliminary obstacle prevents such decision.

Notwithstanding this common feature, jurisdiction and admissibility refer to clearly distinct concepts, which have distinct implications.²

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¹ For an accurate analysis of the various provisions of the Code mentioned in this presentation, as well as for additional references, see MAVROMATI D., REEB M., *The Code of the Court of Arbitration for Sport. Commentary, Cases and Materials 2015* (the "CAS Commentary").

² In general terms on the distinction between issues of jurisdiction and issues of admissibility see PAULSSON J., *Jurisdiction and Admissibility*, in *Global Reflections on International Law, Commerce and Dispute Resolution. Liber amicorum in honour of Robert Briner*, 2005, 601-

617; GOUIFFÈS L., ORDONEZ M., *Jurisdiction and Admissibility: are we any closer to a line in the sand?*, in *31 Arbitration International*, 2015, 107-122. With specific reference to the peculiarities of investment arbitration, where the distinction between issues of jurisdiction of the Tribunal and issues of admissibility of the claim has been raised and extensively discussed, see NEWCOMBE A., *Investor misconduct: Jurisdiction, admissibility or merits?*, in BROWN C., MILES K., *Evolution in Investment Treaty Law and Arbitration*, Cambridge, 2011, 187-200; and ARB(AF)/98/2, *Waste Management, Inc. v. United Mexican States*, dissenting opinion of Keith Highet of 8 May 2000, § 58; ARB/07/31, *Hochtief AG v. Argentina*, decision on jurisdiction of 24 October 2011, § 90 ("Jurisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a

In itself, the conceptual distinction between the two issues is rather simple. In general terms, in fact, it may be said that

i. **jurisdiction** concerns the existence of the power of the Panel to hear a case, a power which finds its source in the agreement of the parties, while

ii. **admissibility** concerns the exercise of the power of the Panel to decide a specific claim submitted to it.

In other words, objections relating to jurisdiction concern the existence and the scope of the Panel's adjudicatory power: typically the existence of consent to arbitration in a given matter. On the other hand, objections pertaining to admissibility concern impediments to the consideration of the merits of the dispute, but they do not put into question the investiture of the Panel as such. As a result, it can be said that objections relating to the Panel concern jurisdiction, while objections concerning the claim regard admissibility.

claim but not of a tribunal. A distinction may also be drawn between questions of admissibility and questions of receivability. A tribunal might decide that a claim of which it is seised and which is within its jurisdiction is inadmissible (for example, on the ground of *lis alibi pendens* or *forum non conveniens*); or it might refuse even to receive and become seised of a claim that is within its jurisdiction because of some fundamental defect in the manner in which the claim is put forward"); and ARB/05/20, *Micula v. Romania*, decision on jurisdiction and admissibility of 24 September 2008, §§ 60-61 ("Objections can be framed as matters of jurisdiction or as matters of admissibility, depending on the context in which they are raised. The Tribunal concurs with Respondent that an objection to jurisdiction goes to the ability of a tribunal to hear a case while an objection to admissibility aims at the claim itself and presupposes that the tribunal has jurisdiction. If a tribunal finds a claim to be inadmissible, it must dismiss the claim without going into its merits even though it has jurisdiction. It is disputed whether the concept of admissibility is helpful in ICSID arbitration. The Tribunal is of the opinion that when an objection relates to a requirement contained in the text on which consent is based, it remains a jurisdictional objection. If such a requirement is not satisfied, the Tribunal may not examine

Why do we need to distinguish in the CAS system issues regarding jurisdiction from issues relating to admissibility?

Indeed, in some other systems of international adjudication such distinction is not necessary and issues relating to jurisdiction and issues regarding admissibility (however conceptually different) are treated in the same way, at least from a procedural point of view. This happens, for instance, in front of the International Court of Justice (ICJ): Article 79(1) of the Rules of Court deals at the same time and in the same way with both issues regarding the jurisdiction of the Court and the admissibility of a State's application to the Court, by indicating that they have to be raised as soon as possible.³

A distinction, however, appears necessary in the CAS system, because different consequences derive under the rules that are applicable in the proceedings, and more specifically under Swiss law,⁴ from the identification of an issue as having a

the case at all for lack of jurisdiction. By contrast, an objection relating to admissibility will not necessarily bar the Tribunal from examining the case if the reasons for the inadmissibility of the claim are capable of being removed and are indeed removed at a subsequent stage. In other words, consent is a prerequisite for the jurisdiction of the Tribunal").

³ The current version of the ICJ Rules of Court was adopted on 14 April 1978. On the mentioned provision see among the others SANTULLI C., *Droit du contentieux international*, 2005, 427. In general terms see also ROSENNE S., *The Law and Practice of the International Court*, 4th ed., 2006, 505; and THIRLWAY H., *Preliminary Objections*, in *Max Planck Encyclopedia of Public International Law* [MPEPIL], 2005, § 14, noting that "in some cases, the allocation of an objection to one category or the other may depend less on the nature of the objection itself than on the terms of the instrument conferring jurisdiction, and a single objection may in fact partake of both natures".

⁴ As it is well known, Swiss law plays a pivotal role in CAS proceedings. In fact, CAS arbitration Panels have their seat in Lausanne, Switzerland (Article R28 of the Code). As a result, CAS administers "Swiss" arbitration proceedings, which

jurisdictional nature or as regarding admissibility.

In fact, it is to be noted, as a first distinctive element, that issues regarding admissibility can be examined by the Tribunal on its own motion and are subject only to the parties' right to be heard. In other words, a Panel is allowed to consider *ex officio* that the claim is not admissible, and dismiss it for such reason. However, before doing that, it should invite the parties to state their position on the matter: it cannot take the parties by surprise, and ground its decision on an issue – even if relating to admissibility – on which the parties were not heard.⁵

On the other hand, jurisdictional issues must be pleaded by the parties (“prior to any defence on the merits”: Article 186(2)

are subject to the provisions contained in Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (the PILA) in accordance with its Article 176(1) (“*The provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland*”), or to the rules of the Swiss Code of Civil Procedure (CPC), pursuant to its Article 353, when the conditions set by Article 176.1 PILA are not satisfied. For ease of reference, mention shall be made in this contribution only of the rules contained in the PILA, as their application corresponds to the vast majority of CAS proceedings.

⁵ On the point, see, for instance, the decision of the Swiss Federal Tribunal (SFT) of 9 February 2009, 4_400/2008, which set aside a CAS award (rendered in CAS 2007/A/1371) because it found that a specific issue (the application of a given provision), which was decisive for the outcome of the arbitration, had not been discussed with the parties in the course of the arbitration.

⁶ An exception in this respect can in fact be identified for the event the respondent does not appear and does not enter any defence in the arbitration. In such situation, in fact, the Panel has the power, and the duty, to verify the jurisdictional basis of its power of adjudication invoked by the claimant/appellant: see LALIVE P., POUURET J.-F., REYMOND C., *Le droit de l'arbitrage interne et*

PILA; Articles R39 and R55 of the Code) and cannot be raised by the Tribunal on its own motion, if both parties are participating in the arbitration.⁶ This is connected to the consensual basis of arbitration (Article 186(2) PILA): if a party fails to object to jurisdiction, it may be held to have accepted it.

In addition, it is to be underlined, as a second distinctive feature, that issues relating to admissibility, as they affect the claim and its suitability for a decision, regard the merits of the dispute. This point has an important implication: as they concern the merit, they cannot be raised before the Swiss Federal Tribunal in setting aside proceedings brought pursuant to Article 190(2) of PILA.⁷ On the other hand, an award (even a preliminary award) can be annulled if the

internationale en Suisse, 1989, 384, who however underline that in such case “*l'arbitre doit examiner sa compétence ... à la lumière des informations don't il dispose*” and should not “*aller au-delà et mener ses propres investigations*”; SFT 20 June 2013, 4A_682/2012 at 4.4.2.1. The same appears to be true with respect to some specific issues affecting the jurisdiction of the Panel, such as the objective arbitrability of the dispute. The matter, however, does not seem to be much relevant in CAS proceedings, in light of the peculiarity of the disputes relating to sport and the broad concept of arbitrability set by Article 177(1) of the PILA. See for instance CAS 2009/A/1909, award of 23 November 2009 (§§ 37-38) indicating that the characterization under domestic law of a decision rendered by a sporting body as a decision of a public law entity does not prevent arbitration at CAS for the review of that decision.

⁷ Article 190(2) PILA, in fact, provides for four group of nullity ground relating to procedure and only one relating somehow to the merits: in fact, an award can be set aside in light of its content only if it runs against some basic principles of public policy, as recognized by Swiss law (SFT 8 March 2006, 4P.278/2006; 27 March 2012, 4A_558/2011). See NETZLE S., *Appeals against Arbitral Awards by the CAS*, in *CAS Bulletin*, 2001, 2, 252; COCCIA M., *The jurisprudence of the Swiss Federal Tribunal on challenges against CAS awards*, in *CAS Bulletin*, 2013, 2, 2

arbitral tribunal wrongly accepted or declined jurisdiction (Articles 190 (2) (b) and 190(3) PILA).⁸

As a result, the distinction between jurisdiction and admissibility is important also from a practical point of view and not only in a conceptual perspective.

The distinction, however clear in theory, turns out to be less clear (if not elusive) in practice, and appears suitable to give rise to some discussions.⁹ “Twilight” zones, in fact, can be identified, in which it is not easy to define an issue as pertaining to jurisdiction or to the merits. We can consider, for instance, the issue of the exhaustion of internal legal remedies: is it a matter regarding admissibility (the claim can be decided by the arbitrators only after the dispute has become final) or concerning jurisdiction (the parties agreed to submit to arbitration only disputes relating to final decisions)? The same can be said for the compliance with time limits for claims to be submitted to the Panel: are they concerning the substantive claim or the arbitrators’ powers, expiring past the deadline?

The definition *in abstracto* of some issues as pertaining to jurisdiction or admissibility appears however to be impossible, or, at least, of little relevance. The same requirement, in fact, can be a condition of admissibility in one instance and a jurisdictional prerequisite in another, depending on the wording of the

agreement (or the institutional rules) under which the tribunal is constituted.

In other words, we have to turn to the CAS system to see whether an issue belongs to one or the other group – and to find the rules which govern their resolution. In such analysis several issues come into play. They shall be briefly considered in order to put them into the context of the present analysis.

II. Issues of jurisdiction

In order to consider the issues pertaining to jurisdiction it is necessary to consider some basic features of arbitration, which are relevant also in the context of CAS arbitration.¹⁰

CAS administers arbitration proceedings and arbitration proceedings require a valid agreement between the parties as a source of the arbitrators’ power to adjudicate on a disputed matter: consent must exist with regard to a matter capable of settlement by arbitration, and must be expressed in a valid form.¹¹ Indeed, the distinction (set by Article R27 of the Code) between ordinary and appeals proceedings is based (also) on the peculiarities of the clause referring to CAS and of its object. In both cases, however, a clause providing for CAS arbitration is necessary. As a result, the distinction between ordinary and appeals arbitration does not involve in itself a problem of jurisdiction.¹²

⁸ KAUFMANN-KOHLER G., RIGOZZI A., *Arbitrage international. Droit et pratique à la lumière de la LDIP*, 2nd ed., 2010, 504.

⁹ The CAS Commentary, 46, significantly underlines that “*the distinction between what constitutes a jurisdictional issue and what relates to the merits is often a daunting task for CAS Panels*”.

¹⁰ No doubts can in fact be raised with respect to the arbitral nature of CAS proceedings, after the landmark decisions of the SFT in the *Gundel* (15 March 1993, 4P.217/1992) and in the *Lazutina* (27 May 2003, 4P.267/2002 and 4P.270/2002) cases.

¹¹ See Article 178 PILA regarding the conditions as to form, and the law applicable to the substantive elements, for the validity of an arbitration agreement.

¹² The point was specifically mentioned in CAS 2013/A/3273, award of 2 September 2014 (§ 112). See Article S20 of the Code, which specifies that the assignment of the proceedings to the ordinary Arbitration Division or to the Appeals Arbitration Division may not be contested by the parties nor be raised by them as a cause of irregularity.

In light of the foregoing, CAS Panels may be called to address all jurisdictional issues that may be raised in every arbitration, and therefore to answer any of the following questions: whether the party invoking the clause is a party thereto, whether the party against which the arbitration is brought is bound by the clause, whether the parties' consent to arbitration was validly expressed in light of the applicable substantive or formal requirements, whether the object of the dispute falls within the scope of the arbitration agreement. A short mention, though, can be made here of those issues that are most likely to arise in CAS arbitration,¹³ in light of its peculiarity.

With respect to ordinary proceedings, an issue (certainly relating to jurisdiction) which arose in the CAS jurisprudence concerns the so-called pathological clauses, *i.e.* clauses affected by some defects in one of its elements.¹⁴ For instance, in case CAS 2010/O/2129, the Panel was faced with a clause contained in a contract between a club (the Club) and a company acting as the Club's agent (the Company) as follows:

“the competent instance in case of a dispute concerning this Agreement is the FIFA Commission, or the UEFA Commission, which will have to decide the dispute that could arise between the club and the agent”.

Such clause – as its wording makes clear – did not contain any reference to CAS. However, the Company seized the CAS with a request for arbitration after a decision of FIFA not to entertain a claim against the Club. In a preliminary award rendered on 17 March 2011, the Panel found jurisdiction.

¹³ MAVROMATI D., Selected issues related to CAS jurisdiction in light of the jurisprudence of the Swiss Supreme Court, in CAS Bulletin, 2011, 1, 34.

¹⁴ Typically, the question relates to the proper identification of the arbitral institution called to administer the proceedings, but can extend to all

In essence, the Panel considered that the parties had a common intent to submit their disputes to arbitration, that the designation of the institution was not subjectively essential (nothing indicated that the parties would not have chosen arbitration in the event of refusal by FIFA to hear the dispute), but that the parties wanted an institution focused on sport, seated in Switzerland. CAS appeared to be the most appropriate forum: therefore, the clause was interpreted by the Panel as contemplating arbitration at CAS. It is to be noted that the Club brought an appeal to the SFT against such award, by claiming that the CAS Panel had wrongly found jurisdiction. The SFT, however, in a decision of 7 November 2011 (4A_246/2011), approved the award, dismissing the challenge brought against it.

As a result, when dealing with the jurisdictional issues raised by a pathological clause, a CAS Panel should verify (i) whether there is a mutual consent of the parties on the points objectively essential for the conclusion of an arbitration agreement (*i.e.*, the intent of the parties to submit their dispute to the binding decision of an arbitral tribunal and the specificity of the object of the dispute submitted to the arbitrators) or on any other point which is to be considered according to the mutual consent of the parties as essential for the conclusion of the arbitration agreement, and (ii) if it is to be considered that a valid agreement has been concluded, whether this agreement can be construed as giving jurisdiction to CAS.

With respect to appeals proceedings, a

other elements of the clause, and can imply defects so severe as to lead to the nullity of the agreement. On the matter see EISEMANN F., La clause d'arbitrage pathologique, in Commercial Arbitration. Essays in Memoriam Eugenio Minoli, 1974, 129.

peculiarity of CAS arbitration,¹⁵ additional questions, then, can be identified. In that regard, the CAS jurisprudence, based on the wording of Article R47 of the Code, is following a consistent approach and highlights three conditions for the jurisdiction to exist: (i) the parties must have agreed to the jurisdiction of CAS (consent to arbitration), (ii) there must be a decision of a federation, association or another sports-related body (existence of a decision), and (iii) the internal remedies available to the appellant must have been exhausted prior to an appeal to the CAS (exhaustion of internal remedies).¹⁶

All those issues can be separately (and briefly) examined.

As to the first point, indeed, Article R47 refers to a basic aspect of arbitration, already mentioned: there can be no arbitration without consent, expressed in an arbitration agreement. With specific reference to disputes regarding decisions rendered by a sports-related body, Article R47 provides that there is consent to arbitrate if the statutes or regulations of that body contemplate a right of appeal to CAS.

Such provision – clear in its face – has some problematic aspects, when it comes to be applied, that the jurisprudence helped to solve. In general, there are two main issues relating to the “existence” of consent: (i) the validity of the arbitration clause “imposed” by the sports entity to its affiliates; and (ii) the validity (from a formal and substantive point of view) of

arbitration clauses by reference. However discussed the issues are in the literature,¹⁷ the CAS jurisprudence does not consider them to be problematic, provided there is evidence of a contractual link between the party invoking the arbitration agreement and the party against which the arbitration agreement is invoked.¹⁸

Another issue, in fact, connected to the one just mentioned, often came to the attention of CAS Panels, and consists in whether a national federation is bound to arbitrate at CAS a dispute with one of its members (*e.g.*, an athlete) only because the rules of the international federation to which it belongs recognize the CAS as a body of appeal: the question, in other words, concerns the “domestic” effect of an arbitration clause contained in the regulations of the international federation.

On the point, the CAS jurisprudence is well-settled and should no longer allow any doubt. The “leading” decision in that respect was rendered on 24 January 2006 by a CAS Panel in CAS 2005/A/952, *Cole*, with respect to the FIFA system, and more specifically to the interpretation of the provision (corresponding to current Article 67(1) of the Statutes) according to which “*appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question*”. In *Cole*, the Panel held that the FIFA Statutes do not oblige by such provision a national federation to allow a right of appeal from its decisions. In any case, even if the FIFA Statutes did

¹⁵ In that regard, it is to be noted that CAS proceedings are “somehow” improperly defined to be appeals proceedings. In fact, no hierarchical relation exists between the lower body and CAS. In the end, CAS “appeals” proceedings are “common” arbitral proceedings in which a dispute concerning a decision is heard: RIGOZZI A., *L’arbitrage international en matière de sport*, 2005, 552.

¹⁶ CAS 2014/A/3775, award of 29 April 2015 (§ 37), making reference to CAS 2011/A/2436, award of 25 May 2012, and to CAS 2009/A/1919, award of 7 May 2010. See also CAS 2008/A/1513, award of 26 January 2009.

¹⁷ For this debate see, for instance, RIGOZZI A., *L’arbitrage international en matière de sport*, 2005, 422-433.

¹⁸ CAS Commentary, 35.

compel the national federation to provide for a right of appeal from its decisions, no right of appeal to the CAS would exist until the national federation has made provisions for this right in its statutes or regulations.¹⁹ As a result, an athlete cannot challenge before CAS domestic decisions of the local football federation by simply invoking the arbitration clause contained in the FIFA Statutes in the absence of a provision at national level so allowing.²⁰

As to the second point, it is to be noted that the CAS appeal jurisdiction is limited to the cases in which the dispute between the parties concerns a “decision” adopted by the sports-related body. As a result, the CAS Panels had to consider, in a number of instances, what constitutes an “appealable decision”:²¹ for instance, in

¹⁹ Confirmed by CAS 2014/A/3629, award of 31 October 2014 (§ 26). See also CAS 2013/A/3199; CAS 2011/A/2472; CAS 2009/A/1910; CAS 2008/A/1708; and CAS 2008/A/1602. In this respect, indeed, another CAS Panel (award of 15 December 2004, CAS 2004/A/676) held that the FIFA rules that came into force on 1 January 2004 (which first recognized the CAS jurisdiction) do not constitute *per se* a basis for arbitration. Instead, they constitute an instruction to introduce a regulation providing for CAS arbitration.

²⁰ It is to be noted, however, that a different conclusion has to be reached in the FIFA system with respect to doping matters. The FIFA rules clearly distinguish between appeals to CAS in doping related matters and appeals in any other matter: with respect to the first situation, in fact, a right is expressly granted to FIFA and WADA to file an appeal with CAS against decisions rendered, *inter alia*, by national federations. As a result, the SFT held, in its decision of 9 January 2009, *Dodô v. FIFA & WADA* (4A_460/2008), that “a general reference to FIFA rules and thus to the appeal rights of FIFA and WADA contained in the FIFA Statutes is sufficient to establish jurisdiction of CAS pursuant to R47 the CAS Code” in a case concerning an appeal brought by FIFA and WADA against a decision rendered by a national federation against a player bound by the FIFA rules through his membership of the national federation. The line of reasoning so announced was followed in CAS case law: for instance, in CAS 2009/A/1910, award of 9 September 2010, the Panel on one hand underlined that, “in accordance with consistent CAS jurisprudence on

the award of 29 April 2015, CAS 2014/A/3775, the issue concerned an email sent by the president of the relevant federation.

The principles also on this matter are well-settled in the CAS jurisprudence, which is inclined to apply a broad interpretation of the term “decision”, and follows the findings set in the *Aris* award of 15 July 2005, CAS 2005/A/899 (§§ 61-63): substance, not form, commands the nature; a decision is indeed a declaration of will (and not a mere information) which is capable of affecting a legal status. In other words, it must contain a ruling intending to affect the legal condition of the addressee or of other parties.²²

As said, the existence of a decision is an

this issue, in the Panel's view Article 63(1) of the current FIFA Statutes does not by itself grant jurisdiction to CAS with respect to decisions passed by confederations, members or leagues (see e.g., CAS 2008/A/1656, CAS 2005/A/952, CAS 2004/A/676, CAS 2002/O/422). Indeed, the mere provision that FIFA 'recognises' the CAS is not sufficient in itself for a CAS panel to claim jurisdiction over decisions issued by organizations other than FIFA (such as, in particular, national federations)”. At the same time, the Panel confirmed that “in contrast, the clear provisions of paras. 5 and 6 of Article 63 of the FIFA Statutes, stating that FIFA and WADA, respectively, are ‘entitled to appeal to CAS against any internally final and binding doping-related decision passed by the Confederations, Members or Leagues’ allow a CAS Panel to claim jurisdiction with respect to a national federation's decision on a doping matter through the express reference made by a national federation's statutes to FIFA Statutes (see CAS 2007/A/1370 & 1376 FIFA & WADA v/ Superior Tribunal de Justiça Desportiva do Futebol & Confederação Brasileira de Futebol & Mr Ricardo Lucas Dodô, and the Swiss Federal Court's judgment of 9 January 2009, 4A_460/2008, confirming the jurisdiction of CAS in such a case)”.

²¹ On the subject see BERNASCONI M., When is a ‘Decision’ an Appealable Decision?, in *The Proceedings before the CAS. CAS & FSA/SAV Conference Lausanne 2006, 2007, 273; and CAS Commentary, 383.*

²² See also CAS 2013/A/3148; CAS 2009/A/1919; CAS 2009/A/1917 (order); CAS 2008/A/1633; CAS 2008/A/1583&1584; CAS 2007/A/1251; CAS 2004/A/748; CAS 2004/A/659.

issue of jurisdiction: the arbitration agreement between the parties only refers to a “decision”, so that in the absence of a “decision” there is no consent to arbitration. Therefore, all consequences deriving from this assumption apply. For instance, it could be raised by a party only, and not by the Panel on its own motion. However, an interesting example of the peculiarities of the CAS arbitration of appeal is offered by the decision rendered (on 14 January 2015) in TAS 2013/A/3408. In such case, the Respondent had not challenged the jurisdiction and actually had acknowledged it by signing the order of procedure issued on behalf of the President of the Panel, which confirmed the CAS jurisdiction. As a result, the Panel was bound to find that it had jurisdiction (§ 49 of the award). That notwithstanding, the Panel had doubts on whether the “decision” challenged fell into the notion of “appealable decisions” provided by the relevant rule of the federation on which the jurisdiction was based. The Panel, as a consequence, while finding the appeal inadmissible for other reasons, stressed that the challenged “decision” did not affect the legal position of the addressee, and therefore the appeal would have been considered to be inadmissible also for such reason (§ 68 of the award). Such conclusion shows an interesting move from an issue of jurisdiction to an issue of admissibility, in light of the multi-fold aspects involved in the characterization of the challenged “decision”: its existence not only concerns jurisdiction (as it

primarily does), but touches, for instance, also the appellant’s interest (and standing) to appeal (because there is no interest in challenging a “decision” which does not produce effects on the addressee), as well as the application of the rules on “appeal” arbitration. The finding of jurisdiction (in the absence of an objection), therefore, does not prevent the Panel from examining the matter also under different perspectives.

The third condition for the CAS jurisdiction is the exhaustion of the “internal” legal remedies prior to an appeal to CAS.²³ This condition is intended to afford the internal bodies of a federation the opportunity to ensure that all the relevant rules, applicable to the case at stake, are fully complied with, to remedy an alleged violation thereof and to prevent an appeal to the CAS. In other words, in order to have CAS jurisdiction it is necessary not only to have a “decision”, but also that such decision is “final”.

Although it pays tribute to the freedom of organization of the sports entity in question, it is based on the assumption that the internal legal order will provide effective remedies for the violations of its internal rules. In this vein, the CAS precedents that have dealt with the issue of the exhaustion of legal remedies have consistently indicated that “*the internal remedy must be readily and effectively available to the aggrieved party and it must give access to a definite procedure*”.²⁴ This may happen when the remedies would unreasonably delay

²³ Confirmed as such by the SFT in a decision of 31 October 2003, 4P.149/2003 and in a decision of 20 June 2013, 4A_682/2012, where the compliance with such condition for the CAS power to hear a case was examined in the framework of the ground regarding “jurisdiction” (Article 190(2)(b) PILA) in setting aside proceedings. See also the CAS Commentary, 390. On this requirement, as a condition of jurisdiction, see CAS 2014/A/3796, award of 6 May 2015, § 49;

and CAS 2013/A/3107, award of 31 January 2014, § 72.

²⁴ See CAS 2007/A/1373, § 9.3, and CAS 2003/O/466, § 6.12; CAS 2008/A/1468; CAS 2008/A/1494; CAS 2008/A/1495; CAS 2008/A/1699; and the orders in CAS 2007/A/1347, and in CAS 2011/A/2243, 2358, 2385 & 2411, which indicated that no obligation can be found to exhaust legal remedies that do not exist or are illusory. Such position was confirmed by the SFT in the decision of 20 June 2013,

the procedure or when the internal remedy would not lead to the hearing of the case with the necessary impartiality: only if the association's internal instances are willing and able to grant effective legal protection to the Appellant, must the obligation to exhaust internal remedies be enforced.

Such principles, indeed, correspond to, and were derived from, the elements defining in general terms the scope of the rule subjecting a judicial claim to the prior exhaustion of internal remedies, which is well-known in the international system of protection of human rights²⁵ and is codified by international conventions, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, at its current Article 35.²⁶

As a result, in the determination of whether any particular remedy meets the criteria of availability and effectiveness, guidance was to be found in the international jurisprudence (and chiefly in the case-law of the European Court of Human Rights) that dealt with it. Therefore, for the purposes of such

evaluation, regard must be had to the peculiar circumstances of the individual case; and account must be taken not only of formal remedies available, but also of the general legal and political context in which they operate, as well as the personal circumstances of the appellant (ECHR, 6 November 1980, *Van Oostervijck v Belgium*, §§ 36-40; 16 September 1996, *Akdivar v Turkey*, §§ 68-69; 24 February 2005, *Khashiyev v Russia*, §§ 116-117; 24 February 2005, *Isayeva v Russia*, §§ 152-153). The availability of any such remedy must be sufficiently certain in law as well as in practice (ECHR, 20 February 1991, *Vernillo v France*, § 27). Where a suggested remedy did not in fact offer reasonable prospects of success, the fact that the appellant did not use it is no bar to admissibility (ECHR, 20 November 1995, *Pressos Compania Naviera SA v Belgium*, § 27; 23 September 2003, *Radio France v France*, § 33). In any case, it is for the party asserting the non-exhaustion of effective and available legal remedies to prove that they exist and can provide an effective remedy and that they have not been exhausted.

Notwithstanding the settled

4A_682/2012 at 4.4.3.2: "*L'obligation d'épuisement des instances préalables ... ne vise que l'instance interne dont la fédération sportive concernée prescrit la mise en oeuvre avant toute saisine du TAS, à l'exclusion de celle à qui la partie recourante a le choix de déférer ou non la décision qui ne la satisfait pas. ... De surcroît, ... il n'est guère envisageable d'admettre que pareille obligation puisse également porter sur un moyen de droit extraordinaire ou incomplet, telle la révision*".

²⁵ But not only. The rule has been held to apply within domestic systems also to the judicial review of administrative acts (in the United States, see for instance the seminal decision of the Supreme Court of 4 March 1992, in *McCarthy v Madigan*, 503 U.S. 140 (1992), which has been held to apply also with respect to the review of decisions of sports entities by the District Court of the Southern District of West Virginia on 30 September 1993, in *Barnes v LAAF*, 862 F. Supp. 1537 (SD W.Va. 1993)). It appears therefore to be an expression of a general principle, seeking to focus on the resolution of disputes primarily in the system where they arise, and allowing an external review

of such disputes only when the remedies of the system of origin are no longer effectively available. In the same vein, the Swiss case-law related to Article 75 of the Swiss Civil Code requires a member of an association to exhaust any internal remedies prior to challenging a decision of the association before an outside tribunal (on the point see the award in CAS 2003/O/466; in general BADDELEY M., *L'association sportive face au droit*, Basel, 1994, 310). However, this requirement will only exist where such a remedy is given. Absent said remedy – meaning an actual remedial procedure to which an aggrieved party would be individually entitled – there could not be such requirement.

²⁶ The obligation to exhaust domestic remedies forms part of customary international law with regard to the so-called "diplomatic protection", recognised as such by the International Court of Justice in the well-known *Interhandel* case (*Switzerland v United States*), judgment of 21 March 1959.

jurisprudence, several issues continue to arise in this respect. An example is offered by CAS 2014/A/3703. In this case the Panel was confronted with a claim for damages caused by the challenged decision brought by the aggrieved club against a federation. The Respondent argued that the claim was not part of the dispute before the lower body: therefore, it could not be brought before a CAS Panel, because, *inter alia*, the internal remedies had not been exhausted. The Panel (in the award of 28 April 2015, at § 55) dismissed the Respondent's objection and found that the claim for damages was the object of a civil dispute and not in itself an issue of disciplinary nature: therefore it could not be required from the club to file first such claim with the federation only to exhaust the legal remedies, since it is obvious that the federation would have dismissed it. In other words, a further confirmation is given of a settled principle: the obligation to exhaust internal remedies concern only those which are effective and not purely illusory.

III. Issues of admissibility

A second group of issues includes those which might be referred to the admissibility of the claim.

²⁷ See also the issue of standing to sue and to be sued: DE LA ROCHEFOUCAULD E., Standing to sue, a procedural issue before the CAS, in CAS Bulletin, 2011, 1, 16. Even when such conditions (or the "parallel" issue of the interest to claim) are not satisfied, the CAS Panel cannot grant the remedy requested by the Appellant/Claimant. They, however, do not appear to be, strictly speaking, conditions of admissibility of a claim, but directly touch the merits of the claim itself.

²⁸ CAS Commentary, 407, 417.

²⁹ CAS Commentary, 626.

³⁰ In CAS 2013/A/3227, award of 21 January 2014, the issue of the power of attorney arose: as a result, the appeal was considered inadmissible (§§ 44-46).

³¹ Please note that the compliance with the time limit to file the appeal brief appears to give rise to different issues, of procedural, more than of

Indeed, into such category different questions can be grouped.²⁷ Unified by the general aspect that they all prevent the Panel of competent jurisdiction from hearing the claim in its merits, they can be divided into at least two sub-groups, depending on their procedural or to substantive nature.

A number of admissibility issues, in fact, are linked to procedural aspects, and more specifically to the compliance with formal conditions for a claim to be entertained by CAS: for instance, the satisfaction of the formal requirements set by Article R48 of the Code (CAS 2014/A/3580)²⁸ or the payment of advances on costs (CAS 2013/A/3426, award of 31 October 2014):²⁹ in all such cases, if the requirements are not complied with or the payment is not made, even after an invitation by the CAS Court Office to cure the problems, the arbitration shall not proceed.³⁰

The main issue relating to the substantive aspects of the admissibility question is given by the compliance with time limits to file an appeal under Article R49 of the Code.³¹ Such issue³² gives rise to several questions: the nature of the deadline, the

substantive, nature: under the Code (which provides that if the appeal brief is not timely filed, the appeal is deemed withdrawn: Article R51) the Panel can no longer hear the case because the appeal does not remain before it, and not because the claim has expired in its substance. With respect to the deadline to file the appeal brief in CAS 2014/A/3461, award of 29 January 2015, the Panel confirmed that the decision of the Division President to extend it is final and cannot be reviewed by the Panel (§ 88). See CAS 2014/A/3643, award of 5 June 2015, §§ 63-71, which examined the timeliness of the appeal brief under the heading of "admissibility".

³² On this issue see HAAS U., The "Time Limit for Appeal" in Arbitration Proceedings before the Court of Arbitration for Sport (CAS), in CAS Bulletin, 2011, 2, 236, and in SchiedsVZ, 2011, 1.

consequences of its non respect, and the way in which it is to be calculated are only some of them.³³ The principles developed in their answer, however, appear now to be settled.

The nature of the issue and the consequences of the expiration of the time-limit were considered by the SFT in a decision of 18 June 2012 (4A_488/2011). In this decision, the SFT noted that the failure to comply with the deadline results in the loss of the Appellant's substantive claim, and not

simply of the right to bring it before the CAS. It is therefore an issue concerning the merits of the claim and not the jurisdiction of the Panel.³⁴

The characterization of the matter as not jurisdictional in nature³⁵ implies distinct consequences: the main is that, upon the expiry of the time limit, the party has no power to bring the case elsewhere, for instance before a State court, as it would happen if only the jurisdiction of the CAS were to cease.³⁶ As recognized in CAS 2013/A/3135, award of 3 April 2014 (§

³³ For an overall examination of the issues see RIGOZZI A., *L'arbitrage international en matière de sport*, 2005, 529-542.

³⁴ Here is the reasoning of the SFT on the point, which is worth mentioning in its entirety: "*Savoir si la tardiveté du dépôt de l'appel entraîne l'incompétence du TAS ou simplement l'irrecevabilité, voire le rejet, de ce moyen de droit est une question délicate. ... Sans doute le reproche fait à un tribunal arbitral de n'avoir pas respecté la limite de validité temporelle de la convention d'arbitrage ou un préalable obligatoire de conciliation ou de médiation a-t-il trait aux conditions d'exercice de la compétence, plus précisément à la compétence ratione temporis, et relève-t-il, comme tel, de l'art. 190 al. 2 let. b LDIP (arrêts 4P.284/1994 du 17 août 1995 consid. 2 et 4A_18/2007 du 6 juin 2007 consid. 4.2; ...). Force est, toutefois, d'observer que ce principe jurisprudentiel vise essentiellement l'arbitrage typique ou usuel, qui prend sa source dans une relation contractuelle et se caractérise par l'existence d'une clause arbitrale dont il convient de rechercher la portée dans le temps. En revanche, il est douteux qu'il vaille aussi pour l'arbitrage atypique, tel l'arbitrage sportif, et qu'il envisage en particulier l'hypothèse dans laquelle la compétence du tribunal arbitral résulte du renvoi aux statuts d'une fédération sportive prévoyant une procédure d'arbitrage pour régler les litiges de nature disciplinaire. En ce domaine, le Tribunal fédéral a déjà jugé que le point de savoir si une partie est recevable à attaquer la décision prise par l'organe d'une fédération sportive sur la base des règles statutaires et des dispositions légales applicables ne concerne pas la compétence du tribunal arbitral saisi de la cause, mais la question de la qualité pour agir, c'est-à-dire un point de procédure à résoudre selon les règles pertinentes dont le Tribunal fédéral ne revoit pas l'application lorsqu'il est saisi d'un recours contre une sentence arbitrale internationale (arrêts 4A_428/2011 du 13 février 2012 consid. 4.1.1 et 4A_424/2008 du 22 janvier 2009 consid. 3.3). Un auteur s'est penché plus avant sur la question examinée ici. Il signale le résultat insatisfaisant auquel conduirait la transposition au délai d'appel prévu par l'art. R49 du Code du principe général*

*voulant que le dépassement du délai convenu par les parties entraîne l'incompétence du tribunal arbitral (en l'occurrence, le TAS) et, par ricochet, la compétence des tribunaux étatiques: en bref, l'application de ce principe aurait pour conséquence qu'après l'expiration du délai d'appel de vingt et un jours fixé par cette disposition, les décisions des fédérations sportives dont le siège est en Suisse pourraient être portées devant les tribunaux suisses jusqu'à l'échéance du délai d'un mois prévu par l'art. 75 CC; une telle conséquence serait sans doute contraire à l'esprit de l'arbitrage international dans le domaine du sport, en ce qu'elle ne permettrait pas de faire en sorte que les sportifs soient jugés de la même manière et selon les mêmes procédures; elle occasionnerait, en outre, des complications difficilement surmontables. Aussi, pour cet auteur, le délai d'appel devant le TAS doit-il être considéré comme un délai de péremption dont l'inobservation entraîne, non pas l'incompétence de cette juridiction arbitrale, mais la perte du droit de soumettre la décision entreprise à tout contrôle juridictionnel et, partant, le déboutement de l'appelant (Antonio Rigozzi, *Le délai d'appel devant le Tribunal arbitral du sport: quelques considérations à la lumière de la pratique récente*, in *Le temps et le droit*, 2008, p. 255 ss.; le même, *L'arbitrage international en matière de sport*, 2005, nos 1028 ss). Semblable opinion apparaît convaincante *prima facie*. Au demeurant, s'il suffisait à une partie d'attendre l'expiration du délai d'appel de l'art. R49 du Code pour saisir les tribunaux étatiques suisses, cette partie serait en mesure de court-circuiter la juridiction arbitrale sportive par sa seule inaction". It is to be noted, however, that, in the end, notwithstanding the clear position expressed, the point was left open, because in any case the claim brought before the SFT, even in framed in terms of jurisdiction, had to be dismissed.*

³⁵ The holding of the SFT clarified the doubts that were present in the CAS jurisprudence: see CAS 2004/A/574, award on jurisdiction of 15 September 2004.

³⁶ HAAS U., *The "Time Limit for Appeal" in Arbitration Proceedings before the Court of*

27), the inadmissibility, if the appeal is not lodged in time, is automatic and the party's reaction or non-reaction cannot change such consequence: the expiration of the deadline has a preclusive effect that should be controlled by the Panel³⁷ on the basis of the facts pleaded and proved by the parties and which the Panel has no discretion to extend.

The issue regarding the determination of the starting point for the calculation of the compliance with the deadline has been examined in CAS 2012/A/2839. In the award of 26 July 2013 (§ 186), the Panel found that the event triggering the time limit for the appeal to CAS is the date on which the party intending to appeal a decision receives notice of it. The delay caused by the national federation in forwarding to the athlete the decision issued by the international federation cannot be held against the athlete, unless it is established that the federation is to be held as an agent for the athlete.

An interesting point which remains open with respect to the deadline for the appeal concerns the challenge of decisions which are null and void. The question is whether the time-limit applies or not. Under Swiss association law, in fact, decisions which are null and void can be challenged before State courts at any point in time.³⁸

In respect of such issue, contradictory positions can be identified in the CAS jurisprudence. On one side, in fact, in CAS 2011/A/2360&2392, the Panel (in the award of 3 July 2012) found that Article R49 of the Code applies irrespective of the substantive law applicable to the merits. Therefore, the characterization of the

decision as null or as voidable under the substantive law is irrelevant. On the other side, in CAS 2013/A/3148, award of 5 September 2014, the Panel seems to recognize that a challenge on that basis can be brought also past the 21-day deadline (in the case, however, it was not established that grounds for nullity existed, and therefore the appeal was dismissed). The first view appears to be preferred: the sporting regulations providing, directly or by reference to the Code, for a deadline to appeal internal decisions, in fact, take priority over domestic laws providing for longer deadlines, even if having mandatory nature. Therefore, from the CAS perspective, only the federation rules imposing a time limit have to be applied. In addition, such solution appears to be in line with the specific needs of the sporting system, which requires clear cut decisions in a short time frame. Leaving a question (validity of a decision) open for an extended period, would lead to uncertainty and run against the need of quick adjudication.

IV. Final considerations

As mentioned above, the line of distinction between issues of jurisdiction and issues of admissibility, however (apparently) easy to draw in theory, might turn out to be difficult to find in practice. This situation holds true also in the CAS system.

In general terms, in fact, the foregoing description actually shows that the case law is rather well settled and gives indications of the line of reasoning followed by the CAS Panels in dealing

Arbitration for Sport (CAS), in CAS Bulletin, 2011, 2, 238.

³⁷ See also CAS 2006/A/1168, § 80. Contrary to such conclusion see CAS 2006/A/1183, award of 8 March 2007, § 21, stating that even though the time limit cannot be extended, CAS is entitled to

proceed if the Respondent does not raise any objection to the late filing.

³⁸ On the matter see also DEL FABBRO M., CAS-rteil im Spannungsfeld von anfechtbaren und nichtigen Vereinsbeschlüssen, in SpuRt, 2014, 49.

with the matter: it is now clear what affects jurisdiction and what constitutes a condition of admissibility. A tendency, however, appears from time to time emerging, in order to deal with some of the consequences deriving from the distinction drawn on the basis of the general categories, which might be felt to be unsatisfactory in the given case. An example, already mentioned, is given by the notion of “appealable decision” in CAS appeals arbitration: being clearly a condition of jurisdiction, the existence of a “decision” in a proper meaning has however been examined also under the different aspect of admissibility, to allow the Panel not to entertain an appeal brought against a measure which does not qualify as a decision, even when a party does not raise a jurisdictional objection. The same could be verified with respect to the exhaustion of internal remedies, in order to discard “premature” appeals.

This shows a peculiarity of sport arbitration: the interests at stake sometimes go beyond those of the litigants and involve an appreciation of the general impact, on the sporting world at large, of the measure requested from, and of the functions performed by, CAS. In those situations, adapting the theoretical categories to the sporting framework in which the CAS operates appears to be the proper solution in order to safeguard the proper functioning of the system.

The Legality of the Arbitration Agreement in favour of CAS under German Civil and Competition Law

The Pechstein Ruling of the German Federal Tribunal (BGH) of 7 June 2016

Despina Mavromati*

- I. Introduction - Proceedings prior to the BGH Ruling
 - II. The operative part of the BGH Ruling
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I. Introduction - Proceedings prior to the BGH Ruling

The German Federal Tribunal (Bundesgerichtshof, BGH) issued its decision in the long-awaited Pechstein case on June 7, 2016 (“BGH Ruling”).¹ The core issue at stake before the BGH was the validity of the arbitration agreement between Ms. Claudia Pechstein (the Athlete), a speed skater and five-time Olympic gold medallist,

and the International Skating Union (ISU). The case has attracted public attention and led to numerous articles, notes and commentaries that discussed the various Court decisions prior to the BGH ruling but also advocated the need for reform of the sports arbitration system, more generally.² Certain authors went as far as to speculate on the devastating consequences for sports arbitration should the BGH confirm the OLG München decision.³ At the same time,

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¹ BGH, Press release issued on 7 June also available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=f2a2659ccbbe3c144cc6c354efcc9926&nr=74892&linked=pm&Blank=1>. Full decision of the Pechstein Ruling, decision of 7 June 2016, KZR 6/15 available here (in German): <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&client=12&nr=75021&pos=0&anz=1&Blank=1.pdf>

² From a huge selection of papers and newspaper articles dealing with the Pechstein case, see, generally, <http://www.lexology.com/library/detail.aspx?g=0583d0a8-d87b-488e-9f9f-d4d5769714fb>, German landmark decision on sports arbitration before CAS, Dr. Benjamin Lissner, June 9 2016; <http://iuscomparatum.info/germany-bgh-renders->

<http://www.faz.net/aktuell/politik/inland/bgh-urteil-gegen-claudia-pechstein-staerkschiedsgerichte-14274166.html> BGH-Urteil zu Pechstein, Fremdbestimmt, aber nicht unwirksam, 7 June 2016, Reinhard Müller. See also Nathalie Voser, The most recent decision in the Pechstein Saga: red flag for sports arbitration? <http://kluwarbitrationblog.com/2015/01/22/the-most-recent-decision-in-the-pechstein-saga-red-flag-for-sports-arbitration/>, Kluwer Arbitration Blog, January 22, 2015.

³ See, among other, the very critical approaches of some authors (prior to the BGH ruling): Lucien M. Walloni, Switzerland: The Pechstein Decision – The End Of Sports Jurisdiction As We Know It?, March 2015, available at: <http://www.mondaq.com/x/388232/Arbitration+Dispute+Resolution/The+Pechstein+Decision+The+End+Of+Sports+Jurisdiction+As+We+Know+It>. See also Antoine Duval, The Pechstein ruling of the Oberlandesgericht München - Time for a new reform of CAS?, January 19, 2015; <http://www.asser.nl/SportsLaw/Blog/post/the->

some renowned international arbitration practitioners criticized the correctness of the German Courts' approach and questioned the admissibility and the limits of control of final arbitral awards by foreign courts (always prior to the BGH Ruling).⁴

The Pechstein saga started in 2009, when the ISU Disciplinary Commission (ISU DC) rendered a decision on July 1, 2009 suspending the Athlete for two years for blood doping. Based on the arbitration agreement that the Athlete had signed in order to participate in the ISU competitions, the Athlete appealed against the ISU decision before the Court of Arbitration for Sport (CAS). The latter issued an order on procedure (OP) on September 29, 2009, confirming *inter alia* its jurisdiction to decide on the issue. Interestingly, the OP was signed by both parties. The CAS rejected the athlete's appeal on November 25, 2009.

The athlete subsequently filed a motion to annul the CAS arbitral award before the Swiss Federal Tribunal (SFT) pursuant to Article 190 par. 2 of the Swiss Private International Law Act (Swiss PILA).⁵ The SFT rejected the athlete's motion on February 10, 2010. The athlete further filed a

motion for revocation of the CAS award, relying on new medical evidence, before the SFT.⁶ This motion was also dismissed on September 28, 2010.⁷

Upon exhaustion of the legal remedies available in Switzerland, the athlete filed a claim before the German Court ("LG München"),⁸ suing the German Skating Federation and the ISU for damages suffered as a result of an ostensibly unlawful doping ban. The LG München dismissed the Athlete's claim. In a nutshell, the LG München held that the arbitration clause between the Athlete and ISU was invalid (because ISU had a monopolistic structure and athletes had no choice but to sign the agreement), but the Court was bound by it because the athlete had not invoked the invalidity of the arbitration agreement at an earlier stage.⁹

The Athlete appealed the LG München decision before the Munich Court of Appeals ("OLG München"), which issued an interim judgment on January 15, 2015.¹⁰ The interim judgment dealt merely with the admissibility of the claim in view of the arbitration agreement between the Athlete and the ISU. In its judgment, the LG München found that

[pechstein-ruling-of-the-oberlandesgericht-munchen-time-for-a-new-reform-of-cas](#). See also Antoine Duval / Ben Van Rompuy, The Compatibility of forced CAS arbitration with EU competition law: Pechstein reloaded, June 23, 2015, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621983. On a more pragmatic approach as to the potential consequences of a confirmation of the OLG ruling by the BGH (also prior to the BGH ruling), see Jeremy Dickerson / James Pheasant / Chris Davies, International Arbitration in Sport: Why The Pechstein Case Could Throw The Court Of Arbitration For Sport Into Disarray, August 25, 2015, <http://www.lawyerissue.com/international-arbitration-in-sport-why-the-pechstein-case-could-throw-the-court-of-arbitration-for-sport-into-disarray/>, par. 3.11. See also Kolja Schwarz, Der Fall Pechstein, das Doping und die Gerichte, <https://www.tagesschau.de/inland/pechstein-faq-101.html>.

⁴ See Xavier Favre-Bulle, Pechstein v. Court of Arbitration for Sport: How Can We Break the Ice? in Müller / Besson / Rigozzi (eds), *New Developments in International Commercial Arbitration*, 2015,

Publications of the CEMAJ Research Center on Alternative and Judicial Dispute Resolution Methods, Geneva / Zurich 2015, Schulthess, p. 328 f. [cited: Xavier Favre-Bulle: Pechstein v. Court of Arbitration for Sport]. See Christian Duve / Karl Oemer Rösch, Ist das deutsche Kartellrecht mehr wert als alle Olympiasiege?, *SchiedsVZ* 2015, pp. 69-77. See also Nathalie Voser, *Kluwer Arbitration Blog* 2015, (fn. 2).

⁵ Again, see the analysis of the SFT judgment in Xavier Favre-Bulle: Pechstein v. Court of Arbitration for Sport (fn.4), p. 319.

⁶ This is possible according to Art. 123 of the Federal Tribunal Act (Loi sur le Tribunal fédéral, LFT).

⁷ See BGH Ruling, at 1-5.

⁸ Landesgericht (LG) München I, *SchiedsVZ* 2014, p. 100.

⁹ The Athlete was therefore prevented from invoking the invalidity of the arbitration agreement based on the res judicata effect of the CAS award. See also <http://iuscomparatum.info/germany-bgh-renders-pechstein-judgment-on-cas/> (17 June 2016).

¹⁰ Munich Court of Appeals (OLG München Ruling), *WuW / E DE – R 4543*, judgment of 15 January 2015 (U 1110/14 Kart).

the arbitration agreement between the Athlete and ISU violated Art. 19 of the German Competition law that aims at harnessing abuses of dominant position (Gesetz gegen Wettbewerbsbeschränkungen, GWB). In the Court's view, ISU has a monopoly in the relevant market (i.e. in the ice speed skating world championships). Even if the imposition of an arbitration agreement upon an athlete is not an abuse of market power per se, the specific circumstances of the case depicted a structural imbalance related to the selection of the arbitrators before the CAS. Furthermore, the Court held that the CAS arbitral award could not be recognized in Germany because it was in violation of German public policy.¹¹ Finally, the OLG München granted the right to appeal to the BGH (Zulassung der Revision) due to the fundamental nature of the legal issues raised in the Pechstein case.¹² As seen above, both the LG and the OLG München decisions were criticised by international arbitration practitioners, mostly related to the limits of admissible review of a final – and binding – arbitral award by foreign courts.¹³

The BGH issued a press release with the operative part of its decision, overturning the OLG München and upholding the arbitration clause between the Athlete and

ISU. Once again, the press release gave rise to many notes, comments and criticisms. Some authors deplored, in general terms, the missed opportunity to instigate reform at the CAS through judicial action.¹⁴ On the other hand, others have regarded the BGH ruling as yet another confirmation of the advantages of arbitration.¹⁵ Unlike the aforementioned commentators, the present paper offers an account of the jurisdictional issues raised in the BGH Ruling under German law and discusses the legal dimensions and the repercussions of the decision for sports arbitration in Germany and at the international level.

II. The operative part of the BGH Ruling

The operative part of the BGH ruling can be summarized as follows:

- a) The CAS is a genuine court of arbitration within the meaning of Article 1025 par. 2 & 1032 par. 1 ZPO (German Code on Civil Procedure).¹⁶
- b) An international sports association like the ISU has a dominant position to the extent that it has a monopoly organizing and allowing athletes' participation in its sports competitions.

¹¹ Fundamental provisions of competition law fall within the scope of German public policy, see OLG München at 73 ff.

¹² See more in the blog www.disputeresolutiongermany.com.

¹³ See inter alia Christian Duve / Karl Oemer Rösch, Ist das deutsche Kartellrecht mehr wert als alle Olympiasiege?, *SchiedsVZ* 2015, pp. 69-77. See also Nathalie Voser, *Kluwer Arbitration Blog* 2015, (fn. 2). See, in particular, see Xavier Favre-Bulle: Pechstein v. Court of Arbitration for Sport (fn. 4), p. 328.

¹⁴ See Antoine Duval, The BGH's Pechstein Decision: A Surrealist Ruling, 8 June 2016, available at <http://www.asser.nl/SportsLaw/Blog/>; see also <https://www.schweizer.eu/> Der Bundesgerichtshof geht in der Anerkennung von Schiedsvereinbarungen sehr weit, 9 June 2016. See various reactions in: Rebecca Ruiz, Sports Arbitration Court Ruling against German Speedskater Claudia Pechstein is Upheld, 7 June 2016, available at <http://www.nytimes.com/2016/06/08/sports/sports-arbitration-court-ruling-against-german->

[speedskater-claudia-pechstein-is-upheld.html?_r=0](http://www.nytimes.com/2016/06/08/sports/sports-arbitration-court-ruling-against-german-speedskater-claudia-pechstein-is-upheld.html?_r=0).

See Mathias Wittinghofer / Sylvia Schenk, June 14, 2016, A never ending story: Claudia Pechstein's challenge to the CAS, June 14, 2016, available at <http://kluwerarbitrationblog.com/2016/06/14/a-never-ending-story-claudia-pechsteins-challenge-to-the-cas/?print=pdf>.

See Christian Duve / Karl Oemer Rösch, Der Fall Pechstein: Kein Startschuss für eine Neugestaltung der Sportschiedsgerichtsbarkeit, *SchiedsVZ* 2014, p. 223.

¹⁵ Nikos Lavranos, The Pechstein Judgment emphasizes the virtues of arbitration, June 9, 2016, available at www.efilablog.org. See also the CAS Statement on the Pechstein Ruling, http://www.tas-cas.org/fileadmin/user_upload/Media_Release_Pechstein_07.06.16_English.pdf

¹⁶ Even if the core issue discussed in the BGH Ruling is the validity of the CAS arbitration agreement, it bears mention that the CAS itself was not a party to the proceedings.

c) However, when a sports federation renders the participation in its competitions conditional on the signing of an arbitration agreement in favour of CAS in accordance with the World Anti-Doping Code, it does not abuse its dominant position (WADC).

d) There are sufficient guarantees in the CAS rules to protect the rights of athletes, notwithstanding the closed list of arbitrators or the fact that the arbitrators are appointed by the international Council of Arbitration for Sport (ICAS). ICAS is the supervising body of CAS and consists predominantly of International Olympic Committee (IOC) and International Sports Federations (IF) representatives. This is because athletes and Sports Federations have a shared interest in the fight against doping.

e) The arbitration agreement is valid, also when assessed against the right of access to justice laid down in Article 2 of the German Constitution (Grundgesetz, GG); the constitutional right of professional exercise (Article 12 par. 1 GG); and the right to a fair trial under Article 6 par. 1 of the European Convention of Human Rights (ECHR).

III. Finality of arbitral awards in Switzerland and application of the New York Convention of 1958

The finality of arbitral awards rendered by tribunals seated in Switzerland is enshrined in Art. 190 par. 1 PILA. The reasons for review by the SFT are exhaustively enumerated in Art. 190 par. 2 Swiss Private International Law Act (PILA).¹⁷ The award can be enforced (unless there is a successful request to be granted suspensive effect) in Switzerland or in a foreign state under the provisions of the New York Convention on the recognition and enforcement of arbitral awards of 1958 (NYC58), which has been

ratified by 156 contracting States so far. Under the terms of the NYC58, enforcement can be refused merely based on the grounds of Art. V of the NYC 58. In this respect, we should note that the review scope by the foreign courts is very narrow and “pro-recognition” or “pro-enforcement” and should in principle avoid reviewing the decision on its merits, and this is based on the principle of *res judicata*, which in turn is based on the underlying principles of natural justice and legal certainty. As X. Favre-Bulle wrote, when a party is unhappy with a first decision and seizes a second court to hear the matter again, the second court should dismiss the action based on the principle of *res judicata*, even if the second court is not in the same state.¹⁸

IV. Some brief facts about the BGH Ruling

In the Pechstein case, the Athlete seized – and exhausted – all available instances before the CAS and, subsequently before the SFT (including a motion for revocation, “*demande de révision*”). The CAS award had become final and binding. However, the Athlete successively seized the German Courts, yet this time in Germany (her native country), in her National Federation’s offices in Munich, suing also the ISU as co-defendant according to Art. 6 par. 1 of the Lugano Convention for damages.¹⁹ The claim was formally different (claim for damages) yet the underlying principles (invalidity of the sanction) touched upon the merits of the case that was brought before – and decided by – the CAS.

Although the operative part of the BGH ruling is unequivocal regarding the validity of the arbitration agreement between the two parties, there are additional noteworthy issues in the main text of the BGH decision.

¹⁷ See also below, fn. 61.

¹⁸ See Xavier Favre-Bulle, 50 Years of the New York Convention on Enforcement of Awards: Conventional Wisdom and Recent Developments, in: Müller/Rigozzi (eds.), *New Developments in International Commercial Arbitration 2008*,

Zurich/Basel/Geneva 2008, pp. 61-79. See also Xavier Favre-Bulle, *Pechstein v. Court of Arbitration for Sport* (fn. 4), p. 326 & 328.

¹⁹ Convention of Lugano on jurisdiction and recognition of judgments in civil and commercial matters of 2007 (“Lugano Convention”).

It should first be noted that the BGH examined the validity of the arbitration agreement applying German law and more particularly the relevant provisions of the German Code on Civil Procedure (ZPO) for the definition of the “arbitral tribunal”.²⁰ The BGH – just like the OLG München decision – also applied German Antitrust Law (GWB) which is imperative law in Germany according to Article 34 of the Introductory Act to the Civil Code (EGBGB).²¹

V. CAS is a “genuine court of arbitration” under German law

In its first part, the BGH ruling examined and ultimately confirmed the validity of the arbitration agreement signed between the Athlete and ISU. The BGH started its analysis by finding that the arbitration agreement signed by both parties comes within the ambit of Article 1025 ff. ZPO. It moved on to find that the arbitration agreement was valid to the extent that the CAS qualifies as a genuine court of arbitration under the relevant German civil procedure provisions, as opposed to an internal tribunal of an association or a (non-arbitral) dispute settlement body.²² The BGH further defined a genuine court of arbitration as an “independent” and “neutral” tribunal, and confirmed that the CAS meets these two conditions. The BGH found support in the judgment by the Swiss Federal Tribunal in *Danilova/ Lazutina*, agreeing that the CAS is independent and ensures a uniform set of jurisprudence.²³

The BGH further examined the claim regarding the existence of a structural imbalance within the supervising body of CAS (the ICAS) that may impinge on the neutrality and independence of the arbitral

tribunal. Under the applicable 2004 CAS Statutes, applicable at the time of the arbitration procedure in 2009, 12 ICAS members out of 20 were appointed by the IOC, the International Federations and the National Olympic Committees (NOCs). The ICAS members would then set up the list of CAS arbitrators, three fifths of which should be composed by arbitrators proposed by the International Olympic Committee (IOC), the National Olympic Committees (NOCs) and the IFs.²⁴ Departing from the OLG München ruling, the BGH found that such imbalance could not possibly endanger the independence and neutrality of the CAS panels.²⁵ By doing so, the BGH adopted a narrow definition of what constitutes lack of independence of an arbitral tribunal, under the standards established by the jurisprudence of the German BGH,²⁶ according to which lack of independence exists when the arbitrators are appointed by one party alone or when the parties cannot influence the constitution of the arbitral panel in the same way. However, this is not the case in CAS arbitration, where, notwithstanding the closed list of arbitrators, both parties can appoint the arbitrator of their choice.²⁷ This position of the BGH was, again, in line with international arbitration practitioners who had criticized the stance of the OLG München Court, which had presumed an inherent lack of independence and a bias of all persons composing the ICAS (and, in turn, of the list of CAS arbitrators), to the extent that they were close to a sports federation.²⁸

To corroborate its reasoning, the BGH further referred to the CAS list of arbitrators and held that the influence of a specific federation (e.g. the ISU) on the constitution of the CAS list of arbitrators would be too

²⁰ I.e. Article 1025 ff. of the German Law on Civil Procedure (ZPO); see BGH Ruling, at 23.

²¹ See BGH Ruling, at 44.

²² See BGH Ruling, at 23.

²³ ATF 4P.267/2002, judgment of 27 May 2003, SchiedsVZ 2004, p. 208 f. See the BGH Ruling at 25. For more details see also Xavier Favre-Bulle, Pechstein v. Court of Arbitration for Sport (fn. 4), p. 335.

²⁴ The CAS Statutes were amended in 2012 and the quota requirements were abolished.

²⁵ See Antonio Rigozzi / Erika Hasler / Brianna Quinn, The 2011, 2012 and 2013 revisions to the Code of Sports-related Arbitration, Jusletter, 3 June 2015.

²⁶ BGH Ruling, at 30.

²⁷ Idem.

²⁸ See Xavier Favre-Bulle, Pechstein v. Court of Arbitration for Sport (fn. 4), p. 339.

small to justify a claim for structural imbalance. On the contrary, the parties can freely choose a neutral arbitrator among the 150 – 200 arbitrators in the list.²⁹

The key argument used throughout the BGH ruling for speaking against the structural imbalance within CAS (that was supported in the OLG München ruling) was that both parties (i.e. athletes and federations) have common interests; for instance, they both share the common goal for a doping-free sport and therefore are not parties with opposing interests. This led the BGH to make the distinction between sports-related disputes and other disputes, such as employment disputes, acknowledging the sui generis character of the former.³⁰

The BGH went on to examine the neutrality and independence of CAS from the viewpoint of the CAS rules. According to the Court, the CAS rules provide for sufficient neutrality and independence of the arbitrators: they sign the declaration of independence at the outset of their appointment, and they cannot form part of the ICAS. CAS Arbitrators should disclose any circumstances which may affect their independence with respect to any of the parties (Article R33 of the CAS Code) and they can be challenged by the parties if there are circumstances that give rise to legitimate doubts over their independence or impartiality (under Article R34 of the CAS Code).

Crucially, the BGH rejected all arguments raised and supported in the OLG München decision about the non-disclosure of recurrent appointments by arbitrators or the scrutiny of the CAS awards by the CAS Secretary General under Article R59:

²⁹ BGH Ruling, at 31. The list of CAS arbitrators currently includes nearly 400 arbitrators. It must be noted that, here again, the BGH referred to the Swiss FT judgment in *Danilova/ Lazutina* (see above).

³⁰ See BGH Ruling, at 32.

³¹ See, in this respect, Despina Mavromati / Matthieu Reeb, *The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials*, Alphen aan den Rijn 2015, p. 366.

according to the BGH, these issues cannot alter the character of the CAS as a “genuine court of arbitration”.³¹ In this respect, the BGH drew an analogy to other major institutional arbitral tribunals that foresee similar practices, like the International Chamber of Commerce (ICC).³² By the same token, the BGH stressed the broad definition of “a genuine court of arbitration” under German law (Art. 1025 ff. ZPO), which essentially leaves outside its scope only tribunals that are not statutorily organized as independent tribunals or act merely as the tribunal of an association.

The BGH equally referred to the BGH jurisprudence on the marginal review made by the German tribunals when they are called to rule on the independence and impartiality of foreign arbitral tribunals in order to recognize or enforce foreign arbitral awards under the New York Convention of 1958.³³ Foreign arbitral awards should only be declined recognition when the arbitrator was the executor of the will of one of the parties or because the arbitrators promoted unilaterally the interests of one party based on irrelevant considerations. This means that the violation of the principle of impartiality in arbitration must have a concrete impact on the proceedings, and this could not be established in the case of the the Athlete during the CAS proceedings. In this respect, the BGH departed from the findings of the OLG München ruling, which had not examined this element specifically with regard to the Athlete’s doping ban, but merely considered that there was a risk that

³² See BGH Ruling at 34. The BGH referred principally to the analogous provision to Art. R33 of the CAS Code in ICC Arbitration (Art. 27 ICC Rules) and cited Andreas Reiner / Werner Jahnel in Rolf A. Schütze, *Institutionelle Schiedsgerichtsbarkeit*, 2nd ed., 2011, ad Art. 27 ICC, at 8 ff.

³³ The New York Arbitration Convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958.

the CAS arbitrators would favour the interests of the sports associations.³⁴

Overall, the BGH stressed the broad scope of Article 1025 ff. ZPO regarding the definition of a “genuine court of arbitration” and confirmed the compatibility of the CAS rules with the requirements of German law pertaining to the neutrality and independence of the CAS arbitrators. It also highlighted the marginal review typically undertaken by German Courts when it comes to examining possible violations of the principle of impartiality of an arbitral tribunal under the New York Convention. The Court further ruled out a predominant influence of the sports federations on the CAS proceedings based on the common interests of both athletes and sports federations in their shared fight against doping. By doing so, it explicitly differentiated between sports-related disputes and labour law disputes (where employers and employees have opposing interests). This means that, in the BGH’s view, the limitations applying to employment (or consumer) arbitration do not apply to sports arbitration.

VI. The scope of the arbitration agreement between the Athlete and the ISU

In a very brief part of the ruling, the BGH confirmed the wide scope of the arbitration agreement signed between the Athlete and the ISU according to Article 26 of the (at the time applicable version of the) ISU Statutes. The scope of the arbitration agreement included also claims for damages or other claims against the ISU. This means that claims for damages against the ISU should be

³⁴ Also, by requiring the establishment of bias based on the concrete circumstances (and not mere allegations of bias), the BGH (see BGH Ruling, at 36: “konkret ausgewirkt haben muss”) aligned its reasoning with BGH jurisprudence: see BGH, Decision of May 15, 1986 – III ZR 192/84, BGHZ 98, 70, 74 f. It also aligned its reasoning with the approach of the SFT and the authors who had criticized the OLG München Ruling: Nathalie Voser, Kluwer Arbitration Blog 2015, (fn. 2). Contra, see Antoine Duval / Ben Van Rompuy, (fn. 3), p. 17.

addressed to CAS based on its exclusive jurisdiction and not to ordinary tribunals. Thus, the BGH overturned the finding of the OLG München that the arbitration agreement signed between the parties (through the OP of September 29, 2009) covered only the specific, doping-related dispute and did not extend to claims for damages.³⁵

VII. The compatibility of the arbitration agreement with German anti-trust laws (Art. 19 GWB)

In the third part of the decision, the BGH examined the compatibility of the arbitration agreement between the Athlete and the ISU with the relevant provisions of German anti-trust law (Art. 19 GWB).³⁶ The BGH upheld the OLG ruling that the ISU falls within the scope of application of Art. 19 GWB: ISU has a dominant position in the relevant market, as the organization of sports events constitutes an economic activity and ISU has a monopoly organizing the world championships in speed skating. In order to establish the prohibition of Art. 19 GWB, an abuse of dominant position has to be established: siding with the OLG München ruling, the BGH found that the imposition of an arbitration clause by a sports association is not per se an abuse of a dominant position.³⁷ The BGH took issue with the OLG München’s ruling finding that ISU does not abuse its dominant position, thereby confirming the validity of the arbitration agreement between the parties under Article

³⁵ OLG München Ruling, at 12. The Court had found that CAS jurisdiction could not be extended to other disputes, particularly to the dispute concerning the claims for damages in question.

³⁶ See BGH Ruling, at 44.

³⁷ OLG München Ruling, at 88. The OLG München had also acknowledged that there are legitimate grounds to favour arbitration, such as uniform competence and procedure, equal opportunities of athletes during the competitions etc.

134 BGB (Bürgerliches Gesetzbuch, German Civil Code).³⁸

The BGH applied a balance of interest test (under Art. 19 par. 1 and par. 4 BWG) and divided its findings into five categories: It concluded that ISU did not abuse its dominant position in the market based on the parties' shared interests (under (aa)); that the imposition of the arbitration agreement by the ISU did not contradict the Athlete's right to access to justice; her right to exercise her profession (Art. 12 GG) (under (bb)); and her right to a fair trial under Art. 6 ECHR (under (cc)). It further examined briefly the conformity of ISU with Art. 102 (competition rules applying to undertakings) of the Treaty on the functioning of the European Union (TFEU) (under dd) and the validity of the arbitration agreement under Swiss law (under ee).³⁹

More specifically, in its first line of arguments (aa), the BGH juxtaposed the Athlete's interest in a fair trial by an independent (arbitral) tribunal to ISU's interest in efficient and international sports arbitration procedures and concluded that both parties shared the interest in having an efficient dispute resolution mechanism, as this ensures uniform standards and equal treatment of all athletes across the world in doping matters.⁴⁰ The BGH went on to stress the important advantages and the necessity of having uniform anti-doping rules through the

adoption of the WADA Code, concluding that it would not be feasible to completely detach sports arbitration from its links to sports federations and the IOC.⁴¹ In this respect, the BGH followed the argumentation adopted by scholars that both athletes and sports federations share the interest in the swift resolution of disputes and that the federations do not impose the arbitration agreements simply in order to abuse their dominant position in the market.⁴²

In its second line of arguments (under bb)), the BGH juxtaposed the constitutional rights of the Athlete to the constitutional rights of the federation, finding that both parties' rights deserve equal protection.⁴³ As to the constitutional right of access to justice under Art. 2 par. 1 GG, the BGH held that it is possible to agree a priori to have recourse to arbitration to the extent that this is the expression of the free will of the parties to the agreement ("freiwillig").⁴⁴ In a much criticized part of the decision,⁴⁵ the BGH concluded that the Athlete entered into the arbitration agreement voluntarily.⁴⁶ It then justified this finding by adopting a wide interpretation of what constitutes a voluntary acceptance of arbitration. The BGH referred to its consistent case-law accepting an "involuntary" waiver of the exercise of fundamental rights (like the waiver of Art. 2 par. 1 GG) in cases of "physical" or "mental" violence against one of the parties; of fraud;

³⁸ For a presentation of the German competition law see also Fabian Stancke, Pechstein und der aktuelle Stand des Sportkartellrechts, *SpuRt* 2015, pp. 46-51.

³⁹ BGH Ruling, at 48.

⁴⁰ BGH Ruling, at 50.

⁴¹ BGH Ruling, at 50.

⁴² See Tarkan Göksu, Das "Pechstein-Urteil" des Landgerichts München: Falsche Anwendung schweizerischen Rechts, *Causa Sport* 2014, p. 360; See Antonio Rigozzi / Fabrice Robert-Tissot, "Consent" in Sports Arbitration: Its Multiple Aspects, Lessons from the Cañas decision, in particular with regard to provisional measures, in: Geisinger/Trabaldo-de Mestral (Eds), *Sports Arbitration: A Coach for Other Players?*, New York 2015, pp. 64 ff., p. 68 & 72; see Christian Duve / Karl Oemer Rösch, (fn. 13), p. 223.

⁴³ BGH Ruling, at 51.

⁴⁴ By doing so, the BGH Ruling employed a very wide test of consent, in direct opposition to the OLG München Ruling. On the approach of the OLG München Ruling, see Xavier Favre-Bulle: Pechstein v. Court of Arbitration for Sport (fn.4), p. 333.

⁴⁵ See Antoine Duval, The BGH's Pechstein Decision: A surrealist Ruling, 8 June 2016, available at: <http://www.asser.nl/SportsLaw/Blog/>; see also Der Bundesgerichtshof geht in der Anerkennung von Schiedsvereinbarungen sehr weit, 9 June 2016, available at <https://www.schweizer.eu/>. See Rebecca Ruiz, Sports Arbitration Court Ruling Against German Speedskater Claudia Pechstein is Upheld, 7 June 2016, available at: http://www.nytimes.com/2016/06/08/sports/sport-s-arbitration-court-ruling-against-german-speedskater-claudia-pechstein-is-upheld.html?_r=0.

⁴⁶ BGH Ruling, at 53.

or in cases of lack of declaration of intent. In the case of an arbitration agreement signed by both parties, whereby both contractual parties define the terms, none of the parties appears to have accepted to waive its human rights against its free will.⁴⁷

More specifically, the Athlete signed the arbitration agreement in January 2, 2009, in order to be able to participate in the World Championships. However, in the BGH's view, this precise instance does not meet the aforementioned conditions of threat, fraud or mental constraint as interpreted by the BGH and the BVerfG. Most importantly, the fact that the Athlete did not wish to sign the arbitration agreement does not mean that the athlete was "forced" to sign it, all the more because, within the context of a contractual agreement, both parties to the contract undertake mutual obligations.⁴⁸

Having confirmed that the arbitration agreement is, in fact, a contract signed by both contractual parties whereby they undertake mutual rights and obligations, the BGH acknowledged ISU's bargaining power in this contractual relationship. Recalling that ISU has the monopoly of organizing the world ice speed-skating championships, the BGH noted that the signing of the arbitration agreement by the Athlete was in essence defined unilaterally by the ISU ("fremdbestimmt").⁴⁹

⁴⁷ BGH Ruling, at 54.

⁴⁸ BGH Ruling, at 55.

⁴⁹ On the very interesting debate among Swiss scholars and practitioners around what constitutes consent in sports arbitration, see in particular Antonio Rigozzi / Fabrice Robert-Tissot, 2015 (fn. 42), p. 64 f. The authors support the validity of the arbitration agreement notwithstanding the lack of true consent by the athletes. See also Margareta Baddeley, *Droits de la personnalité et arbitrage: dilemme des sanctions sportives*, in: Gauch/Werro/Pichonnaz (eds.), *Mélanges en l'honneur de Pierre Tercier*, Geneva/Zurich/Basel 2008, p. 717 ff. For a pragmatic presentation of the situation in sports arbitration see Xavier Favre-Bulle: *Pechstein v. Court of Arbitration for Sport* (fn. 14), p. 332.

⁵⁰ BGH Ruling, art. 58.

To ensure the protection of the constitutional rights in case of "Fremdbestimmung", German law foresees the application of the general provisions of the German Civil Code, along with Art. 19 GWB. In this case, Pechstein's right to exercise her profession (guaranteed by Art. 12 GG) was de facto restricted by the imposition of the arbitration clause by ISU.⁵⁰ Nevertheless, the imposition of the arbitration clause by the ISU safeguards the – equally constitutionally guaranteed – right of the autonomy of associations, as laid down in Art. 9 par. 1 GG. Seen from this angle, a sports association aims at promoting a given sport through the establishment of criteria and conditions for the participation in the organized sports business. It is therefore essential to have uniform and coherent regulations governing the organization of that sport. Moreover, according to the BGH, it is widely accepted that sports arbitration is necessary, in particular in the field of doping, in order to ensure the uniform application of the anti-doping rules and fair competition among athletes. The BGH added to the advantages of sports arbitration the criteria of speed, efficiency and recognition and enforcement under the NYC58.⁵¹

Taking issue with the position of the OLG München Ruling, according to which the UNESCO Convention against Doping⁵² does not clearly impose a duty to include an arbitration clause in favour of CAS in sports-related contracts,⁵³ the BGH found such an

⁵¹ BGH Ruling, at 58.

⁵² UNESCO International Convention against Doping in Sport of 19 October 2005.

⁵³ OLG München Ruling, at 85. The Court had found that Art. 4§1 of the Convention merely referred to the principles of the WADC and that this provision did not clearly oblige parties to provide for the exclusive jurisdiction of CAS, notwithstanding the fact that Art. 13.2.1 WADC provided for an exclusive appeal against ADR decisions to the CAS and the compliance mandate of Art. 23.2.2. It must be noted that this was an answer to ISU's argument that the GWB rules are precluded because the arbitration clause was mandated by the UNESCO Convention Against Doping in Sport of 2005 (OLG München Ruling, at 84).

obligation to derive directly from the provisions of the WADC, and more specifically Art. 13.2.1 & 23.2.2 thereof. Through the ratification of the UNESCO Convention against Doping by Germany, the WADC founding principles constitute by now binding international law for Germany.⁵⁴

By concluding that ISU did not abuse its dominant position in the market within the meaning of Art. 19 GWB, the BGH took into account a number of factors, such as the advantages of sports arbitration for both athletes and sports federations.⁵⁵ The BGH further referred to the protection of the constitutional rights of athletes (like the right to exercise their profession and their right of access to justice), and the need to ensure a certain level of independence and impartiality of CAS and its arbitrators. The BGH made it clear that the wide variety of arbitrators who are on the CAS list gives sufficient margin of manoeuvre to athletes, who can appoint an independent and impartial arbitrator of their choice.⁵⁶ A further step towards the protection of athletes lies in the CAS Rules, which offer the possibility to challenge an arbitrator when there are “circumstances [that] give rise to legitimate doubts over her/his independence or over her/his impartiality”.⁵⁷ Finally, the BGH reiterated that athletes still have the possibility to file a motion to set aside the CAS award before the SFT, based a limited number of grounds.⁵⁸ In

this regard, the BGH referred to the *Cañas* judgment of the SFT, confirming the invalidity of the waiver to appeal to the SFT in sports-related disputes.⁵⁹

Some (isolated) scholars have criticized the utility and even the legality of the SFT review, suggesting that the Swiss judicial system would somehow “protect” its arbitral institutions at all costs:⁶⁰ it should be noted that, in principle, the control made by the SFT (and by the vast majority of supreme courts who have ratified the NYC58) is a legality control which aims at safeguarding the lawfulness of the arbitral proceedings and the basic rights of the parties to an arbitration procedure that took place in Switzerland. Evidently, the control is limited to the specific grounds exhaustively enumerated in Art. 190 para. 2 PILA and does not extend to a re-hearing of the case *de novo* or to all general allegations as to the lack of independence of the arbitral institution. Otherwise the SFT would have become the third instance of sports disputes, and this would contradict the very spirit of arbitration, by extending substantially the duration of the case and increasing the costs of the proceedings. The SFT has indeed heard numerous motions to set aside CAS awards so far and has vacated some of them, based on a variety of grounds.⁶¹

⁵⁴ Idem for the IOC, which under Art. 30.1.2 WADC conditions the recognition of international sports federations on their compliance with the WADC, see BGH Ruling, at 60.

⁵⁵ The BGH therefore repeated, in other words, the “shared interests” argument of sports arbitration put forward in the determination of the CAS as a “genuine court of arbitration” – see above: CAS is a “genuine court of arbitration” under German law. See BGH Ruling at 62.

⁵⁶ See the similar arguments raised also under the first part of the decision, when the BGH dealt with the qualification of CAS as a genuine CAS is a “genuine court of arbitration” under German law.

⁵⁷ Art. R34 of the CAS Rules.

⁵⁸ The control of arbitral tribunals by the supreme court of the seat of arbitration is a possibility that is also foreseen in many other countries, like in Germany under Art. 1059 ZPO, see BGH Ruling at 62.

⁵⁹ See ATF 4P.172/2006, judgment of the SFT of March 22, 2007.

⁶⁰ See the criticisms of Antoine Duval on the SFT (who called the SFT “a paper tiger”) in the blog <http://verfassungsblog.de/the-pechstein-case-transnational-constitutionalism-in-inaction-at-the-bundesgerichtshof/> of 10 June 2016.

⁶¹ See inter alia ATF 4A_400/2008, judgment of February 9, 2009; ATF 4A_456/2009, judgment of May 3, 2010; ATF 4A_600/2010, judgment of March 17, 2011; ATF 4A_558/2011, judgment of March 27, 2012; ATF 4A_627/2011, judgment of March 8, 2012. See also Despina Mavromati, Jurisprudence of the Swiss Federal Tribunal in Appeals against CAS Awards, in: Michele Bernasconi (ed.) *Arbitrating Disputes in a Modern Sports World – 5th Conference CAS & SAV/FSA Lausanne 2014*.

Having said this, there are minimum standards of procedural nature that arbitral institutions must comply with and these were clearly found to be met, not only by the SFT but also by the BGH, as it was made evident by the recent BGH ruling. Indeed, the BGH concluded that there were sufficient procedural guarantees in the CAS Statutes and Code and the SFT review system and that athletes should not have any additional right to request a hearing before a German state tribunal. On the contrary, and this is an important point of the BGH ruling, the Court stressed the importance of recognizing and enforcing foreign arbitral awards under the NYC58 and under the conditions of Article V thereof (that were found, in casu, to be met).⁶²

Finally, the BGH did not miss the opportunity to reiterate the traditionally favourable view of arbitration proceedings under German law⁶³ but also the adoption of a federal law to fight doping in sport (*Gesetz zur Bekämpfung von Doping im Sport*), which equally foresees recourse to arbitration for doping-related cases.

In its third line of arguments in order to substantiate, through the balance of interests test, its position that ISU did not abuse its dominant position,⁶⁴ the BGH examined the conformity of the arbitration agreement with Art. 6 of the ECHR (under cc). Said

⁶² BGH Ruling at 62.

⁶³ In particular, Art. 1025 ZPO was modified in 1997 in order to further promote and facilitate the use of arbitration as a dispute resolution method, see BGH Ruling at 63.

⁶⁴ i.e. after establishing that both parties shared the common interest in having an independent international arbitral tribunal in order to ensure uniform application of the anti-doping rules and fair competition (aa) and that the basic constitutional rights of the athletes were not violated from the signing of the arbitration agreement (bb).

⁶⁵ ECHR, judgment of March 5, 1962 – 1197/61, X v. Bundesrepublik Deutschland: see BGH Ruling at 65.

⁶⁶ See *Pechstein v. Switzerland*, No. 67474/10. Ms Pechstein filed a complaint of unfairness of proceedings before the CAS, and of a lack of impartiality and independence of the CAS and its arbitrators. The ECHR gave notice of the application to the Swiss Government and raised questions under

provision guarantees the right to a fair trial. The BGH has confirmed that the jurisdiction of ordinary courts could be validly excluded, in the light of Art. 6 ECHR, by an arbitration agreement, if such agreement has been entered into voluntarily, is lawful and clearly worded, if the arbitration procedure has been designed in accordance with the guarantees given in Art. 6 ECHR and if the arbitral awards can be set aside by a court of law in case of procedural errors. The BGH reiterated its previous findings on the voluntary participation of the Athlete to the arbitration agreement, developed in par. 53 and 54 of the BGH Ruling and discussed earlier. In addition, the BGH referred to the jurisprudence of the ECHR in order to substantiate its findings.⁶⁵ In this respect, it must be noted that the Athlete had also filed in 2010 a complaint with the European Court of Human Rights, which is currently pending before said Court,⁶⁶ but the ECHR is not bound by the decisions and the findings of national courts.⁶⁷

As a fourth (under dd)) criterion in order to substantiate its finding that ISU did not abuse its dominant position, the BGH examined – and subsequently excluded – the violation of Art. 102 TFEU, which is a provision almost identical to Art. 19 GWB (the national equivalent to Art. 102 TFEU) and finds parallel application in Germany.⁶⁸ Like under Art. 19 GWB, Art. 102 TFEU only prohibits

Art. 6 par. 1 of the ECHR. See the factsheet of the ECHR available at http://www.echr.coe.int/Documents/FS_Sport_EN_G.pdf.

⁶⁷ See more in Ulrich Haas, *Zwangsschiedsgerichtsbarkeit im Sport und EMRK*, ASA Bull 2014, p. 707-734.

⁶⁸ Settled ECJ case-law portrays this concept as ‘a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers’. See Case 27/76, *United Brands v. Commission*, [1978] ECR 207, para. 65. See more on Art. 102 TFEU in A. Duval / Ben Van Rompuy, *The compatibility of forced CAS arbitration with EU competition law: Pechstein reloaded*, p. 11-12.

the *abuse* of a dominant position.⁶⁹ Abuse of a dominant position may be either exploitative (directly harming consumers) or exclusionary (that could exclude the market to competitors). It should be noted that the OLG München decision (which only examined the compatibility of the arbitration clause with Art. 19 GWB and not with Art. 102 TFEU) was criticized in its considerations on competition law.⁷⁰ The OLG decision had failed to scrutinize whether the anti-doping rules could be justified on the basis of their legitimate objective, without taking into account the actual effect of the rules.

Finally, the BGH proceeded to an examination of the conformity of the arbitration agreement with Swiss law (*ee*).⁷¹ Following the tenets of German civil law, the BGH applied Swiss law as the law of the country where arbitration proceedings have to take place in case of dispute pursuant to the arbitration agreement.⁷² Distancing itself from the OLG München ruling once again, the BGH determined that the arbitration agreement was valid based on Swiss law, irrespective of the fact that the Athlete was obliged to sign the arbitration agreement in order to be able to participate in the competitions. The BGH applied Swiss law as it would have been applied by Swiss Courts. Thus, it referred to the SFT jurisprudence and to the Cañas judgment, according to

which non-voluntary arbitration agreements are valid to the extent that a right to appeal before the SFT is guaranteed. Such right cannot be lawfully waived for sports-related disputes and this comes as a counter-balance to the favourable view of sports arbitration by the SFT and as a further guarantee of legality for athletes.⁷³

VIII. Some concluding remarks

A central point of disagreement between the OLG München⁷⁴ and the BGH – and arguably a threshold question for the final conclusion – is the qualification of CAS as a “genuine court of arbitration” within the meaning of Art. 1025 ff. ZPO. The BGH also clearly distinguished between labour law disputes and sports-related (doping-specific) disputes, indirectly recognizing the peculiarities of sports-related disputes among athletes and federations, more generally: this is an important finding, as the limitations existing in labour law arbitration cannot find analogous application in the sports sector. The BGH justified this by the common – or rather non-conflicting – interests of both athletes and sports federations in the swift resolution of disputes and in the fight against doping.

The BGH further employed the “balance of interests” test in order to examine whether the ISU abused its dominant position in the relevant market. In addition, the BGH seemed to adopt a much narrower control as

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621983. Importantly, in MOTOE (C-49/07, ECJ judgment of July 1, 2008), the Court clarified that an undertaking can, *inter alia*, acquire a dominant position when it is granted special or exclusive rights enabling it to determine whether and under what conditions other undertakings can have access to the relevant market and supply their services. It further found that Articles 102 and 106 TFEU are violated when the fact that such rights within the meaning of Article 106 par. 1 TFEU are granted is liable to create a risk of an abuse of a dominant position. The OLG München Ruling shortly referred to the MOTOE judgment as an argument that competition law also applies to the sports sector.

⁶⁹ ECJ Case 85/76, *Hoffmann-La Roche v Commission* (1979), ECR 61, para 91.

⁷⁰ See Nathalie Voser, *Kluwer Arbitration Blog* 2015, (fn.4). See also Christian Duve / Karl Oemer Rösch,

(fn. 13), p. 71. Anti-doping rules have generally been seen as justified by a legitimate objective, i.e. they are inherent in the organization of competitive sport, see the *D. Meca-Medina / I. Majcen v. Commission, ECJ Decision C-519/04 P*, 18 July 2006. See also the Wouters ruling of the ECJ, case C-309/99 of February 19, 2002. See also Panagiotis Delimatsis, “Thou shall not...(dis)trust”: Codes of conduct and harmonization of professional standards in the EU”, 47(4) *Common Market Law Review*, 2010, p. 1083 f.

⁷¹ In addition to the provisions of German anti-trust law that had to be applied in this case, the validity of the arbitration agreement had to be examined according to Swiss law. See BGH Ruling, at 70.

⁷² According to the principle of “characteristic performance”.

⁷³ See the Cañas judgement, ATF 4P.172/2006, judgment of the STF of March 22, 2007, at 4.3.3.2.

⁷⁴ OLG München Ruling, at 88.

the foreign court in the enforcement mechanism of arbitral awards.⁷⁵ The BGH also seemed to weigh carefully the actual effects on competition since a possible confirmation of the OLG München ruling could have had a long-term adverse impact on other, non-State arbitration mechanisms.⁷⁶

The BGH found that the fact that the athlete did not wish to sign what constitutes a “contractual agreement” does not meet the high legal standard of a “forced” waiver of the party’s constitutional rights as established in the jurisprudence of the BGH. However, the BGH acknowledged that the signature of the arbitration agreement was “fremdbestimmt” (defined by a party having monopoly in the organization of world championships) and therefore proceeded to balancing the relevant interests according to the general provisions of civil law and the basic constitutional rights of the Athlete.

Moreover, while the OLG München found that there was no rational justification for the structural imbalance in favour of the sports associations nor were there shared interests between athletes and sports associations,⁷⁷ the BGH concluded exactly the opposite. Despite the peculiarities of the CAS arbitrators’ appointment process, no structural imbalance can be identified that puts into question the independence and impartiality of the institution.

Overall, the BGH rendered a landmark decision in the Pechstein case, confirming the favourable view of German state courts vis-à-vis arbitration proceedings in general and the sports-related arbitration system in particular. The decision also constitutes a confirmation that CAS, with its minor

imperfections, is a reliable alternative dispute resolution mechanism as the last instance for doping-related disputes. Crucially, the BGH found that the OLG München had gone too far in its control of the arbitration agreement and most particularly the control of “independence” and “neutrality” according to the German Code on Civil Procedure and the jurisprudence of the BGH for the recognition and enforcement of arbitral awards under the NYC58, thereby preempting any future light-hearted attacks to the existing sports dispute resolution system but also to arbitration proceedings, more generally.

Indeed, as highlighted above, one of the milestones of international arbitration is the finality of the arbitral awards and their recognition and enforcement by the foreign courts that have ratified the NYC 58, without entering into the merits of the case. As some scholars said after the OLG München Ruling, the Pechstein case could have had important systemic repercussions for arbitration in general, as it could jeopardise the legal certainty that arbitral awards made in Switzerland offer, suggesting that arbitral awards can be reviewed by foreign courts without limits.⁷⁸ The BGH seems to be mindful of these systemic ramifications. All in all, it is submitted that avoiding to open the Pandora’s box of endless challenges against arbitration awards is, at equipoise, a correct decision.

At the same time, the BGH ruling must be placed in its context, i.e. it concerns the recognition of validity of an arbitration clause that resulted in a foreign arbitral award (rendered by an arbitral institution) in a

⁷⁵ The focus on specific details of the enforcement mechanism in the OLG München ruling was criticized as “striking” and “unclear” from a general competition law point of view. See Nathalie Voser, *Kluwer Arbitration Blog* 2015, (fn. 2).

⁷⁶ In particular, under EU competition law, legal proceedings are generally only considered to be an abuse of a dominant position in very limited circumstances, see ECJ, case T-111/96, *IIT Promedia*. See Nathalie Voser, *Kluwer Arbitration Blog* 2015, (fn. 2).

⁷⁷ OLG München Ruling, at 109-110.

⁷⁸ By reviewing de novo the merits of an already final and binding arbitral award, a foreign court could indeed endanger the basic principles of international arbitration. One of the principal objectives of the Lugano Convention was that a European court seized as second court should recognize and enforce a decision (without reviewing the merits of the previous decision, under Art. 36, or even the jurisdiction of the previous court under Art. 35): see Christian Duve / Karl Oemer Rösch, (fn. 13) pp. 69-77. See also Xavier Favre-Bulle: *Pechstein v. Court of Arbitration for Sport* (fn. 4), p. 330.

sports-related, anti-doping dispute between an athlete and a sports federation. Also, the control made by the BGH on the institutional structure of CAS was based on a situation that existed back in 2009 (the 2004 version of the CAS Code was applicable back then).⁷⁹ The role of the BGH was to control all elements of the case under German civil and competition law (but also under Swiss law) and proceed to a judgment on the specific case at hand. Had the BGH decided to confirm the OLG ruling, this would have important consequences but limited to German athletes, who could theoretically choose to go to ordinary courts instead of seizing the CAS. But again, strictly speaking, the decision could only have a precedential value to the extent that the 2004 version of the CAS code would apply. This would not mean that the international sports arbitration would come to an end, simply because it is a universally accepted (even by the critics of the system) necessity that provides for basic yet essential due process guarantees and there is no other alternative at the moment.

Against this background, and independently of any external pressure, CAS has been working, already since 2012, on a series of important institutional reforms, including, *inter alia*, the most recent effort to increase the number of (former and present) elite athletes as CAS arbitrators.⁸⁰ Since 2012, the CAS Code has completely abolished the quotas for IOC, NOCs and IFs which could suggest the nomination of arbitrators for the

CAS roster of arbitrators (former Art. S14, which was scrutinized by the OLG München Ruling); the CAS list of arbitrators currently comprises nearly 400 arbitrators (compared to 300 in 2009) from all regions of the world;⁸¹ the constitution of ICAS has also been modified with the addition of many ICAS members who have no links to the IFs or the IOC (stemming mostly from the judiciary).⁸² The ICAS has further created an efficient legal aid fund (granting legal aid to physical persons (i.e. athletes) who lack the financial means to bring their case to the CAS.⁸³

Certainly, there will always be interesting propositions from academics and arbitration practitioners regarding institutional modifications which are necessary to boost the trust of athletes in the CAS system. Some issues may even take a philosophical dimension, and opinions are far from unanimous. Take for instance the recurring issue of opening the list of CAS arbitrators. Here again, it can be argued that arbitrators who do not figure on the list would be prone to be against such list and to suggest its abolition. It should be noted that most of the policies and the rules adopted by the ICAS (on the constitution of the panel, the conduct of the proceedings and the issuance of the award) were inspired by other successful arbitration rules in institutional arbitration and may have advantages and disadvantages, depending on the perspective.⁸⁴

⁷⁹ Indeed, the ICAS proceeded to a number of procedural reforms, modifying also some provisions as to the constitution of the ICAS and abolishing the quotas for the list of arbitrators which were scrutinized in the OLG München and the BGH Ruling.

⁸⁰ The ICAS now is actively encouraging the appointment of international level athletes / former international level athletes with full legal education for the list of CAS arbitrators. For those without necessary arbitration experience, the CAS organizes a series of educational seminars and preparation training courses in the following months.

⁸¹ Full list of the CAS arbitrators (with their resumes) available at www.tas-cas.org.

⁸² We should also note that, from the 20 members of ICAS, there is now equal representation of men and

women (10/10). Furthermore, seven out of the twenty members have no links to sports federations and five are Olympians / former elite athletes (M. Lenard, M. Dodd, T. Smith, C. Schmidhauser, D. Pound). In its current composition (2016), the ICAS counts seven attorneys, one university professor, five judges, two government representatives and five sports officials.

⁸³ See the statistics on the legal aid fund of CAS in Despina Mavromati / Matthieu Reeb (fn. 32), p. 105.

⁸⁴ Various scholars and arbitration practitioners have proposed, from time to time, minor or major institutional reforms within CAS. See, *inter alia*, Charles Poncet, *The independence of the Court of Arbitration for Sport*, *European International Arbitration Review*, 2012/1, p. 31 ff.; See also Antonio Rigozzi / Fabrice Robert-Tissot, 2015 (fn. 42), p. 71.

Finally, a question that legitimately arises is whether the BGH would reach a similar decision in non-doping cases. From the argumentation in the first part of the decision (according to which the CAS is a genuine court of arbitration under the applicable German laws but also the arguments as to the advantages of sports arbitration and the autonomy of associations), one can reasonably speculate that the BGH ruling would not be different.

Pechstein/International Skating Union

Work of reference: yes

Official reporter of Decisions of the German Federal Court of Justice in Civil Matters (*BGHZ*): yes

Systematic Collection of Decisions of the German Federal Court of Justice (*BGHR*): yes

Received on 10 June 2016

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Sec. 1025 para. 2, sec. 1032 para. 1 of the Code of Civil Procedure (*Zivilprozessordnung, ZPO*); sec. 19, para. 1 of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*); Art. 12 of the Federal Constitution (*Grundgesetz, GG*); Art. 6 para. 1 of the ECHR

- a) The Court of Arbitration for Sports (CAS) in Lausanne is a court of arbitration pursuant to the definition of sections 1025 para. 2 and 1032 para. 1 of the Code of Civil Procedure.
- b) International sports federations organised according to the “one place principle” are market leaders with regards to the admission of athletes to the sports competitions organised by it.
- c) It is not an abuse of the sports association’s market position if the association makes the participation of an athlete in a sporting competition dependent on the athlete signing an arbitration agreement that includes a clause naming the CAS as the court of arbitration under the anti-doping rules. The Rules of Procedure of the CAS contain sufficient guarantees safeguarding the rights of the athletes, and the arbitral awards of the CAS are subject to review by the Federal Tribunal of Switzerland (*Bundesgericht*).
- d) The fact that the arbitrators must be chosen by the parties from a closed list drawn up by an international body consisting predominantly of representatives of the International Olympic Committee, the National Olympic Committees and the international sport federations is no indication that the Rules of Procedure of the CAS are lacking sufficient guarantees to safeguard the rights of the athletes. With regard to questions of anti-doping measures, sports federations and athletes are not, generally speaking, divided into opposing “camps” pursuing different interests.
- e) Under the circumstances, the arbitration agreement is not invalid from the point of view of the right to access to state courts (*Justizgewährungsanspruch*) pursuant to Art. 2 para. 1 of the Federal Constitution, the fundamental freedom to pursue professional activities pursuant to Art. 12 para. 1 of the Federal Constitution, nor the right to a fair hearing pursuant to Art. 6 para. 1 of the European Convention on Human Rights.

German Federal Court of Justice, judgement of 7 June 2016 - KZR 6/15 - Higher Regional Court of Munich (*OLG München*)
Regional Court (*Landgericht*) of Munich I

English translation of the judgement of the German Federal Court of Justice, of 7 June 2016 – KZR 6/15
Higher Regional Court of Munich (*OLG München*)
Regional Court (*Landesgericht*) of Munich I

Received on
10 June 2016
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FEDERAL COURT OF JUSTICE
IN THE NAME OF THE PEOPLE
JUDGEMENT

KZR 6/15

Handed down on:
7 June 2016
Bürk
Clerk of the court
acting as authentication officer

In the legal matter of

Versus

1. Deutsche Eisschnelllauf-Gemeinschaft
e.V. (DESG),
represented by the president, Menzinger
Straße 68, Munich,

Claudia Pechstein, Wendenschloßstraße 298,
Berlin,

Plaintiff, Appellant and Respondent

Defendant,

Attorney of record: Dr Hammer, attorney at
law –

2. International Skating Union (ISU),
represented by the president, Chemin de
Primerose 2, Lausanne (Switzerland),

Defendant, Appellee and Complainant
Attorneys of record: Jordan and Dr Hall,
attorneys at law –

Having held a hearing on 8 March 2016, the
anti-trust division (*Kartellsenat*) of the Federal

Court of Justice, presided by the president of
the Federal Court of Justice, Limperg, and

attended by presiding judges Prof. Dr. Meier-Beck and Dr. Raum and attended by associate judges Prof. Dr. Strohn and Dr. Deichfuß, has passed the following

Decision:

In reply to the Second Defendant's writ of certiorari (*Revision*), the partial final and the partial interim judgement of the anti-trust division of the Higher Regional Court of Munich of 15 January 2015 is hereby set aside insofar as the Court of Appeal has found against the Second Defendant in the said judgement.

The Plaintiff's appeal against the judgement of the Regional Court of Munich I of 26 February 2014 is dismissed in its entirety.

The costs of the appeal proceedings shall be borne by the Plaintiff.

The facts of the case

1 The Plaintiff is an internationally successful speed skater. The First Defendant – which is not involved in the appeal proceedings – is the German National Association for speed skating, which has its registered offices in Munich. The Second Defendant is the International Skating Union (hereinafter referred to as ISU); the ISU has its registered offices in Switzerland. Both federations are organised in accordance with the “one place principle”, i.e., there is only one German and one international federation that organise speed skating competitions on the national and international level.

2 On 2 January 2009, during the period before the speed skating world championships in Hamar (Norway) on 7 and 8 February 2009, the Plaintiff signed a registration form provided by the Second Defendant. If the Plaintiff had not signed this registration form, she would not have been permitted to compete. By signing the form, the Plaintiff undertook, inter alia, to comply with the Second Defendant's anti-doping regulations. Furthermore, she also signed an

arbitration agreement that provided that any disputes should be brought before the Court of Arbitration for Sport (hereinafter referred to as CAS) in Lausanne and that the jurisdiction of the ordinary courts of law should be excluded.

3 During the World Championships in Hamar, blood samples were taken from the Plaintiff; these samples showed elevated reticulocyte counts. The Second Defendant considered this to be evidence of doping. Its disciplinary commission decided on 1 July 2009 to ban the Plaintiff from competition with retroactive effect as of 7 February 2009 for two years on the ground of illegal blood doping, to annul the results obtained by the Plaintiff during the competitions on 7 February 2009 and to strip her of the points, awards and medals that she had won. In a letter dated 19 July 2009, the First Defendant informed the Plaintiff that she was also excluded from training as a result of this ban and that her status as a member of the team for the Olympic Winter Games 2010 had been suspended.

4 The Plaintiff and the First Defendant appealed to the CAS against the decision of the disciplinary commission. On 29 September 2009, the CAS submitted its Rules of Procedure for these proceedings, in which, inter alia, it determined its own jurisdiction. These Rules of Procedure were signed by the parties. In an award dated 25 November 2009, the CAS dismissed the appeals almost without exception; only the date of commencement of the ban was altered to 8 February 2009.

5 The Plaintiff appealed against this award to the Swiss Federal Tribunal; this appeal was dismissed by a judgment dated 10 February 2010. A further appeal (*Revision* [i.e.: based on alleged new facts]) filed by the Plaintiff with the Swiss Federal Tribunal was dismissed by a judgment dated 28 September 2010.

6 By the present action, the Plaintiff requests a declaratory judgement stating that

her ban due to doping was unlawful, and a decision ordering the Defendants to pay compensation for the material damage suffered by her, as well as compensation for her pain and suffering. The Regional Court (*Landgericht*) dismissed the complaint (Regional Court of Munich I, SchiedsVZ 2014, 100). The Plaintiff accepts the dismissal of the complaint against the First Defendant; however, she has filed an appeal against the dismissal of the complaints against the Second Defendant. The Court of Appeal handed down a partial final and partial interim decision (Higher Regional Court of Munich, WuW/E DE-R 4543) dismissing the Plaintiff's appeal to the extent of dismissing the first point of the complaint filed against the Second Defendant – i.e., the request for a declaratory judgement stating that the doping ban imposed on the Plaintiff was illegal. Concerning the further relief sought in the complaints – damages, including damages for pain and suffering –, the Court of Appeal has found that the action filed against the Second Defendant is admissible. The Second Defendant then appealed against this decision by an appeal on points of law only, which was allowed by the Court of Appeal and is now being contested by the Plaintiff.

Statement of reasons

7 A. The Court of Appeal based its decision essentially on the following reasons:

8 The German courts have international jurisdiction over the complaint against the Second Defendant. This jurisdiction is based on Art. 6 no. 1 of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007 (Lugano Convention 2007). The close link required as a prerequisite for recourse to these courts, together with another legal entity, at the place where the other legal entity has its registered offices, is provided by the fact that the complaints against the First Defendant and the Second Defendant are based on one and the same factual and legal

situation. There are no indications of any abusive behaviour on the Plaintiff's part, e.g. by filing a suit against the First Defendant with the sole aim of establishing the jurisdiction of the German courts over the Second Defendant. The German courts continue to hold jurisdiction with regard to the complaint filed against the Second Defendant even after the dismissal of the complaint against the First Defendant has become *res iudicata*.

9 The arbitration agreement concluded between the Plaintiff and the Second Defendant does not hinder access to the regular courts. The arbitration agreement is invalid because it infringes mandatory law. Pursuant to Art. 34 of the Introductory Law to the German Civil Code (EGBGB), the effectiveness of the arbitration agreement must be evaluated in accordance with German anti-trust law. Such an evaluation shows that the arbitration agreement is invalid according to sec. 19 para. 1, para. 4 no. 2 of the German Act against Restraints on Competition (*GWB*), old version. The Second Defendant holds a monopoly position in the relevant market of admission to speed skating world championships and is therefore an addressee of the norm. The organisation of sporting events constitutes a commercial activity. By submitting a registration form providing for the jurisdiction of a court of arbitration and excluding the jurisdiction of the courts of law, the Second Defendant imposed general terms and conditions of business. This assessment is not contradicted by the International Convention against Doping in Sports of 19 October 2005, which refers to the principles of the World Anti-Doping Code (hereinafter referred to as WADC) that include mandatory jurisdiction of the CAS. There is no indication either that the Convention considers this specific detail to be part of the principles that the signatory states – including Switzerland – undertook to adhere to, or that Switzerland had created a statutory obligation according to which the Second Defendant would have had to draw up an arbitration agreement involving the

CAS. The question whether the Second Defendant felt itself obliged to demand an arbitration agreement involving the CAS for other than statutory reasons, particularly because it wanted to maintain its recognition by the International Olympic Committee, is irrelevant to the assessment from the point of view of anti-trust law.

10 A request for an arbitration agreement on the part of the organiser of an international sporting competition is not, in itself, an abuse of a dominant market position. In particular, guaranteeing uniform jurisdiction and rules of procedure in proceedings based on similar sets of facts prevents contradictory decisions and provides an objective reason for submitting disputes between athletes and federations in connection with international competitions to a uniform court of arbitration for sports. In the present case, however, the request to sign the arbitration agreement does constitute an abuse of market position, since the federations have a significant influence on the selection of the persons eligible for appointment as arbitrators in proceedings before the CAS. There is no objective justification for this excess of power in the hands of the federation. The only reason for an athlete to sign the arbitration agreement despite this imbalance is the monopoly position of the federation. Since the arbitration agreement blocked the Plaintiff's access to the courts of law and to a judge provided by law, the level of materiality required for an assumption of abuse of market position may be considered to have been exceeded.

11 An assumption of abuse under anti-trust law is not contradicted by the deletion of sec. 1025 para. 2 of the Code of Civil Procedure (ZPO), old version, which provided for the invalidity of an arbitration agreement in cases where one party abused its economic or social dominance to force the other party to sign it. To justify the deletion of this provision, the legislative authorities argued that the invalidity of the arbitration agreement would constitute an excessive legal consequence in view of the fact that

arbitration offered legal protection that is, generally speaking, equivalent to that of the courts of law, and that the rule of sec. 1034 para. 2 of the Code of Civil Procedure guarantees a balanced composition of the court of arbitration. However, these legislative considerations are irrelevant to the evaluation under anti-trust law, since it is a typical feature of anti-trust abuse control that market-dominating enterprises are prohibited from certain behaviours that are freely permitted to other market participants.

12 The Plaintiff is not prevented from bringing her case before a court of law because of contradictory behaviour. It is true that she filed an objection against the doping ban with the CAS. However even if this had entailed an acknowledgement of the latter's jurisdiction, such jurisdiction cannot be extended to other disputes, particularly to the dispute concerning the claims for damages in question here. Furthermore, it is unclear why the Second Defendant should have been expected to assume that the Plaintiff would have recourse to the CAS for other disputes than those concerning the validity of the doping ban. After all, the signing of the Rules of procedure of the CAS could only have established its jurisdiction over the pending dispute concerning the doping ban, but not over other proceedings.

13 The first claim (declaratory judgement establishing the illegality of the doping ban) is inadmissible since it was not aimed at a declaratory judgement concerning a legal relationship. However, the other claims (material damages and compensation for pain and suffering) are admissible. To the extent that it is admissible, the complaint is not ready for decision; in particular, it is not unfounded due to any *res iudicata* effects of the arbitral award of the CAS. The recognition of the CAS award constitutes a violation of *ordre public* due to the fact that the arbitration agreement violated anti-trust law.

14 B. The Second Defendant's appeal on a point of law is successful and

restores the judgement of the regional court which had dismissed the complaint. The complaint, to the extent that it has not yet been dealt with, is inadmissible.

15 I. However, the German courts have international jurisdiction over the complaint pursuant to Art. 6 no. 1 in conjunction with Art. 60 of the Lugano Convention 2007.

16 Pursuant to Art. 6 no. 1 of the Lugano Convention 2007, the courts of a state bound by this convention also have jurisdiction over actions filed against a defendant which has its registered offices in another signatory state if it is being sued together with a defendant having its registered offices in the state in which the court is located, and if the connection between the complaints is so close that joint proceedings and a joint decision appear to be necessary in order to prevent contradictory decisions being passed in separate proceedings. In the present case these requirements have been met with regards to the action filed jointly against the First and Second Defendant.

17 1. According to the case law of the Federal Court of Justice, the interpretation of Art. 6 no. 1 of the Lugano Convention 2007 must take into account the parallel provision of Art. 8 no. 1 of the Brussels I Regulation as well the relevant case law of the Court of Justice of the European Union (decision of 30 November 2009 – II ZR 55/09, WM 2010, 378). According to this, the necessary link between the complaints may be assumed to exist if the legal and factual situation is identical in both cases and there is a risk of contradictory decisions (ECJ, judgement of 11 April 2013 – C-645/11, NJW 2013, 1661, margin no. 43 – Sapir; judgement of 11 October 2007 – C- 98/06, Slg. 2007, I-8340, margin no. 40 – Freeport; Federal Court of Justice, decision of 30 November 2009 – II ZR 55/09, WM 2010, 378; Geimer in Geimer/Schütze, Europäisches Zivilverfahrensrecht, 3rd ed., Art. 6 of the Brussels I Regulation, margin no. 19;

Thomas/Putzo/Hübstege, ZPO, 36th ed., Art. 8 of the Brussels I Regulation, margin no. 4). As far as the claims for damages still pending before the Court of Appeal are concerned, the complaint against the Second Defendant is based on the Plaintiff's allegation that the doping ban imposed upon her was unlawful. The First Defendant was accused of having concretized the doping ban imposed by the Second Defendant by way of a letter dated 19 July 2009, and having subsequently implemented it. This means that the claims filed against the First Defendant were also based on the allegation of unlawfulness of the imposed doping ban. This means that both complaints are based on the same factual and legal situation, particularly in view of the fact that the Plaintiff has also cited both Defendants as joint and several debtors (see Bergermann, Doping und Zivilrecht, 2002, p. 256; Grothe in Festschrift für Hoffmann, 2011, p. 601, 614 et seq.; Classen, Rechtsschutz gegen Verbandsmaßnahmen im Profisport, 2014, p. 38; Adolphsen in Adolphsen/Nolte/Lehner/Gerlinger, Sportrecht in der Praxis, 2012, margin no. 1253; concerning the question of connectedness (*Konnexität*) in case of joint and several liability, see Stadler in Musielak/Voit, ZPO, 13th ed., Art. 8 of the Brussels I Regulation, margin no. 3).

18 2. The Court of Appeal has correctly rejected the suggestion of an attempt at forum shopping, i.e., the suggestion that the First Defendant had only been sued in order to keep the Second Defendant away from the Swiss courts that would actually have had jurisdiction over it. In particular, an alleged inconclusiveness of the complaint against the First Defendant does not constitute sufficient evidence of an abuse of Art. 6 of the Lugano Convention 2007.

19 According to the case law of the Court of Justice of the European Union, the jurisdiction clause of Art. 8 no. 1 of the Brussels I Regulation cannot be interpreted to mean that a plaintiff is entitled to bring an action against a plurality of defendants with

the sole purpose of removing one of them from its proper court (EUGH, judgement of 13 July 2006 – C-103/05, Slg. 2006, I-6840, margin no. 32 – Reisch Montage; judgement of 27 September 1988 – 189/87, Slg. 1988, 5579, margin no. 9 – Kalfelis). However, the lack of attempts at forum shopping is not a prerequisite of jurisdiction requiring separate examination, but needs only to be taken into account in connection with the considerations as to whether a joint hearing and decision appears necessary (ECJ, judgement of 11 October 2007 – C-98/06, Slg. 2007, I-8340, margin no. 54 – Freeport; Geimer in Geimer/Schütze, *Europäisches Zivilverfahrensrecht*, 3rd ed., Art. 6 of the Brussels I Regulation, margin no. 23; MünchKommZPO-Gottwald, 4th ed., Art. 6 of the Brussels I Regulation, margin no. 14; concerning the consideration as an independent item for examination, see Stadler in Musielak/Voit, ZPO, 13th ed., Art. 8 of the Brussels I Regulation, margin no. 3).

20 Any act of forum shopping – which would have to be taken into account - will however not be assumed to have been proved just because the complaint against the First Defendant was already inadmissible under national law at the time it was filed, or was found to be inadmissible subsequently (see ECJ, judgement of 30 July 2006 – C-103/05, Slg. 2006, I-6840, margin no. 31, 33 – Reisch Montage; for an opinion affirming jurisdiction pursuant to Art. 6 no. 1 of the Brussels I Regulation independently of the admissibility or merits of the “original action”, see also Kropholler / von Hein, *Europäisches Zivilprozessrecht*, 9th ed., Art. 6 of the Brussels I Regulation, margin no. 8, 16; Geimer in Geimer/Schütze, *Europäisches Zivilverfahrensrecht*, 3rd ed., Art. 6 of the Brussels I Regulation, margin no. 25; MünchKommZPO-Gottwald, 4th ed., Art. 6 of the Brussels I Regulation, margin no. 6; Thomas/Putzo/Hüßtege, ZPO, 36th ed., Art. 8 of the Brussels I Regulation, margin no. 5; for a different opinion, see Wagner, in Stein/Jonas, ZPO, 23rd ed., Art. 6 of the Brussels I Regulation, margin no. 44 et seq.; for a different opinion, see Stadler in

Musielak/Voit, ZPO, 13th ed., Art. 8 of the Brussels I Regulation, margin no. 5). This point of view is supported, in particular, by the fact that the practical effectiveness of the jurisdiction provision of Art. 6 no. 1 of the Lugano Convention 2007 would no longer be guaranteed if difficult questions of jurisdiction or the question of the merits of the “original action” had to be dealt with already at the stage at which the jurisdiction of the court is being examined (see Kropholler/von Hein, *Europäisches Zivilprozessrecht*, 9th ed., Art. 6 of the Brussels I Regulation, margin no. 16). In this way, the legal certainty aimed at by this provision would also be impaired (see ECJ, judgement of 13 July 2006 – C-103/05, Slg. 2006, I-6840, margin no. 25 – Reisch Montage). Conclusions may be different in cases where the inconclusiveness of the “original action” is obvious. However, this is not the case here. The contrary opinion set forth in the appeal on a point of law relied mainly on the consideration that the First Defendant was not involved in the doping ban on which all the Plaintiff's claims for damages are based and that, therefore, it had not committed any act that could have given rise to liability. On the other hand, the Plaintiff considered the First Defendant to be liable because it had implemented the doping ban imposed by the Second Defendant although it could have ignored the ban quite easily, and it would have been possible and reasonable for it to do so. This is not an obviously ineligible starting point for joint action including the First Defendant.

21 3. According to the principle of *perpetuatio fori*, the international jurisdiction of German courts over the action against the Second Defendant, once established, will not cease as a result of the dismissal of the action against the First Defendant having become *res iudicata* in the meantime (ECJ, judgement of 5 February 2004 – C-18/02, Slg. 2004, I-1441, margin no. 36 et seq. – DFDS Torline; Kropholler/von Hein, *Europäisches Zivilprozessrecht*, 9th edition, Art. 6 of the Brussels I Regulation, margin no. 14; Adolphsen in

Adolphsen/Nolte/Lehner/Gerlinger, Sportrecht in der Praxis, 2012, margin no. 1254; Schlosser in Schlosser/Hess, EU-Zivilprozessrecht, 4th edition, Art. 8 of the Brussels I Regulation, margin no. 3).

22 II. However, the complaint is inadmissible due to the Second Defendant pleading the arbitration agreement (sec. 1032 para. 1 in conjunction with sec. 1025 para. 2 of the Code of Civil Procedure).

23 1. By signing the registration for the competition at the Second Defendant's request, the Plaintiff and the Defendants entered into an arbitration agreement pursuant to sections 1025 et seq. of the Code of Civil Procedure. The CAS is a "true" court of arbitration within the meaning of the Code of Civil Procedure and not merely an association tribunal (*Verbandsgericht*) (for more details concerning this distinction, see FCJ, judgement of 28 November 1994 – II ZR 1 1/94, BGHZ 128, 93, 108 et seq.; Schlosser in Stein/Jonas, ZPO, 22nd ed., ahead of sec. 1025, margin no. 11) or any other dispute resolution body.

24 a) The general outlines of the position of the judiciary power within the governmental structure and its relationship with the citizens have been established as fundamental principles of the German legal system (cf. BVerfGE 2, 307, 320). A judge must observe a proper distance and neutrality (cf. BVerfGE 21, 139, 145 et seq.; 42, 64, 78); the nature of a judge's work excludes any possibility that it could be done by uninvolved third parties (for the relevant case law, see, inter alia, BVerfGE 3, 377, 381). As regards arbitration, the function and effect of which constitutes substantive jurisprudence, no exception to this principle is made. Consequently, a "true" court of arbitration by which access to the court of law can be effectively excluded can only exist in cases where the arbitration court called upon to decide the particular case represents an independent and neutral instance (FCJ, judgement of 15 May 1986 – III ZR 192/84,

BGHZ 98, 70, 72; decision of 27 May 2004 – III ZB 53/03, BGHZ 159, 207, 211 et seq.; Schlosser in Stein/Jonas, ZPO, 22nd ed., ahead of sec. 1025, margin no. 11).

25 b) The CAS represents such an independent and neutral instance. Unlike a federation or association tribunal (concerning this point, see FCJ, decision of 27 May 2004 – III ZB 53/03, BGHZ 159, 207, 210 et seq.), it is not incorporated into any particular federation or association. As an institution, it is independent of the sports federations and Olympic Committees that support it (see Federal Tribunal of Switzerland, judgment of 27 May 2003 – 4P.267-270/2002, SchiedsVZ 2004, 208, 209 et seq. – Danilova and Lazutina); it is intended to ensure uniform jurisdiction across all federations.

26 c) The procedure of drawing up the list of arbitrators of the CAS indicates no structural imbalance impairing the independence and neutrality of the CAS to such an extent that its position as a "true" court of arbitration could be called into question (this is also the conclusion of Görtz, *Anti-Doping-Maßnahmen im Hochleistungssport aus rechtlicher Sicht*, 2012, p. 219; Schlosser in Stein/Jonas, ZPO, 22nd ed., sec. 1034, margin no. 13; for a different opinion, see Classen, *Rechtsschutz gegen Verbandsmaßnahmen im Profisport*, 2014, p. 69 et seq.; Orth, *SpuRt* 2015, 230, 232; Heermann, *SchiedsVZ* 2015, 78, 79, who has some doubts; Holla, *Der Einsatz von Schiedsgerichten im organisierten Sport*, 2006, p. 204).

27 aa) According to the findings of the Court of Appeal, the 2004 rules governing the procedure that were applicable on the date on which the arbitration agreement was signed (Statutes of the Bodies Working for the Settlement of Sports-related Disputes, hereinafter referred to as Statutes, and the Procedural Rules, hereinafter referred to as the Procedural Rules), the parties appealing to the CAS are only entitled to select the arbitrators from a closed list of

arbitrators drawn up by the International Council of Arbitration for Sport (hereinafter referred to as ICAS). The ICAS consists of 20 members. The International Sports Federations (of which the Second Defendant is one), the National Olympic Committees and the International Olympic Committee are each entitled to appoint four of these members. These 12 members then appoint four members “with a view to safeguarding the interests of the athletes”. These 16 members finally appoint four further members who are independent of the organisations that have nominated all the other members. The members of the ICAS pass their decisions with a simple majority of all votes. When selecting arbitrators for the CAS, the ICAS is obliged to guarantee a distribution that corresponds to its own composition: one fifth of the arbitrators must be chosen from those appointed by the International Sports Federations, one fifth from those appointed by the International Olympic Committee and one fifth from those appointed by the National Olympic Committees; a further fifth should be selected to safeguard the interests of the athletes and the remaining fifth should consist of persons who are independent of the persons responsible for proposing the other arbitrators. During appeal proceedings before the CAS, the president of the appeal division who has been elected by a simple majority in the ICAS is entitled to appoint a chairman for the panel seized of the dispute in question if the parties to the dispute failed to come to an agreement concerning this point.

28 The Court of Appeal concludes from this that due to the majority principle applying to the ICAS, the federations are overrepresented by the 12 members appointed by them, which allegedly enables them to influence the composition of the list of arbitrators, particularly in view of the fact that the independence in relation to the federations of the further eight members cannot be guaranteed since they are elected by the 12 members linked to the federations. This ascendancy represents a risk in that the

persons included in the list of arbitrators are likely, for the most part or even entirely, to be closer to the federations than to the athletes. There is no objective justification for this preponderance of the federations. In disputes between the federations and the athletes, the interests of the parties are not identical, but rather directly opposed to each other.

29 bb) This conclusion is without merit.

30 The independence required for a qualification as a “true” court of arbitration will be found to be lacking in cases where the members of the arbitral tribunal are determined solely or predominantly by one party, or where the parties to the dispute do not have equal influence on the composition of the tribunal (FCJ, decision of 27 May 2004 – III ZB 53/03, BGHZ 159, 207, 213 et seq.; Haas, ZVglRWiss 2015, 516, 517 et seq.; Classen, Rechtsschutz gegen Verbandsmaßnahmen im Profisport, 2014, p. 62 et seq.). However, in case of an actual dispute the parties have equal influence on the composition of the arbitral tribunal of the CAS. Both parties are entitled to choose an arbitrator from the (closed) list of arbitrators. A list of arbitrators as such is unobjectionable as long as it is not used to institutionalise the predominant influence of one party (see Zöller/Geimer, ZPO, 31st edition, sec. 1034, margin no. 11) or the body exercising a decisive influence on the drawing up of the list of arbitrators is closer to one party than to the other, i.e., belonging to a specific “camp” (Schlosser in Stein/Jonas, ZPO, 22nd ed., sec. 1025, margin no. 10). There is no such predominant influence in the present case.

31 The list of arbitrators reflects no institutionalisation of a predominant influence on the part of any specific sports federation involved in actual proceedings (in this case, the Second Defendant) in the sense that it could have directly influenced the list. The Second Defendant only has an indirect influence over the composition of the list of

arbitrators, since, according to the findings of the Court of Appeal, it is one of the international sport federations entitled to appoint four members of the ICAS. Furthermore, one fifth of the arbitrators should be appointed from among the persons named by the international sport federations. This means that an international sports federation such as the Second Defendant does have a certain influence on the composition of the list of arbitrators. However, its scope is not sufficient to permit the Second Defendant to exercise a decisive influence on the composition of the list of arbitrators. No indications have been found, and no evidence has been provided to suggest that the list of arbitrators, which must include a minimum of 150 persons – in fact, it includes far more than 200 (see Haas, ZVglRWiss 2015, 516, 528) – does not contain a sufficient number of neutral persons independent of the Second Defendant (see FCJ, judgement of 7 January 1971 – VII ZR 160/69, BGHZ 55, 162, 175 et seq.; Pfeiffer, SchiedsVZ 2014, 161, 164; Öschütz, Anmerkung zur Entscheidung des schweizerischen Bundesgerichts im Fall Danilova und Lazutina, SchiedsVZ 2004, 211, 212).

32 A dominant influence of the federation involved in the proceedings in the present case cannot be deduced from the fact that the sports federations and the Olympic Committees globally have an important influence with respect to the composition of the list of arbitrators. A predominant position of the federation involved in the present proceedings vis-à-vis the athlete when determining the arbitrators could only be deduced from this if “federations” and “athletes” were seen as two “camps” confronting each other and motivated by opposing interests, as may be the case in other areas, e.g. in disputes involving employers and employees. However, “federations” and “athletes” do not represent such opposing camps. It is true that, in the present case, a federation – the Second Defendant – and an athlete – the Plaintiff – were facing each other before the CAS as

opposing parties; yet this does not mean that it is possible to place all the other sports federations automatically in the same camp as the Second Defendant. Generally speaking, the sports federations and the Olympic Committees are competing units with very different individual interests (see Haas, ZVglRWiss 2015, 516, 528 et seq.). As far as the obligation of implementing the WADC is concerned, they may very well represent parallel interests in doping cases. However, these interests are usually identical with the interests of the athletes in ensuring that sport remains free from doping. Furthermore, beyond the common goal of ensuring doping-free sports competitions, there will frequently be quite different individual interests on the part of the various federations and the athletes. Like the First Defendant, a federation may support its athlete in doping-related proceedings because it is convinced of the athlete’s innocence. Another federation – as, in the present case, the Second Defendant – may defend the doping ban imposed by its disciplinary commission. As far as the athletes are concerned, an athlete found guilty of doping will fight for the mildest possible sanctions, while other athletes, whose interests may have been prejudiced by their doping competitor, may possibly be in favour of much stricter sanctions.

33 The panel has not lost sight of the fact that possibly the interest of the “federation’s side” in ensuring effective implementation of the rules and the public perception of such implementation may be in conflict with the interests of the athlete in question in ensuring a high standard of evidence. However, in view of the main goal of a doping-free sport pursued by all federations and athletes – despite very different individual interests in individual cases – this does not justify an assumption of homogenous “camps”, consisting of “the federations” and “the athletes”, which would permit individual sports federations such as the Second Defendant to be automatically lumped with all the other federations so as to construe a predominance of an individual party to the

proceedings with respect to the composition of the arbitral tribunal.

34 d) In other respects, the Statutes and the Procedural Rules of the CAS provide sufficient individual independence and neutrality on the part of the arbitrators. After the appointment, the arbitrators must sign a declaration to the effect that they undertake to exercise their function in an objective and independent manner. They cannot be members of the ICAS and they are obliged to disclose to the parties any circumstances that may impair their impartiality. Furthermore, the parties are given the opportunity to challenge an arbitrator who appears to them to be not impartial. The Plaintiff's objection that this right of challenge is only of limited value since the arbitrators are not obliged to disclose whether and how many times in the past they have already been appointed by a party can all the less hinder the classification of the CAS as a "true" Court of Arbitration, just like the right of suggestion (*Hinweisrecht*) of the Secretary General of the CAS – before being signed, an arbitral award must be submitted to the Secretary General, who may correct formal errors and draw the attention of the arbitral tribunal to "fundamental issues of principle" (compare the doubts resulting from this as to the factual independence of the arbitral tribunal with the similar provision of Art. 33 [corresponding to Art. 27 of the old version] of the ICC Rules of arbitration, see Reiner/Jahnel in Schütze, *Institutionelle Schiedsgerichtsbarkeit*, 2nd ed., Art. 27 ICC, margin no. 8 et seq.; Schlosser in Stein/Jonas, *ZPO*, 22nd ed., sec. 1036, margin no. 60 et seq.).

35 aa) The provision of sec. 1034 para. 2 of the Code of Civil Procedure, which provides a special procedure, subject to a time limit, before domestic courts of arbitration in cases of structural predominance of one party in the composition of the arbitral panel, indicates that not all impairments of the independence and neutrality of the arbitral panel will exclude the applicability of sections 1025 et seq. of the Code of Civil Procedure. Rather,

the application of sections 1025 et seq. will only be waived if the court of arbitration is no longer organised as an independent and impartial body according to its own statutes or if the "arbitral proceedings" boil down to no more than a decision on the part of the association or federation itself to safeguard its own interests, i.e. if a mere representation of the interests of the association or federation in question is to be expected (FCJ, decision of 27 May 2004 – III ZB 53/03, BGHZ 159, 207, 212 et seq.).

36 This is in accordance with the case law of the Federal Court of Justice concerning foreign arbitral awards, the recognition of which is only refused if the violations of the requirement of neutrality are absolutely irreconcilable with the principles governing the exercise of judicial power, e.g. because, from the point of view of a neutral observer, they justify the assumption that the arbitrators are no more than agents implementing the intentions of one party, or because the arbitrators unilaterally promote the interests of one party over those of the other for reasons unrelated to the case in question. This means that recognition of a foreign arbitral award can only be refused if the violation of the rule of impartial administration of justice has had actual, palpable consequences to the arbitral proceedings (FCJ, judgement of 15 May 1986 – III ZR 192/84, BGHZ 98, 70, 74 et seq.).

37 bb) However, as already explained above, this is definitely not the case here.

38 The fact that a federation has, as a rule, more often the opportunity to nominate an arbitrator than an individual athlete is in the nature of things; it does not mean that the arbitrator nominated by the federation can be considered as its agent.

39 The right of the Secretary General of the CAS to point out fundamental issues of principle does not, basically, constitute a restriction to the independence of the arbitral tribunal, either. Rather, this right of

suggestion serves to guarantee a uniform jurisdiction.

40 2. The arbitration agreement between the parties of 2 January 2009 covers the claims for damages raised by the Plaintiff.

41 When the Plaintiff signed the registration form of 2 January 2009, she submitted to the articles of association of the Second Defendant. The registration form expressly refers to art. 26 of the articles of association, as well as to the right of decision of the CAS with regard to final and absolute arbitral awards binding upon the Second Defendant, its members and all participants in events organised by the Second Defendant, to the total exclusion of the jurisdiction of all ordinary courts. Art. 26 of the Second Defendant's articles of association in force at the time set out the responsibilities of the CAS. According to this, claims for damages and other claims against the Second Defendant, which could otherwise have been brought before a civil court, were to be subject to the exclusive jurisdiction of the CAS.

42 3. The arbitration agreement between the parties is valid.

43 a) The agreement must be evaluated in accordance with the standards established by sec. 19 of the Act against Restraints of Competition, old version.

44 In case of a conflict of laws, the question of a valid conclusion and the effectiveness of an arbitration agreement must be evaluated in accordance with the rules of German International Private Law (FCJ, judgement of 3 May 2011 – XI ZR 373/08, NJW-RR 2011, 1350, margin no. 38). According to Art 27 et seq. of the Introductory Law to the German Civil Code, valid until 17 December 2009 and thus applicable to the arbitration agreement of 2 January 2009 (cf. FCJ, loc. cit.), the effectiveness of the arbitration agreement must be determined in accordance with German anti-trust law, the law applicable to the contract notwithstanding. According to

Art. 34 of the Introductory Law to the German Civil Code, old version, the applicable provisions are those provisions of German law that cannot be contractually modified and that are mandatorily applicable internationally to the facts in question, without regard to the law governing the contract itself. These include the provisions of anti-trust law (MünchKommBGB-Martiny, 4th ed., Art. 34 EGBGB, margin no. 94; Palandt/Thorn, BGB, 68th ed., Art. 34 EGBGB, margin no. 3). Concerning this point, the conflict of laws clause of private competition law in sec. 130 para. 2 of the Act against Restraints of Competition (cf. Reh binder in Immenga/Mestmäcker, Wettbewerbsrecht, 5th ed., § 130 GWB, margin no. 291) states that the provisions of the Act against Restraints of Competition are applicable to all restraints of competition which – as in the present case concerning an abuse of a dominant market position vis-à-vis a person resident in Germany – have an impact within the scope of applicability of this law, even if they have been initiated outside the scope of applicability of this law (cf. Tyrolt, Sportschiedsgerichtsbarkeit und zwingendes staatliches Recht, 2007, p. 44; for a different opinion, see Duve/Rösch, SchiedsVZ 2015, 69, 74).

45 b) The Second Defendant is the addressee of the norm of sec. 19 of the Act against Restraints of Competition, old version. The Court of Appeal has correctly found that the organisation of sporting events constitutes a commercial activity and that, in view of the one place principle, the Second Defendant occupies a monopoly position in the relevant market of the organisation of speed skating world championships.

46 c) The arbitration agreement entered into by the parties is valid. It does not infringe the prohibition of abuse under anti-trust law pursuant to section 19 of the Act against Restraints of Competition in the version applicable to this dispute, in force until 29 June 2013 (hereinafter referred to as the “old version”), which would render it

invalid pursuant to sec. 134 of the German Civil Code.

47 The question whether the applicability of the prohibition of abuse under antitrust law is excluded because the Second Defendant was not acting as an entrepreneur when entering into the arbitration agreement, but rather in accordance with its obligation to provide exclusive jurisdiction of CAS for legal remedies against decisions in anti-doping proceedings resulting from the participation in an international sporting event, or in cases involving international top athletes (Art. 13.2.1 in conjunction with Art. 23.2.2 WADC), may be left unanswered. In any case, the behavior of the Second Respondent – following a comprehensive evaluation of the interests of both parties, taking into account the aim of the Act against Restraints of Competition of safeguarding the freedom of competition - does not constitute any abuse of its dominant position in the market.

48 It is also irrelevant whether the Second Defendant's request that the Plaintiff sign the arbitration agreement should be evaluated in accordance with sec. 19 para. 4 no. 2 of the Act in Restraint of Competition, old version (abuse of conditions) or in accordance with the general clause of sec. 19 para. 1 of the Act against Restraints of Competition, old version (concerning this point, BGH, judgement of 6 November 2013 – KZR 58/11, BGHZ 199, 1, margin no. 65 – VBL-Gegenwert; Fuchs/Möschel in Immenga/Mestmäcker, Wettbewerbsrecht, 5th edition, § 19 GWB, margin no. 254, 256; the question is left open by FCJ, decision of 6 November 1984 – KVR 13/83, WuW/E BGH 2103, 2107 – Favorit; Nothdurft in Langen/Bunte, Kartellrecht, 12th ed., § 19 GWB, margin no. 144). The balancing of interest required both under sec. 19 para. 4 no. 2 and under sec. 19 para. 1 of the Act against Restraints of Competition, old version, shows that the Second Defendant has not committed any abuse. The request for an arbitration agreement designating the CAS as the Court of arbitration is definitely

justified from an objective point of view and does not contradict the general values enshrined in the law. In particular, this request is in no way contrary to the Plaintiff's right of access to the courts, her rights of professional freedom (Art. 12 of the German Constitution) and her rights under Art. 6 ECHR. This also means that the arbitration agreement cannot be considered invalid pursuant to sec. 138 of the German Civil Code.

49 aa) As far as the balancing of interests is concerned, the Plaintiff is mainly interested in obtaining a decision by an independent court (of arbitration) in fair proceedings, while the Second Defendant is mainly interested in safeguarding the interests of sporting federations in achieving functioning global sports arbitration. However, neither aspect is limited to the interests of one party only. Only an independent and fair sports arbitration can expect to be recognised and respected worldwide, and every athlete wishing to participate in fair competition must be interested in having alleged violations of anti-doping rules cleared up and sanctioned on an international level in accordance with uniform standards, and in ensuring equal treatment for all the athletes from different countries against whom such violations may have been alleged.

50 The fact that the fight against doping is of paramount importance worldwide has never been denied by either party and is undisputed. Against this background, a uniform system of arbitration is intended to implement the anti-doping rules of the WADC in an effective manner and in accordance with uniform case law. If this task were left to the courts in the individual states, the goal of international sporting arbitration would be jeopardised. No one has succeeded as yet in drawing up a system of rules capable of maintaining international sports arbitration, while, at the same time, completely avoiding the deficiencies in connection with the appointment of independent arbitrators and the proceedings

in general that results from the significant influence exercised by the international sports federations and the Olympic Committees. The CAS procedure has been criticised in the past – inter alia due to the case law of the Swiss Federal Tribunal –, which has already led to modifications of these procedural rules (Öschütz, *SchiedsVZ* 2004, 211 et seq.). The statutes of the CAS, as they currently stand, contain procedural rules for the appointment of arbitrators which can be considered as acceptable.

51 bb) The request of the Second Defendant that an arbitration agreement be signed does not violate the fundamental rights of the Plaintiff. It is true that it affects the fundamental rights. However, this fact, by itself, does not mean that the interests of the Plaintiff must always be given precedence when balancing the interests of the parties pursuant to sec. 19 of the Act against Restraints of Competition, old version, (cf. concerning the fundamental right to private property, BGH, decision of 4 March 2008 – KVR 21/07, BGHZ 176, 1, margin no. 38 et seq. – Soda-Club II), particularly in view of the fact that the case involves fundamental rights on the part of the Second Defendant, as well.

52 The right of access to justice, which is derived from the rule-of-law principle in conjunction with the fundamental rights, particularly with Art. 2 para. 1 of the German Constitution, guarantees access to courts governed by the state and staffed with independent judges (cf. BVerfGE 107, 395, 406 et seq.; 117, 71, 121 et seq.; 122, 248, 270 et seq.; Uhle in Merten/Papier, *Handbuch der Grundrechte*, Band V, 2013, § 129, margin no. 29; Papier in Isensee/Kirchhof, *Handbuch des Staatsrechts*, 3rd ed., vol. VIII, § 176, margin no. 12). However, it is possible to waive this right to access to the state courts and to agree on arbitration instead, as long as the parties have submitted voluntarily to the arbitration agreement and the resulting waiver of a decision by state judicial authority (BGH, judgement of 3 April 2000 – II ZR 373/98, BGHZ 144, 146, 148 et seq.; –

Körbuch; Zöller/Geimer, *ZPO*, 31st ed., ahead of § 1025, margin no. 4; Schütze, *Schiedsgericht und Schiedsverfahren*, 5th ed., Introduction, margin no. 10; Uhle in Merten/Papier, loc. cit., § 129, margin no. 4; Papier in Isensee/Kirchhof, loc. cit., § 176, margin no. 13; Lachmann, *Handbuch für die Schiedsgerichtspraxis*, 3rd ed., margin no. 240).

53 (1) The Plaintiff submitted to the arbitration agreement voluntarily and, consequently, effectively (similarly with respect to the conclusions: Adolphsen in Adolphsen/Nolte/Lehner/Gerlinger, *Sportrecht in der Praxis*, 2012, margin no. 1151 et seq.; Görtz, *Anti-Doping-Maßnahmen im Hochleistungssport aus rechtlicher Sicht*, 2012, p. 241 et seq.; Dube/Rösch, *SchiedsVZ* 2015, 216, 222 et seq.; for a differing opinion, see Orth, *SpuRT* 2015, 230, 231; Monheim, *SpuRT* 2014, 90, 91; Classen, *Rechtsschutz gegen Verbandsmaßnahmen im Profisport*, 2014, p. 87 et seq.; Heermann, *SchiedsVZ* 2015, 78, 80; Bleistein-Degenhart, *NJW* 2015, 1353, 1355; Bergermann, *Doping und Zivilrecht*, 2002, p. 141 et seq., 281; see also Maihold, *SpuRt* 2013, 95, 96, who has some doubts).

54 An involuntary waiver of reliance on fundamental rights may have been obtained in cases where physical or psychological coercion have been used, e.g. by threatening considerable disadvantages (cf. BVerfG *NJW* 1982, 375, regarding lie detectors), where the party waiving its rights has been misled, where he or she is not aware of the significance and scope of his/her declaration (Merten in Merten/Papier, *Handbuch der Grundrechte*, Band III, 2009, § 73 129, margin no. 38, 21; Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, vol. III/2, 1994, p. 914; Lachmann, *Handbuch für die Schiedsgerichtspraxis*, loc. cit., margin no. 241) or where no respective declaration of intent has been made, at least consciously (concerning this point, see FCJ, judgement of 3 April 2000 – II ZR 373/98, BGHZ 144, 146 – Körbuch). If the waiver of fundamental rights is part of a contractual

agreement, this agreement must be considered as the decisive legal instrument for the realisation of free and independent actions in relation to others. The contractual parties themselves thereby determine how their individual interests are adequately balanced within their internal relationship. In this way, the exercise of freedom and the undertaking of mutual obligations are concretised. For this reason, the corresponding intentions of the contractual parties are therefore, as a general rule, considered proof of an adequate balancing of interests, enshrined in the contract, which in principle the state must respect (cf. BVerfGE 103, 89, 100; BVerfG, NJW 2011, 1339, margin no. 34). In case of a contractual agreement, this means that it will be generally assumed that the parties entered into the contract voluntarily.

55 The present case is no exception. In order to be able to participate in the speed skating world championships in Hamar (Norway) in pursuit of her profession, the Plaintiff signed the registration form provided by the Second Defendant on 2 January 2009. It has been neither established nor alleged that she was forced to do so by any unlawful threat or misrepresentation or by physical coercion. The fact as alleged by her, i.e., that she did not want the arbitration clause – that is to say, one of the terms and conditions of the contract – contained in the registration form is no proof that she did not sign the contract of her own free will. In fact, a contractual agreement presupposes a willingness on the part of the parties – in particular in cases where they represent opposing interests – to give up some of their own positions and to accept conditions that are not in accordance with their own intentions but with those of the other party. There is nothing to be said against this, as long as the contract in question provides an objective balancing of interests. However, in cases where one of the parties is in a position of such power that it is able to determine the terms of the contract more or less unilaterally, the other party may be said to have been coerced into agreeing to such terms. If, in such a situation,

fundamental rights are affected, the rules and regulations of the respective state have to come into action in a balancing manner in order to protect these fundamental rights (BVerfGE 81, 242, 255; 89, 214, 232; 103, 89, 100 et seq.).

56 In the present case however, the Plaintiff's decision was imposed on her. The Second Defendant holds a monopoly on the organisation of speed skating world championships. The Plaintiff's pursuing of her profession depended on her participation in such world championships. Consequently, the Second Defendant was actually in a position to impose the terms and conditions of participation in the championships on the Plaintiff. Furthermore, in light of the obligation on the part of the Second Defendant pursuant to Art. 13.2.1 in conjunction with Art. 23.2.2 WADC of foreseeing the CAS as the court of arbitration, it may be assumed that the Plaintiff would not have been admitted for participation in the competition if she had refused to also sign the arbitration agreement.

57 In such cases of "heteronomy", the provisions to be applied in order to safeguard the fundamental rights include, in particular, the general clauses of civil law (sections 138, 242, 307, 315 of the German Civil Code), which also include sec. 19 of the Act against Restraints of Competition (cf. Nothdurft in Langen/Bunte loc. cit., § 19 GWB, margin no. 2). Fundamental rights must be taken into account when concretising and implementing these (BVerfGE 81, 242, 255 et seq.; 89, 214, 232 et seq.; 115, 51, 66 et seq.) and the reciprocal action of colliding fundamental rights must be taken into account and limited in such a way as to ensure that they are as effective as possible for all parties concerned (BVerfGE 89, 214, 232).

58 In balancing the interests of the parties pursuant to sec. 19 of the Act against Restraints of Competition, old version, particularly the fundamental rights involved, with regard to the Plaintiff it must be taken

into account that, in addition to her claim to access to the courts, her fundamental right of exercising her profession freely (Art. 12 para. 1 of the German Constitution) is affected. The fundamental right to a free exercise of one's profession includes not only the right to choose and take up one's profession freely, but also the right to exercise that profession as one sees fit (cf. the fundamental considerations in BVerfGE 7, 377 et seq.). The requirement imposed by the Second Defendant, i.e., its rule that participation in competitions – which is absolutely necessary for professional athletes when exercising their profession – will not be permitted unless a registration form containing, inter alia, an arbitration clause has been signed, constitutes a restriction on the freedom to exercise one's profession. If the Plaintiff were to refuse to comply with this requirement, e.g. because she did not want to agree to arbitration, she would be practically prevented from exercising her profession.

59 (2) On the other hand, the imposition of arbitration proceedings constitutes a procedural safeguard of the Second Defendant's autonomy as an association, which is equally guaranteed as a fundamental right (Art. 9 para. 1 of the German Constitution). Sports federations such as the Second Defendant promote sports in general and particularly their own sport by creating the prerequisites for organised sport. To achieve the relevant goals, it is of fundamental importance to ensure that the rules apply to all athletes and are implemented everywhere in accordance with uniform standards (Görtz, *Anti-Doping-Maßnahmen im Hochleistungssport aus rechtlicher Sicht*, 2012, p. 243). It is therefore generally recognised, particularly in the area of international sport, that arbitration agreements determining the jurisdiction of a particular court of arbitration are required to ensure a uniform procedure with regard to the implementation of the rules of sports law. Particularly in the area of doping, uniform application of the anti-doping rules of the federations and of the WADC is indispensable to ensure fair

international sporting competitions for all athletes. Furthermore, a uniform court of arbitration for sport can contribute to the development of international sports law. Further advantages of an international sports arbitration, as compared to state courts, include the specialist knowledge of the arbitrators, the speed of the decision-making process, which is of paramount importance for the athlete involved in such proceedings, and the international recognition and execution of arbitral awards (cf. BT-Drucks. 18/4898, p. 38; Adolphsen in Adolphsen/Nolte/Lehner/Gerlinger, *Sportrecht in der Praxis*, 2012, margin no. 1030 et seq.; Holla, *Der Einsatz von Schiedsgerichten im organisierten Sport*, 2006, p. 30 et seq.; Heermann, *SchiedsVZ* 2014, 66, 75; Duve/Rösch, *SchiedsVZ* 2014, 216, 223 et seq. and *SchiedsVZ* 2015, 69, 77; Orth, *SpuRT* 2015, 230).

60 Concerning the Second Defendant, it must further be remembered that it is, in turn, obliged by Art. 13.2.1 in conjunction with Art. 23.2.2 WADC to insist on arbitration agreements designating the CAS as the court of arbitration. Due to the ratification of the International Convention against Doping in Sport of 19 October 2005 (BGBl. II 2007, p. 354) by the Federal Republic of Germany, the principles of the WADC represent contractual law which is binding under international law (cf. Görtz, *Anti-Doping-Maßnahmen im Hochleistungssport aus rechtlicher Sicht*, 2012, p. 85). Furthermore, the International Olympic Committee, in compliance with its obligation under Art. 20.1.2 WADC, makes its recognition of international sport federations dependent on their compliance with the rules laid down in the WADC.

61 (3) The result of the balancing of these rights and interests leads to the conclusion that the Second Defendant, with its requirement that the arbitration agreement proposed by it, be signed, has not abused its dominant market position in the meaning of sec. 19 of the Act against Restraints of Competition, old version.

62 This result is due, on the one hand, to the fact that not only the federations but also, and more particularly, the athletes benefit from the aforementioned advantages of sports arbitration, since these depend on fair conditions during competition to be able to exercise their sport (professionally, if applicable). This includes, but is not limited to, uniform application of the anti-doping rules, which, at present, can only be guaranteed by the CAS as a globally recognised court of sports arbitration. However, to ensure, on the other hand, that the Plaintiff's fundamental rights to access to justice and free exercise of her profession are protected to the greatest possible extent, the standards applied to the independence and neutrality of the CAS must not be too low. As already stated above, the list of CAS arbitrators basically contains a sufficient number of independent and neutral persons; furthermore, in particular the Second Defendant, as the opposing party in these proceedings, does not have institutional supremacy in connection with the drawing up of the list of arbitrators and the composition of the court of arbitration. Moreover, the Plaintiff was not without legal remedies if she had factual misgivings concerning the impartiality and neutrality of the arbitral tribunal. Rather, the statutes and the Procedural Rules of the CAS contain suitable regulations in case of conflict of interest. Moreover there is also the option – exercised by the Plaintiff – of having the arbitral awards of the CAS reviewed by the federal courts of Switzerland to a certain extent. According to the case law of the Swiss Federal Tribunal, this legal remedy, which resembles the German proceedings pursuant to sec. 1059 of the Code of Civil Procedure regarding reversal of an arbitral award (cf. Tyrolt, *Sportschiedsgerichtsbarkeit und zwingendes staatliches Recht*, 2007, p. 104), cannot be excluded in the arbitration agreement (Swiss Federal Tribunal, judgement of 22 March 2007 – 4P.172/2006, *SchiedsVZ* 2007, 330, 332 et seq. - Cañas). There is no further reaching right for a decision particularly by a German state court. Rather, the German legal

system recognises both foreign judgements and foreign arbitral awards if the relevant requirements have been fulfilled (sec. 328 of the Code of Civil Procedure and/or Art. V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (New York Convention)).

63 Furthermore the legislative intent of facilitating the valid conclusion of an arbitration agreement in cases like the present must be taken into account. Sec. 1025 para. 2 of the Code of Civil Procedure, in its version applicable up to 31 December 1997, provided that an arbitration agreement will be invalid if either party has used its commercially or socially dominant position to coerce the other party into signing the agreement or into accepting terms and conditions that generally grant it a predominant position vis-a-vis the other party during the proceedings and particularly with regard to the appointment or rejection of arbitrators. The legislative authorities deleted this provision, since they considered that the legal consequence of an invalidity of the arbitration agreement in case of exploitation of the commercial or social dominance of a party was too far-reaching in view of the equivalence of legal protection in arbitration proceedings (BT-Drucks. 13/5274, p. 34). This assessment is confirmed in sec. 11 of the Law Against Doping in Sports enacted on 10 December 2015 (BGBl. I 2015, p. 2210), which also provides the possibility of an arbitration agreement in cases like the present. In the explanatory memorandum of this law (BT-Drucks. 18/4898, p. 38 et seq.), it is made clear that arbitration agreements pre-formulated by the sports federations are not, in the opinion of the legislative authorities, invalid because they have been signed involuntarily. Furthermore, Germany has ratified the International Convention against Doping in Sport of 19 October 2005 (BGBl. II 2007, p. 354), which in its Art. 4 para. 1 refers to the rules of the WADC and imposes an obligation on the signatory states to comply with these rules. And, as already

stated above, Art. 13.2.1 in conjunction with Art. 23.2.2 WADC provide for arbitration clauses that designate the CAS as the relevant court of arbitration.

64 cc) An arbitration agreement naming the CAS as the relevant court of arbitration does not violate the rights of the Plaintiff in the light of Art. 6 ECHR, either.

65 Art. 6 para. 1 ECHR provides that, with respect to civil law claims, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. However, like the claim of access to the courts established by the German Constitution, this right of access to ordinary courts may also be waived. In particular, the jurisdiction of ordinary courts may be excluded in arbitration agreements if the arbitration agreement has been entered into voluntarily, is lawful and clearly worded, if further the arbitration procedure has been designed in accordance with the guarantees given in Art. 6 ECHR and if the arbitral awards can be set aside by a court of law in case of procedural errors (European Court of Human Rights (ECHR), judgement of 28 October 2010 – 1643/06, margin no. 48 – Suda ./, République Tchèque; Meyer in Karpenstein/Mayer, EMRK, 2nd ed., Art. 6, margin no. 59). According to the statements set out above under bb), these requirements have been fulfilled. According to the case law of the European Court of Human Rights, the fact that the Plaintiff is obliged, to be able to exercise her profession, to sign the registration form imposed by the Second Defendant does not mean that the arbitration agreement has not been voluntarily signed and therefore infringes the Convention (cf. EKMR, Judgement of 5 March 1962 – 1197/61, X ./, Federal Republic of Germany; Matscher in Festschrift Nagel, 1987, p. 227, 238; for a similar conclusion, see Pfeiffer, SchiedsVZ 2014, 161, 165; for a different opinion, see Heermann, SchiedsVZ 2015, 78, 80 et seq.; undecided: Niedermair, SchiedsVZ 2014, 280, 283).

66 dd) The prohibition of abuse under anti-trust law pursuant to Art. 102 TFEU offers no basis for the assumption that the arbitration agreement between the parties is invalid, either. As in the case of sec. 19 of the Act against Restraints of Competition, a balancing of interests shows that the Second Defendant has not abusively exploited its dominant position in the market.

67 ee) Finally, an invalidity of the arbitration agreement cannot be based on Swiss law, either.

68 (1) With the exception of several provisions that cannot be waived by contractual agreement within the meaning of Art. 34 of the Introductory Law to the German Civil Code, old version, such as, for instance, provisions of anti-trust law, the validity of the arbitration agreement must be assessed in accordance with Swiss substantive law. As already stated above, the substantive law applicable to the arbitration agreement must be determined in accordance with Art. 27 et seq. of the Introductory Law to the German Civil Code, old version. Since the parties failed to include an express choice of law clause, the agreement is subject, pursuant to Art. 28 para. 1 sentence 1 of the Introductory Law to the German Civil Code, old version, to the law of the state to which it is most closely linked. According to Art. 28 para. 2 sentence 1 of the Introductory Law to the German Civil Code, old version, it must be assumed that the agreement is most closely linked with the state in which the party expected to provide the characteristic performance has its official residence or, in the case of a company, an association or a legal entity, its head offices, on the date on which the agreement was signed. In the case of arbitration agreements, the place of arbitration is seen as a major connecting link for determining the state with which the agreement has the closest connection (MünchKomm-ZPO-Münch, 4th ed., § 1029, margin no. 37; Tyrolt, Sportschiedsgerichtsbarkeit und zwingendes staatliches Recht, 2007, p. 43, fn. 90; for a similar conclusion, see Heermann,

SchiedsVZ 2015, 78, 83; Pfeiffer, SchiedsVZ 2014, and hundred 61, 163; for different opinion concerning the connecting link, but similar conclusion, see Zöller/Geimer, ZPO, 31st ed., § 1029, margin no. 15, 107 et seq.; Tyrolt, loc. cit., p. 43; Bergermann, Doping und Zivilrecht, 2002, p. 272; Voit in Musielak/Voit, ZPO, 13th ed., Art. 1029, margin no. 28; Schlosser in Stein/Jonas, ZPO, 22nd ed., sec. 1025, margin no. 9 and § 1029, margin no. 108).

69 (2) Contrary to the assumption of the Regional Court [*Landgericht*], the arbitration agreement is not invalid under Swiss law because the Plaintiff was practically obliged into signing it since she would otherwise have been unable to exercise her profession.

70 Foreign law must be applied by German courts in the same way as the courts of the foreign country in question interpret and apply it (FCJ, judgement of 14 January 2014 – II ZR 192/13, NJW 2014, 1244, margin no. 15). The case law of the Swiss Federal Tribunal on the question of “involuntary signing” of arbitration agreements in favour of the CAS which are imposed on professional athletes by the sports federations shows that although a professional athlete will only sign the arbitration agreement under duress because he knows that he will not be able to exercise his profession otherwise, the arbitration agreement will still be valid (Swiss Federal Tribunal, judgement of 22 March 2007 – 4P.172/2006, SchiedsVZ 2007, 330, 332 et seq. - Cañas). Concerning this point, the Swiss Federal Tribunal states that a waiver of legal remedies in relation to arbitral awards declared in advance is invalid, because it is not to be expected, in view of the structural imbalance, that the athlete would have voluntarily waived any legal remedies at his

disposal. Insofar there was is a contradiction between the treatment of the arbitration agreement and of the waiver of legal remedies, at least in theory. However, this is justified in view of the speedy resolution of disputes by specialised arbitration panels hedged about with sufficient guarantees of independence and impartiality. The “favourable” treatment of the question of voluntary conclusion of the arbitration agreement is balanced by the fact that legal remedies will not be considered to have been waived. Consequently, the present arbitration agreement between the parties, which does not exclude the right to appeal to the Swiss courts of law, is also valid under Swiss law.

71 III. The decision as to costs is based on sec. 97 para. 1 of the Code of Civil Procedure.

Limperg Meier-Beck Raum

Strohn Deichfuß

Lower courts:

Regional Court of Munich I, decision of 26 February 2014 – 37 O 28331/12 –

Higher Regional Court of Munich, decision of 15 January 2015 – U 1110/14 Kart –

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.

Real Federación Española de Fútbol (RFEF) v. Fédération Internationale de Football Association (FIFA)

27 November 2015

Football; Transfer of minors; Protection of minors in the context of international transfers; Role of the national associations in the protection of minors; Obligation to abide by Art. 19 RSTP even when no International Transfer Certificate (ITC) is required; Liability of the national associations for failure of their members to comply with Article 19.4 RSTP; Duties of national associations under Article 5.1 RSTP; Principles for mitigating or aggravating disciplinary sanctions; Final nature of decisions regarding the amount and allocation of costs and expenses imposed by FIFA disciplinary bodies;

Panel

Mr Rui Botica Santos (Portugal), President

Mr José Maria Alonso Puig (Spain)

Prof. Ulrich Haas (Germany)

Facts

A dispute arose as a result of the international transfer of 31 foreign under-aged players (the “Minors” or the “players”) to Spanish football under the auspices of the RFEF. At the time of the transfers some of the Minors were under 10, others under 12 years of age. Specifically, on diverse dates between 2005 and 2012, the Minors were either de-registered from their maternal football associations and/or transferred to various Spanish clubs, a majority of them to Futbol Club Barcelona (“Barcelona”). They were subsequently registered as players at the following Regional Associations: the Federación Catalana de Fútbol (the “FCF”), the Federación Andaluza de Fútbol (the “FAZ”) and the Federación de Fútbol de la

Comunidad Valenciana FCF (the “FCV”). Prior to their immediate transfers to Barcelona, some of the players had been registered as players of clubs of various different nationality. Some of the players however had never previously been registered with a club and were only registered for the first time in their career as players of the Spanish clubs FC Sevilla, EFB Calafell, FC Sevilla, RCD Espanyol and CF Sagrada Familia. The RFEF never received an International Transfer Certificate (the “ITC”) for some of the players. In addition, the RFEF did not file any application to a sub-committee to be appointed by the FIFA Players’ Status Sub-Committee seeking the sub-committee’s approval of the international transfer and/or first registration of some of the players.

Following an investigation by FIFA’s Integrity and Compliance of Transfer Matching System GmbH department (the “FIFA TMS Department”) into potential irregularities related to the transfer of the Minors, the RFEF was informed that the FIFA Disciplinary Committee (the “Disciplinary Committee”) had launched investigations against Barcelona and the RFEF in relation to the international transfer and/or first registrations of the Minors.

On 28 November 2013, the Disciplinary Committee rendered its decision. It declared itself competent to adjudicate and sanction the RFEF for breaching Articles 19.1 and 19.3 of the FIFA Regulations on the Status and Transfer of Players (the “FIFA RSTP”) only in relation to 14 of the Minors (for some of them for Article 19.1 of the FIFA RSTP and for others for Article 19.3 of the FIFA

RSTP). It did not sanction the RFEF for breaching Articles 19.1 and 19.3 of the FIFA RSTP in relation to the other 17 Minors because in its opinion under the regulations then in force, only FIFA's Players' Status Committee had jurisdiction to do so. It further found the RFEF liable for violations of Article 19 para.4 in conjunction with Annexes 2 and 3 FIFA RSTP as well as Articles 5 para. 1 and 9 para. 1. The RFEF was imposed a fine of CHF 500,000 as well as costs and expenses of CHF 30,000; further a reprimand was issued against the RFEF. Also on 28 November 2013, the Disciplinary Committee found Barcelona liable for the same violations.

The RFEF appealed the decision by the Disciplinary Committee before the Appeal Committee. On 19 August 2014, the Appeal Committee dismissed the appeal and upheld the decision of 28 November 2013 (the "Appealed Decision"). The grounds of the Appealed Decision were notified to the RFEF on 22 October 2014.

On 7 November 2014, the RFEF filed an appeal with the Court of Arbitration for Sport ("CAS") against the Appealed Decision.

A hearing was held in Lausanne, Switzerland on 6 May 2015.

Reasons

1. The RFEF was claiming to have been prevented from complying with its obligations as FIFA member as a result of a conflict between the FIFA regulations and Spanish law. The Panel recalled that whereas the European Union had recognised the freedom of movement and the right to work, certain checks and balances had been placed on these rights in situations where minors were involved and/or likely to be directly affected by their parents' migration. The Panel further underlined that in 2001, FIFA and the

European Union had come to a consensus that the international transfer of minors was generally prohibited, which was passed into law vide Article 19 RSTP. As a member of the European Union, the Kingdom of Spain had acknowledged the application of this general prohibition throughout Spain and no express Spanish law stating otherwise had been brought to the Panel's attention by the RFEF. Therefore, the RFEF could not argue that the FIFA RSTP was incompatible and/or in conflict with Spanish law and/or that any such conflict prevented it from complying with its duties as a FIFA member.

2. One of the main assertions of the RFEF was that in relation to 21 of the Minors, it had not breached the FIFA RSTP since, in accordance with Article 9.4 RSTP, minors aged below 12 years did not fall under the scope of the regulations. Relying mainly on the structure of Article 9 RSTP, the Commentary to Article 9.4 RSTP as well as the award in CAS 2014/A/3793, the Panel held that whereas under Article 9.4 RSTP minors aged below 12 years were excluded from ITC requirements, that exclusion did not affect the substance of the FIFA RSTP provisions on the international transfer of minors as provided for under Article 19 RSTP. Article 9 RSTP was only an administrative procedure purely aimed at regulating ITC requirements in order to facilitate the registration of players at the new association. According to the Commentary, FIFA's sole intention with Article 9.4 RSTP was to exclude minors aged below 12 years from the calculation of training compensation and solidarity mechanism. In no way was it a licence for breaching the prohibitions contained under Article 19 RSTP by transferring minors aged below 12 years. For the Panel, these 21 Minors were therefore also subject to the FIFA RSTP.

3. Having established the above the Panel – with regards to those Minors that had been moved from one club to another in another country – held that they (irrespective of whether or not they were under 12 years at the time of the transfer) had been internationally transferred in contravention of Article 19.1 FIFA RSTP, the backbone of the FIFA RSTP provisions on the protection of minors; and that the RFEF – the body in charge of running football in Spain – had breached its oversight role by failing to make use of the statutory frameworks and tools at its disposal to ensure the full protection of minors as imposed under Article 13.1 (d) FIFA Statutes and Article 1.3 (a) FIFA RSTP. The Panel concluded that by failing to perform its oversight role as required under Article 13.1 (d) FIFA Statutes, the RFEF by default or omission had breached Article 19.1 FIFA RSTP.

With regards to the Minors that had never previously been registered with a club before moving to Spain and which were only registered for the first time in their careers as players of various Spanish clubs, the Panel found that under Article 13.1 (d) FIFA Statutes, the RFEF was required to ensure that Barcelona and the FCF strictly complied with Article 19.3 FIFA RSTP. By failing to comply with this oversight role, the RFEF had been negligent and had, by default or omission, breached Article 19.3 FIFA RSTP. In this context the Panel, referring to the reasoning as outlined under 2. above, expressly rejected the RFEF's claim that a breach of Article 19.3 FIFA RSTP was only possible with regards to players aged over 12 years at the time of the transfer.

The Panel further decided that the RFEF, by default or omission, had breached Article 19.4 FIFA RSTP as read together with Annexes 2 and 3, as it had – amongst others – not sought the approval of the subcommittee appointed by the Players'

Status Committee in relation to the international transfer and/or first registration of some of the Minors, and had neither submitted an application (by TMS or otherwise) for such transfers. The Panel acknowledged in this context that possibly the RFEF could have been in a better position to perform its duties had it received proper information and/or a request from Barcelona in relation to the players in question. At the same time however the Panel also held that the RFEF could have better complied with its duty following from Article 13.1 (d) FIFA Statutes read together with Article 19.4 FIFA RSTP if it had conducted impromptu spot checks on the activities of Barcelona. Lastly the Panel found that Article 19.4 FIFA RSTP had seemingly been drafted in such a manner that an association (RFEF) could not avoid liability even if its members (Barcelona) were largely responsible for its breach.

4. Looking at the alleged violation of Article 5.1 FIFA RSTP, the Panel found that Article 5.1 was a provision the proper realization of which entailed the performance of certain duties on the part of both clubs and national associations. It held that whereas in most cases the process of registration was first moved by the new club (*in casu* Barcelona) by petitioning its association to register the players in question, in the absence of any registration petition from the clubs an association's duty did not end or cease, as implied by the RFEF. According to the Panel the RFEF had an ancillary duty to play in ensuring full compliance of Article 5.1 FIFA RSTP; this role entailed undertaking both preventive (by virtue of Article 13.1 (d) FIFA Statutes the RFEF was required to ensure that Barcelona followed the procedure laid down under Article 5.1 FIFA RSTP; it could possibly have done this by conducting spot checks on all organized football tournaments held in the Kingdom of Spain with a view

to deterring its member clubs from fielding unregistered players) and curative (national associations are generally and by implication empowered to take disciplinary action on clubs that field players who have not been registered at the national association) measures in monitoring clubs' compliance thereof. The Panel concluded that by failing to perform its oversight role as required under Article 13.1 (d) FIFA Statutes, the RFEF by default or omission had breached Article 5.1 FIFA RSTP. Similarly, the Panel found that the RFEF had – by default or omission – breached Article 9.1 FIFA RSTP with regards to some of the Minors (despite the fact that those Minors were never directly registered at the RFEF), for which the RFEF had failed to request and/or receive ITCs from their previous associations. It underlined that whereas primarily, the process of dispatching an ITC to the new association is first moved by the player's new club, the RFEF, as association, had a statutory ancillary duty, *i.e.* that of ensuring that its members complied with Article 9.1 FIFA RSTP as envisaged under Article 13.1 (d) FIFA Statutes. Conclusively the Panel rejected the RFEF's argument of *nulla poena sine culpa*.

5. With regards to the question of the appropriateness of the fine and the costs the Panel dismissed the majority of the arguments raised by the RFEF and found that it had to solely look at the principle of proportionality as well as the principle of equal treatment. The following basic and guiding principles, although not exhaustive, had to govern a decision making body in fixing the level of pecuniary sanctions: (a) the nature of the offence; (b) the seriousness of the loss or damage caused; (c) the level of culpability; (d) the offender's previous and subsequent conduct in terms of rectifying and/or preventing similar situations; (f) the applicable case law and (g) other

relevant circumstances. Assessing the fairness of the sanction in the case at hand, the Panel noted that the RFEF had not only violated procedural rules in the context of the transfers of the Minors (as had been the case in a prior FIFA decision where a lower fine was imposed), but also substantive rules, *i.e.* the rules pertaining to the protection of minors in Articles 19.1 and 19.3 FIFA RSTP. As these rules were of great significance, their violation had to be taken (particularly) seriously. A further aggravating factor was that minors had been at the root of the case and that apart from the Minors also the national federations and clubs to whom the minors originally belonged had suffered damage. As regards RFEF's level of culpability, the Panel found the RFEF to have been rather negligent in performing its oversight role, while at the same time it took into account that the violations had been initiated by Barcelona and facilitated by a Regional Association which failed to inform or involve the RFEF in the procedures that lead to the transfer and registration of the Minors. Lastly the Panel acknowledged that the RFEF was a first time offender in as far as failing to perform its oversight role *vis-à-vis* the international transfer of minors is concerned and that it had demonstrated both a remorseful acknowledgement of an involuntary omission as well as a positive desire to prevent a repeat of the same with good prospects of rehabilitation. The Panel therefore reduced the basic fine for the breach of Articles 19.1 and 19.3 to CHF 20,000 per minor (instead of CHF 25,000) and further annulled the increase of sanction imposed by FIFA under Article 41 FIFA Disciplinary Code arguing that, contrary to FIFA's reasoning, it had to be considered that the substantive provisions on the protection of minors could not have been infringed without the simultaneous infraction of the respective procedural rules; therefore no increase of the basic sanction was warranted.

6. With regards to the RFEF's challenge of the procedural costs the Panel pointed out that according to Article 105.4 FIFA Disciplinary Code, there was no possibility to challenge a procedural order on costs, and that it was therefore unable to review the amount imposed.

Decision

The Panel considered the RFEF to have breached its oversight role under Article 13.1 (d) FIFA Statutes and consequently occasioned a passive infringement of Articles 19.1, 19.3, 19.4 as read together with Annexes 2 and 3, 5.1 and 9.1. Consequently, it fined the RFEF CHF 280,000. The rest of the decision of the Appeal Committee was fully upheld.

CAS 2014/A/3828

Indian Hockey Federation (IHF) v. International Hockey Federation (FIH) & Hockey India

17 September 2015

Hockey; Governance (membership); Principle of autonomy of an association to accept or refuse applications for membership; Absence of duty of an association to safeguard the procedural fairness of state proceedings;

Panel

Judge Conny Jörneklint (Sweden), President
Ms Sangeeta Mandal (India)
Mr Hans Nater (Switzerland)

Facts

The Indian Hockey Federation (the “IHF” or “Appellant”) has been involved in the national and international governance of hockey for many years and seeks recognition as the Indian member of the International Hockey Federation.

The International Hockey Federation (the “FIH” or “First Respondent”) is the international federation of the Olympic sport of field hockey. It is officially recognized by the International Olympic Committee.

Hockey India (the “Second Respondent”) was formed on 20 May 2009 and was recognized by the FIH Congress in November 2014 as the representative federation for India in the FIH.

The IHF was formed and registered as a society in India in 1925, with the purpose of regulating hockey (or, at least, men’s hockey) in India. It became a member of the FIH in 1927. In around 2000/2001, the IHF and the Indian Women’s Hockey Federation (“IWHF”) created a new entity, known as the Indian

Hockey Confederation (“IHC”), of which the IHF and the IWHF were the two constituent members.

The FIH said that in 2008 it discovered that the IHC did not govern either men’s or women’s hockey, but was merely a facade behind which the IHF continued to govern men’s hockey and the IWHF continued to govern women’s hockey.

The IHF said that on 12 August 2010, the IWHF was merged into the IHF, with all its assets and liabilities transferring to the IHF, and was dissolved shortly afterwards. From that time, said the IHF, the IHF has been fulfilling all the functions of the IHC. The IHC itself was apparently dissolved in around 2011. The IHF describes itself as *“its successor organisation (as the entity within which all the functions, assets and liabilities of the IHC’s two members are now concentrated)”*.

The entitlement of the IHF to describe itself as the successor to the IHC, or at least what the consequences are of such an argument, are disputed by the FIH.

On 28 April 2008, the Indian Olympic Association (“IOA”) temporarily suspended its recognition of the IHF. The IHF has challenged this decision in Indian courts.

On 20 May 2009, Hockey India was formally established. In June 2009 it was recognized by the FIH as its member for India, in place of the IHC.

On or around 10 May 2009, the IOA disaffiliated the IHF and the IWHF.

On 21 May 2010, the High Court of Delhi quashed the IOA's decisions.

The High Court of Delhi's decision did not alter the fact that Hockey India was the FIH's member for India.

With reliance on a statement of case dated 9 June 2011, the IHF brought a complaint before the Judicial Committee of the FIH (the "Judicial Committee Proceedings"). The gist of the IHF's case was that the IHC (which was the FIH's member at the relevant time) had not been given notice of the termination of its membership nor of Hockey India's application for membership, and accordingly had not been able to make representations.

Further, the IHF argued that Hockey India did not qualify for membership. The IHF argued that Hockey India did not govern hockey in India and therefore could not declare an exclusive right to govern hockey (as a result of the High Court of Delhi's order dated 21 May 2010, which effectively reinstated the IHF as the governing body in India).

The requirements to govern hockey and to declare an exclusive right to govern (the interpretation of which was disputed by the parties and is discussed below) were found in Article 6 of the FIH's statutes in force at that time (the "Old Statutes").

The key parts of the Old Statutes are as follows:

6.1 Requirements for membership

- (a) *An NA of a country may be or remain affiliated to the FIH only if it governs Hockey for both men and women in that country.*
- (b) *The activities of the Members of the FIH shall be solely and exclusively concerned with the*

Hockey in their own country but the Executive Board may make special and temporary allowance in this regard in respect of new small NAs.

(d) *Every Member must declare:*

- (i) *Its opposition to any discrimination on the grounds of race, gender, politics, religion or creed; and*
- (ii) *That it has the exclusive right to govern Hockey in its own country.*

6.3 Application for Membership

- (d) *An attestation, endorsement, and confirmation by its NOC that the NA has been accepted as a member of the NOC and is the central authority responsible for all matters relating to Hockey in the country concerned. If a NOC has not yet been formed in the country, or if formed but not yet recognized by the IOC, the endorsement shall be given by the highest national authority in sport. An NA automatically ceases to be a member of the FIH if it ceases to be a member of its NOC;*

6.7 Transfer

- (a) *Membership is not transferable.*
- (b) *If a Member ceases to be qualified to remain a member or is dissolved, ceases to exist or suspends operations and another body is created or comes into existence in place of that Member which satisfies the provisions of Articles 6.1 and 6.3, that other body may make application to become a Member.*

In addition, the IHF had argued that Hockey India could not qualify for membership since it did not exist as a legal entity at the time of the purported transfer.

On 1 June 2012, the FIH wrote to the IOA, informing the IOA that the IHF and Hockey India had been invited to explain why they met the FIH's membership criteria. The letter also asked the IOA to confirm which body (out of

the IHF and Hockey India) it endorsed as the central authority responsible for all matters relating to hockey, for the purposes of Article 6.3(d) of the Old Statutes.

On 5 September 2012, the IOA Special Committee issued its decision recommending that Hockey India be confirmed and endorsed. The IHF challenged this decision before the Delhi High Court which granted a stay on 25 September 2012 preserving the status quo.

The FIH resolved not to put the IHF's and Hockey India's competing claims before the FIH Congress in November 2012. At that meeting, however, the FIH Congress apparently approved a revised procedure for resolving competing claims. These new rules are set out below (the "New Statutes").

The key parts of the New Statutes are as follows:

2.3 Criteria for membership

To be and to remain a Member, an NA must satisfy (both at the time it applies for membership and at all times after it has been admitted as a Member) all of the following requirements:

- (a) *It must be concerned solely and exclusively with the administration, organisation and playing of Hockey and not with any other sport (provided that the Executive Board may make special and temporary exceptions from this requirement in respect of new small NAs).*
- (b) *It must claim the exclusive right to govern both men's and women's Hockey in its Country, i.e., it must not recognise any other body's claim to govern either men's or women's Hockey in its Country (other than by exercise of powers delegated to that other body by the NA).*
- (c) ...

2.4 Applications for membership and transfers of membership

(a) *Only Congress may admit an NA as a full Member. Applications for membership may be made as follows:*

(i) ...

(b) *If membership for particular Country is vacant, and more than one body applies to be admitted as a Member for that Country, or in other circumstances where there are competing claims to be entitled to membership for a particular Country and the Executive Board deems it appropriate to apply this clause, the competing claims shall be resolved as follows:*

(i) *The Executive Board will specify the criteria by which the competing claims are to be assessed.*

(ii) *The Executive Board will appoint appropriate persons to a committee to consider the respective claims of the competing bodies, in accordance with a fair and impartial process, and then to make a written recommendation as to which of those bodies, in the committee's view, best meets the criteria and so should be the FIH's Member for that Country.*

(iii) *The Executive Board will submit that recommendation to the next meeting of Congress for decision. However, if it sees fit the Executive Board may admit/ treat the recommended body as a provisional Member pending that meeting, strictly without prejudice to the powers of Congress pursuant to sub-clause (iv), below.*

(iv) *At its next meeting, Congress will consider the competing claims, together with the committee's recommendation, and will give each claimant an equal opportunity to be heard by Congress, before deciding which claim to accept.*

(v) *The decision of Congress shall be final. The rejected claimant may challenge that decision exclusively by appeal to the*

CAS in accordance with Article 11.3(b)(i) of these Statutes.

On 11 March 2013, the FIH wrote to Hockey India and the IHF stating that it (the FIH) would seek to apply the New Statutes to the parties' competing claims. The FIH said it would appoint a committee to consider the competing claims and make a recommendation, which would then be submitted to the next Congress meeting.

On 27 March 2014, the appointed Committee recommended that the FIH Congress recognise Hockey India as its sole member for India.

On 30 September 2014, the FIH wrote to Hockey India and the IHF inviting them both to send up two representatives to the FIH Congress on 1 November 2014 to present their cases before any decision was made about the competing claims.

On 1 November 2014, the FIH Congress unanimously approved Hockey India as the FIH member for India. The IHF did not attend the meeting to put its case before the FIH Congress.

On 28 November 2014, the Appellant filed its Statement of Appeal against the FIH in accordance with Article R47 et seq. of the Code of Sports-related Arbitration (the "Code") with the Court of Arbitration for Sport (the "CAS").

On 11 May 2015, an oral hearing was conducted at 4 New Square Chambers in London, United Kingdom.

Reasons

1. First the IHF submitted that the FIH applied the wrong statutes. In particular, the

IHF contented that the FIH was wrong to apply the New Statutes in circumstances where the dispute about membership had arisen before their introduction. In this respect, the Panel underlined that under Swiss law which is applicable to the FIH in its capacity as Swiss association, the right of a Swiss association to regulate and determine its own affairs is considered essential for the association. One of the expressions of private autonomy of associations is the competence to issue rules relating to their own governance, their membership and -where a sports association is concerned- their own competitions. However, this autonomy is not absolute. In light of the principle recognized by CAS jurisprudence regarding the general distinction between procedural and substantive rules (see CAS 2002/O/410), generally, laws and rules relating to procedural matters apply immediately upon entering into force and regardless of when the facts occurred. On the other hand, it is a general principle that laws, regulations and rules of a substantive nature that were in force at the time when the facts occurred must be applied. Even a procedural rule should not be applied retrospectively where its application would entail a violation of general principles of fairness and of good faith. However, it is necessary to consider the special circumstances of a case in light of the principles which underlie that general proposition, such as fairness and good faith.

The Panel is of the view that the Old Statutes did change when they became the New Statutes. The introduction of criteria to deal with competing bodies for one membership was a substantive change. In the Panel's view, the changes did not favour the IHF over Hockey India or Hockey India over the IHF. The principles of fairness and good faith were not breached in the special

circumstances of the case because (i) the substantive changes to the FIH's statutes were necessary in order to deal with the fact that there were competing claims and (ii) the changes were neutral in their effect.

The Panel considered that if the principles of fairness and good faith (among others) were not breached, if (by way of example) no issue of legitimate expectation aroused, if the decision in issue did not appear to have been made arbitrarily, then there were no grounds on which to infringe upon an association's right to autonomy. As the case 2002/O/410 makes clear, the starting point is that an association has autonomy to accept or refuse applications for membership. That principle of autonomy may be limited, but it is not limited, in the Panel view by formal breaches, which carry no substantive unfairness.

2. Secondly, the IHF submitted that the FIH should have awaited the outcome of the Indian procedures. In this regard, the Panel determined that the Swiss legal principles which allow an association to regulate its own membership are determinative in the sense that an international sport federation is not required to wait for the outcome of a set of proceedings before a state court regarding a membership issue over which it had no control. Specifically, it would be contrary to an international federation's right to autonomy to oblige it to wait until a national government had decided which body was to be the national sports federation, before making any decision. Moreover, no rule impose on an association a duty to safeguard the procedural fairness of proceedings over which it had no control and to which it was not a party.

The Panel considered that the appeal filed by the Indian Hockey Federation on 28 November 2014 shall be dismissed whereas the decision of the International Hockey Federation Congress dated 1 November 2014 shall be confirmed.

Decision

CAS 2014/A/3852

Ascoli Calcio 1898 S.p.A. v. Papa Waigo N'diaye & Al Wahda Sports and Cultural Club

11 January 2016

Football; Termination of the employment contract without just cause; CAS jurisdiction; Absence of just cause; Validity of a unilateral option clause; Liability under Article 17.2 RSTP; Criteria to be taken into consideration when calculating the compensation; Request for sporting sanctions;

Panel

Mr José María Alonso Puig (Spain), President
Mr Michele Bernasconi (Switzerland)
Mr Jirayr Habibian (Lebanon)

Facts

Ascoli Calcio 1898 SpA (the “Appellant” or “Ascoli”) is an Italian football club currently under bankruptcy proceedings. Papa Waigo N'diaye (the “First Respondent” or the “Player”) is a Senegalese international football player. Al Wahda Sport Cultural Club (the “Second Respondent” or “Al Wahda”) is a football club based in Abu Dhabi, United Arab Emirates.

On 9 August 2011, Ascoli and the Player signed an employment agreement (the “Contract”), valid until 30 June 2012. Pursuant to clause 2 of the Contract, the Player granted Ascoli a right of option to extend the agreement up to 30 June 2014; this right had to be exercised via certified mail with return receipt to be sent to both the Player and the Serie B League by 25 June 2012. The remuneration due to the Player was EUR 90,000 net for the season 2011/2012. It was further foreseen that in case Ascoli exercised the option, for seasons 2012/2013 and

2013/2014 the Player would receive EUR 240,000 net if Ascoli played in the Serie B or EUR 490,000 if Ascoli played in the Italian Serie A. In both cases, the Player was also entitled to receive EUR 10,000 for travel benefits and a variable bonus depending on the number of goals scored by him.

At the end of season 2011/2012, the Player had scored 15 goals for which he was entitled to receive a EUR 50,000 bonus, net. Ascoli remained in the Italian Serie B.

On 30 May 2012, Ascoli exercised its right of option. The letter sent by Ascoli could not be delivered to the Player as, apparently, he had changed domicile. Ascoli holds that in any case the Player signed receipt of the exercise of the option by Ascoli in Ascoli’s office. The Player denies this and states that the signature affixed to it is not his.

On 7 July 2012, the Player signed a new employment contract with Al Wahda.

Upon request by the United Arab Emirates Football Association (“UAEFA”) for the Player’s international transfer certificate, the Italian Football Federation (“FIGC”), denied the transfer, as the Player appeared to be duly registered with Ascoli, following the latter’s exercise of the right of option. The matter having been submitted to the FIFA Single Judge, the latter on 14 August 2012 issued his decision allowing the provisional registration of the Player with Al Wahda.

On 16 May 2013, Ascoli filed a claim before the FIFA Dispute Resolution Chamber

(“DRC”) against the Player and Al Wahda, for breach of contract. The Player, in response, filed a counterclaim, requesting payment for due salaries and the goal bonus owed by Ascoli, totalling EUR 66,788.42.

On 17 December 2013, Ascoli entered into bankruptcy proceedings and was declared bankrupt by the Court of Ascoli Piceno.

On 25 April 2014, the DRC rejected the claim by Ascoli and partially accepted the counterclaim of the Player. It ordered Ascoli to pay the Player EUR 57,500 plus 5% interest p.a. from 21 July 2012. The decision was notified to the Parties on 21 November 2014 (the “Appealed Decision”).

On 12 December 2014, Ascoli filed a Statement of Appeal with the CAS. On 22 December 2014, Ascoli filed its Appeal Brief. Together with its Appeal Brief Ascoli submitted an exhibit (Exhibit n° 3) allegedly containing the Player’s signature.

On 9 January 2015, FIFA informed the CAS that it did not intend to be a party to the proceedings. That however, only FIFA had standing regarding the hypothetical imposition of sporting sanctions (the imposition of the latter on both the Player and Al Wahda having been requested by Ascoli).

On 27 February 2015, the CAS informed the Parties that the Panel had decided for an independent expert to be appointed to determine whether the signature was the Player’s. On 1 July 2015, the CAS provided the Parties with the expert report of the independent expert which concluded that the signature affixed to Exhibit n° 3 of the Appeal Brief was not the Player’s.

On 10 September 2015 a hearing took place at the CAS Headquarters in Lausanne, Switzerland.

Reasons

1. The First Respondent contended that due to the fact that the Appellant had lost its status as an associated club to the FIGC, it was no longer a member of FIFA and could therefore not obtain the benefit of appealing against a FIFA decision before the CAS. Considering that at the time when the Appellant had filed its claim before the DRC, it had not yet entered into bankruptcy and was a full member of the FIGC and, thus, of FIFA, and furthermore that the DRC had issued its decision after it had been informed that the Appellant had been declared bankrupt, the Panel dismissed the objections. Referring to Article 24.2 *in fine* of the FIFA Regulations on the Status and Transfer of Players (the “RSTP”), the Panel held that the DRC’s decisions were appealable by the parties of the corresponding proceedings, and that neither the FIFA Statutes nor the RSTP required any specific qualifications to file the appeal. That whereas it could be accepted that in order to initiate DRC proceedings, a club or player had to be a valid member of FIFA, this question (i.e. whether a player or a club are members of FIFA) was only relevant at the time of determining the jurisdiction of the DRC, and not that of the CAS. The Panel underlined that the parties of a procedure before the DRC accepted that pursuant to Article 24 RSTP and Article 66 FIFA Statutes, CAS was competent to hear appeals against the relevant decision.
2. Whilst the Player held that the option clause was invalid, as it limited his freedom of movement, Ascoli argued that pursuant to the applicable case law, the option was valid. The Panel noted that unilateral clauses for the extension of contracts were not invalid *per se* as neither the RSTP nor

any case law held that similar clauses were invalid under all circumstances. Rather, a case-by-case assessment had to be carried out in order to determine the validity of specific clauses. In its opinion, the two main issues to be considered when analysing the initial validity of an unilateral option were whether the total duration of the contractual relationship was reasonable and according with the applicable regulations, and whether the ensuing terms and conditions of employment were fair and adequately reflected the right granted by the player to the club, without the need of further negotiation. The Panel found that in the present case, both requirements were amply met insofar as the total duration of the Contract (3 years, therefore remaining below the 5 years maximum duration allowed by the RSTP) was reasonable and insofar as due consideration had been given in the Contract to the granting of the right of option, leading to a substantial increase in the Player's remuneration (from EUR 90,000 to EUR 240,000 in the case of Ascoli playing in Serie B or EUR 490,000 in the case of Ascoli playing in Serie A). In conclusion the Panel held that the option granted to Ascoli by the Player was valid.

Analyzing clause 2 of the Contract the Panel held that the only issue under discussion was whether the option clause had been duly exercised vis-à-vis the Player, as he had not received the notice sent on 30 May 2012. In this context the Panel disregarded the notice allegedly signed by the Player at Ascoli's headquarters, as the independent CAS expert had concluded that the signature affixed to it was not the Player's. The Panel further noted that whereas the Contract stipulated that any change of the Player's address had to be communicated to the other Party (here Ascoli), the Player had not provided any evidence that he had indeed made such communication.

Although such notification was of a formal nature, the importance given to it by the parties had to be upheld. Ascoli - having correctly notified the option to the address provided in the Contract- could not be denied its right because the Player had failed to adequately inform it of his change of domicile. Taking further into account that clause 2 itself was unilateral and did not require effective acceptance by the Player, the Panel deemed the option to have been validly exercised.

3. The Appellant argued that having moved to Al Wahda in spite of the extension, the Player had breached the Contract. The Player conversely argued that even if the option was deemed to have been validly exercised, he had terminated the Contract with just cause, as Ascoli owed him certain amounts for his salary and bonus. The Panel first of all held that the salaries for April and May 2012 had been paid, albeit late, but that the respective delays were, under the circumstances of the case, in particular the fact that the Player had not sent an explicit reminder, not significant enough to justify the termination of the Contract with just cause. As regards the salary for June 2012 and the bonus for goals scored, the Panel found that they had only been due by 20 July 2012 and that on 7 July, when the Player had signed his contract with Al Whada, no salaries were due to him. As a consequence, while clarifying that the Player was still entitled to the June 2012 salary and the bonus in question, the Panel decided that the termination of the Contract by the Player was without just cause and therefore gave rise to compensation.
4. In response to Al Wahda's argument that it had signed the contract with the Player with the understanding that the Player was a free agent and further that it was not a party to the proceedings, the Panel, referring to

Article 17.2 of the RSTP, held that liability under that rule was of an objective nature and did not require that the new club be considered as instigator of the player's breach. It was undisputed that Al Wahda was the new club of the Player pursuant to the definitions provided in the RSTP. Consequently Al Wahda was jointly and severally liable for payment of any compensation due following the Player's breach of the Contract.

5. According to the Appellant, consideration had to be given to the fact that the breach had occurred during the protected period, as only one year of contractual relationship had elapsed. The Panel noted that the criteria established in Article 17 of the RSTP were not the sole criteria to be taken into consideration but that, on a case-by-case basis, other relevant criteria could be found. It considered that in the case at hand it had to be taken into consideration that Ascoli had engaged a players' agent to search for opportunities to transfer the Player in the Middle East, thus showing that it did not intend to keep the Player; and that further it could be concluded from an email by the Player's agent of 9 July 2012 that Ascoli had valued the services of the Player at EUR 500,000 on that same date, being this the amount that it required to transfer the Player. Considering the value of the Player's new contract (USD 1,800,000 for two seasons, even though the contract was terminated after the first season – EUR 1,450,000 according to Ascoli), the salary costs that Ascoli had saved (over EUR 900,000 net for two years: two seasons at EUR 429,000 gross per season, plus EUR 10,000 per season as travel benefits, plus any bonus that the Player could have obtained for each season), the fact that Ascoli intended to transfer the Player and that at the time of the breach by the Player, Ascoli itself valued his services at EUR

500,000, the Panel concluded that a fair compensation could be set at EUR 500,000. The Panel clarified that the respective amount already also took into consideration any and all salaries paid or not paid by Ascoli to the Player, namely the June 2012 salary and the Player's goal bonus, and further underlined that Al Wahda was jointly and severally liable for payment pursuant to Article 17.2 RSTP.

6. While acknowledging that during the hearing, Ascoli had withdrawn its initial request for sporting sanctions the Panel, referring to consistent CAS case law, underlined that sporting sanctions were decisions inherent to FIFA only. As a consequence, an Appellant requesting that the CAS impose sporting sanctions that had not been imposed by FIFA had to call FIFA as respondent to the proceedings.

Decision

The appeal filed by Ascoli was partially upheld. The decision by the FIFA Dispute Resolution Chamber of 25 April 2014 was set aside, and Papa Waigo N'diaye was ordered to pay Ascoli an amount of EUR 500,000 plus 5% interest per annum from 7 July 2012 to the date of payment. Al Wahda was held jointly and severally liable to pay the amount referenced above to Ascoli.

TAS 2015/A/3920

Fédération Royale Marocaine de Football (FRMF) c. Confédération Africaine de Football (CAF)

17 novembre 2015 (dispositif du 2 avril 2015)

Football; Sanction disciplinaire à l'encontre d'une fédération pour désistement de l'organisation d'un championnat; Notion de décision pouvant faire l'objet d'un appel devant le TAS; Pouvoir d'examen du TAS (de novo); Qualification d'une demande de report de l'organisation d'une compétition en refus; Absence de force majeure (risque sanitaire); Proportionnalité de la sanction sportive; Appréciation des sanctions financières;

Formation

Prof. Luigi Fumagalli (Italie), Président
Me Michele Bernasconi (Suisse)
Me François Klein (France)

Faits

La Fédération Royale Marocaine de Football (ci-après: "FRMF" ou "l'Appelante") est la fédération nationale responsable de l'organisation du football au Royaume du Maroc. Elle est membre de la Confédération Africaine de Football (ci-après: "CAF") et de la Fédération Internationale de Football (ci-après: "FIFA").

La CAF (ci-après: "l'Intimée") est l'organe faitier en ce qui concerne l'organisation du football sur le continent africain. Elle est notamment responsable de l'organisation des compétitions continentales et exerce le pouvoir disciplinaire sur ses fédérations membres, en application de ses Statuts et règlements. Elle est l'une des cinq confédérations de la FIFA.

L'appel a été déposé par la FRMF à l'encontre

de la décision rendue le 6 février 2015 par le Comité Exécutif de la CAF (ci-après: "le Comité Exécutif") concernant les "*sanctions sportives suite au retrait du Maroc pour l'organisation de la Coupe d'Afrique des Nations Orange 2015*" consistant en une suspension de l'équipe nationale A, représentative de la FRMF, de participation aux deux éditions subséquentes de la Coupe d'Afrique des Nations (ci-après: la "CAN"), soit celles de 2017 et 2019, et en une amende réglementaire de USD 1'000'000 (ci-après: "la Première Décision").

L'appel est également déposé à l'encontre de la décision rendue le même jour par le Comité Exécutif concernant les "*sanctions financières suite au retrait du Maroc pour l'organisation de la Coupe d'Afrique des Nations Orange 2015*" (ci-après: "la Deuxième Décision").

En 2010, la FRMF a déposé sa candidature auprès de la CAF pour organiser et accueillir la CAN en 2015.

Le 29 janvier 2011, la CAF a choisi la FRMF pour organiser la CAN 2015 au Maroc.

En mars 2014, face à la propagation de l'épidémie du virus Ebola en Afrique de l'Ouest, le Maroc a mis en place un plan national de veille et de préparation à la riposte contre cette maladie mortelle, conformément aux recommandations de l'Organisation Mondiale de la Santé (ci-après: "OMS").

Le 8 août 2014, l'OMS a qualifié l'épidémie de la maladie à virus Ebola d'"*événement extraordinaire*" et d'"*urgence de santé publique de portée internationale*" constituant un "*risque de*

santé publique pour la communauté internationale”.

En août 2014, au vu de l'évaluation du risque, le Ministère de la Santé du Maroc (ci-après: le “Ministère de la Santé”) et la FRMF ont élaboré un plan de couverture sanitaire dédié à la CAN 2015, incluant une section spécifique concernant le risque Ebola.

Le 8 octobre 2014, le Ministère de la Santé du Maroc a sollicité l'avis du Directeur régional Méditerranée Orientale de l'OMS. Dans sa réponse du 10 octobre 2014, celui-ci a indiqué qu'il revenait au Maroc de décider du maintien ou du report de la date de l'organisation de la CAN 2015 au regard d'une analyse rigoureuse du risque, en prenant en compte les plus récents rapports épidémiologiques sur la maladie.

Le même jour, le Ministère de la Santé du Maroc a pris position et a demandé aux autorités publiques compétentes de reporter l'organisation de tous les rassemblements importants de personnes auxquels participent des pays où le virus est apparu, y compris les manifestations sportives internationales telles que la Coupe d'Afrique des Nations dont l'organisation prévue au Maroc durant les mois de janvier et février 2015.

Dans un communiqué de presse du 11 octobre 2014, le Maroc annonça au public, par la voie d'un communiqué de presse, qu'il souhaitait reporter la CAN 2015.

La CAF fit part au Ministère de la Jeunesse et des Sports du Maroc qu'elle était dans l'impossibilité d'accéder à sa demande et, par conséquent, la CAF confirma le maintien de la CAN 2015.

Le 11 novembre 2014, dans une lettre adressée à la FRMF et au Ministre de la Jeunesse et des Sports du Maroc, le Président de la CAF prit

note de la volonté Maroc de maintenir sa demande de report d'un an du tournoi pour des raisons prétendues “sanitaires de la plus haute dangerosité” et de son refus d'organiser la compétition du 17 janvier au 8 février 2015 évoquant un cas de force majeure. La CAF en déduisit que la FRMF renonçait à l'organisation de la compétition aux dates arrêtées, ce qui équivalait donc à un retrait. Par conséquent, le Comité Exécutif confirma que la CAN 2015 n'aurait pas lieu au Maroc et indiqua que l'équipe nationale du Maroc était disqualifiée et ne pourrait prendre part à la CAN 2015.

Le 14 novembre 2014, la CAF confia l'organisation de la CAN 2015 à la Guinée Equatoriale.

Le 6 février 2015, le Comité Exécutif de la CAF tint une réunion à Malabo pour se prononcer sur la décision du Maroc de ne pas organiser la CAN 2015 prévue du 17 janvier 2015 au 8 février 2015. Au terme de cette réunion, il prit deux décisions, l'une portant sur des “sanctions sportives” (la Première Décision) et l'autre sur des “sanctions financières” (la Deuxième Décision):

- (i) “Sanctions sportives”. Le Comité Exécutif de la CAF considéra que contrairement à ce que soutenait la FRMF, la force majeure ne pouvait être retenue au bénéfice de cette fédération. Aussi, en application des articles 7.1a, 23.11 et 62 des Statuts de la CAF, de l'article 41 des règlements d'application des Statuts de la CAF, de l'article 92.4 des règlements de la compétition et des termes de l'A.A.O. signé pour la CAN Orange 2015, le Comité Exécutif décida de suspendre l'équipe nationale représentative A de la FRMF de toute participation aux deux prochaines éditions de la CAN, celles de 2017 et de

2019, et d'infliger à cette même fédération une amende règlementaire de 1 million de dollars (USD 1'000'000). Cette Première Décision fut notifiée le même jour à la FRMF, avec une motivation sommaire.

- (ii) "Sanctions financières". Lors de la réunion du 6 février 2015, le Comité Exécutif se prononça également sur les "sanctions financières" à l'encontre de la FRMF. En application de l'article 92.4 des règlements de la CAN, la CAF décida de mettre à la charge de la FRMF la somme de EUR 8'050'000 en réparation de l'ensemble des préjudices matériels subis par la CAF et les parties prenantes du fait du désistement survenu. Par courrier du même jour, la CAF informa la FRMF de la Deuxième Décision. Elle indiqua que le détail de l'ensemble des préjudices matériels subis serait communiqué le plus rapidement possible avec les justificatifs requis.

Le 16 février 2015, la FRMF adressa une déclaration d'appel au Tribunal arbitral du Sport (ci-après: le "TAS") à l'encontre de ces deux décisions du Comité Exécutif du 6 février 2015.

L'audience se tint le 17 mars 2015.

Considérants

1. La compétence du TAS en ce qui concerne la Première Décision n'est pas contestée par l'Intimée, qui l'a expressément reconnue dans ses écritures ainsi que par la signature de l'ordonnance de procédure. Quant à l'appel contre la Deuxième Décision, la compétence du TAS est contestée par l'Intimée, dès lors qu'elle considère qu'il ne s'agit pas d'une décision au sens stricte du terme, mais d'une simple lettre dans laquelle le Comité exécutif informa la FRMF que la CAF avait décidé de réclamer la réparation du préjudice subi en le chiffrant à EUR 8'050'000, et indiquait par ailleurs que la CAF adresserait ultérieurement à la FRMF le détail des préjudices matériels, accompagné des justificatifs requis. La Formation arbitrale doit donc décider si la Deuxième Décision est bien une décision dont il peut être fait appel, conformément à l'article R47 du Code. A cet égard, la Formation arbitrale peut se référer à la jurisprudence du TAS, dont il confirme les conclusions (cf. 2010/A/2315). Selon la jurisprudence du TAS, ce qui caractérise une décision est une question de fond et non de forme; par ailleurs, l'autorité qui rend la décision doit avoir l'intention d'affecter les droits d'une personne et ces droits doivent effectivement être affectés; enfin, une décision doit être distinguée d'une simple information. Ainsi, une lettre, aux termes de laquelle une sanction financière est infligée par le comité exécutif d'une fédération à l'un de ses membres, constitue une décision susceptible de faire l'objet d'un recours devant le TAS.
2. L'Appelante fait valoir des arguments d'ordre formel quant à la validité des Décisions querellées. A cet égard, la Formation arbitrale a rappelé que de jurisprudence constante, le TAS considère que des vices formels rencontrés devant les instances des fédérations ou organisations sportives peuvent être guéris par le fait que l'appelant a eu la possibilité de faire appel devant le TAS, qui procède à un examen complet du cas tant en fait qu'en droit (Article R57(1) du Code). En effet, en raison du plein pouvoir d'examen conféré aux formations arbitrales du TAS, l'appel au TAS permet de "*considérer comme purgés les vices de procédure ayant éventuellement affecté les instances précédentes*" (TAS 2004/A/549 par.

- 31; voir également CAS 2003/O/486 par. 50; CAS 2006/A/1153 par. 53; CAS 2008/A/1594 par. 109; TAS 2008/A/1582 par. 54; TAS 2009/A/1879 par. 71). Cependant, certains vices formels graves ayant entachés la procédure devant les instances juridiques des fédérations sportives ne peuvent être guéris devant le TAS. Ainsi, une grave violation du droit d'être entendu d'une partie pourrait, dans certains cas, mener à l'annulation d'une décision rendue par une fédération sportive, en raison de ce vice formel (CAS 2010/A/2275). De même, une décision rendue par un organe incompétent d'une fédération sportive devrait, en principe, être annulée (cf. CAS 2009/A/1903 para. 194 *et seq.*). En tout état de cause, la Formation arbitrale considère que l'absence de motivation d'une décision d'une organisation sportive, aspect particulier du droit d'être entendu, fait partie de vices formels entachant une décision qui peuvent être guéris durant la procédure devant le TAS, dès lors que les formations arbitrales du TAS revoient l'ensemble des cas d'espèce en fait et en droit en application de l'article R47 du Code (sur ce point en particulier, voir également la sentence TAS 2014/A/3475, para. 52ss et CAS 2006/A/1175, para. 8). Cet argument formel est par conséquent écarté par la Formation arbitrale. De même, le grief tiré de la violation du principe du contradictoire et des droits de la défense est infondé si la partie soulevant ce grief a eu l'opportunité d'exposer sa position à plusieurs reprises avant qu'une sanction ne soit prononcée à son encontre.
3. L'Appelante conteste le fait qu'elle se serait désistée de l'organisation de la CAN 2015, au motif qu'elle aurait adressé une simple demande de report de la compétition. L'interprétation des lettres de la FRMF du

10 octobre 2014 et du 8 novembre 2014 comme un "désistement" ou un "retrait" au sens de l'article 90 du Règlement d'organisation de la CAN (Ed. 2011) serait constitutive d'une "erreur de fait" entachant la légalité de la décision attaquée. Cependant, la Formation arbitrale soutient à cet égard la position de l'Intimée, qui considère que demander un report (et persister dans cette demande malgré le refus de son partenaire) signifie ne pas organiser la compétition telle que prévue, mais proposer d'organiser l'événement selon des modalités considérablement différentes que celles qui ont été convenues, soit une autre compétition. Ainsi, une demande de report d'une année par une fédération nationale relative à l'organisation d'une compétition continentale constitue un "refus" ou un "désistement" de l'organisation de cette compétition.

4. L'Appelante estime que sa demande de report de l'organisation de la CAN 2015 était due à un cas de "force majeure". Le facteur principal qui a motivé la demande de report est l'aggravation importante et inquiétante de l'épidémie de la maladie à virus Ebola. L'Appelante considère par ailleurs avoir suivi les recommandations de l'OMS et du Ministère de la Santé. Cependant, la Formation arbitrale considère que l'Appelante n'a pas prouvé un cas de force majeure dans le cas d'espèce, et que, au contraire, la position de l'Intimée à cet égard doit être suivie. Il n'existe pas de définition légale de la force majeure en droit suisse. La jurisprudence suisse retient la force majeure de manière très restrictive. Celle-ci présuppose l'impossibilité de s'exécuter. Des difficultés ne suffisent pas. Ainsi, la condition selon laquelle la prestation -ici l'organisation d'une compétition- ne pouvait absolument pas être fournie par le débiteur en raison d'un

risque sanitaire, n'est pas remplie dès lors qu'une autre fédération a été en mesure d'organiser ladite compétition aux dates convenues en prenant les mesures sanitaires adéquates, ce qui démontre qu'une solution était envisageable.

5. La Formation arbitrale considère qu'en se retirant de l'organisation d'une compétition en l'absence de force majeure, l'Appelante a violé son engagement envers la CAF ainsi que le Règlement d'organisation de la CAN (Ed. 2011) sanctionnant un tel comportement fautif et applicable en tant que *lex specialis*. En règle générale, toute sanction imposée doit être proportionnée à la faute commise. La jurisprudence du TAS souligne que la quotité d'une sanction infligée par une instance disciplinaire dans l'exercice du pouvoir discrétionnaire qui lui est octroyé par le règlement applicable ne peut être revue que lorsque la sanction est manifestement et largement disproportionnée (cf. CAS 2012/A/2762, para. 122). Bien que le cas de force majeure ne puisse être retenu, le degré de culpabilité peut être considéré comme léger au regard de l'ensemble assez exceptionnel de circonstances et notamment de craintes sanitaires sérieuses. Tel est le cas lorsque la décision d'une fédération de ne pas organiser une compétition repose sur l'application du principe de précaution pour la sauvegarde de la vie humaine dans un contexte international de grande peur par rapport à une situation épidémiologique certes maîtrisable, mais inquiétante au vu de monde entier. Dans ce contexte, l'imposition ultérieure d'une sanction "sportive" telle que la suspension de l'équipe nationale à participer aux deux éditions subséquentes d'une coupe continentale est disproportionnée notamment en raison du fait que cette équipe a déjà été disqualifiée pour la

précédente édition.

6. En plus de la sanction purement disciplinaire traitée ci-dessus, la CAF a imposé à la FRMF "une amende réglementaire de 1 million de dollars (1 000 000 USD)", en application du Règlement d'organisation de la CAN (Ed. 2014). Cependant, la Formation a considéré qu'une amende réglementaire doit être réduite en fonction du montant prévu par le règlement applicable au moment des faits (Ed. 2011). Par ailleurs, la Formation a considéré qu'une sanction financière dont le montant n'est pas justifié doit être annulée.

Décision

L'appel déposé par la Fédération Royale Marocaine de Football contre la décision du 6 février 2015 rendue par le Comité Exécutif de la Confédération Africaine de Football concernant les sanctions financières est admis et l'appel déposé par la Fédération Royale Marocaine de Football contre la décision du 6 février 2015 rendue par le Comité Exécutif de la Confédération Africaine de Football concernant les sanctions sportives est partiellement admis.

CAS 2015/A/3926

FC Gelsenkirchen-Schalke 04 v. Union des Associations Européennes de Football (UEFA)

6 October 2015

Football; Disciplinary sanction imposed on a club for stairways blocked by supporters during a match; Autonomy of an association under Swiss law; Scope of UEFA's autonomy under Article 2 of the UEFA Statutes; UEFA's competence to adopt security regulations; Interpretation of Article 38 of the UEFA Safety and Security Regulations; Burden of proof and regulatory assumption under Article 38 of the UEFA Safety and Security Regulations; Requirement to keep stairs "free of any obstructions" under Article 38 of the UEFA Safety and Security Regulations; recidivism under Art. 19 para 1 UEFA DR;

Panel

Prof. Lukas Handschin (Switzerland), Sole Arbitrator

Facts

On 30 September 2014, a group match of the 2014/2015 UEFA Champions League competition (the "UCL") between the Appellant and NK Maribor (the "Match") took place in the Veltins-Arena in Gelsenkirchen (the "Stadium"). The report of the UEFA delegate Claude Runavot submitted on 30 September 2014, 23:06, (the "UCL Delegate Report"), stated in its section "*crowd behaviour (home team) - controversial banner, fans standing blocking the stairways*" the following: "supporters were blocking the stairways". Further, the UCL Delegate Report rated this situation as "unsatisfactory". The UCL Delegate Report pointed out, that further details would follow in an additional report. The UCL Delegate Report was filed by the Appellant with its appeal brief. In his additional report of 1

October 2014 (the "Additional Report"), Claude Runavot further specified his observations. This Additional Report stated the following: "*FC Schalke 04 supporters were standing in two aisles of the North stand, behind the goal, throughout the match. No incident to be indicated due to the positive behaviour of German supporters*".

On 16 October 2014, the UEFA Control, Ethics and Disciplinary Body sanctioned Schalke with a fine of EUR 10,000 based on Article 38 of the UEFA Safety and Security Regulations, which provide that "*the match organiser must take measures to ensure that all public passageways, corridors, stairs, doors, gates and emergency exit routes are kept free of any obstructions, which could impede the free flow of spectators*".

On 13 February 2015, the Appellant filed its statement of appeal against the Appealed Decision. On 6 March 2015, UEFA agreed to submit the proceedings to a Sole Arbitrator. On 12 March 2015, the Appellant also agreed to submit this arbitration to a Sole Arbitrator. On 18 March 2015, Prof. Dr. Lukas Handschin, accepted his appointment as Sole Arbitrator by the President of the CAS Appeals Arbitration Division by duly signing the Arbitrator's Acceptance and Statement of Independence form.

In its statement of appeal, the Appellant requested that: "*The decision of the UEFA Appeals Body of February 2nd 2015 is changed and the decision of the UEFA Control, Ethics and Disciplinary Body of October 16th 2014 is set aside*". In its answer, the Respondent requested to reject the reliefs sought by FC Gelsenkirchen-Schalke 04, to confirm the decision under

appeal and to order FC Gelsenkirchen- Schalke 04 to pay all the costs of this arbitration.

Reasons

1. The association autonomy is enshrined in Article 23 of the Swiss Constitution, Freedom of association, which reads: *“Freedom of association is guaranteed. Every person has the right to form, join or belong to an association and to participate in the activities of an association”*. The Swiss law of private associations provides in Art. 60 et seq. Swiss Civil Code (CC) a very wide degree of self-determination, autonomy and independence. Private associations may issue rules concerning their governance, membership and their own competitions.
2. The scope of the association autonomy is primarily defined by the objectives of the association in the articles of association, in the present case in Article 2 of the UEFA Statutes. Relevant in this case are the objectives of UEFA according to Article 2, i.e. to *“promote football in Europe in a spirit of peace, understanding and fair play, without any discrimination on account of politics, gender, race or any other reason”* (Article 2 lit. b), *“organise and conduct international football competitions and tournaments at European level for every type of football whilst respecting the players’ health”* (Article 2 lit. d) and *“ensure that the needs of the different stakeholders in European football (leagues, clubs, players, supporters) are properly taken into account”* (Article 2 lit. j).
3. UEFA’s competence to adopt security regulations which protect the spectators is in particular foreseen in Article 2 of the UEFA Statutes in lit. d): *“organise and conduct international football competitions”* and lit. j): *“ensure that the needs of the different stakeholders in European football (leagues, clubs, players, supporters) are properly taken into account”*. Security regulations which protect the spectators are based on the objective to

“organise and conduct international football competitions” and to *“ensure that the needs of the different ... supporters ... in European football are properly taken into account”*. As regards the present case in concreto, the Sole Arbitrator deems it is proportional that the stairs in the Stadium have to be kept free of obstructions. It appears obvious that, if the stairways are kept free, the evacuation of spectators is easier. Standing or sitting on the stairways may not necessarily lead to an incident; in most cases it leads to no incident. But it may lead to an incident, with grave consequences, as the 1985 Heysel stadium tragedy has shown. People can be killed in crowd movements if escape ways are obstructed. To prohibit standing on the stairways is a very light intervention. It is easy to apply; all spectators have an assigned seat and can therefore stand in front of the assigned seat. If this light intervention is compared to its purpose, the safety of the spectators in an emergency-situation, these rules are obviously proportional. UEFA is entitled based on the association autonomy to regulate for the benefit of the safety of the spectators a norm that requires the organizer of a football match to keep the stairways free.

4. UEFA has its own regulations regarding the stairways and this regulations require that the stairways have to be kept free. Article 38 of the UEFA Safety and Security Regulations reads in its English version: *“The match organizer must take measures to ensure that all public passageways, corridors, stairs, doors, gates and emergency exit routes are kept free of any obstructions, which could impede the free flow of spectators”*. The focus of this rule is clearly that the stairs must be kept *“free of any obstructions”* and not only obstructions, which could impede the free flow of spectators. If the rule would only apply to those obstructions which impede the free flow of spectators, the rule would be very difficult to apply, since the effect of the

obstruction would always have to be considered when applying the rules.

A security regulation which would only be violated if it could be established that the free flow of spectators is impeded would be very impractical indeed. It would require a constant monitoring of the situation by security personnel. If only obstructions which could impede the free flow of spectators would be forbidden, then the security personnel would have, at a certain point in time when this level is reached, to request the number of spectators standing on the stairways which make the difference between the status of free flow of spectators and impediment of the same to leave. This is impractical and may lead to another security risk in that the persons on the stairs have to leave or in that not all persons standing on the stairways are treated equally. Further, who should be entitled to decide whether the obstructions impede the free flow of spectators, the head of security for the whole stadium or the security officer on site? These uncertainties show that such interpretation of the rule in question would be impractical and rather impede the security of the spectators instead of improving it. A rule which requires that all stairways must be free of any obstructions (even if they do not impede the free flow of spectators) is easy to use, practical and does not lead to different interpretations.

5. According to Article 38 of the UEFA Disciplinary Regulations *“facts contained in official UEFA reports are presumed to be accurate. Proof of the inaccuracy may, however, be provided”*. Article 38 of the UEFA Disciplinary Regulations creates a *“regulatory assumption”*, that the statements contained in official UEFA reports are correct. This regulatory assumption shifts the burden of proof to the Appellant in this case. The function of the burden of proof is to allocate who bears the risk that the proof of a specific fact is

not possible. The regulatory assumption that the report of the UEFA inspector is correct results in a shift of the burden proof to the Appellant.

To assume a *“regulatory assumption”* in this case makes sense, because only the Appellant has the domestic authority (Hausrecht) and only the Appellant has the possibility to secure the evidence in this respect, for example to take pictures or video-recordings of the behaviour of the spectators. Both the UCL Delegate Report and the Additional Report reports have to be analysed in a consolidated matter and they both describe a violation of Article 38 UEFA Safety and Security Regulations. The statement of the delegate that *“no incident to be indicated (...)”* does not nullify the statement regarding spectators on the stairways; it merely confirms that the fact that spectators stood on the stairways had no serious consequences.

6. UEFA has the competence to adopt regulations which protect the spectators, such as Article 38 of the UEFA Safety and Security Regulations. The focus of this rule is clearly that the stairs must be kept *“free of any obstructions”* and not only obstructions which could impede the free flow of spectators. A security regulation which would only be violated if it is established that the free flow of spectators is impeded would be impractical, it would require a constant monitoring of the situation by security personnel. For this reason, it must be concluded that the Appellant violated Article 38 of the UEFA Safety and Security Regulations.
7. According to Article 19 para. 1 lit. a) UEFA DR, offenses which have led to a one-match suspension can be taken into account as repeat offenses if they have been committed within one year of the previous violation. In Article 6, disciplinary measure,

the UEFA DR divide disciplinary measures into disciplinary measures which may be imposed on member associations and clubs and disciplinary measures which may be imposed on individuals. Only lit. c) and d) of Article 19 para. 1 UEFA DR apply to individuals, member associations and clubs. Therefore, Art. 19 Para. 1 lit. a and b are not relevant to interpret the content of Article 19 para. 1 lit. d) in this case. For clubs and associations it is generally acknowledged that recidivism must be assumed if an offense of a similar nature is committed within in five years. Only for corruption and match-fixing cases the time limit for recidivism is ten years.

In view of the above, the Sole Arbitrator holds that the Appellant is to be considered recidivist. The sanction contains two elements: the sanction which would have been imposed on the Appellant without recidivism, and an aggravating element for recidivism. The appellant has only contested the aggravating element (recidivism), but not the sanction as such (without recidivism). It is undisputed, that UEFA sanctioned the Appellant for similar behaviour on 20 June 2011 with a fine of EUR 5,000 (FC Schalke 04 vs. Valencia CF of 9 March 2011) and by decision of 17 October 2013 (FC Schalke 04 v. FC Steauna Buckarest of 18 September 2013) with a fine of EUR 7,500. UEFA, in handing down a fine of EUR 10,000, has considered the Appellant's recidivism as an aggravating element.

Decision

The Sole Arbitrator came to the conclusion that the Respondent had not exceeded its discretionary powers, deemed the fine proportionate and dismissed the appeal.

CAS 2015/A/3981
CD Nacional SAD v. CA Cerro
26 November 2015

Football; Compensation for training; FIFA Circular Letters regarding the calculation of training compensation amount; Inadmissibility of counterclaims in CAS Appeal proceedings; Admissibility of the appeal; CAS power of review; Rationale of the rules on training compensation; Use of guidelines established by FIFA Circular Letters to assess potential disproportion of the standard training compensation;

Panel

Mr Pedro Tomás Marqués (Spain), President
Mr João Nogueira da Rocha (Portugal)
Mr Michele Bernasconi (Switzerland)

Facts

Clube Desportivo Nacional Futebol SAD (the “Appellant” or “Nacional”) is a Portuguese football club affiliated to the Federação Portuguesa de Futebol (“FPF”), which in turn is a member of the Fédération Internationale de Football Association (“FIFA”).

Club Atlético Cerro (the “Respondent” or “Cerro”) is a Uruguayan football club affiliated to the Asociación Uruguaya de Fútbol (the “AUF”), which in turn is a member of FIFA.

Pursuant to the player passport of the football player E. (the “Player”), the Player, born on 26 November 1989, was registered with the Respondent as an amateur football player from 16 March 2007 until 30 September 2009 and, as a professional football player, from 1 October 2009 until 30 August 2012. On 31 August 2012, the Player was registered as a professional player with the Portuguese club Associação Desportiva da Camacha

(“Camacha”). On 26 September 2012, the Player was registered as a professional player with the Appellant.

On 14 March 2014, the Respondent filed a claim before the Dispute Resolution Chamber of FIFA (the “FIFA DRC”) against the Appellant and Camacha, claiming payment of the training compensation from the Appellant and, subsidiarily, from Camacha. Cerro argued that the first transfer of the Player to Camacha was simulated, in order to circumvent the regulations on training compensation, as the Player was first hired by Camacha on 20 August 2012 and subsequently transferred on a loan basis to Nacional on 21 August 2012, without even having to pay any loan fee. For this reason Cerro held that with regard to the payment of the training compensation, the Appellant would have to be considered as the Player’s new club.

On 27 November 2014, the FIFA DRC rendered its decision, partially accepting the claim by Cerro and ordering Nacional to pay to Cerro the amount of EUR 225,000 plus 5% interest p.a. as of 27 October 2012 (the “FIFA DRC Decision”). On 19 February 2015 the grounds of the FIFA DRC Decision were notified to the parties.

On 11 March 2015, Nacional filed its Statement of Appeal against the FIFA DRC Decision with the CAS Court Office pursuant to Article R48 of the Code of Sports-related Arbitration (the “CAS Code”). In a nutshell, Nacional firstly requested for the FIFA DRC Decision to be annulled and secondly, for the CAS Panel to either hold that it does not have to pay training compensation for the Player or,

alternatively, for the training compensation imposed to be declared excessive considering the effective training costs of the Player and for a new, reduced training compensation to be imposed.

On 23 March 2015, the Appellant filed its Appeal Brief requesting amongst others to be provided with an additional deadline of 15 days in order to produce certain documentary evidence; further requesting the CAS Panel to adopt an award annulling the FIFA DRC Decision and adopting a new one, considering the amount of EUR 225.000,00 of training compensation excessive in light of the effective training costs of the Player (those of the Appellant), reducing said amount to EUR 1.000,00 per season.

On 23 April 2015, the Respondent filed its Answer to the Appeal, requesting, amongst others, the CAS to reject Nacional's request for an extension of its deadline to present documentation as well as Nacional's request for Cerro to produce documentation regarding the average of costs effectively incurred by Cerro in training; further to reject the Appeal by Nacional and – in case CAS were to determine the training compensation to be paid, to declare it to amount to EUR 237,616.

On 20 May 2015, the CAS Court Office notified the parties that the Panel had rejected the Appellant's request to extend the deadline to produce documentary evidence. Further that the Panel had also rejected the Appellant's request for the production of documentary evidence regarding the average costs effectively incurred by Cerro with its youth players, more specifically the Player E.

On 1 September 2015 a hearing took place in Lausanne, Switzerland.

Reasons

1. The Panel noted that whereas FIFA Circular Letters (FIFA Circular Letters no. 826 and no. 1299, both referred to by the parties, established the indicative amount of EUR 60,000 per season in relation to European clubs belonging to category 2, as is the case for the Appellant) issued by FIFA pursuant to Article 4.2 of Annexe 4 of the RSTP were not regulations in a strict legal sense, they reflected the understanding of FIFA and the general practice of federations and associations belonging thereto (see, e.g., CAS 2009/A/1908) and were therefore relevant for the interpretation of the relevant FIFA rules and had to be taken into account to decide the dispute.
2. Seeing that unlike in its Statement of Appeal, in its Appeal Brief Nacional had not challenged the main pronouncement that Nacional shall pay to Cerro the training compensation envisaged by Article 20 RSTP, but had rather limited its legal argumentation to sustain an alleged disproportion of the amount of the training compensation, the Panel – in line with the Respondent's position during the proceedings – found that the appeal was simply intended to reduce the amount of the training compensation awarded by the FIFA DRC, but not to question Nacional's obligation to pay such training compensation. Further, with respect to the Respondent's petition for training compensation amounting to EUR 237,616, the Panel held that the respective submission by the Respondent did not constitute a mere statement of defence but a genuine counterclaim which exceeded the content any answer to an appeal could have under Article R55 of the CAS Code. The Panel further held that whereas in its view, the FIFA DRC had apparently committed a material error when calculating the training compensation, and had granted an amount

lower than the correct one, it had to take into account that the Respondent had not filed an independent appeal with the CAS against the FIFA DRC Decision; and that insofar as since the amendment of the CAS Code in 2010 it was no longer possible for a respondent to submit a counterclaim at the late stage of the filing of the Answer to the Appeal, the petition submitted by the Respondent had to be rejected *a limine*. The Panel concluded that the sole issue to decide was whether or not there was any ground to reduce the training compensation awarded by the FIFA DRC to the Respondent.

3. The Appellant claimed that when taking into account the effective training costs incurred in connection with the Player, the amount awarded as training compensation was excessive and disproportionate. The Appellant based its position on the average costs it spent for the training of its young players, claiming in particular that during the 2014/2015 sporting season it had trained a total number of 507 youth players (which would be its average annual number of young players under training of the past 10 years) and had spent an annual budget of EUR 437,769 per year in their training. Therefore, in the Appellant's opinion, its average training cost per player and year amounts to EUR 1,000.

Conversely the Respondent argued that insofar as before the FIFA DRC, the Appellant had not requested the revision of the training compensation resulting from the application of the indicative amounts established by the FIFA Circular Letters, and had not filed with the latter any evidence for this purpose, the FIFA DRC did not take a decision in that regard which could be appealed before CAS; that therefore the appeal was not admissible. The Respondent further argued that in any

case, the Appellant had not proved the disproportion of the amount awarded as training compensation and therefore requested for the appeal to be dismissed.

Whereas the Panel agreed with the Respondent that as a general rule, a party objecting to the result of a calculation based on the rules on training compensation should refer the matter to the FIFA DRC, it also held that in its opinion a party may first - before the FIFA DRC – exclusively challenge its obligation to pay any training compensation and later on, in case its claim is rejected by the said body, limit any further appeal before the CAS to challenging the amount of the training compensation awarded by the FIFA DRC. The Panel therefore dismissed the Respondent's claim of the inadmissibility of the appeal.

4. The Panel further found that pursuant to Article R57 of the CAS Code, it had full power to review the facts and the law within the limits determined by the parties within the appeal procedure, and was empowered to issue a new decision replacing the appealed one. It further held that in addition, accepting that by doing this it may theoretically decide an aspect of a decision that was not previously and expressly addressed by the first instance body (i.e. the potential reduction of the training compensation to be awarded due to its potential disproportion with the effective training costs), this was not prohibited by or against any specific provision of the CAS Code or any of the applicable regulations. Indeed, the Panel considered that, in principle, in the appeal procedures before the CAS the parties are not bound by the specific position held by them in the previous instance, but are able to file new arguments or evidence provided that these are in relation with the submissions filed therein (i.e. like in the case at stake, where

the Appellant moved from requesting that no training compensation be awarded to the Respondent to requesting the reduction of its corresponding amount). For these reasons the Panel dismissed the arguments made by the Respondent in this regard.

5. With regards to the request for the reduction of the training compensation, the Panel firstly took into account that in light of the aim of the training compensation – i.e. to stimulate solidarity within the world of football, not to reimburse actual training costs - the rationale of the rules on training compensation was for such compensation to be a reward and an incentive rather than a refund of the actual training costs incurred in training young players. The Panel further underlined that under the RSTP, the new club of the Player may ask for the reduction of the training compensation fee if it deemed that the amount resulting from the indicative amounts and principles of the FIFA Regulations was *“clearly disproportionate to the case under review”*.
6. The Panel further held that according to Article 8 of the Swiss Civil Code the burden of proof of any reason to deviate from the indicative amounts envisaged by the RSTP and to reduce the amount of the training compensation would lie on the Appellant. With regard to the type of evidence apt to substantiate the alleged disproportion of the training compensation, the Panel in particular referred to FIFA Circular Letter no. 799, which set out some specific criteria for calculating training compensation; the Panel clarified at the same time that whereas according to FIFA Circular Letter 769, *“to render the system manageable and to ensure predictability as to the amount of training compensation due, the training and education costs to be compensated will not be calculated for each individual club”*, the guidelines established by the FIFA Circular Letters could be used to

calculate the effective training cost of one player in a particular case, in order to assess if the standard training compensation amount was *“clearly disproportionate”*. The Panel found that the Appellant had not discharged its burden of proof as it had only submitted one piece of evidence in support of its appeal, specifically a self-made document of one page containing an alleged summary of the costs corresponding to the Appellant’s *“Youth Football Budget Season 2014/2015”*. The Panel, noting first that the season 2014/2015 did not correspond to any of the sporting seasons in which the Player was affiliated with the Respondent, further underlined that the summary was not supported by any document, background or accounting official document or expert report proving the reality of such costs; it therefore concluded that the evidence provided was not sufficient to establish to its comfortable satisfaction the alleged disproportion of the training compensation. Notwithstanding this, the Panel further held that even assuming that the Appellant had discharged its burden of proof, following its own calculation of the adequate training compensation the Panel had come to the conclusion that the training compensation awarded by the FIFA DRC Decision was not to be deemed as disproportionate in the terms envisaged by Article 5.4 of Annexe 4 RSTP and that, on the contrary, it was fully in accordance with the applicable rules.

Decision

The Panel dismissed the appeal filed by Nacional and confirmed the FIFA DRC Decision.

CAS 2015/A/4129

Demir Demirev et al. v. International Weightlifting Federation (IWF)

6 October 2015 (operative part of 25 August 2015)

Weightlifting; Doping (stanozolol); Condition to grant a stay of the arbitration proceedings; Burden and standard of proof; No significant fault or negligence under the 2015 WADAC; Degree of fault;

Panel

Judge James Reid QC (United Kingdom),
President
Mr Luc Argand (Switzerland)
Prof. Ulrich Haas (Germany)

Facts

International Weightlifting Federation (“IWF”) is the international body governing the sport of weightlifting. It is a signatory of the World Anti-Doping Code (“WADC”). It is a not for profit organization governed by Article 60 *et seq.* of the Swiss Civil Code and its Constitution, and having its seat in Lausanne, Switzerland.

Mr Demir Demirev, Mr Stoyan Enev, Mr Ivaylo Filev, Ms Maya Ivanove, Ms Milka Maneva, Mr Ivan Markov, Mr Dian Minchev, Mr Asen Muradiov, Mr Ferdi Nazif, Ms Nadezha-May Nguen and Mr Vladimir Urumov (collectively “the Athletes”) are international athletes in the weightlifting discipline affiliated to the Bulgarian Weightlifting Federation which is a member of the IWF. As such the Athletes are bound by the terms of the IWF Anti-Doping Policy (“IWF ADP”).

In March 2015 the Athletes were in training for the European Championships. On 2 March 2015 they all supplied out-of-competition urine samples in Sofia,

Bulgaria. On the doping control forms most of the Athletes declared they had taken prescription or non-prescription medications or supplements over the preceding seven days.

None of the Athletes mentioned having taken a supplement called Trybest. None of the medications/supplements mentioned by the Appellants were supposed to contain prohibited substances.

The Athletes and the accompanying person certified that the sample collection was conducted in accordance with the relevant procedure and that the information given by them on the Doping Control Form was complete and accurate.

By reports dated 18 March 2015, the accredited laboratory in charge of testing reported, for all the Athletes, Adverse Analytical Findings (AAFs) of 3'-hydroxystanozolol glucuronide and mentioned that the presence of this substance was consistent with the administration of the prohibited substance stanozolol, an S1.1 anabolic agent in the WADA Prohibited List: 3'-hydroxystanozolol glucuronide is a stanozolol metabolite.

By notices titled “*Report on Adverse Analytical Finding*”, dated 19 March 2015, the IWF informed the athletes of the AAFs that they were provisionally suspended from any weightlifting activity and that they might request the analysis of the B-samples and a hearing before the IWF Hearing Panel.

The B-samples’ analyses, requested by the Bulgarian Weightlifting Federation, were conducted by the laboratory. The laboratory

concluded that the results were the same as for the A-sample analyses.

In the meantime, on 26 March 2015, the BWF requested the IWF to have a supplement called Trybest analysed by an accredited laboratory, and on 27 March 2015, the IWF agreed.

On 22 April 2015, the laboratory informed the IWF that *“in all analysed capsules stanozolol was detected”* and that *“stanozolol was not declared as ingredient on the label of the TRYBEST products”*.

At the beginning of April 2015, the Athletes provided *“Explanation letters”* to the IWF. They all stated that they never attempted to take any prohibited substance, but only dietary supplements, amino acids and vitamins such e.g. as *“Trybest”* (explicitly mentioned in all the statements). They all said that they were unpleasantly surprised by the result of the doping control, that they had no explanation for the findings and were greatly concerned for their sports careers.

The Athletes requested a hearing before the IWF Hearing Panel. The hearing was held on 10 June 2015. At the hearing the Athletes accepted the accuracy of the Adverse Analytical Findings (AAFs) reported by the laboratory and that the IWF has established anti-doping rule violations of article 2.1 IWF ADP and that they were responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. They argued, however, that they bore no fault or negligence, so that the otherwise applicable period of ineligibility should be eliminated in accordance with Article 10.4 IWF ADP. They argued that Trybest was an established supplement which had been used for many years without any adverse analytical findings and that the findings in their cases had been caused because some unknown person or persons had deliberately sabotaged the particular batch of Trybest.

The IWF Hearing Panel did not accept this

submission. It found, on the balance of probabilities, that the Athletes had established that the prohibited substance entered their system, through the ingestion of the supplement Trybest given to them by the BWF staff during a training camp in Bulgaria, but did not find that the possibility of sabotage has been established on the balance of probabilities. The Panel considered that the most likely reason why stanozolol was found in the samples given by the athletes was that they were administered contaminated supplements, but not as a result of deliberate sabotage. The Panel considered that on a balance of probabilities the Athletes bore no significant fault or negligence, because Trybest had been used for several years by the Bulgarian team, without problems with anti-doping testing. The athletes and their entourage therefore had reason to believe that the supplement was safe. But taking 15 to 20 different supplements was a risk factor they should have considered. In addition they did not mention Trybest on the Doping Control Forms, which they should have. Taking these factors into account and bearing in mind the terms of Article 10.5.1 and 10.5.2 IWF ADP the Panel applied the same sanction of 9 months of ineligibility to all the Athletes being sanctioned for a first violation, and for the Athletes who have been sanctioned before, an increased sanction in accordance with article 10.7.1 IWF ADP of 18 months ineligibility. In each case the period of provisional suspension was to be credited and the individual results the Athletes achieved between the testing and the provisional suspension disqualified.

The Appellants filed their Statement of Appeal with the CAS on 6 July 2015. The Athletes sought provisional measures pending the determination of the appeal as well as substantive relief. A hearing was held.

Reasons

1. Inter alia the Athletes sought a stay of the decision appealed against and of the appeal

proceedings until the end of criminal proceedings said to be ongoing in Bulgaria. The Panel rejected the application by the Appellants to defer the hearing of the appeal until after the conclusion of the criminal proceedings instigated in Bulgaria and to stay the penalties imposed in the meanwhile. The decision whether to stay the proceedings was a procedural one to be made by the Panel. The Panel found that under the applicable Swiss law, the alleged existence of criminal proceedings does not constitute a mandatory ground for staying an arbitration proceedings especially where no issue was raised by the appeal that it was beyond the competence of the CAS panel to determine on the evidence before it.

2. The Appellants' primary case was that the Trybest capsules which they had taken were the source of the prohibited substance, stanozolol and that those capsules had been deliberately sabotaged in the course of manufacture. In these circumstances, it was said, there was no fault or negligence on the part of the Appellants, the appeal should be allowed and the applicable periods of ineligibility eliminated.

The Panel stressed that under the applicable anti-doping rules, in order to benefit from an eliminated or reduced sanction, the burden of proof is placed on the athlete to establish that the violation of the anti-doping rules was not intentional and/or that he bears no fault or negligence or no significant fault or negligence. The standard of proof is the balance of probabilities. In this respect, while sabotage theories produced by the athletes - which could entitle the athletes to be absolve from any penalty- may be possible, they are not sufficient in the absence of evidence showing that it is more likely than not that a prohibited substance was introduced as a deliberate act of sabotage. Neither

individually nor collectively did the factors on which the athletes relied established on the balance of probabilities that the capsules were sabotaged by the deliberate introduction of stanozolol. On the other hand, the Panel found that the athletes, on a balance of probabilities, bore no significant fault or negligence, because they were administered contaminated supplements. Therefore, the no significant fault or negligence regime applicable to contaminated supplements will benefit the athletes.

3. Under the IWF Anti-Doping Policy in force since 1 January 2015 adopted according to the amendment of the WADA Code, the standard sanction for a first anti-doping violation is 4 years ineligibility for a first offence. In cases where an athlete can establish no significant fault or negligence and that the detected prohibited substance came from a contaminated product, then the period of ineligibility shall be, at a minimum, a reprimand and no period of ineligibility, and at a maximum, two years of ineligibility, depending on the athlete's degree of fault. This is substantially more generous to the athlete than the provision under which, in other cases where the athlete can establish no significant fault or negligence, the penalty may be reduced to a minimum of one half of the standard period of ineligibility, that is to say 2 years.
4. In the present case the principle factors urged on behalf of the Athletes for a reduction of the penalty to the greatest extent permitted by the IWF ADP were that they had reason to believe that the capsules were safe, that they had taken them without any problem over a period of years, that they had done so under the direction of the team doctor, and that, though they had not specifically mentioned Trybest as something they were taking on the doping

control forms, the Athletes had in general terms mentioned the categories of supplement into which Trybest fell. Finally it was submitted that the periods of ineligibility imposed would have very adverse consequences on their ability to qualify for the next Olympic Games.

The Panel considered that the fact for an athlete to comply with the directions of a team doctor in taking a product does not absolve him from all liability. Similarly, it is not sufficient for an athlete to declare on a doping control form in the most general and anodyne of terms the type of supplements he claimed to be taking. The Panel found that it behoves those who choose to enter on complicated regimes of supplements in an endeavour to maximise their performance to take the greatest care not only in what they take, but in how they declare it. However, the fact that a supplement had been used over a substantial period without any adverse consequences weighs substantially in the favour of the athletes. However, even if an athlete cannot be expected to carry out regular analysis of each new batch, there should be evidence of care being taken by the athletes to ensure the product was and continued to be appropriate.

In reviewing the facts and the law as provided by Art R57 of the CAS Code, the Panel paid attention to the decision of the IWF Hearing Panel, and came to the conclusion that the appropriate penalty in the case of those Athletes who are first offenders is one of 9 months ineligibility, that is to say considerably less than half the maximum penalty which could be imposed. In the cases of the Athletes, who have been found to have committed a second anti-doping offence, it was not argued that a penalty double that of the penalty imposed on the first offenders was inappropriate.

Accordingly the appropriate penalty in each of those cases is one of 18 months in accordance with Article 10.7.1 of the IWF ADP.

Decision

It follows that the appeal must be dismissed and the decision of the IWF Anti-Doping Panel is confirmed.

CAS 2015/A/4151

Panathinaikos FC v. Union des Associations Européennes de Football (UEFA) & Olympiakos FC

26 November 2015 (operative part of 24 August 2015)

Football; Eligibility of a club to participate in a UEFA competition; Sufficient interest to appeal; Distinction between admission and competition phases; Standing to sue after the competition phase has under Article 81.01 of the UEFA Champions League Regulations (UCLR);

Panel

Mr Mark Hovell (United Kingdom), President;
Mr Manfred Nan (the Netherlands);
Mr Jan Räker (Germany)

Facts

Panathinaikos FC (“Panathinaikos” or “the Appellant”), is a football club currently competing in Super League Greece (the “Super League”). It is a member of the Hellenic Football Federation (HFF), which in turn is affiliated to Union des Associations Européennes de Football (UEFA; “the First Respondent”). Olympiakos FC (“Olympiacos” or “the Second Respondent”) is a football club currently competing in Super League and a member of the HFF.

In the summer of 2010, Evangelos Marinakis became the majority owner of Olympiakos. On 3 December 2014, Greece’s Assistant Prosecutor Against Corruption, Aristides K. Koreas filed a preliminary report (the “Koreas Report”), alleging that Mr. Marinakis was involved in match-fixing. On 17 December 2014, the Supervising Prosecutor of the First Instance Court of Athens found that there was sufficient evidence against Mr. Marinakis for the case to be advanced to the second stage of Greek criminal proceedings and the case was

assigned to the Special Investigating Judge for Corruption, Giorgos Andreadis.

By virtue of winning the Super League in the 2014/15 season, Olympiakos achieved sporting qualification directly to the group stages of the 2015/16 UEFA Champions League. On 15 May 2015, Olympiakos duly sent to UEFA its Admission Criteria Form for the UEFA Club Competitions 2015/16. Olympiakos attached a “*Statement of Accusations against President of Olympiakos FC Mr. Marinakis*”, noting the ongoing match-fixing investigation taking place in Greece.

On 12 June 2015, Panathinaikos submitted the Koreas Report and a summary of the ongoing investigation into allegations of match-fixing by Mr. Marinakis to UEFA. However, Panathinaikos did not submit a formal complaint under Article 48 of the 2014 UEFA Disciplinary Regulations (“UEFA DR”) at this stage.

On 17 June 2015, the UEFA Appeals Body decided to suspend the proceedings against Olympiakos and to provisionally admit the latter into the UEFA Champions League 2015/16 (the “Appealed Decision”).

On 19 June 2015, Panathinaikos filed a formal complaint with UEFA against Olympiakos, pursuant to Articles 48(c) and (g) of the UEFA DR. Briefly, Panathinaikos referred to and analysed evidence and findings in the Koreas Report and requested that Olympiakos be banned from the 2015/16 Champions League and additional UEFA competitions pursuant to applicable UEFA Regulations. On 23 June

2015, UEFA informed Olympiakos that disciplinary proceedings had been opened based on Article 48(g) of the UEFA DR.

On 10 July 2015, a Decree of the Appeals Council of Athens was issued, dropping a number of other historic charges against Mr. Marinakis on the basis that “*there was insufficient evidence of guilt for him for the offences*”.

On 17 July 2015, the draw was held for the third qualifying round of the 2015/16 Champions League. Panathinaikos was drawn against Club Brugge KV (Belgium). On 5 August 2015, Panathinaikos was eliminated from Champions League competition on sporting merit by Club Brugge KV after losing 4-2 on aggregate.

On 23 July 2015, the UEFA Appeals Body held a hearing. At the hearing, the Chairman of the UEFA Appeals Body was informed that Panathinaikos had filed an appeal before the CAS against the Appealed Decision. Also on 5 August 2015, in light of the pending CAS case, the UEFA Appeals Body ordered the following procedural measure: “*To provisionally suspend the present UEFA proceedings until the Court of Arbitration for Sport renders its final decision in the procedure CAS 2015/A/4151 Panathinaikos FC v. UEFA & Olympiakos FC*”.

On 10 August, Panathinaikos filed its Appeal Brief with the CAS. The Appeal Brief, contained - amongst others - the following prayers for relief, requesting that the CAS: “*1. Annuls the decision of the UEFA Appeals Body dated 17 June 2015; 2. Declares the Second Respondent ineligible to participate in 2015/16 UEFA competitions (including, without limitation, the 2015/16 Champions League); and 3. Imposes disciplinary sanctions against the Second Respondent as it deems appropriate (...)*”.

Reasons

1. As a general introduction to its legal reasoning, the Panel stated that it could not be that every club that had been knocked out of the 2015/16 UEFA Champions League competition had a sufficient interest to appeal the Appealed Decision to CAS. Panathinaikos had submitted that it had an interest to ensure there is a fair competition and that its integrity is preserved. The Panel however found that every football club could say that, but it was UEFA’s role to safeguard the integrity of its competition. Further, the requirement of Article 62.2 of the UEFA Statutes was for a club to be “directly affected”. It was not that every competitor was “affected” as they were in the competition, they needed to be affected directly or legally. However, the Panel noted Panathinaikos was not like every club or competitor, it had a unique position compared to such other competitors, as it had indeed finished as the runner up behind Olympiakos in the Super League 2014/15.
2. For the Panel, the crux of the matter was that if it would determine that the UEFA Appeals Body were wrong in failing to declare Olympiakos ineligible pursuant to Article 4.02 of the UCLR, would it find that Panathinaikos had demonstrated that it would replace Olympiakos in the Group Stages of the 2015/16 UEFA Champions League? Theoretically, this could have come in one of two ways: a) pursuant to Article 4.08 of the UCLR, which states that a club which is not admitted to the competition is replaced by the next best-placed club in the top domestic championship of the same association; or b) pursuant to Article 81.01 of the UCLR, according to which any matters not provided for in the UCLR, such as cases of force majeure, will be decided by the UEFA Emergency Panel.

On the one hand, UEFA was submitting that, as the 2015/16 UEFA Champions

League had already started, there would be no automatic replacement pursuant to Article 4.08 of the UCLR. Once the UEFA Champions League was underway, then any replacement was a matter for the Emergency Panel to determine, pursuant to Article 81.01 of the UCLR. In practice, UEFA had never applied Article 4.08 after a competition had started. Moreover, Panathinaikos had already participated in the 2015/16 UEFA Champions League, having been knocked out on sporting merit by Club Brugge KV during the third qualifying round. On the other hand, Panathinaikos was submitting that nowhere in Article 4.08 did it state that the replacement rule ended once the competition had started.

The Panel noted that although the drafting of Article 4.08 could indeed have been clearer, when considering the interpretation of the UCLR, in various parts of Article 4, the sub-articles that were intended to continue after the admission phase were expressly stated to do so. Also, when considering the practicalities of the Champions League tournament, there needed to be an admissions phase. During that phase eligibility was considered, whether on alleged match fixing grounds, or licensing and financial grounds. But, at a certain stage, the names needed to “*go into the hat*” and be drawn and the qualifying rounds of the competition needed to start. The Panel also noted that pursuant to Article 13.02 of the UCLR the competition consisted of the “*qualifying stage*”, the “*play offs*” and the “*UEFA Champions League*”. In the Panel’s determination, the competition phase started with the qualifying stages and at this time the admission phase had concluded. Moreover, in the previous cases where the UEFA had made use of Article 4.08, the competition phase had not yet commenced.

3. UEFA was stating that after the competition had started, any issues were “disruptive” and were the domain of the Emergency Panel to deal with in a way to protect the smooth running and integrity of the competition.

The Panel noted the previous instances where the competition was underway and the Emergency Panel was called into action; it had never relied upon Article 4.08 of the UCLR. It also noted the wide discretion that Article 81.01 of the UCLR gave to the Emergency Panel, but found that standing to sue had however to be restricted to a club that could show to the Panel that it would directly replace an excluded club and not by the means of possibly being entered into a draw along with a number of other clubs or by a possible one-off decision that the Emergency Panel could take. Panathinaikos had not established to the Panel that Article 4.08 of the UCLR should survive the commencement of the competition, nor that the outcome from the Emergency Panel would be that it would simply replace Olympiakos with Panathinaikos, as it had finished in second place in the Super League.

Ultimately, the Panel stated that it could not – and did not have to – second guess exactly what the Emergency Panel would do, but that there was some logic in UEFA’s position that the most likely outcome would be to order a draw from the various clubs eliminated from the play-off round (so this would not include Panathinaikos in any event) as these were the last to be eliminated, so the closest on sporting merit; and that it would not advance Panathinaikos ahead of the club (Club Brugge KV) that had already eliminated it on the pitch.

Decision

Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Panel concluded that Panathinaikos had no standing to sue and dismissed the Appeal by Panathinaikos.

CAS 2015/A/4213

Khazar Lankaran Football Club v. Fédération Internationale de Football Association (FIFA)

5 January 2016

Football; Termination of a contract of employment without just cause; Power of a CAS Panel to determine its own jurisdiction under Swiss law; Legal basis for an appeal against a FIFA decision; Notion of a “decision” according to CAS case law; Letter as a challengeable decision under Art. R47 CAS Code; Absence of an opportunity to obtain a binding and challengeable decision and denial of justice;

Panel

Prof. Petros Mavroidis (Greece), President
Mr Jan Räker (Germany)
Mr Raymond Hack (South Africa)

Facts

On 12 November 2011, Mr Veldin Muharemovic, a professional player of Bosnian-Herzegovinian nationality, initiated proceedings with the FIFA Dispute Resolution Chamber (the “DRC”) to obtain compensation for the damages incurred following Khazar Lankaran’s unilateral termination of the employment relationship existing between them.

In a decision dated 20 August 2014, the DRC decided to partially accept the claim, ordered Khazar Lankaran FC, to pay to the claimant the amount of AZN 3,000, and declared Khazar Lankaran banned from registering any new players, either nationally or internationally, for the two next entire and consecutive registration periods following the notification of the decision.

On 9 July 2015, the Court of Arbitration for Sport (the “CAS”) dismissed the appeal filed by Khazar Lankaran on 23 October 2014 against the Initial Decision, confirming thus the original decision of 20 August 2014 by the DRC.

On 26 August 2015, the Football Association of Azerbaijan (“AFFA”) sent a letter to Mr Omar Ongaro, FIFA Head of the Players’ Status and Governance, requesting clarification as to “*whether FC Khazar Lankaran is able to make transfers after 31/08/2015 (ex., whether they are able to sign players, whose contracts have been finished before 31/08/2015)*”. On 28 August 2015, Mr Marco Villiger, FIFA Director of Legal Affairs, and Mr Omar Ongaro sent their response to AFFA. They stated therein that “*in accordance with the [Initial Decision], we inform you that the registration of new players for [Khazar Lankaran] will only be possible as of the beginning of the next registration period fixed by your association (cf. art. 17 par. 4 of the Regulations on the Status and Transfer of Players)*”. On 8 September 2015, Khazar Lankaran invited Mr Marco Villiger to confirm its ability to register free players as from 31 August 2015 “*in accordance with the 2010 edition of the Regulations, CAS jurisprudence and the established legal principle of non-retroactivity*”. On 11 September 2015, Mr Marco Villiger and Mr Omar Ongaro sent their written response to Khazar Lankaran, and indicated inter alia that, based on Khazar Lankaran’s correspondence, they do not find any elements for a different appreciation of the situation and that they adhere to their previous position and kindly refer to the contents of their aforementioned communication. They also emphasized that all

the considerations included in the letter were of general nature and as such without prejudice whatsoever.

On 17 September 2015, Khazar Lankaran filed its statement of appeal with the CAS with respect to FIFA's letters of 11 September 2015 (the "Litigious Letter"), requesting, inter alia, the CAS to "*order FIFA to take all necessary steps and/or refrain from any actions in order to enable [Khazar Lankaran] to register new players on a provisional basis within the shortest timeframe possible*".

Reasons

1. The CAS is competent to determine its own jurisdiction and whether it may adjudicate the merits of the appeal. The so-called "Kompetenz-Kompetenz" of an international arbitral tribunal sitting in Switzerland is recognized by Article 186 para. 1 of the Swiss Law on Private International Law, which is applicable to CAS arbitration proceedings. As this is an appeal arbitration procedure, the Panel must address any jurisdictional issue, first by considering Article R47 para. 1 of the Code, which reads as follows: "*An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body*".
2. The legal basis for an appeal against a FIFA decision is set out in Article 63 para.1 of the FIFA Statutes, edition 2011 (or Article 67 para. 1 of the FIFA Statutes, current edition), according to which "*Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS*

within 21 days of notification of the decision in question". In accordance with the above provisions, the CAS has the power to adjudicate appeals against a sports organization (i.e. a federation, association or sports-related body) provided notably that an actual "decision" has been issued, that it is final (i.e. all other available stages of appeal have been exhausted) and that it is challenged in a timely manner.

3. The applicable FIFA regulations, in particular the FIFA Statutes, do not provide any definition for the term "decision". The possible characterisation of a letter as a decision was considered in several previous CAS cases (CAS 2008/A/1633; CAS 2007/A/1251; CAS 2005/A/899; CAS 2004/A/748; CAS 2004/A/659). The Panel endorses the definition of "decision" and the characteristic features of a "decision" stated in those CAS precedents: "*the form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitute a decision subject to appeal*" (CAS 2008/A/1633 para. 31; CAS 2007/A/1251 para. 30; CAS 2005/A/899 para. 63; CAS 2004/A/748 para. 90).

"In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties" (CAS 2008/A/1633 para. 31; CAS 2007/A/1251 para. 30; CAS 2005/A/899 para. 61; CAS 2004/A/748 para. 89). "*A decision is thus a unilateral act, sent to one or more determined recipients and is intended to produce legal effects*" (CAS 2008/A/1633 para. 31; CAS 2004/A/748 para. 89; CAS 2004/A/659 para. 36). "*An appealable decision of a sport association or federation "is normally a communication of the association directed to a party and based on an*

'animus decidendi', i.e. an intention of a body of the association to decide on a matter [...]. A simple information, which does not contain any 'ruling', cannot be considered a decision". (CAS 2008/A/1633 para. 32)

4. On 26 August 2015, AFFA wrote to Mr Omar Ongaro in order to “clarify with [him] whether FC Khazar Lankaran is able to make transfers after 31/08/2015 (...)”. On 28 August 2015, Mr Marco Villiger and Mr Omar Ongaro sent their response to AFFA. A textual reading of the letter to FIFA and the response provided suggests that AFFA had asked Mr Ongaro to “clarify” the consequences of the Initial Decision on Khazar Lankaran, in particular to say whether the latter was entitled to register new players as from 31 August 2015. In their response, Mr Marco Villiger and Mr Omar Ongaro “informed” AFFA that “in accordance with the [Initial Decision]”, Khazar Lankaran could register new players only as of the beginning of January 2016.

AFFA was not requesting FIFA to issue a formal decision. Indeed, unlike other legal orders, there is nothing like a procedure embedded in the FIFA legal order, whereby ‘clarifications’ of decisions can be sought. Likewise, Mr Marco Villiger and Mr Omar Ongaro had no reason to believe that AFFA was expecting anything else than the mere confirmation of the date on which would end the ban imposed upon its affiliate by the DRC. That much, nevertheless, had been decided already in the FIFA decision of 20 August 2014, and confirmed subsequently by the CAS. In addition, in their letter of 28 August 2015, Mr Marco Villiger and Mr Omar Ongaro made clear that their evaluation of the situation was based strictly on the Initial Decision. In other words, it appears that the FIFA Representatives had neither the competence to issue a ‘clarification’ decision, nor the animus

decidendi to issue a new and independent ruling, distinct from the Initial Decision.

As to the Litigious Letter, by means of its letter of 8 September 2015, Khazar Lankaran was not explicitly requesting a formal decision and the FIFA Representatives had no reason to infer differently. The Litigious Letter does not constitute a challengeable decision, as it does not contain a ruling affecting the rights of Khazar Lankaran. It is not a ruling materially affecting the legal situation of the Parties. On the contrary, the content of the Litigious Letter is perfectly consistent with point n° 6 of the operative part of the Initial Decision.

It also seems evident from the text of the Litigious Letter that Mr Marco Villiger and Mr Omar Ongaro did not intend such communication to be a decision issued on behalf of the FIFA. They lacked the animus decidendi. The FIFA Representatives carefully chose their words and insisted on the purely informative nature of their letter of 11 September 2015. In an unambiguous manner, they confirmed that they maintained the “position” expressed to AFFA and did not find any reason to have “a different appreciation of the situation”. The Litigious Letter does not raise any new question nor implement new measures, which may suggest that it considered the Initial Decision as being incomplete in some manner. From the beginning, the FIFA Representatives have always expressly declared that the Initial Decision was final and kept referring to it as being binding for Khazar Lankaran as well as for FIFA. For all the above reasons, the Panel holds that the Litigious Letter dated 11 September 2015 is not a final decision.

5. The FIFA Regulations do not contain a specific provision allowing a party to file a

request for clarification of a decision issued by FIFA. The absence of any viable opportunity to obtain a legally binding and challengeable clarification might likely have to be treated as or like a denial of justice, which would be treated like a decision subject to an appeal at CAS (see CAS 2005/A/944 para. 58, 71).

However, the absence of this procedure is not fatal to the interests of Khazar Lankaran or other clubs/addressees of FIFA decisions that might find themselves in similar position. Khazar Lankaran had several other options at its disposal if it wanted to clarify the actual length of the effective ban imposed upon it, should it consider, of course, that point n° 6 of the operative part of the Initial Decision contained some uncertainty in this regard.

Decision

The Panel concluded that the Litigious Letter dated 11 September 2015 was not a final decision. Based on Article R47 of the Code and the applicable FIFA Regulations, the appeal was declared inadmissible.

Jugements du Tribunal Fédéral* Judgements of the Federal Tribunal



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

Judgment of the Swiss Federal Tribunal 4A_324/2014

16 October 2014

Fenerbahçe Spor Kulübü (appellant) v. Union des Associations Européennes de Football (UEFA) (respondent)*

Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 11 April 2014

Extract of the facts

Fenerbahçe Spor Kulübü (the Appellant) is a professional football club based in Istanbul, Turkey. It is a member of the Turkish Football Federation (TFF). The Union des Associations Européennes de Football (UEFA, Respondent), based in Nyon, is the European Football Federation to which the Turkish Football Federation belongs. It organizes the UEFA Champions League, among others.

On February 21 and 26, March 6, 7, and 20 and on April 9, 2011, various football games took place in the framework of the Turkish “*Süper Lig*,” during which various people around Fenerbahçe Spor Kulübü were paid bribes to lose the game. On April 14, 2011, a new Turkish law (n. 6222) came into force, which made it a criminal offence to manipulate the outcome of games. On May 5, 2011, Fenerbahçe Spor Kulübü submitted to UEFA the document “*UEFA Club Competitions 2011/2012 Admissions Criteria Form*,” in which the club affirmed that it had not been involved, directly or indirectly, in any manipulation of games since April 27, 2007.

On July 3, 2011, the Turkish police arrested 61 people in the context of a broad criminal investigation concerning match-fixing in Turkish football. On April 26, 2012, the TFF Ethics Committee released the report of an

investigation into the charges that various football games had been manipulated, among others, those in which Fenerbahçe Spor Kulübü participated. In a decision of May 6, 2012, the TFF Disciplinary Committee banned a member of the management board of Fenerbahçe Spor Kulübü from any activities related to football for three years and the vice president and the coach for one year. On June 4, 2012, UEFA received the report of the TFF Ethics Committee of April 26, 2012. In a letter of June 7, 2012, the Secretary General of UEFA asked the chairman of the Control and Disciplinary Body to initiate disciplinary proceedings against Fenerbahçe Spor Kulübü.

In a decision of June 22, 2013, the Control and Disciplinary Body of UEFA excluded Fenerbahçe Spor Kulübü from the next three UEFA competitions for which the club could qualify, with the third year of the ban suspended for probation. In a decision of June 10, 2013, the UEFA Appeals Body overturned the decision of the Control and Disciplinary Body of June 20, 2013, in part pursuant to an appeal by Fenerbahçe Spor Kulübü and limited the ban to just the next two UEFA competitions.

In a submission of July 16, 2013, Fenerbahçe Spor Kulübü appealed the decision of the UEFA Appeals Body of June 10, 2013, to the CAS and applied for a stay of enforcement. UEFA did not oppose a stay of enforcement. On July 18, 2013, Fenerbahçe Spor Kulübü advised the CAS that the parties had reached

* The original decision is in German.

an agreement about the timing of the proceedings, among others. Also on July 18, 2013, the CAS confirmed the stay of enforcement, in view of the agreement of the parties.

In an arbitral award of August 28, 2013, the CAS rejected the appeal and upheld the decision of the UEFA Appeals Body of July 10, 2013. Fenerbahçe Spor Kulübü filed a civil law appeal for annulment of the CAS arbitral award to the Federal Tribunal.

Extract of the legal considerations

1. The Appellant submits that the CAS violated the principle of equal treatment of the parties (Art. 190(2)(d) PILA) because CAS essentially emphasized speed in adjudicating the appeal and decided only six weeks after the appeal was introduced, instead of sending the matter back to UEFA. In doing so, the CAS perpetuated the unequal treatment of the parties, finding its origin in the procedure in the UEFA bodies.

Insofar as the Appellant raises a procedural violation before the Federal Tribunal because it claims not have been given sufficient opportunity to interrogate the parties and the witnesses during the two-day hearing, its argument will not be heard. One does not see that it raised this alleged violation during the arbitral proceedings; to the contrary, the factual findings in the award under appeal show that on its own initiative the Appellant reduced the number of witnesses it planned to call from 53 to 35 two days before the hearing and to 32 a day before, while also waiving 13 additional witnesses during the hearing. The grievance has thus been forfeited.

In its further argument, the Appellant also does not show that it raised an alleged unequal treatment of the parties by the Arbitral

Tribunal during the arbitral proceedings. Contrary to its submissions before the Federal Tribunal, it did not strive to remedy the alleged violation during the arbitral proceedings, in the appeal brief or at the hearing. Instead, in the reasons in support of the appeal, it relied merely on various irregularities in the proceedings of the UEFA bodies and asked the CAS to send the case back to the UEFA Appeals Body for a new assessment should the CAS not follow its main submission that the sanctions should be annulled. Shortly before the conclusion of the hearing, the Appellant stated it had not freely consented to the accelerated procedure, so that the case should be sent back to the bodies of UEFA. The Appellant does not show that it applied to the CAS for more time for additional submissions or evidence or for the repetition or supplementation of certain procedural steps, let alone that he had already complained of unequal treatment in the arbitral proceedings.

Therefore, the Appellant did not undertake all appropriate effort to seek correction of the alleged violations in the arbitral proceedings. Thus, it forfeited the right to argue an alleged unequal treatment within the meaning of Art. 190(2)(d) PILA in the recourse proceedings in the Federal Tribunal. The corresponding argument is not capable of appeal as well.

2. The Appellant argues that the Arbitral Tribunal violated its right to be heard by applying the law in an unforeseeable manner (Art. 90(2)(d) PILA).

According to the case law of the Federal Tribunal, there is no constitutional right for the parties to be heard specifically as to the legal assessment of the facts they introduce. Neither does the right to be heard mean that the parties would have to be heard in advance as to the factual findings important to the case. There is, however, an exception when a court intends to base its decision on a legal consideration that

was not relied upon by the parties and the relevance of which they could not have reasonably anticipated.

Contrary to what the Appellant seems to assume, the CAS did not disregard the sentencing criteria of Art. 17 UEFA Disciplinary Regulations (2008 edition) in favour of the WADA Code but rather relied on the former provision instead. Moreover, the Arbitral Tribunal specifically explained why it did not reduce the sanction, although it differed from the federation bodies and found “only” four cases of match-fixing established. In particular, the CAS held on the basis of Art. 17 of the UEFA Disciplinary Regulations that a two-year ban was clearly justified in the case at hand.

The Arbitral Tribunal considered that a sanction at the higher end of the range was appropriate in view of its own case law, according to which bans of between one and eight years have been imposed for match-fixing and also in view of the gravity of the case in comparison with match-fixing previously adjudicated. Yet it remained with a two-year ban in view of the principle of *ultra petita* – the Respondent had waived an appeal. Contrary to the view adopted in the appeal brief, the CAS reference to the fact that comparable sanctions are imposed in doping cases, which would basically justify a two-year ban, which could be higher in particularly serious cases and reduced in the presence of mitigating circumstances, was not at all “*the paramount consideration for setting the sanction*”. Under the circumstances, the CAS was not obliged to give the Appellant the opportunity to state its views as to the sentencing rules of the WADA Code. There has not been an application of the law by surprise, which would violate the right to be heard.

3. The Appellant argues that the CAS violated public policy. It argues that the

award under appeal violates the principle *ne bis in idem* (prohibition of double jeopardy) which belongs to public policy according to Art. 190(2)(e) PILA, as two sanctions were issued for the same act.

The principle of *ne bis in idem* belongs, in principle, to public policy within the meaning of Art. 190(2)(e) PILA. However, the Federal Tribunal left open the extent to which this principle of criminal law would also have to be taken into account in disciplinary sport law. The issue needs not be examined in depth in the case at hand, as the CAS itself assumed its applicability and examined the compatibility of the sanction with this principle in detail. The Federal Tribunal limits itself therefore to the review of the specific application of the aforesaid principle by the Arbitral Tribunal.

In the arbitral proceedings, the Appellant saw a violation of the principle *ne bis in idem* because it had already been excluded from the Champion League’s 2011/2012 season, pursuant to the decision of the Turkish Football Federation of August 24, 2011; therefore, it could not be banned a second time from the competition by UEFA. The Arbitral Tribunal held that Article 50(3) of the UEFA Statutes in connection with Article 2.05 and 2.06 UCLR anticipates a two-stage procedure: in the first stage, an administrative measure would be issued on the basis of Article 2.05 UCLR, namely a one-year ban from European competitions. In a second stage, a disciplinary measure would be issued which has no maximum duration and could be issued “*in addition to the administrative measure*”. The two types of bans would have to be clearly separated pursuant to the purpose of the aforesaid provisions, insofar as a ban from the competition could be issued immediately at first, before UEFA would review the alleged transgressions in detail. UEFA would have an interest worthy of protection to exclude a club from the competition immediately without

first initiating comprehensive disciplinary proceedings against it. According to the CAS, the administrative measure is therefore not the final but merely a provisional minimal sanction, which seeks to protect the integrity of the specific competition.

The application of the principle *ne bis in idem* requires in particular that, in the first proceedings, the court should have had the opportunity to assess the facts in all respects. There is no apparent reason why this should apply when, in the first proceedings, the Turkish Football Federation merely issued an administrative measure to protect the integrity of the competition for a limited time in provisional proceedings and not in the context of a comprehensive disciplinary procedure to assess the alleged violations in a definitive way. As the Federal Tribunal held in a previous case concerning the jurisdiction of sports arbitration, the application of the prohibition of double jeopardy requires in particular that the legal values protected should be identical; moreover, the Court pointed out that the prohibition does not exclude that the same proceedings could carry civil, administrative or disciplinary consequences besides the criminal ones. There is no violation of the principle *ne bis in idem* by the CAS. The argument that public policy was violated is therefore unfounded.

The Federal Tribunal rejects the appeal as unfounded.

Arrêt du Tribunal fédéral 4A_634/2014
21 mai 2015
A. S.p.A. (recourant) v. B. Ltd (intimé)

Recours en matière civile contre la sentence rendue le 26 août 2014 par le Tribunal Arbitral du Sport (TAS)

Extrait des faits

Par sentence du 26 août 2014, le Tribunal Arbitral du Sport (TAS) a condamné la défenderesse A. S.p.A., un club de football professionnel italien, à payer à la demanderesse B. Ltd, une société de droit anglais, la somme totale de 9'400'000 euros, intérêts en sus, en exécution de deux contrats conclus les 27 et 28 avril 2012 par lesquels le club italien avait acquis de la société anglaise les droits patrimoniaux relatifs à un footballeur professionnel argentin, droits qu'un club de football professionnel argentin avait cédés à ladite société sur la base d'accords passés antérieurement avec elle.

Le 3 novembre 2014, A. S.p.A. (ci-après: la recourante) a formé un recours en matière civile au Tribunal fédéral en vue d'obtenir l'annulation de la sentence en question.

Extrait des considérants

1. Invoquant l'art. 190 al. 2 let. b LDIP, la recourante soutient, en premier lieu, que le TAS s'est déclaré à tort compétent pour trancher une contestation qui ne constituait pas un litige en matière de sport, mais un différend de nature purement commerciale. Se serait-il agi d'un litige sportif, la même conclusion devrait d'ailleurs être tirée selon elle, étant donné que le TAS aurait excédé les limites de sa mission en refusant d'appliquer les règlements de la Fédération Internationale de Football Association (FIFA).

Aux termes de l'art. 186 al. 2 LDIP, l'exception d'incompétence doit être soulevée préalablement à toute défense sur le fond. C'est un cas d'application du principe de la bonne foi, ancré à l'art. 2 al. 1 CC, qui régit l'ensemble des domaines du droit, y compris l'arbitrage. L'art. 186 al. 2 LDIP est dispositif en ce qui concerne les modalités d'exercice de l'exception d'incompétence. Aussi les règlements d'arbitrage prévoient-ils des formes et délais spécifiques. L'art. R39 du Code de l'arbitrage en matière de sport exige que cette exception soit soulevée dans la réponse du défendeur.

La recourante affirme avoir soulevé l'exception d'incompétence dans la procédure arbitrale. A cet égard, elle se réfère, en particulier, au n. 75 de la sentence attaquée. Le passage de ladite sentence cité par elle, qui est extrait du résumé de ses arguments, est ainsi libellé: (traduction française) *"B. n'a aucune prétention valable à l'encontre de A."* Ce passage n'a strictement rien à voir avec une exception d'incompétence. La recourante ne mentionne pas à quel (s) autre (s) endroit (s) de sa réponse elle aurait contesté la compétence du TAS. Par conséquent, elle est déchuë du droit de remettre en cause celle-ci à ce stade de la procédure, conformément à la jurisprudence susmentionnée. Que le TAS ait, malgré tout, examiné d'office la question de sa compétence n'y change rien. Il s'ensuit l'irrecevabilité du recours sur ce point.

2. La recourante se plaint de la violation de son droit d'être entendue, au sens de l'art. 190 al. 2 let. d LDIP. Elle reproche au TAS d'avoir fondé sa sentence sur le seul droit suisse, à l'exclusion des règlements de la FIFA sur lesquels elle s'était basée, et cela

sans inviter les parties, au préalable, à se déterminer sur la question du droit applicable.

En Suisse, le droit d'être entendu se rapporte surtout à la constatation des faits. Le droit des parties d'être interpellées sur des questions juridiques n'est reconnu que de manière restreinte. En règle générale, selon l'adage *jura novit curia*, les tribunaux étatiques ou arbitraux apprécient librement la portée juridique des faits et ils peuvent statuer aussi sur la base de règles de droit autres que celles invoquées par les parties. En conséquence, pour autant que la convention d'arbitrage ne restreigne pas la mission du tribunal arbitral aux seuls moyens juridiques soulevés par les parties, celles-ci n'ont pas à être entendues de façon spécifique sur la portée à reconnaître aux règles de droit.

A titre exceptionnel, il convient de les interpellier lorsque le juge ou le tribunal arbitral envisage de fonder sa décision sur une norme ou une considération juridique qui n'a pas été évoquée au cours de la procédure et dont les parties ne pouvaient pas supputer la pertinence. Au demeurant, savoir ce qui est imprévisible est une question d'appréciation. Aussi le Tribunal fédéral se montre-t-il restrictif dans l'application de ladite règle pour ce motif.

Considéré à la lumière de ces principes, le grief examiné confine à la témérité. Force est, en effet, d'admettre, avec l'intimée et le TAS, que la recourante a eu tout loisir de se déterminer sur la question du droit applicable et qu'elle ne s'est pas privée de le faire dans son mémoire de réponse du 26 novembre 2013. Aussi est-ce en vain qu'elle plaide aujourd'hui l'effet de surprise à ce propos.

3. Dans un dernier groupe de moyens, la recourante dénonce une double violation de l'ordre public matériel, visé à l'art. 190 al. 2 let. e LDIP, en raison de l'atteinte

portée par la sentence au principe de la fidélité contractuelle, d'une part, ainsi qu'à l'interdiction des intérêts usuraires et à la protection contre les peines conventionnelles excessives, d'autre part.

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 Tribunal fédéral a souligné à maintes reprises que la quasi-totalité du contentieux dérivé de la violation du contrat est exclue du champ de protection du principe *pacta sunt servanda*.

Selon la recourante, le TAS aurait violé le principe de la fidélité contractuelle pour ne pas avoir remarqué que les différentes conventions signées par les parties étaient "*irréremédiablement irréconciliables*" et pour avoir tenu un raisonnement en totale contradiction avec les accords passés antérieurement par l'intimée et un club de football argentin. En argumentant de la sorte, la recourante méconnaît totalement la notion spécifique de fidélité contractuelle, telle qu'elle a été précisée par la jurisprudence susmentionnée. Elle s'en sert, en réalité, 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.

La recourante, il est vrai, plaide, dans sa réplique, en faveur d'une extension du principe de la fidélité contractuelle, en invoquant une opinion doctrinale. Elle oublie, ce faisant, qu'un recourant ne peut se servir de la réplique ni pour invoquer un moyen de droit qu'il n'avait pas présenté en temps utile, c'est-à-dire avant l'expiration du délai de recours non

prolongeable, ni pour compléter, hors délai, la motivation de son recours.

Le TAS se voit encore reprocher d'avoir alloué à l'intimée, à titre de peine conventionnelle, un montant de 1'680'000 euros correspondant à un quart des 6'720'000 euros en souffrance. A en croire la recourante, cette peine conventionnelle, du reste stipulée dans un contrat que l'intimée n'avait pas invoqué à l'appui de sa requête d'arbitrage, violerait la disposition d'ordre public de l'art. 163 al. 3 CO, aux termes de laquelle le juge doit réduire les peines qu'il estime excessives. Elle serait partiellement nulle, au sens de l'art. 20 al. 2 CO, vu son caractère usuraire, en tant qu'elle excède le plafond de 15% fixé à l'art. 14 de la loi fédérale sur le crédit à la consommation (LCC; RS 221.214.1) applicable par analogie. En tout état de cause, ladite peine représenterait, toujours selon la recourante, une compensation pour le prétendu défaut de paiement, soit un intérêt de retard. Aussi contreviendrait-elle à l'interdiction de l'anatocisme, puisque l'intérêt ordinaire de 5% l'an porte sur un montant qui représente déjà une compensation du paiement tardif.

L'art. 163 al. 3 CO est une norme d'ordre public, c'est-à-dire une disposition impérative que le juge doit appliquer même si le débiteur de la peine conventionnelle n'a pas demandé expressément une réduction du montant de celle-ci. Cette notion d'ordre public n'a rien à voir avec l'ordre public de l'art. 190 al. 2 let. e LDIP. Le Tribunal fédéral l'a déjà souligné de longue date en faisant observer, s'agissant des règles impératives telles que l'art. 163 al. 3 CO, qu'il ne lui appartient pas de revoir la sentence arbitrale comme s'il était une juridiction d'appel, mais uniquement de sanctionner la violation de l'interdiction des mesures discriminatoires ou spoliatrices ordonnées par le tribunal arbitral ou couvertes par lui. En l'occurrence, la recourante s'en prend en vain au fondement de la peine conventionnelle qui

lui a été infligée par le TAS, car cela revient à critiquer l'interprétation que les arbitres ont faite des accords conclus par les parties. Pour le surplus, elle ne démontre pas, ni même ne prétend, que le montant de cette peine, qui a d'ailleurs été significativement réduit par le TAS (1'680'000 euros au lieu de 6'720'000 euros), constituerait une restriction contractuelle excessive de sa liberté économique propre à mettre son existence en péril, à tel point que la peine infligée devrait être qualifiée de mesure spoliatrice.

Enfin, la recourante assimile à tort les intérêts exigés pour le retard dans le paiement de la peine conventionnelle à la mise en compte d'intérêts pour cause de retard dans le paiement des intérêts moratoires, procédé contrevenant à l'interdiction de l'anatocisme prévue à l'art. 105 al. 3 CO. Quoi qu'il en soit, l'allocation d'intérêts composés ne viole pas l'ordre public au sens de l'art. 190 al. 2 let. e LDIP.

Le Tribunal fédéral rejette le recours dans la mesure qu'il est recevable.

Informations diverses
Miscellaneous



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