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Editorial

Although 2017 is not an Olympic year, the CAS will probably register more than 550 procedures and has set up two ad hoc divisions for the 8th Asian Winter Games held in Sapporo, Japan, in February 2017 and for the 5th Asian Indoor Martial Arts Games held in Ashgabat, Turkmenistan, in September 2017 respectively. The coming weeks are also likely to generate more work for the CAS, as we are approaching the beginning of the XXIII Olympic Winter Games.

Indeed for the coming year, the CAS Anti-Doping Division (ADD) put in place to handle doping cases from the 2016 Rio Summer Olympic Games onwards has been established again for the PyeongChang Winter Olympic Games which will take place in South Korea from 9 February to 25 February 2018. The ADD will be headed by Judge Ivo Eusebio, Switzerland, and by Ms Tjasa Andrée-Prosenc, Slovenia, Co-President. It will be composed of 6 arbitrators: Prof. Jens Evald, Denmark, Mr Ken Lalo, Israël, Mr Markus Manninen (Finland), Ms Cameron Myler (USA), Ms Janie Soublière, Canada and Mr Mark Williams (Australia).

A "regular" Ad Hoc Division (AHD) has also been established by the ICAS for the PyeongChang Winter Olympic Game. The AHD will act as an appeal court and also as a sole instance (for non-doping related matters). Its function is to provide for the resolution by arbitration of any dispute including doping arising on the occasion of, or in connection with the Olympic Games. The AHD will be headed by Mr Michael Lenard, USA, President and by Ms Corinne Schmidhauser, Switzerland, co-President. It will be composed of 9 arbitrators: Mr Mohamed Abdel Raouf, Egypt, Ms Laurence Boisson de Chazournes, France, Mr John Faylor, Germany/USA, Ms Thi My Dung Nguyen, Vietnam, Mr Jinwon Park, Korea, Ms Carol Roberts, Canada, Mr Martin Schimke, Germany, Ms Zali Steggall, Australia and Mr Bernard Welten, Switzerland.

This new issue of the CAS Bulletin includes an equal number of football cases and of disciplinary cases mostly related to doping.

In the field of football, the well-known case 4602 Football Association of Serbia v. UEFA analyses the issue of membership of associations and explains in detail the notion of legal interest and of standing. Both cases 4805 and 5063 deal with the transfer of minors and with the application and interpretation of Article 19 FIFA RSTP although addressing different questions. The French case 4490 RFC Seraing v. FIFA clarifies the ban of "Third-Party Ownership" (TPO) and of "Third-Party Investment" (TPI) practices. Interestingly, in Raja Club Athletics de Casablanca, the jurisprudence of the Swiss Tribunal regarding *res judicata* when a party has withdrawn its appeal has been applied to the CAS case law. Finally, the case 4560 Al Arabi SC Kuwait v. Papa Khalifa Sankare deals with the admissibility of counterclaims by respondents in appeal proceedings and with the termination of employment contract by the player with just cause.

Turning to doping, the swimming case 4534 Fiol Villanueva v. FINA addresses the issue of the origin of the prohibited substance and its consequences in the analysis of the athlete's degree of fault and the duration of the ineligibility period. The case 4502 Patrick Leeper v. IPC deals with a doping violation committed by a Paralympic athlete and analyses the notion of appealable decision notably against a settlement agreement and the recognition of decisions. The weightlifting case 4973 Chunhong Liu v. IOC is one of the first re-testing case examining different related issues resulting from lapse of time between sample collection and re-testing. In 4777 Izzat Artykov v. IOC, the panel also deals for the first time with an appeal against a decision taken by the CAS Anti-Doping Division and develops the issue related to the apparent authority of NOC's

during the Olympic Games whereas in the cycling case 4828, the validity, admissibility and reliability of evidence is addressed regarding "presence" and "use" of a prohibited substance. Finally the equestrian case 4921 Maria Dzhumadzuk and EFU v. FEI addresses the issue of a breach of the FEI Codex for dressage judges.

We are pleased to publish in this issue an interesting article entitled "*Unless Fairness Requires Otherwise*" co-written by Mr Markus Manninen, CAS arbitrator & Mr Brent J. Nowicki, CAS counsel, which analyses the exceptions to retroactive disqualification of competitive results for doping offenses. Furthermore, in the area of sport mediation, an analysis of the criteria to choose a mediator prepared by Ms Kristina Hopper and Mr Richard Doman, both barristers involved in mediation, is also included in this Bulletin.

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

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

Matthieu Reeb
CAS Secretary General

Articles et commentaires
Articles and Commentaries

"Unless Fairness Requires Otherwise"
A Review of Exceptions to Retroactive Disqualification of Competitive Results for Doping Offenses

Markus Manninen* & Brent J. Nowicki**

I. Introduction

Retroactive disqualification of competitive results is a vital part of a credible anti-doping regime for various reasons. It has a deterrent effect on doping, particularly when combined with increased use of Athlete Biological Passports ("ABP") and re-testing of samples. Moreover, from the clean athletes' point of view, retroactive re-rankings and re-allocation of medals may have intangible significance and considerable economic effects as successful athletes are awarded substantial amounts of monetary compensation based on their results.

This article focuses on the most common legal challenges relating to the retroactive disqualification of an individual athlete's competitive results under Article 10.8 of the World Anti-Doping Code (2015) (the "WADC"). In particular, this article provides an overview of the requirements for the disqualification of results affected by an anti-doping rule violation ("ADRV"), and further examines the grounds for exceptionally upholding an athlete's results under certain factual scenarios.

II. Disqualification of Competitive Results

A Panel's determination of the consequences of an ADRV may be broken down into two distinct considerations. First, a Panel must decide on the imposition of a period of ineligibility. The consideration (i.e. the "ban") is the principle sanction for an ADRV and is rigid in its application. It is aimed at *inter alia* punishing the offending athlete and deterring other athletes from cheating.[1] Second, a Panel must decide on the disqualification of an athlete's competitive results. This consideration, while maintaining the automatic disqualification of results in accordance with Article 9 of the WADC, provides for discretion when the ADRV affects an athlete's results over a certain period of time. As set forth below, it is this

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[1] See Lewis & Taylor, *Sport: Law and Practice*, 3rd Ed., Bloomsbury Professional Ltd., Croydon, 2014, p. 545, sec. C2.168 (noting that the purpose of an imposition of a period of ineligibility is to *"punish the transgressor, to prevent him re-offending during the period of the ban, to deter him and others from cheating (or indeed from failing in their responsibility to do everything in their power to keep themselves clean of prohibited substances and methods, and to maintain public confidence in the integrity of sports and in the readiness, willingness and ability of its governing bodies to keep sport clean*".) (internal citations omitted).

discretion which makes way for varying applications in CAS jurisprudence.

A. Mandatory Disqualification

Any assessment of the disqualification of results begins with Art. 9 of the WADC, which provides as follows:

Article 9 Automatic Disqualification of Individual Results

An anti-doping rule violation in Individual Sports in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes.

The consequence of this rule is automatic and applies whenever there is a "presence" violation of Art. 2.1 of the WADC in connection with an in-competition test. There is no room for any discretion or alternative explanation.[2] Indeed, an athlete's intent or degree of fault in the commission of the ADRV is of no importance in this evaluation.[3] Moreover, Panels have routinely held that it is not relevant whether the prohibited substance in question enhanced the athlete's sporting performance in the competition that produced the positive sample.[4] Instead, a Panel is simply tasked with correcting the results of the competition in question to ensure that the record reflects a clean and fair sporting event.[5]

B. Discretionary Disqualification

Following the mandatory disqualification of results in a particular competition that produced the positive sample, further consideration must be given by a Panel as to whether (1) other results obtained during the event (i.e. results earned in competitions taking place at the same event before or after the ADRV occurred) (Art. 10.1 of the WADC) and (2) results obtained after the ADRV through the commencement of any provisional suspension or period of ineligibility shall be disqualified (Art. 10.8 of the WADC). Each consideration is addressed in turn below.

1. Art. 10.1 of the WADC

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[2] *Misha Aloyan v. IOC,* CAS 2017/A/4927, para. 71 (stating clearly that *"Article 9 of the IOC ADR leaves no room for any form of discretion to verify whether a finding of an anti-doping rule violation should not trigger the 'Automatic Disqualification of Individual Results'"*.).

[3] See *Id.* at para. 76 ("[T]*he disqualification of the individual results obtained in the competition in connection with which an anti-doping rule violation was found to follow [is] an unavoidable consequence of that finding, without any scope for the hearing body to avoid its imposition, even in those exceptional cases where no sanction was inflicted, because the athlete bore no fault or negligence. It was underlined that when an athlete wins a medal with a prohibited substance in his or her system, this is held to be unfair to the other athletes in that competition, regardless of whether the medallist was at fault in any way*".); See also *UCI v. Jack Burke and Canadian Cycling Association*, CAS 2013/A/3370, para. 184 (results in connection with an in-competition test disqualified despite the Panel's finding of no fault); *Filippo Volandri v. International Tennis Federation*, CAS 2009/A/1782, para. 100 (results in connection with an in-competition test disqualified despite the Panel's issuance of a reprimand).

[4] *Mariano Puerta v. ITF*, CAS 2006/A/1025, para. 11.7.16, pt. 3 (disqualifying individual results from the competition producing the positive sample regardless of whether the ingestion of the substance in question was *"negligible and had no performance-enhancing effect"*); *Alain Baxter v. IOC*, CAS 2002/A/376, para. 3.29 ("[T]*he disqualification of an athlete for the presence of a prohibited substance, whether or not the ingestion of that substance was intentional or negligent and whether or not the substance in fact had any competitive effect, has routinely been upheld by CAS panels*".).

[5] See WADC (2009), Art. 9 Commentary (*"When an Athlete wins a gold medal with a Prohibited Substance in his or her system, that is unfair to the other Athletes in that Competition regardless of whether the gold medalist was at fault in any way. Only a "clean" Athlete should be allowed to benefit from his or her competitive results*".); *See* also *Aloyan*, CAS 2017/A/4927 at para. 76 ("[O]*nly a clean athlete is allowed to benefit from his or her competitive results*".); *Andreea Raducan v. IOC*, CAS OG 2000/11, para. 7.24 (supporting the strict consequence of an automatic disqualification of a gold medal winner as a matter of fairness to all other athletes); *IAAF v. ARAF & Ekaterina Sharmina*, CAS 2016/O/4464, para. 194; (one of the main purposes behind the disqualification of results is to remove any tainted performances); *Baxter*, CAS 2002/A/376, para. 3.29 (disqualification of result is required to ensure the integrity of the results); *Fritz Aanes v. Fédération Internationale de Luttes Associées*, CAS 2001/A/317, pg. 17 (stating that the interests of a doped athlete gives way to the fundamental principle of sport that all competitors must have equal chances).

Art. 10.1 of the WADC provides discretion as to whether disqualification of an athlete's results obtained in a "*Competition*"[6] that occurred prior to and after an ADRV in a single "*Event*"[7] is warranted. Article 10.1 of the WADC provides as follows:

10.1 Disqualification of Results in the Event during which an Anti-Doping Rule Violation Occurs

An anti-doping rule violation occurring during or in connection with an Event may, upon the decision of the ruling body of the Event, lead to Disqualification of all of the Athlete's individual results obtained in that Event with all Consequences, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1.

As an initial matter, it is noted that the wording of this provision is clear: Art. 10.1 of the WADC addresses all *Events* of a *Competition*. As such, the provision does not differentiate between *Events* prior to or after the ADRV. To the contrary, Art. 10.1 of the WADC explicitly refers to *"all of the Athlete's individual results obtained"* in the Competition during which an ADRV occurs.[8]

When this happens, discretion is given (interestingly) to *"the ruling body of the Event"* – not to an independent hearing body or anti-doping organization – to decide what consequences, if any, should be given to the results earned on the front and back side of an ADRV in any given *Event*. In this regard, Article 10.1 of the WADC goes on to provide that "[f]*actors to be included in considering whether to Disqualify other results in an Event might include, for example, the seriousness of the Athlete's anti-doping rule violation and whether the Athlete tested negative in the other Competitions*". In other words, has the context of the ADRV "contaminated" all other results in the Competition?[9]

The two criteria for "contamination" (i.e. the seriousness of the ADRV and whether the athlete tested negative in other Events in the Competition) are considered in Art. 10.1.1 of the WADC as follows:

10.1.1 If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Competitions shall not be Disqualified, unless the Athlete's results in Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the Athlete's anti-doping rule violation.

Therefore, an athlete's results in the other *Events* shall not be disqualified if the athlete bears no fault or negligence for the ADRV and the results in the other *Events* were not likely to be affected by the prohibited substance. Otherwise, the "ruling body" and/or Panel shall utilize its discretion in Art. 10.1 of the WADC in deciding whether to disqualify such other results within a *Competition*.

2. Art. 10.8 of the WADC

Art. 10.8 of the WADC provides an explicit rule regarding the retroactive disqualification of competitive results: all results from the ADRV until the commencement of the provisional suspension or ineligibility period shall be disqualified. There are no quantitative or temporal limitations to the disqualification.[10] Therefore, in an individual case, the rule could invalidate a significant number of results covering a considerable period of time.

There is, however, one important exception to this rule, according to which the results may remain untouched if *"fairness requires otherwise"*. As shown below, this discretionary

[6] Defined as a "*single race, match, game or singular sport contest*". *See* WADC Appendix 1, Definitions.

[7] Defined as a "*series of individual Competitions conducted together under one ruling body (e.g. the Olympic Games, FINA World Championships, or Pan-American Games)".* See WADC Appendix 1, Definitions.

[8] See *Mads Glasner v. FINA*, CAS 2013/A/3274, para. 73.

[9] *Id.*, para. 82.

[10] See *WADA v. ASADA, Australian Weightlifting Federation & Aleksan Karapetyn*, CAS 2007/A/1283, para. 55.

exception has resulted in significant discussion and challenges for hearing panels.

Article 10.8 of the WADC reads as follows:

"10.8 Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation

In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes".[11] (Emphasis added.)

III. "Unless Fairness Requires Otherwise"

Art. 10.8 of the WADC does not stipulate from whose standpoint "fairness" should be evaluated. This, of course, has great significance on the outcome of the consideration – both from a public perception and burden of proof perspective.

The provision refers to "fairness" at a general level and gives rise to different interpretations. But this issue has not been addressed in detail in the arbitral awards of the CAS. The implied starting point seems to be that fairness should be primarily assessed from the point of view of the athlete having committed the ADRV.[12] This is a well-established approach. The athlete is a party to the disciplinary proceedings and it is his or her achievements that are primarily at stake.

The viewpoint shall not, however, be categorically restricted to the athlete in question. Indeed, as noted by the Sole Arbitrator in *Chernova*[13], *"not to disqualify results that have been achieved by using a prohibited substance or prohibited method cannot be considered as fair with regard to the other athletes"* that competed against the sentenced athlete.[14]

A. Interpretation

When considering the application of "fairness", CAS Panels have undoubtedly taken a broad approach.[15] This was quite clearly explained in *Glasner*[16] where the respondent, the Fédération Internationale de Natation (FINA), argued for a narrow interpretation of the term and submitted that fairness required results obtained after the ADRV be maintained only in cases where disciplinary proceedings were delayed.[17]

The Sole Arbitrator, however, rejected FINA's position and confirmed that the term "fairness" should be interpreted broadly and cover a variety of situations to justify the retention of otherwise disqualified results. In doing so, the Sole Arbitrator highlighted CAS jurisprudence interpreting this notion[18] and noted that the systematic interpretation of the rules supports such a view. Put simply, it

[11] Article 10.8 of the Code substantively corresponds with its predecessors (i.e. the 2009 and 2003 versions of the WADC). Therefore, relevant legal praxis is not limited to cases adjudicated under the 2015 version. None of the versions contains comments that would be relevant for the purposes of this article.

[12] See *e.g., UCI v. Alex Rasmussen & The National Olympic Committee and Sports Confederation of Denmark*, CAS 2011/A/2671, paras. 83-84; *Ryan Napoleon v. FINA*, CAS 2010/A/2216, para. 17; *Volandri*, CAS 2009/A/1782, paras. 55-56; and *Guillermo Cañas v. ATP Tour*, CAS 2005/A/951, paras. 9.8-9.9.

[13] *IAAF v. ARAF & Tatyana Chernova*, CAS 2016/O/4469.

[14] *Id.* at para. 176; *See also* Marjolaine Viret, *Evidence in Anti-Doping at the Intersection of Science and Law,* T.M.C. ASSER PRESS, The Hague, 2016, p. 494 (noting that *"retroactive Disqualification is detrimental to fair competition since it creates an uncertainty for other Athletes as to the definitive rankings");* and *IAAF v. RUSAF & Anna Pyatykh*, CAS 2017/O/5039, para. 132.

[15] See *IAAF v. ARAF, Sergey Kirdyapkin & RUSADA, CAS 2015/A/4005,* para. 121; *Glasner*, CAS 2013/A/3274, para. 85 (*citing UCI v. Monika Schachl & ÖRV*, CAS 2008/A/1744).

[16] CAS 2013/A/3274.

[17] *Id.*, para. 84.

[18] *Id.*, para. 85 (citing *Schachl*, CAS 2008/A/1744, para. 74).

is clear that when approaching this exception, general principles of fairness must prevail.[19]

B. Burden of Proof

The burden of establishing that *"fairness requires otherwise"* is on the athlete. Art. 10.8 of the WADC establishes that – as a principle matter – all results obtained from the date a positive sample was collected through the commencement of any Provisional Suspension or Ineligibility period shall be disqualified. This is, in essence, the rule (i.e. the disqualification).

To negate the rule (i.e. establish that fairness requires otherwise such that the results should be maintained), the party seeking to dislodge this rule (i.e. the athlete) should carry the burden to prove otherwise on the balance of probabilities. After all, it is in the athlete's interest to maintain the results which the rule otherwise requires be disqualified.[20] To interpret differently would, in essence, rewrite Art. 10.8 of the WADC to require the anti-doping authority to not only establish the ADRV but also establish that fairness requires the remaining results not be maintained. This would up-end the intent of the article.[21]

C. Assessing "Fairness": The Applicable Factors

It is often difficult to determine whether all results between an ADRV and a ban should be disqualified or whether fairness dictates a deviation from this principle (after all, the disqualification of all results is the main rule which Panels should follow). Each case must be judged on its own merits. Based on CAS jurisprudence, it is, however, possible to extrapolate several factors that hearing panels may take into consideration when assessing the principle of fairness. No one particular factor is determinative on the issue. Instead, Panels consider an overall evaluation of the evidence in support of "fairness".[22] These factors are discussed below.

1. Delays in Results Management

Depending on the nature of the ADRV at issue, Art. 10.8 of the WADC could capture results achieved by an athlete over a lengthy period of time.[23] If the proceedings on the ADRV have taken a particularly (and, perhaps, unexplainably) long time to adjudicate and the delay is not attributable to the athlete, fairness may dictate that only some of the athlete's results be invalidated. This has been confirmed in various CAS awards,[24] including for example, in *Volandri*,[25] as follows:

"Although the ITF knew of the adverse analytical findings, it chose not to inform Mr Filippo Volandri and to let the latter take part in 19 tournaments before formally charging him with a doping offence. Such a long period is unacceptable and incompatible with the intention of the anti-doping regime that matters should be dealt with speedily. (…) Based on the above considerations, the Panel is of the opinion that fairness requires (…) that his individual result in respect of the 2008 Indian Wells tournament only is disqualified (…)".

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[19] See *IAAF v. ARAF & Mariya Savinova-Farnosova*, CAS 2016/O/4481, para. 195 (the "*general principle of fairness must prevail in order to avoid disproportional sanctions*").

[20] Although, one could envisage a situation where a governing body may prefer that the results be maintained. In such a case, these arguments could assist the athlete in meeting his or her burden.

[21] See Lewis & Taylor, p. 542 (noting that *"And it is the athlete's burden to show (…) that 'fairness requires otherwise'".). Contra,* Viret, p. 495 (noting that *"Until the burden of proof is explicitly placed on the Athlete, it is submitted that the burden of proof should stay on the ADO, consistent with the general statement in Article 3.1 of the WADC that the Code will 'place' the burden of proof upon the Athlete".).*

[22] See *e.g. IAAF v. ARAF, Yuliya Zaripova & RUSADA*, CAS 2015/A/4006, para. 102; *Kirdyapkin*, CAS 2015/A/4005, para. 121; *IAAF v. ARAF, Sergey Bakulin & RUSADA*, CAS 2015/A/4007, para. 121.

[23] Lewis – Taylor, p. 542.

[24] See e.g. *IAAF v. ARAF & Kristina Ugarova*, CAS 2016/O/4463 (criticizing delays in results management such that fairness required a portion of the athlete's results to be retained by the athlete); *ASADA v. Daniel Nisbet*, A2/2009 (permitting athlete to maintain results earned prior to notification of ADRV, which was caused by the seizure of prohibited substance by government officials two months prior to such notification); *Volandri*, CAS 2009/A/1782.

[25] *Volandri*, CAS 2009/A/1782, para. 99.

It should be noted that the impact of a long delay in notifying an athlete of an ADRV or adjudicating an ADRV is particularly complex in cases involving retesting[26] and as addressed below, in ABP cases. In such cases, the delays may be significant and it may be debatable whether the anti-doping organisation in question could or should have operated quicker in commencing the disciplinary proceedings, considering that the athlete has obviously endeavoured to conceal the ADRV.

2. Athlete's Degree of Fault

If the athlete's degree of fault is low and he or she is successful in obtaining a reduced period of ineligibility, fairness may require that only some results be disqualified. In *Cañas*, for example, the Panel ruled as follows:

9.9 Since the [CAS] *Panel has found that Appellant bears No Significant Fault or Negligence, the* [CAS] *Panel deems that fairness dictates that other than with respect to the* [Mexican] *Tournament, none of Appellant's results shall be disqualified.*[27]

But such a finding is not absolute. In *Karapetyn*,[28] the CAS Panel rejected the view that a finding of no (significant) fault or negligence is a necessary pre-condition for the exercise of its discretion to find fairness under Art. 10.8 of the WADC. In that case, WADA argued that an athlete's results must be disqualified unless the athlete shows exceptional circumstances (i.e. that he bore No Significant Fault or Negligence). Moreover, WADA further asserted that fairness required the disqualification of the athlete's results because he negligently ingested the prohibited substance without reading the label of the product he ingested or conducting other due diligence prior to ingestion. The Panel, however, disagreed with WADA and maintained that the fairness provision[29] *"stands on its own"* with no one specific condition as to a determination of fairness. So long as discretion is exercised in good faith, without bias, error, or undue influence, *"Art. 13.8*[30] *extends to the decision-maker discretion to determine what fairness requires"*. In other words, an athlete's degree of fault is not a decisive factor, but an element to consider when assessing fairness and the disqualification of results.

Moreover, it is worth noting that while Art. 10.8 of the WADC provides that all results shall be disqualified between the ADRV and the commencement of the provisional suspension or ineligibility period, an argument naturally follows that results should not be disqualified at all if no period of ineligibility is finally imposed on an athlete. This has been confirmed in the case of *Volandri* in which the Panel sanctioned the athlete with a reprimand and only disqualified the athlete's results in respect of the tournament in which he had given a positive sample.[31]

On the contrary, to the extent the ADRV is intentional or the athlete's degree of fault is high, it is arguable that the disqualification of all results - even over a fairly long period of time - is justified.[32] This said, the longer the period of time under scrutiny, the harsher the disqualification of all results could be, in which case Panels may find that fairness requires some of the results be upheld.

3. (Un)affected Sporting Results

[26] See e.g. decision of Anti-Doping Hearing Panel of the IBU concerning Mr Alexander Loginov on 30 June 2015.
[27] *Cañas*, CAS 2005/A/951, paras. 9.8-9.9.
[28] *Karapetyn*, CAS 2007/A/1283.
[29] *Id.* at 31 & 55.
[30] Art. 13.8 of the Australian Weightlifting Federation's 2004 Anti-Doping Policy is the equivalent of Art. 10.8 of the WADC.
[31] *Volandri*, CAS 2009/A/1782 (finding that an athlete could maintain the results he obtained in 19 tournaments following the ADRV in question when the athlete was sanctioned with a reprimand and the results were earned before the athlete was charged with a doping offence).
[32] See *Serghei Tarnovschi v. International Canoe Federation*, CAS 2017/A/5017 (disqualifying all results from date of ADRV through provisional suspension as "*no elements of "fairness" can be invoked given the Appellant's failure to disprove the legal presumption of intent*".)

To the extent an athlete is able to establish that the results obtained between the ADRV and the conclusion of his/her ban and/or period of provisional suspension were not affected by the prior administration of the prohibited substance, fairness may require that such results should be retained by the athlete. This abides by the principle of fair play and is indeed expressly recognised as a potential factor to be included in the consideration of whether to disqualify results in multi-competition events.[33]

A negative doping control analysed between the test leading to the ADRV and the commencement of the ineligibility period is an indication that the use of a prohibited substance has not affected the results. This factor has been accepted by various CAS Panels.[34] For example, in *Rasmussen*, the Panel noted as follows:

"(…) the Panel finds it important to emphasize the circumstance that, as conceded by the UCI at the hearing, the First Respondent's competitive results after 28 April 2011 had not been affected by any doping practice, and were fairly obtained by Rasmussen. Therefore, the Panel sees no reason to disqualify them".[35]

Although this particular part of the fairness test appears rather straightforward at first glance, the issue can be complex. Indeed, depending on the substance and other circumstances of the case, it could be persuasively argued that the past administration of a banned substance has indirectly affected the results in the form of the athlete's enhanced ability to practice harder or recover faster.

On the other hand, it is obvious that continuous use of a prohibited substance or a prohibited method during the infringement period should lead to the disqualification of all results. For example, in the cases of *Sharmina*[36] and *Chernova*[37] the athlete's continued use of prohibited substances, as evidenced through the biological passport program, resulted in complete disqualification of results earned during the entire period of blood doping practices. In these cases, Panels indicated that while the disqualification may be excessive[38] in terms of proportionality, the fairness to the other athletes and the removal of tainted performances from the record supersedes such a principle.[39]

4. Significant Consequences of the Disqualification of the Results

Significant negative financial or competitive consequences resulting from the disqualification of results may support the view that no or only a limited annulment of results should be imposed. In the case of

[33] See Article 10.1 of the WADC.

[34] See *Rasmussen,* CAS 2011/A/2671, para. 84; *Volandri*, CAS 2009/A/1782, para. 98; *UCI v. Valjavec v. Olympic Committee of Slovenia*, CAS 2010/A/2235, para. 117; *WADA v. UCI & Valverde*, CAS 2007/A/1396 & 1402, para. 19.14; *Karapetyn*, CAS 2007/A/1283, para. 54.

[35] See *Rasmussen,* CAS 2011/A/2671, para. 84.

[36] *Sharmina* CAS 2016/O/4464, para. 190 (disqualifying results achieved during the entire period during which the athlete used prohibited substances as demonstrated through the athlete's biological passport and noting that *"the application of a fairness exception will strike a balance of proportionality between the legitimate aims of deterrence and the fight against doping and the means used for such purpose*").

[37] *Chernova*, CAS 2016/O/4469, para. 176 (disqualifying results achieved during the entire period during which the athlete used prohibited substances as demonstrated through the athlete's biological passport and noting while "*the fact that such period of disqualification, seen only from the perspective of the sanction of disqualification of the results, must be deemed excessive in terms of proportionality*", "*not to disqualify results that have been achieved by suing a prohibited substance or prohibited method cannot be considered as fair with regard to other athletes that competed against the Athlete during this period*").

[38] See *I. v. Fédération Internationale de l'Automobile (FIA)*, CAS 2010/A/2268 at para. 141, *Puerta*, CAS 2006/A/1025, and *Giorgia Squizzato v. FINA*, CAS 2005/A/830 (all affirming that excessive sanctions are prohibited).

[39] In Lance Armstrong's case, the disqualification period was even longer. All his results were disqualified from 1 August 1998 onwards because he was shown to have used prohibited substances at least from 1998 to 2005. *See* USADA Press Release dated 24 August 2012.

Schachl, the Panel took into account that disqualifying the athlete's results following the ADRV would have included the disqualification of results achieved in the Olympic Games.[40] Similarly, in the case of *Napoleon*, the Panel noted that by disqualifying all the results between the ADRV and the commencement of the ineligibility period, the athlete would have lost the opportunity to participate in the Commonwealth Games.[41] Therefore, the panel disqualified results over two separate periods:

"These periods of disqualification equate to the ban imposed by FINA but take account of the undue delay which would have otherwise precluded the Appellant from fair participation in future competitions".[42]

But not all Panels are as forgiving. In *Tarnovschi*,[43] the athlete committed an ADRV on 8 July 2016. Both WADA and the International Canoe Federation were notified of the ADRV on 4 August 2016. The athlete alleged that he was not notified of the ADRV until 18 August 2016. The athlete proceeded to compete in the Rio Olympics where he finished in third place and was subsequently tested following the event. The results of his test were clean. Nevertheless, despite these clean results, the Panel found that no elements of "fairness" could be invoked as the athlete failed to disprove the legal presumption of intent as to the ADRV in question (committed over month before the Olympics).[44] As a result, the Panel disqualified the athlete's bronze medal – the only medal won by his home country of Moldova at the Olympics that year.

On its face, considerations of results for "major" events could raise significant objection by other athletes on the basis of proportionality. In other words, why are one athlete's results more important than another athlete's results? Notwithstanding the foregoing jurisprudence, it should be reemphasized that the significance of a competition is not the sole consideration when determining fairness.[45] An overall evaluation of all such factors is absolutely necessary[46] and Panels should not be merely swayed by sympathy due to the significance of an event.

5. "Gaps" in a Blood Doping Scheme

The literal reading of Art. 10.8 of the WADC requires the disqualification of competitive results as from the moment a positive sample is collected. Determining this "start date" is, of course, easy when the ADRV is a result of an in- or out-of-competition doping control on a specific date. But complications arise when an ADRV is established on the basis of an ABP, which is not determined based on a specific doping control but instead on a series of doping controls taking place over a certain time period.

Complications further rise when, during this time period, there are "gaps" in the ABP where there is no evidence of doping use or methods. In this regard, Panels must decide whether it is appropriate to disqualify (a) all results obtained during the entire period of the ABP; or (b) only the results earned in the period where a scheme of doping is confirmed (i.e. the "doping scheme");[47] or (c) only those results directly impacted by evidence of doping.[48]

[40] *Schachl*, CAS 2008/A/1744 paras. 76-78 (maintaining results earned after ADRV when there was no suggestion or evidence to indicate that the athlete has ever ingested performance-enhancing substances, or that her results at the Olympic Games were affected in any way by her ADRV).
[41] *Napoleon*, CAS 2010/A/2216.
[42] *Id.*, paras. 7.9-7.10.
[43] *Tarnovschi*, CAS 2017/A/5017.
[44] *Id.*, paras. 71-72.
[45] *Id.* (noting that significant delays attributed to Panel's decision to allow the athlete to maintain results).
[46] *Kirdyapkin*, CAS 2015/A/4005, para. 121.
[47] See *e.g.*, *Savinova-Farnosova*, CAS 2016/O/4481; *Sharmina*, CAS 2016/O/4464; *IAAF v. ARAF & Petr Trofimov*, CAS 2016/O/4883; *Chernova*, CAS 2016/O/4469; *WADA v. Vladislav Lukanin & IWF*, CAS 2014/A/3734.
[48] See *e.g., IAAF v. RUSAF & Svetlana Vasilyeva*, CAS 2017/O/4980.

Historically, Panels have applied a literal application of Art. 10.8 of the WADC when considering the disqualification of results. In other words, all results earned from the inception of the ABP through the provisional suspension or period of ineligibility were disqualified. This can be seen in varying CAS jurisprudence.[49]

Recently, however, some Panels have taken a "selective approach" and looked more closely within the ABP when deciding whether all, or some, of an athlete's results should disqualified. For example, in *Savinova-Farnosova*,[50] the IAAF sought the disqualification of the athlete's results as from 15 August 2009 (i.e. Sample 1 on her ABP) through 24 August 2015 (i.e. the date of her provisional suspension).[51] The athlete, however, argued that there was no evidence of doping in Sample 1 and using such date as the "start date" for the disqualification of results would be unfair. She also argued that her blood values during the 2012 Olympic Games (i.e. Sample 13 on her ABP) fell within her normal range and therefore disqualifying such results would also be unfair.

In consideration of the ABP, the Sole Arbitrator determined that the athlete's blood values confirmed the use of prohibited substances as from 26 July 2010 (i.e. Sample 3 – the eve of the European Championship), not Sample 1 as requested by the IAAF. Based on a literal reading of Rule 40.8 of the IAAF Rules (which are synonymous with Article 10.8 of the WADC), therefore, all results earned by the athlete as from Sample 3 through the date of the provisional suspension would have to be disqualified despite there being no evidence of doping use by the athlete after Sample 21 on the ABP (i.e. 19 August 2013).

In consideration of the fairness exception, however, the Sole Arbitrator found it unfair to disqualify the athlete's results between Sample 21 (i.e. 19 August 2013) and the date of the provisional suspension (i.e. 24 August 2015) considering that the ABP did not evidence doping use or methods during this "gap" period and moreover, that the athlete could not be blamed for the delay in the results management process (which only started long after the relevant ABP samples became known to the IAAF).[52] As a result, only those results earned by the athlete within the "doping scheme" (Sample 3 to Sample 21) were disqualified on the basis of fairness.[53]

The case of *Savinova-Farnosova* does not stand alone. Several other cases also share the position that disqualifying all results earned by an athlete during the entire period of the ABP is disproportionate and unfair.[54] Indeed, such is the case even when the athlete, by using a sophisticated plan and scheme in order to hide the use of prohibited substances, is responsible for the disproportionality of the disqualification.[55] In such cases, only the results earned within the actual doping scheme are disqualified and the

[49] See *e.g.* CAS 2014/A/3614 & 3561 *IAAF & WADA v. Real Federación Española de Atletismo & Marta Domínguez Azpeleta* (disqualifying all results as from the collection of Sample 1 (5 August 2009) through to the commencement of her provisional suspension (8 July 2013)); *Kirdyapkin*, CAS 2015/A/4005; *IAAF v. ARAF, Yuliya Zaripova & RUSADA*, CAS 2015/A/4006; *IAAF v. ARAF, Sergey Bakulin & RUSADA*, CAS 2015/A/4007; *IAAF v. ARAF, Olga Kaniskina & RUSADA*, CAS 2015/A/4008; *IAAF v. ARAF, Valeriy Borkin & RUSADA*, CAS 2015/A/4009; *IAAF v. ARAF, Vladimir Kanaikin & RUSADA*, CAS 2015/A/4010.

[50] CAS 2016/O/4481.

[51] A total of 28 Samples were collected over a period from 15 August 2009 to 22 March 2015.

[52] CAS 2016/O/4481, para. 197.

[53] It is noted that the athlete's results earned during the 2012 Olympic Games fell within this period and were therefore disqualified.

[54] CAS 2016/O/4464, paras. 189-190 and CAS 2016/O/4883, para. 66.

[55] See CAS 2016/O/4464, para. 190 *("Even considering that the Athlete herself, by using a sophisticated plan, scheme, and tactics in order to hide the use of a prohibited substance or prohibited method, was responsible for this disadvantage as to the application of [Art. 10.8 of the WADC], the Sole Arbitrator, nevertheless, holds that only the application of a fairness exception will strike a balance of proportionality between the legitimate aims of deterrence and the fight against doping and the means used for such purpose*".)

results earned in the "gaps" before or after the scheme are maintained.

This said, in at least one case a Sole Arbitrator permitted an athlete to maintain her results earned in the "gaps" within a doping scheme. In *Vasilyeva*,[56] the Sole Arbitrator determined that the athlete took part in a repetitive and sophisticated blood doping scheme from 2011 to 2016. As a result, the IAAF submitted that all results obtained by the athlete between the collection of Sample 2 (i.e. 18 October 2011) to the starting date of the provisional suspension (i.e. 13 December 2016) be disqualified.[57] In other words, like the case of *Savinova-Farnosova*, the IAAF asserted that all results earned within the actual doping scheme be disqualified and that any results earned before the scheme (i.e. Sample 1) or after the scheme be maintained.

The Sole Arbitrator, however, disagreed in part with the IAAF. While it was found that the athlete engaged in *"continuous, intentional, and several violations of the anti-doping regulations" with an "aim to gain advantage of her unlawful practice,"* the athlete's ABP only showed abnormalities indicating that the athlete engaged in blood doping cycles in 2011, 2012, 2013, and 2016.[58] There was no proof that the athlete used prohibited substances or methods in 2014 and 2015. As a result, despite considering the years 2014 and 2015 for the establishment of the overall doping scheme, the results earned during these two specific years were not disqualified.[59] So, contrary to *Savinova-Farnosova*, the Sole Arbitrator did not disqualify all results earned within the scheme, but instead looked at the results within the scheme to determine whether they were affected by the athlete's doping practices. And as a result, the Sole Arbitrator permitted the athlete to maintain the results earned in the "gaps" within the doping scheme.

6. Re-Testing and Non-Analytical Violations

Re-testing cases and ADRVs based on non-analytical evidence may cover a considerable period of time between the commission of an ADRV and the imposition of a provisional suspension or an ineligibility period.[60] In such cases, a strict application of the main rule of Art. 10.8 may lead to an unjust result.

In *Pyatykh*[61], the athlete provided a sample on 31 August 2007. It was re-tested in December 2016 (i.e. nine years and three months later) and then found positive for a prohibited substance. In addition, the athlete had committed another ADRV in 2013, evidenced by non-analytical evidence. The Panel did not consider it fair to disqualify any of the athlete's results between 1 September 2007 and 5 July 2013 because there was no proof that the athlete used prohibited substances or methods during this period. The athlete's results, however, were disqualified between 6 July 2013 and the commencement of the provisional suspension on 15 December 2016 (i.e. not from the first ADRV onwards). The disqualification period did not equal the length of the ban (here four years) either, which appears to have been the philosophy in at least some of the IAAF re-test cases.[62] The logic behind such approach is that had the athlete immediately been found to have committed an ADRV, he or she would not

[56] *Vasilyeva*, CAS 2017/O/4980.
[57] *Id.*, para. 93.
[58] *Id.*, para. 96.
[59] *Id.*, para. 97.
[60] See Viret, p. 491 (noting that *"Article 10.8 of the WADC retains its importance where a Provisional Suspension is non-mandatory, e.g. for Specified Substances and for non-analytical violations, where the discovery (and thus the possibility of investigating the case) may occur a long time after the commission of a doping offence"*.), *See also* Paul David, *A Guide to the World Anti-Doping Code, The Fight for the Spirit of Sport,* CAMBRIDGE UNIVERSITY PRESS, Cambridge, 2013, p. 312.
[61] CAS 2017/O/5039.
[62] See *Ugarova*, CAS 2016/O/4463, para. 138, according to which *"the policy of the IAAF in retesting cases is that the disqualification is for such period as the disqualification would have been if the sanction would have been pronounced at the time of the anti-doping rule violation, the rationale being that the athlete would not have been able to achieve these results had the result management process started immediately"*. *See* also IAAF news *"Revision of Results Following Sanctions of Tsikhan and Ostapchuk"* 27 April 2014.

have been eligible to obtain the disqualified results.[63]

The period between the sample collection and the re-test was significantly shorter in *Loginov*, a case adjudicated by the IBU Anti-Doping Hearing Panel.[64] The sample was re-analysed after 11 months' storage. The Panel acknowledged that the rule enshrined in Art. 10.8 may, together with the imposition of the ban, *de facto* considerably extend the period of ineligibility. However, the Panel observed that refraining from disqualifying the results in the circumstances of the case would run against the rationale of re-testing stored samples, including disqualifying the results of cheating athletes.

7. Additional Ineligibility Period in the Second Instance

One of the special situations in which Panels must carefully consider the fairness exception is a scenario in which an athlete has fully served an ineligibility period imposed by the first instance, has regained eligibility and then is subjected to a longer ban at the appellate level.[65]

A review of CAS case law shows that the Panels have applied divergent interpretations in these situations. In *Abdelfattah*,[66] the athlete refused to submit to sample collection, which led to a six-month ineligibility period imposed by the FILA Federal Appeal Commission. WADA appealed to the CAS four days after the athlete's initial ineligibility period lapsed. The Panel ordered an additional ban of eighteen months and disqualified all results achieved by the athlete during a period of five months between the date when the six-month sanction expired and the date from which the remaining part of the ineligibility was served. It seems that when assessing fairness, the Panel gave significant weight to the nature of the athlete's ADRV and the relatively short duration of the disqualification period.

Other Panels have emphasized, in particular, the responsibility of the first-instance tribunal as the culprit of the gap between two bans. In *Keisse*,[67] the athlete was subjected to a provisional suspension in December 2008. 11 months later, the athlete was acquitted of an ADRV by the first-instance tribunal. At the same time, the provisional suspension became void. WADA took the matter to the CAS. The Panel upheld the appeal and imposed the standard two-year ineligibility period. However, the Panel deemed that it would have been unfair to disqualify the athlete's results because he was able to compete due to the erroneous decision by the first-instance tribunal.[68]

The anti-doping organisation's responsibility was highlighted in *Alvarez*[69] as well. In addition to the athlete's legal right to compete, the Panel paid attention to the language of Art. 10.8 by noting that it entitles disqualifying results *"through the commencement of any Provisional Suspension or Ineligibility period"*. According to the Panel, it was ambiguous whether the language of Art. 10.8 contemplates the gap in the athlete's suspension. The Panel added that disqualifying results *"would work an injustice, effectively increasing the four years effect of her suspension in a manner not expressly contemplated"* in the applicable rules and left the results undisturbed.[70]

IV. Concluding Remarks

The disqualification of the results deserves careful consideration by a Panel. After all, such disqualification not only affects the

[63] See David, p. 312.
[64] Decision of the Anti-Doping Hearing Panel of the IBU concerning Mr Alexander Loginov on 30 June 2015.
[65] See David, p. 312-313 (referring to *Agence Mondiale Antidopage (AMA) c. ASBL Royale Ligue Vélocipédique Belge (RLVB) & Iljo Keisse*, CAS 2009/A/2014, without analysing the case).
[66] *WADA v. FILA & Mohamed Ibrahim Abdelfattah,* CAS 2008/A/1470.
[67] *Keisse*, CAS 2009/A/2014.
[68] *Id.,* para. 159.
[69] *WADA v. International Weightlifting Federation and Yenny Fernanda Alvarez Caicedo,* CAS 2016/A/4377.
[70] *Id.,* para. 70-71.

athlete in question, but aims to rectify the record books for the benefit of all athletes. Decisions on disqualification should be made through the lens of fairness, having regard to the various factors applicable to each case. It is clear, however, that although the prerequisites for upholding, in exceptional cases, the results between the ADRV and a ban have been clarified by the CAS, the application of Article 10.8 of the WADC remains a challenging task.

Sports Mediation: Getting the Right Mediator

Kristina Hopper and Richard Doman*

Executive Summary

Mediation is proving to be very popular for the settlement of sports disputes. Its success not only depends upon the willingness of the parties to try to settle their disputes amicably and quickly, but also on getting the right mediator to assist them in doing so. In this article, we will consider the qualities required of a good mediator. We will begin, however, with some remarks on what mediation is and – equally importantly – on what it is not. We will end with some general conclusions.

I. Introduction

Sport is now a global industry, which is worth billions of dollars – and still counting.

With so much money at stake, it is not surprising that disputes related to sport – especially commercial and financial ones – are on the increase. There is as much at risk off as on the field of play.

As the sporting community prefers to settle their disputes 'within the family of sport' rather than through the courts, ADR (Alternative Dispute Resolution) in its various forms has come into its own. In particular, Mediation, is proving to be not only a popular way of settling sports disputes, but also an effective one. In fact, generally speaking, where Mediation is appropriate, it enjoys a success rate of 85%, according to mediation providers, such as CEDR (Centre for Effective Dispute Resolution), which is based in London in the United Kingdom.[1] The Court of Arbitration for Sport, which is based in Lausanne, Switzerland, also offers Mediation for the settlement of sports-related disputes.[2] See later remarks on the CAS.

Perhaps the main reason for the success of Mediation in a sporting context is that it offers a 'win-win' outcome and, as such, tends to preserve and maintain sporting relationships, being a non-adversarial process, unlike litigation, where there is a 'win-lose' outcome.[3]

II. Mediation

What is Mediation? And what is it not?

According to Kelly Parsons:

"Mediation differs from other alternative dispute resolution methods, such as arbitration, because the outcome or solution is not imposed. It has to be concluded voluntarily by the parties on either side. The mediator facilitates by evaluating the dispute and proposing solutions, but does not make a judgment as happens in an arbitration or independent expert determination. This means the parties own the

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[1] See 'Sport, Mediation and Arbitration', Ian S Blackshaw, 2009, TMC Asser Press, The Hague, The Netherlands, at 4.1, p. 18.

[2] See 'Settling Sports Disputes by CAS Mediation', Prof Dr Ian Blackshaw, CAS Bulletin 1/2014, at pp. 25-30.

[3] For other advantages of Mediation, see 4.2, op. cit., fn. 2.

outcome, it is there problem also their solution. Therefore they are more likely to get an outcome they can live with".[4]

Mediation is also a confidential and '*without prejudice*' process. This means that nothing revealed, admitted or conceded by the parties during the Mediation, if unsuccessful, can be disclosed and relied on in any subsequent arbitration or court proceedings. Equally, the mediator is not required to give any evidence in such proceedings. In other words, it is as if the Mediation had not taken place at all. In fact, Mediation is a non-legally-binding process until a 'settlement agreement' is signed by the parties concerned.

However, Mediation is not a panacea for settling all kinds of disputes and not appropriate in all circumstances and cases.

As mentioned above, Mediation will never be successful unless the parties are genuinely willing to reach an amicable settlement of their dispute and ready to make compromises in the process. In one case, involving a dispute between the English Rugby Union and several professional clubs, when Mediation was proposed for settling their dispute, the Head of English First Division Rugby is reported to have said: *"it wouldn't make any difference if they brought the Queen in to arbitrate".*[5] Needless to say, a successful Mediation was not possible in those circumstances!

Equally, Mediation is not appropriate where injunctive relief is required.

Also, in a sporting context, Mediation is not possible for resolving disciplinary disputes, such as doping, match-fixing and corruption cases.[6] However, in other cases, where the particular circumstances permit and the parties in dispute agree, Mediation is possible for settling other kinds of disciplinary disputes.[7] Furthermore, in principle, CAS Mediation is available only for the resolution of disputes submitted to the ordinary arbitration procedure.[8] In other words, in non-appeal cases.

It should be noted, however, as Prof Ian Blackshaw points out, that Mediation, although not available for doping cases, can be appropriate for settling the commercial/financial issues and consequences; for example, the loss of lucrative and sponsorship contracts, which often follow from a doping case, particularly where the sports person concerned has been wrongly accused of being a drugs cheat. He cites the case of Diane Modahl, who lost her legal action in the Courts, and observes that she *"would probably have been better advised to try to settle her claims for compensation against the British Athletic Federation through mediation rather than through the courts".*[9] Whether she would have been successful or not, Mediation, especially through the CAS, could certainly have saved her considerable time and court and legal costs, which reputedly totalled £1 million![10]

In general, the costs of the Mediation are shared equally by the parties.

We now turn to the qualities required of a good mediator, which is the subject of this article.

III. What makes a good mediator?

Mediation - in one form or another - has been around since time immemorial and, writing in 1688, the Prior of St. Pierre, had the following to say;

"…. To be a good mediator you need more than anything patience, common sense, an appropriate manner, and goodwill …. Gain credibility in their minds …. Listen patiently to all their complaints".

We will return to some of these qualities later.

In determining the profile of the mediator, regard should be paid to the role that the

[4] The European Lawyer, July 2000.
[5] Reported in the English newspaper 'The Guardian' on 20 October 2000.
[6] See article 1, para. 2, of the CAS Mediation Rules of 1 September 2013, as amended on 1 January 2016.
[7] Article 1, para. 3, ibid.
[8] Article 1, para. 2, ibid.
[9] Blackshaw, op. cit., fn. 1, at p. 47.
[10] *Diane Modahl v British Athletic Federation* [2001] EWCA Civ 1447.

mediator is expected to play in a Mediation. The role of a mediator, as defined in the CAS Mediation Rules, is as follows:

"The mediator shall promote the settlement of the issues in dispute in any manner that he/she believes to be appropriate. To achieve this, he/she will:
a. identify the issues in dispute;
b. facilitate discussion of the issues by the parties;
c. propose solutions.
However, the mediator may not impose a solution of the dispute on either party".[11]

Regarding the qualities required in a mediator, first and foremost, he/she must be independent of the parties, both when appointed and throughout the Mediation process. Facts may come to light or circumstances may arise in the course of the Mediation, which change the situation that obtained at the outset, making it impossible for the mediator to remain independent. In CAS Mediations, on accepting the appointment, the mediator must sign a form confirming such independence.

Article 6, para. 3, of the CAS Mediation Rules provides as follows:

"The mediator shall be and must remain impartial, and independent of the parties, and shall disclose any facts or circumstances which might be of such nature as to call into question her/his independence in the eyes of any of the parties. Notwithstanding any such disclosure, the parties may agree in writing to authorize the mediator to continue his mandate".

The mediator must also have a reputation for neutrality and this will inspire confidence in him/her by the parties in dispute.

The mediator must also be prepared to devote sufficient time to the Mediation to allow it to be conducted expeditiously. In all forms of ADR, and particularly in relation to sport, where deadlines often apply, for example, in eligibility issues, time is of the essence.

Again, the mediator must be professional and act as such at all times. Barrister and solicitor mediators will, of course, be subject to their own disciplinary rules – those of the Bar Council and The Law Society. Other mediators may not belong to any particular profession and, therefore, may be subject to professional disciplinary rules. In order to promote and maintain high standards of conduct, many organisations providing Mediation services have issued their own Codes of Conduct. Thus, for example, those mediators appointed in CEDR Mediations will be subject the terms and conditions of the CEDR Code of Conduct. Incidentally, the EU, in 2004, also issued its own Code of Conduct for Mediators. This Code is stated to be expressly *"without prejudice to national legislation or rules regulating individual professions".*[12]

In terms of professionality, one grey area should be mentioned. In a '*Med-Arb*' situation, that is, where the parties first attempt Mediation, but have already agreed in advance that, in the event of the Mediation not being successful, they will proceed to Arbitration, can – should – the mediator also be the arbitrator?

The CAS Mediation Rules answer this controversial question as follows:

"However, if all parties have explicitly agreed so in writing, once the mediation procedure is terminated, it is possible for the mediator to subsequently act as arbitrator for the same dispute and issue an arbitral award in accordance with the CAS arbitration rules ("Med-Arb procedure")....".[13]

Allowing the mediator to act as the arbitrator in the same dispute, where the parties to that dispute agree, is, of course, in line with the essential nature of any form of ADR, including Mediation, namely, that, in all cases,

[11] Article 9.

[12] Para. 4; text of the Code at www.ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

[13] Article 13, para. 3.

it is a consensual matter. A matter of mutual agreement. See also para. 4.4 of the CEDR Solve Code of Conduct for Third Party Neutrals of 2017, which also applies the same principle.

One argument in favour of the mediator acting in the related arbitration proceedings is that the mediator will be familiar with the issues in the case, as well as the parties. This, of course, can be a distinct advantage, in that, in the subsequent arbitration proceedings, such knowledge will save time and money, both essential characteristics and objectives of ADR. On the other hand, the mediator may already have formed a view on the merits of the case; whereas, a new arbitrator, entirely fresh to the case and without any preconceptions, will approach it more open-mindedly and without there being any risk of any bias towards one side or the other.

The authors of this article take the view that it may be better, from a professional point of view, to avoid any such risks of bias – actual or perceived – and decline to act as the arbitrator in the subsequent proceedings, even though the parties may wish the mediator to continue as the arbitrator. However, the matter should be determined on a case-by-case basis, according to the particular circumstances.

Many commentators and leading practitioners in Mediation, like the Prior of St. Pierre, as mentioned above, have also drawn up their own list of essential qualities for a good mediator. These include, for example, Eileen Carroll, QC, and Prof Dr Karl Mackie CBE. Their 'wish' list for a good mediator runs as follows:

"background and status;
track record;
style of approach;
credibility;
humility;
diplomatic approach;
intellectual rigour;
integrity;
patience;
persistence; and
energy".[14]

The learned authors and leading Mediation practitioners add as follows:

"Mediators have to adapt to different parties and different situations, and have to remember that that they are the agent of all the parties. There is a range of styles and backgrounds already available in this field……..Overall, one is seeking a certain elegance of approach that works across cultures, personalities and specialisms".[15]

Understanding and appreciating cultural differences, alluded to in the above quote, is essential in international mediations, many of which involve sports disputes. Likewise, a specialist knowledge, expertise and experience of the subject of the dispute is also called for, especially in relation to Sports Mediations.

Again, as noted above, a good mediator needs to be a good listener.

Also, as noted above, patience and persistence are required qualities, and the authors of this article would also add the need for politeness. All of these qualities - the so-called three 'Ps' of negotiating - are required in effective negotiating, as, after all, mediation is a form of assisted negotiation, in which the mediator helps the parties to resume and continue negotiating.

Of course, one could go on and comment on other qualities required of a good mediator, but this would only give the impression that an effective and successful mediator needs to be super human – in theory at least.

The value of Mediation in a sports disputes context cannot be overstated. Suffice to mention the *Woodhall/Warren* dispute that was settled by mediation some years ago and offered as a case study by Prof Blackshaw,

[14] 'International Mediation: Breaking Business Deadlock', Caroll & Mackie, 2016, Bloomsbury Professional, Haywards Heath, United Kingdom, at p. 49.

[15] Ibid.

whose remarks on the case are worth quoting, *in extenso*, as follows:

"In this case, in April 1999, Richie Woodhall sought to terminate his management and promotion agreements with Frank Warren, claiming that Warren was in breach of them and also that the agreements were unenforceable. Woodhall refused to fight for Warren, and also started approaches to other boxing promoters.

On the other hand, Warren refused to let Woodhall go, claiming that contracts were valid; that there was still some considerable time to run on them; and that he was not in breach of them. The parties were adamant in their respective positions.

Woodhall, therefore, started proceedings in the English High Court in June, 1999. He requested an early hearing of the case to enable him to fight the defence of his world title by September, as required by the rules of the World Boxing Organisation. As the agreements required that any disputes were to be referred to the British Boxing Board of Control, Warren, for his part, sought an order from the Court to that effect.

This dispute had all the makings of a full-blown legal fight in the Courts with lots of blood on the walls – and in the full glare of the media. As such, it would not only be time-consuming and expensive to both parties, but also potentially damaging for their reputations. In addition, Woodhall was anxious to get back in the ring, and, if he were to continue to be of any value to Warren, he needed to fight his mandatory defence to his world title within a short period of time. So, in all these circumstances, the question arose as to whether the Court was the best forum in which to resolve this bitter dispute. It was decided to refer the dispute to mediation. And the Court was prepared to adjourn the proceedings for a short time, to enable the parties to see if they could, in fact, settle their differences by this method.

A hastily-arranged mediation was set up by CEDR. Within 72 hours later, the dispute was resolved, and Woodhall signed a new deal with Warren and continued to box for him. Unfortunately, as mediation is confidential and there is no official record or transcript of the process, it is not possible to have a 'blow-by-blow' account of what was said, what arguments were adduced and exactly why a settlement was reached (e.g. what leverage the mediator was able to apply to reach a compromise) and what precisely were its actual terms. One thing can, however, be deduced from the brief facts and circumstances of this dispute, there were some sporting and commercial deadlines to concentrate the minds of the parties and act as a spur to reaching a compromise. There was also a pressing need for the parties not to 'wash their dirty linen in public'".[16]

See also the case of Ellery Hanley, the Rugby League coach, who made some unflattering comments about his club's directors, which was also settled quickly and effectively by Mediation, thereby avoiding a lengthy and costly Court action for defamation.[17]

IV. Conclusion

Mediation, for the reasons mentioned above, is proving to be a popular method of ADR for resolving sports disputes, which, in view of sport now being such big business globally, are on the increase.[18]

Recourse to the Courts is no longer the only way of resolving sports disputes, as the *Woodhall/Warren* case above clearly demonstrates. And, indeed, the Courts themselves actually encourage parties to seek Mediation, in appropriate cases.

Mediation not only can save time and money but it also helps to preserve existing and future sporting and business relationships.

Not only must the particular case be suitable for Mediation and the parties willing to compromise, but its success also depends upon the particular skills and qualities of the person chosen by the parties to be their mediator – a role, as we have seen, that is very

[16] Blackshaw, op. cit., fn. 1, at p. 130.

[17] For some further details of this case, see Blackshaw, op.cit., fn. 1, at p.64.

[18] CAS is now registering between 500 and 600 new Sports Arbitration cases each year.

demanding, indeed, in practice. He or she needs to have a good understanding and appreciation of the dynamics and other special characteristics of sport that need to be served, especially at the international level, as well as having most of the qualities summarised in this article. To have all of them, would perhaps require the mediator to be super human.

The practice of Mediation also gives rise to some thorny professional issues, including actual and potential conflicts of interests and independence considerations, which need to be appreciated and faced by the mediator and the parties.

However, Mediation, when appropriate, is effective; but it is not a universal solution for resolving disputes in general or sporting ones in particular. To use a sporting metaphor, it is very much a case of 'horses for courses'!

Jurisprudence majeure*
Leading Cases

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

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

CAS 2016/A/4408
Raja Club Athletic de Casablanca v. Baniyas Football Sports Club & Ismail Benlamalem
29 June 2017

Football; Termination of the employment contract without just cause by the player; *Res judicata* of a decision when a party has withdrawn its appeal and *Res judicata* of a decision against a party found to be jointly and severally liable of a debt; Failure to appear at work without just cause; Definition of "new" club

Panel
Mr Rui Botica Santos (Portugal), President
Mr Didier Poulmaire (France)
Prof. Luigi Fumagalli (Italy)

Facts

On 15 December 2010, Mr Ismail Benlamalem ("Player"), a professional football player of Moroccan nationality, entered into an employment contract with Raja Club Athletic de Casablanca ("Raja Club"), a football club with its registered office in Casablanca, Morocco and a member of the Royal Moroccan Football Federation ("FRMF"). This contract was a fix-term agreement, valid for four seasons, effective from 1 December 2010 until 30 June 2014.

On 1 August 2012, the Parties contractually agreed to the transfer of the Player to Baniyas Football Sports Club Company LLC ("Baniyas"), a football club with its registered office in Baniyas, United Arab Emirates and a member of the United Arab Emirates Football Association ("UAEFA"), on a temporary loan basis, from 1 August 2012 to 31 May 2013. For this purpose, they signed a document entitled *"Foreign Football player Loan Contract"* ("Loan Contract"), which governed the details of the loan between the two clubs as well as the labour relationship between the Player and Baniyas.

Under the Loan Contract a loan fee of USD 400,000 was due to Raja Club *"on execution of the loan contract"* and the Player was entitled to a remuneration consisting of two *"advanced payment"* of USD 100,000, one *"payable upon the execution of the contract"* and the other one payable on 18 November 2012, as well as a *"salary"* of USD 5,000 at the end of every calendar month. Among other obligations, the Player committed himself a) to *"refund the received advanced payment in the event of unilateral termination without* [just] *cause"*, b) to *"participate in all matches and training sessions and related activities, unless otherwise required by the Club"*, c) to *"obey all instructions issued by* [Baniyas]*"*, d) not to *"retire, on his own initiative, throughout the term of this contract"*, e) not to *"leave the state without having written* [the end of this clause is missing]*"*.

It is undisputed that Baniyas made the following payments: on 13 August 2012, USD 100,000 to the Player corresponding to the first *"advanced payment"*; on 15 August 2012, USD 400,000 to Raja Club corresponding to the loan fee; on 29 November 2012, USD 70,000 to the Player corresponding to the second *"advanced payment"*, from which was deducted a fine of USD 30,000 imposed upon the Player by Baniyas following internal disciplinary proceedings initiated against him; and four times USD 5,000 corresponding to four months of salaries.

It is undisputed that the Player left Abu Dhabi on 4 October 2012. The reasons why he did so are however disputed. It is Baniyas' case that, from the moment the Player left Abu Dhabi, it tried to enter into contact with him but could not reach him by any means. On 21 October 2012, Baniyas sent a notification to the Player ("First Notification"), whereby it urged the Player to return to the club within the next 24 hours. The Player contests having ever received such notification. Baniyas submits that, on 31

October 2012, and in the absence of any news from the Player, it sent him a second notification ("Second Notification") summoning him to appear within the next three days. According to Baniyas, the Player finally showed up at the club in the evening of 31 October 2012. On 8 November 2012, Baniyas notified in writing the Player of its decision to impose upon him a USD 30,000 fine as a disciplinary sanction following his absence *"during the period from 4-10-2012 to 31-10-2012 (…)"*. On 1 December 2012, the Player left Baniyas and never returned.

Baniyas claims that on 4 December 2012, it served another notification to the Player ("Third Notification") urging him to come back to the club within the next 72 hours, failing which he would have to face *"the legal responsibilities resulting from* [his] *breach and* [Baniyas] *will start legal proceeding in accordance to the provisions stipulated in the employment contract and FIFA rules"*. Baniyas sent a copy of this document (via facsimile) to FIFA, UAEFA and to Raja Club. According to the transmission report, Raja Club received the fax.

It is undisputed that the Player returned to Raja Club after 31 May 2013, *i.e.* after the maturity date of the Loan Contract.

On 14 December 2012, Baniyas initiated proceedings before the FIFA Dispute Resolution Chamber ("DRC") against the Player. Apparently, FIFA received Baniyas' claim but did not act upon it. On 12 September 2014, Baniyas lodged a second claim before FIFA against the Player for terminating his employment relationship without just cause and against Raja Club for inducement to breach his employment contract. In a decision dated 21 May 2015, the DRC held that the Player terminated the employment relationship with Baniyas without just cause when he left the club on 1 December 2012 and, therefore, was liable to pay compensation *"for breach of contract in the amount of USD 293,562 plus 5% interest p.a"*., in accordance with Article 17 para. 1 of the applicable Regulations on the Status and Transfer of Players ("RSTP"). The DRC also decided that *"[Raja Club] shall be held severally liable for the payment of the amount"*. On 18 December 2015, the Parties were notified of the decision ("Appealed Decision").

On 5 January 2016, Raja Club filed a statement of appeal (dated 4 January 2016) against the Appealed Decision with the CAS in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration ("Code"). Raja Club designated Baniyas as sole Respondent.

On the same day, the Player also filed a statement of appeal with the CAS against the Appealed Decision but failed to submit his appeal brief within the given time limit. As a consequence, the President of the Appeals Arbitration Division of the CAS terminated the arbitral proceedings initiated by the Player on 2 March 2016.

On 15 March 2016, the Player requested to intervene in the arbitral proceedings in accordance with Articles R41.3 and R41.4 of the Code. The Player's petition was eventually granted following the approval of Raja Club and Baniyas.

On 11 August 2016, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing, which was eventually scheduled for 29 March 2017, with the agreement of the Parties.

Reasons

1. According to Baniyas, the Appealed Decision had become final and binding upon the Player as the latter had failed to submit his appeal brief within the given time limit and the arbitral proceedings initiated by the Player on 2 March 2016 had been terminated. The Player as well as Raja Club were claiming that the CAS is

not bound by the factual or legal findings of the DRC and that the parties to the procedure are identical to the ones involved in the dispute before the DRC. Under such circumstances, the Player had to have the same rights as Baniyas and Raja Club. They were also arguing that there would be a risk of conflicting decisions in relation to the subject-matter of the dispute, if the Appealed Decision was final and binding upon the Player but the CAS was to find that the Player did not terminate his employment relationship with Baniyas without just cause.

The Panel started by stating that an arbitral tribunal would violate procedural public policy if it was to disregard the *res judicata* effect of a previous decision or if the final award departed from the opinion expressed in an interlocutory award disposing of a material preliminary issue. The Panel also recalled that the impact of the withdrawal of an appeal filed before the CAS by one of the co-defendants had been addressed by the Swiss Federal Tribunal (SFT) in a decision rendered on 28 August 2014 (ATF 140 III 520; translation from French to English can be found on the website: www.swissarbitrationdecisions.com). In substance, the SFT had held that an arbitral tribunal acting in appeal proceedings no longer had jurisdiction if the appeal was withdrawn.

For the Panel, as in the present case, the Player's appeal before the CAS against the Appealed Decision had been deemed withdrawn when he had failed to supplement his incomplete statement of appeal within the allotted time and a termination order had been rendered on 2 March 2016, the outcome had to be the same: the decision of the first instance body had become final and binding upon the Player and the CAS no longer had jurisdiction *ratione personae* over him. The fact that the Player had been allowed to intervene as a respondent in other arbitral proceedings between two other parties against the same decision did not change the fact that the decision was enforceable as far as he was personally concerned. For the Panel, the proceedings initiated before the CAS by another party (Raja Club), on the one hand, and by the Player, on the other hand could have remained separate *vis-à-vis* these parties, who were independent from each other. The position taken by the Player (such as his withdrawal from the proceedings) did not have any impact on the legal position of the other, irrespective of whether this could result in an award inconsistent with the Appealed Decision towards the Player. As a respondent in the other arbitration proceedings, the Player was only allowed to request the total or partial dismissal of the appeal of Raja Club. In other words, he was not in a position to request the Panel to modify the Appealed Decision on certain aspects as such requests would amount to counterclaims, which are inadmissible. Therefore, he could not somehow change the fact that the Appealed Decision was final and binding upon him, following the withdrawal of his appeal.

Finally, with regard to the party (Raja Club) that had been found by the DRC to be jointly and severally liable of the compensation for breach of contract owed by the Player to Baniyas, the Panel followed the jurisprudence of the Swiss Federal Tribunal in the abovementioned judgement and held that a first instance decision which had already been declared final and binding upon the principal debtor (the Player) because the latter had withdrawn his appeal was not *res judicata vis- à-vis* the party that had been found to be jointly and severally liable of the debt. Therefore, the Panel had to address the submissions of Raja Club on the merits of the case.

2. Raja Club was contesting the findings of the DRC that the Player had terminated his employment relationship without just cause when he had left the club on 1 December 2012 and was therefore liable to pay compensation.

   The Panel held that there is an unjustified non-appearance at or leaving of the working place when the employee is absent for a certain amount of time and the employer can reasonably assume that it is not in the employee's intention to return and that his decision is final. This is particularly true if the employee is summoned to return to work or to justify his non-appearance (for instance by means of a medical certificate) and does not comply or is unable to provide a just cause. Likewise, if the employee does not return to work after vacation and leaves his employer without any news for several months, the employer can – in good faith - assume that the employee's employment has ended without having to dismiss him or the employee having explicitly resigned.

   The Panel further found that in the present case, it was undisputed that the Player had left Baniyas on 1 December 2012 never to come back. Although Raja Club had submitted that the Player had asked for a meeting to explain the reasons of his leave and had informed Baniyas by SMS on 1 December, this assertion had not been established in any manner. With regards to the burden of proof, it was not sufficient to simply assert a state of fact for the Panel to accept it as true. In any event, the simple fact for the Player to send an SMS to the team manager did not make his departure legitimate and/or excuse his absence from his club. Likewise, Raja Club had offered no evidence that the Player had a) committed to come back after a certain time, b) tried to contact Baniyas while he was abroad, c) informed his employer of his intentions, d) discussed a possible end of contract, or e) complained about his employer's attitude towards him. As for Baniyas on the other hand, it had been able to establish that it had complied with all of its contractual duties and to show unequivocally that it was still interested in the Player's services. In particular, it was undisputed that until 1 December 2012, the club had paid to the Player all of his dues and that it had sent notification(s) urging the Player to return to the club. In light of the foregoing, the Panel came to the conclusion that the Player had unilaterally and prematurely terminated his employment relationship with Baniyas without just cause.

3. As a result, Baniyas was entitled to an amount of compensation which had been calculated in detail by the DRC. As Raja Club had not provided any reason justifying a reduction of the amount, the Panel found that the DRC decision in this regard had to be upheld in its entirety, without any modification. Raja Club was however contesting to be jointly and severally responsible for the payment of the compensation.

   The Panel held that the first club for which a player registers after a contractual breach was to be considered as the player's *"new club"* for the purpose of Article 17 para. 2 RSTP. The fact that the Player had returned to Raja Club on the basis of an employment contract which existed before the loan contract with Baniyas did not change the fact that Raja Club had to be considered as the *"new club"*. The FIFA Regulations were subjecting loan transfers to the same rules, which governed ordinary or permanent transfer of players. The Panel explained that one of the characteristics of a transfer, be it a loan or a permanent transfer, is that it brings with it the effects of contractual stability. Under such circumstances, there was no valid reason to treat differently the club of origin, to

which the player returns after he terminated the loan agreement without just cause and another club, which registers the same player for the first time. As a result, the Panel held that Raja Club was to be considered as jointly and severally responsible for the payment of the compensation.

Decision

In light of the above, the Panel dismissed the appeal filed by Raja Club Athletic de Casablanca against the decision issued by the FIFA Dispute Resolution Chamber on 21 May 2015.

TAS 2016/A/4490
RFC Seraing c. Fédération Internationale de Football Association (FIFA)
9 mars 2017

Football; Sanctions à l'encontre d'un club ayant contrevenu à l'interdiction des pratiques de "Third Party Ownership"; Prise en compte du droit de l'Union européenne en tant que droit applicable; Légalité des articles 18bis et 18ter RSTJ au regard des libertés de circulation; Légalité des articles 18bis et 18ter RSTJ au regard du droit de la concurrence; Légalité des articles 18bis et 18ter RSTJ au regard du droit suisse de la concurrence; proportionnalité de la sanction

Formation
M. Bernard Foucher (France), Président
Me Bernard Hanotiau (Belgique)
Me Ruggero Stincardini (Italie)

Faits

L'ASBL Royal Football Club Seraing ("RFC Seraing" ou le "Club" ou l'"Appelant"), est une association sans but lucratif de droit belge, dont le siège social est à Seraing, en Belgique. RFC Seraing est un club de football affilié à l'Union Royale Belge des sociétés de Football-Association ("URBSFA"). Il évolue en Division 1 Amateur lors de la saison 2016-2017, championnat organisé par l'URBSFA et troisième niveau national du football belge. La Fédération Internationale de Football Association ("FIFA" ou "l'Intimée") est une association à but non lucratif de droit suisse, dont le siège statutaire est à Zurich en Suisse. Dans l'exercice de ses fonctions, la FIFA a adopté le Règlement du Statut et du Transfert des Joueurs ("RSTJ") dont les articles 18bis et 18ter sont relatifs à l'influence des tierces parties sur les clubs de football affiliés à la FIFA.

Le 30 janvier 2015, RFC Seraing et la société de droit maltais Doyen Sports Investment Limited ("Doyen") ont conclu un contrat de type *Third party ownership* ("TPO") intitulé *"Cooperation Agreement"* ("l'Accord de coopération"), prévoyant notamment que le Club transfère à Doyen les droits économiques de trois joueurs nommément désignés contre le payement par Doyen de EUR 300.000 en trois échéances. Aux termes de l'Accord de coopération Doyen devient ainsi propriétaire de 30% *"de la valeur financière dérivant des droits fédératifs"* de ces trois joueurs.

Le 2 juillet 2015, le secrétariat de la Commission de Discipline de la FIFA (le "Secrétariat FIFA"), via l'URBSFA, a ouvert une procédure disciplinaire à l'encontre du RFC Seraing pour violation des articles 18 bis et 18 ter du Règlement du Statut de Transfert des Joueurs de la FIFA ("RSTJ"). Depuis 2008, l'article 18bis du RSTJ interdit aux clubs de signer des contrats *"permettant à une quelconque autre partie ou à des tiers d'acquérir dans le cadre de travail ou de transferts, la capacité d'influer sur l'indépendance ou la politique du club ou encore sur les performances de ses équipes"*. Par Circulaire 1464 du 22 décembre 2014, la FIFA a promulgué un nouvel article 18ter, ajouté au RSTJ par le Comité exécutif de la FIFA lors des séances des 18 et 19 décembre 2014. L'article 18ter du RSTJ a un champ d'application plus restreint et précis que l'article 18bis dans le sens où la prohibition qu'il instaure vise ainsi plus spécifiquement les opérations de TPO.

Le 9 juillet 2015, RFC Seraing a saisi une instruction dans le *Transfer Matching System* ("TMS"), système régulant les transferts internationaux des joueurs de football géré par la société FIFA TMS GmbH ("FIFA TMS"), afin d'engager de manière permanente le joueur portugais X. ("Joueur"), libre de tout contrat et avec lequel un contrat de travail, intitulé *"Contrat de joueur de football"* ("Contrat de joueur"), a été conclu le 7 juillet 2015. A cette même date, RFC Seraing et Doyen ont signé un accord

dénommé *"Accord de participation aux droits économiques"* ("ERPA") et renvoyant à un Accord de partenariat. Aux termes de cet accord, le club a vendu à Doyen 25% des droits économiques du joueur susvisé, en contrepartie d'une somme de 50 000 euros. L'ERPA et le Contrat de joueur ont été téléchargés conjointement par RFC Seraing et Doyen dans le TMS.

Le 21 juillet 2015, le Secrétariat FIFA a étendu le champ d'application de la procédure disciplinaire à une violation potentielle par le Club des articles 18bis et 18ter du RSTJ résultant de la conclusion de deux accords avec des tierces parties.

Le 4 septembre 2015, la Commission de Discipline de la FIFA a rendu une décision (la "Décision de la CD FIFA") reconnaissant le RFC Seraing coupable de violations des articles 18bis et 18ter du RSTJ. Elle a condamné le Club a une interdiction *"d'enregistrer des joueurs, tant au niveau national qu'international, pendant les quatre (4) périodes d'enregistrement, complètes et consécutives, suivant la notification de la présente décision"* ainsi qu'à une amende de CHF 150'000.

Sur recours du RFC Seraing, la Commission de Recours de la FIFA a rendu le 7 janvier 2016 une décision ("Décision de la CR FIFA") confirmant la Décision de la CD FIFA. Cette décision a été notifiée à RFC Seraing et à l'URBSFA le 22 février 2016.

Le 9 mars 2016, RFC Seraing a formé appel de la Décision de la CR FIFA auprès du TAS. Le 17 octobre 216, une audience s'est tenue à Lausanne au siège du TAS.

Considérants

1. Dans ses demandes, l'Appelant se prévalait de l'application du *"droit UE"* ainsi que du droit suisse. Il faisait de plus valoir qu'en sa qualité de personne morale de droit belge, il était aussi fondé à invoquer la protection du droit belge.

En ce qui concerne le droit applicable, la Formation arbitrale a rappelé que l'article 19 de la Loi fédérale sur le droit international privé disposait qu'un tribunal arbitral siégeant en Suisse devait prendre en compte les dispositions impératives du droit étranger lorsque trois conditions étaient cumulativement remplies: i) ces dispositions relevaient d'une catégorie de normes qui doivent recevoir application quel que soit le droit applicable au fond du litige; ii) il existait une relation étroite entre l'objet du litige et le territoire ou les dispositions impératives du droit étranger sont en vigueur; et iii) au vu de la théorie et la pratique du droit Suisse, les dispositions impératives devaient viser à la protection des intérêts légitimes et des valeurs fondamentales et leur application devait mener à une décision appropriée. C'était le cas pour le droit de l'Union Européenne dans la mesure où i) les dispositions concernant notamment le droit de la concurrence et les libertés de circulation étaient communément considérées comme des règles impératives par les juridictions de l'Union et la doctrine; ii) les relations étroites entre (a) le territoire sur lequel le droit européen était en vigueur et (b) l'objet du litige, tenaient au fait que la mise en cause de la légalité du RSTJ avait un impact évident sur le territoire européen; et iii) l'ordre juridique suisse partageait les intérêts et valeurs protégées par les dispositions de droit européen en matière de droit de la concurrence et de libertés de circulation. La Formation arbitrale a donc estimé devoir tenir compte des règles impératives de droit de l'Union européenne invoquées par les parties.

En ce qui concerne le droit belge en revanche, la Formation arbitrale a considéré que celui-ci n'était pas applicable à la présente procédure en vertu de l'article R58 du Code TAS et de l'article 66 des Statuts de la FIFA. Elle a estimé

qu'en tout état de cause, ses dispositions impératives n'étaient invoquées par l'Appelant qu'en vue de justifier l'existence d'un principe de proportionnalité de la sanction aux manquements établis, principe dont les parties convenaient par ailleurs qu'il existait également en droit européen et en droit suisse. L'Appelant n'ayant pas démontré en quoi le principe de proportionnalité de la sanction revêtait en droit belge des spécificités particulières, les arguments tirés de ce droit étaient indifférents à la solution du litige.

2. A titre principal, l'Appelant soutenait que les articles 18bis et 18ter RSTJ étaient illégaux, au motif que ces articles étaient contraires au droit de l'UE. En particulier, ces articles portaient plus spécifiquement atteinte à la liberté de circulation des capitaux (article 63 du Traité sur le Fonctionnement de l'Union Européenne, TFUE), à la liberté de circulation des travailleurs (article 45 TFUE), à la liberté de prestation de services (article 56 TFUE), consolidés par les articles 15 (liberté professionnelle et de travailler) et 16 (liberté d'entreprise) de la Charte des Droits Fondamentaux de l'Union européenne, en ce qu'ils entravaient ces libertés et que ces entraves résultaient de l'activité réglementaire d'une fédération sportive.

   La Formation arbitrale a admis que les articles 18bis et 18ter RSTJ constituaient une interdiction pure et simple des financements de clubs par certains investisseurs à partir de certains schémas de financement et instauraient à ce titre une restriction non discriminatoire (une entrave) aux mouvements de capitaux à partir, vers ou entre des États-membres de l'UE relatifs au financement des clubs. Elle a toutefois rappelé que même si elles pouvaient constituer des entraves, des restrictions aux libertés garanties par le TFUE n'étaient pas nécessairement des entraves prohibées. Au-delà des justifications expressément prévues par le TFUE, non invoquées en l'espèce, la jurisprudence admettait des restrictions à ces libertés dès lors que la mesure restrictive *"poursui*[vait] *un objectif légitime et se justifi*[ait] *par des raisons impérieuses d'intérêt général"* et *"que l'application d'une telle mesure* [était] *propre à garantir la réalisation de l'objectif en cause et* [n'allait] *pas au-delà de ce qui* [était] *nécessaire pour atteindre cet objectif"*.

   Selon la Formation arbitrale, l'interdiction des opérations de TPO poursuivait en l'occurrence des objectifs légitimes tels que la préservation de la stabilité des contrats de joueurs, la garantie de l'indépendance et l'autonomie des clubs et des joueurs en matière de recrutement et de transferts, la sauvegarde de l'intégrité dans le football et du caractère loyal et équitable des compétitions, la prévention de conflits d'intérêts et le maintien de la transparence dans les transactions liées aux transferts de joueurs. Au terme d'une analyse de la pratique des TPO, il fallait en effet reconnaître que cette pratique faisait naître de nombreux risques, notamment liés à l'opacité des investisseurs en cause qui échappaient à tout contrôle des organes de régulation du football et qui pouvaient en toute liberté procéder à des cessions de leur investissement, non contrôlées; des risques d'atteinte à la liberté professionnelle et aux droits des joueurs en pouvant influer, dans un intérêt spéculatif, sur leur transfert; des risques de conflits d'intérêts, voire de truquage ou de manipulation des matches, contraires à l'intégrité des compétitions, puisqu'un même investisseur pouvait réaliser des TPO dans plusieurs clubs relevant de la même compétition; ainsi que des risques liés à l'éthique puisque l'objectif poursuivi était un intérêt financier spéculatif, exclusif de considérations d'ordre sportif et même moral.

Quant au caractère proportionné de l'interdiction, la Formation arbitrale a tout d'abord relevé que les articles 18bis et 18ter n'interdisaient pas tout investissement par des tiers au sens du RSTJ dans les clubs de football, mais uniquement les investissements de type "TPO", c'est-à-dire qui, soit confèrent à l'investisseur le pouvoir d'influer sur l'indépendance et la politique d'un club, soit impliquent une indemnité ou un droit contingent au transfert ou à l'indemnité de transfert de joueurs ou encore à sa relation de travail (salaire, durée d'emploi, etc.). Les mesures en cause n'interdisaient ainsi que certains schémas de financement, et n'interdisaient pas les autres types de financements des clubs de football. Les mesures n'interdisaient pas non plus le financement par des tiers au sens du RSTJ, des opérations de transfert, les financements d'opérations de transfert spécifiques restant possibles, pour autant qu'ils ne contreviennent pas aux articles 18bis et 18ter du RSTJ.

Selon la Formation, les objectifs invoqués ne pouvaient pas non plus être atteints au moyen d'une régulation et de mesures de transparence accrues, qui auraient constitué des mesures moins restrictives qu'une interdiction. En effet, les articles 18bis et 18ter du RSTJ constituaient des interdictions de signer des contrats prohibés faites aux clubs et aux joueurs de football dont la FIFA pouvait contrôler les transferts et qui étaient soumis à ses règlementations. En revanche, la FIFA ne pouvait pas contrôler les intérêts de personnes qui ne lui étaient pas affiliées, ni les contrats qui étaient conclus à l'occasion ou à la suite de transferts par d'autres personnes que les clubs, joueurs et agents et dont la déclaration était obligatoire via le TMS. Dans un tel contexte, les risques de conflits entre les intérêts des clubs, des joueurs et des ayants droits finaux ou successifs des accords d'investissements, via des schémas de type TPO étaient réels et impossibles à contrôler pour les instances du football que sont la FIFA et les fédérations nationales. Au-delà de ne pas avoir les moyens de contrôler qui étaient les détenteurs ou bénéficiaires ultimes ou successifs des droits liés aux transferts et indemnités de transferts des joueurs, la FIFA ne pouvait juridiquement pas en réguler les pratiques, dès lors qu'ils n'étaient pas affiliés à la FIFA ou à des fédérations nationales de football. Dans ce contexte, des mesures alternatives à l'interdiction faite aux clubs et joueurs de conclure des schémas de financements de type TPO n'apparaissaient pas raisonnablement à même d'atteindre les objectifs poursuivis.

En conséquence, la Formation arbitrale a considéré que les restrictions à la liberté de circulation des capitaux résultant des articles 18bis et 18ter du RSTJ étaient justifiées et adaptées à l'atteinte aux objectifs légitimes poursuivis par ces mesures.

Les arguments développés par les parties au regard de la liberté de circulation des travailleurs et de la liberté de prestation de services étant largement similaires à ceux concernant la liberté de circulation des capitaux, la Formation arbitrale s'est appuyée sur le raisonnement tenu en cette dernière matière pour constater que l'Appelant n'avait pas démontré que les articles 18bis et 18ter du RSTJ étaient contraires aux articles 45, 56 et 63 du TFUE et 15 et 16 de la Charte des Droits Fondamentaux de l'Union européenne.

3. L'Appelant soutenait également que l'interdiction des TPO constituait une entrave par effet, ou alternativement, par objet, à la libre concurrence contraire à l'article 101 du TFUE car elle avait pour objectif ou pour effet de limiter la liberté de financement des clubs en ce qui concerne leur politique de recrutement de

joueurs. De surcroit, l'interdiction des TPO entrainait une monopolisation du marché au profit des clubs affiliés à la FIFA, à l'exclusion des autres opérateurs et affectait en particulier les petits clubs en altérant leurs possibilités de financement sur le marché des transferts, et les supporters pris en tant que consommateurs.

La Formation arbitrale a tout d'abord souligné qu'aucune analyse économique substantielle, au-delà de considérations générales, n'avait été soumise pour définir le marché pertinent et démontrer les éventuels effets anticoncurrentiels des dispositions en cause. Elle a ensuite affirmé que l'application des articles 18bis et 18ter RSTJ n'avait pas pour objet de restreindre, d'empêcher ou de fausser le jeu de la concurrence, mais de réglementer le marché des transferts de joueur afin de poursuivre les objectifs légitimes invoqués par la FIFA. En admettant même qu'une analyse économique substantielle ait permis de définir le marché pertinent et démontrer les éventuels effets anticoncurrentiels des dispositions en cause sur le marché des transferts, les objectifs légitimes poursuivis auraient été de nature à justifier l'atteinte à la concurrence.

4. Dans ses considérants relatifs à la légalité des articles 18bis et 18ter RSTJ au regard du droit suisse, la Formation arbitrale a relevé que si l'Appelant invoquait les articles 5 et 7 de la Loi fédérale suisse sur les cartels et autres restrictions à la concurrence du 6 octobre 1995 ("LFCRC"), il n'avait pas développé d'arguments spécifiques sur la base du droit suisse de la concurrence. Dès lors que ce dernier poursuivait des objectifs comparables à ceux poursuivis par le droit européen de la concurrence, la Formation arbitrale a donc estimé que ses constatations relatives aux moyens tirés des articles 101 et 102 du TFUE répondaient au moyen fondé sur la LFCRC.

   Quant à une éventuelle contrariété des dispositions en cause avec le droit de propriété et la liberté économique des articles 26 et 27 de la Constitution fédérale de la Confédération suisse (Cst), la Formation arbitrale a considéré que l'Appelant ne développait pas d'arguments spécifiques y relatifs, mais incluait ces fondements dans le cadre de son moyen relatif à la violation de la LFCRC. Or, dès lors que l'Appelant n'avait pas démontré la contrariété des articles 18bis et 18 ter du RSTJ au droit européen et suisse de la concurrence, il n'avait pas non plus démontré leur illégalité au regard des articles 26 et 27 Cst. La Formation a donc également rejeté ce moyen.

5. L'Appelant soutenait enfin que les sanctions imposées par la Décision de la CR FIFA étaient gravement disproportionnées.

   La Formation arbitrale a rappelé que le principe de la proportionnalité entre les infractions et les sanctions était un principe général largement appliqué par le TAS et reconnu dans la plupart des systèmes juridiques qui trouvaient en l'espèce à s'appliquer. Constatant qu'en application du Code Disciplinaire de la FIFA (CDF), les sanctions possibles pouvaient être notamment l'expulsion d'une compétition (art. 28 CDF), la déduction d'un nombre de points obtenu en championnat (art. 30 CDF) ou encore la relégation (article 29 CDF), tandis que le montant de l'amende pouvait être fixé jusqu'à hauteur de CHF 1.000.000 (article 15 CDF), la Formation arbitrale a affirmé que la sanction infligée par la Décision de la CR FIFA n'était donc certainement pas la plus grave ou la plus lourde pouvant être infligée.

En l'espèce, deux infractions distinctes avaient été commises par le RFC Seraing, chacune d'elle justifiant une interdiction de recruter de nouveaux joueurs pendant deux périodes de transfert. Toutefois, il s'agissait de la première sanction imposée pour manquement à l'article 18ter RSTJ qui était lors des faits, une disposition nouvelle; dès lors il n'existait encore aucune jurisprudence interne. En outre, si la durée des contrats avait été plus courte et limitée à la période de transition prévue à l'article 18ter RSTJ, ceux-ci n'auraient pas enfreint le RSTJ, de telle sorte que ces contrats n'étaient devenus contraires aux dispositions du RSTJ qu'à partir du 30 janvier 2016. Enfin, si lesdits contrats avaient été conclus un mois plus tôt, ils n'auraient aucunement enfreint le RSTJ. Pour toutes ces raisons, en particulier parce que les infractions commises l'avaient été au cours d'une période transitoire en matière de réglementation sur la TPO, la Formation arbitrale a considéré que les violations réglementaires étaient légèrement atténuées.

Décision

Partant, Formation arbitrale a partiellement admis l'appel déposé par ASBL Royal Football Club Seraing contre la Décision de la Commission de Recours de la FIFA du 7 janvier 2016 et a réduit l'interdiction faite au RFC Seraing d'enregistrer des joueurs, tant au niveau national qu'international, à trois périodes d'enregistrement, complètes et consécutives, suivant la notification de la présente sentence. En revanche, elle a maintenu la condamnation du RFC Seraing au paiement d'une amende de CHF 150.000.

CAS 2016/A/4502
Patrick Leeper v. International Paralympic Committee (IPC)
12 August 2016 (operative part 26 January 2016)

Paralympic athletics (track and field); Doping (benzoylecgonine); Relationship between the right of appeal against decisions and the recognition of decisions; Right of appeal against settlement agreements; Right of appeal against first instance settlement agreements only; Parties bound by the settlement agreement; Applicability of recognition under Article 15.1 IPC Code to settlement agreements; Application of Article 10.5.2 IPC Code/WADC to social/recreational drugs

Panel
Mr Conny Jörneklint (Sweden), President
Mr Luc Argand (Switzerland)
Prof. Ulrich Haas (Germany)

Facts

Mr Patrick "Blake" Leeper (hereinafter the "Appellant" or the "Athlete") is a double amputee and has competed in Paralympic track and field events for the United States. He principally competes in sprint events in the T43 classification, and has won Paralympic medals.

The International Paralympic Committee (hereinafter the "IPC" or the "Respondent") is the global governing body of the Paralympic movement, also acting as the international federation for nine para sports (including para athletics). The IPC is a German private law foundation whose headquarters and seat are in Bonn, Germany.

On 21 June 2015, the Athlete provided an in-competition urine sample which subsequently returned an adverse analytical finding for the prohibited substance benzoylecgonine (a metabolite of cocaine). The Athlete was charged by the United States Anti-Doping Agency ("USADA") with an Anti-Doping Rule Violation ("ADRV") for breach of Article 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample) of the IPC Anti-Doping Code ("IPC Code").

The Athlete's case was initially heard by an independent American Arbitration Association ("AAA") Panel. In its final award of 6 November 2015 (the "AAA Decision"), the AAA Panel found that the Athlete had not met his burden under Articles 10.4 and 10.5 of the IPC Code of showing how the banned substance got into his system and therefore imposed a period of ineligibility of two years under Article 2.1 of the 2015 WADA Code ("WADC"), starting from the date of sample collection.

On 25 November 2015, the Appellant submitted a Statement of Appeal against the AAA Decision to the Court of Arbitration for Sport ("CAS") (file reference CAS 2015/A/4323 ("Case 4323")). The Appellant also requested a stay of the proceedings to allow him and USADA the opportunity to attempt to negotiate a settlement agreement concerning the sanction.

Thereafter, the Appellant and USADA settled their dispute agreeing – among others – that USADA would impose a one-year period of ineligibility on the Appellant, which the Appellant would accept, and withdraw his appeal. On 15 January 2016, USADA and the Appellant executed the settlement agreement (hereinafter the "Settlement Agreement"). On 19 February 2016, following request by the Appellant, CAS issued a Termination Order and removed Case 4323 from the CAS roll.

On 22 February 2016, having been informed of the Settlement Agreement on 1 February 2016, the IPC sent an email to USADA, the

World Anti-Doping Agency ("WADA"), and the United States Olympic Committee ("USOC") outright rejecting the Settlement Agreement (the "IPC Decision").

On 10 March 2016, the Athlete filed a request with the CAS to reinstate Case 4323. In response the CAS Court Office advised the Athlete that his request would be treated as a new appeal. Upon proper filing, the new procedure was given reference number CAS 2016/A/4493 ("Case 4493").

On 14 March 2016, the Athlete filed a statement of appeal with the CAS against the IPC Decision.

On 23 March 2016, the Respondent requested that Case 4493 be consolidated with the current appeal CAS 2016/A/4502. On 1 April 2016, the Appellant rejected the request in question. On 24 May 2016, the CAS Court Office on behalf of the President of the Appeals Arbitration Division informed the Parties that Case 4493 and 4502 had been consolidated in accordance with Article R52 of the Code.

On 14 June 2016, the Panel invited the Parties to file written submissions to address the question of the relationship between Article 15.1 of the WADC that reads *"Subject to the right to appeal provided in Article 13, testing, hearing results or other final adjudications of any Signatory which are consistent with the Code and are within that Signatory's authority, shall be applicable worldwide and shall be recognized and respected by all other Signatories"* and Article 13.2.3 (para. 1) which foresees amongst others a right of appeal for the IPC against decisions related to an anti-doping rule violation (and the respective corresponding rule in the IPC Code).

On 20 June 2016, the Athlete informed the Panel that he wished to withdraw the proceedings in Case 4493. A termination order was thereafter rendered on 15 July 2016.

Reasons

1. To start with the Panel addressed what it determined to be the central question in these proceedings *i.e.* whether the IPC was entitled, under the IPC Code, to recognise only the AAA Decision and to not recognise the separate, subsequent Settlement Agreement between USADA and the Athlete. In this context the Athlete argued that insofar as the IPC had been given the right to appeal the Settlement Agreement, which it decided not to use, it had been obliged to recognise the Settlement Agreement. Conversely, the IPC took the position that Article 15.1 of the IPC Code simply provided that testing, hearing results and other final adjudications that are consistent with the WADC and within the authority of a signatory of the WADC (which the Settlement Agreement was not, amongst others because USADA had no authority to conclude the Settlement Agreement and because once the AAA had rendered its decision, that decision was binding on all signatories, and it was not capable of being voluntarily set aside and substituted by another decision) will be recognised as such, subject to any appeals under Article 13. Furthermore, the IPC argued that the relationship between Articles 15.1 and 13.2.3 of the IPC Code certainly did not impose any obligation to appeal, and that in cases where the requirements of Article 15.1 of the IPC Code were not met there was no obligation for signatories to recognise testing, hearing results or other final adjudications of any other signatory of the WADC.

   The Panel considered that the IPC Code provides some provisions in order to prevent the IPC to be bound by a decision that it does not want to be bound by: (a) a right to appeal against (certain) decisions under Article 13 of the IPC Code and (b)

the rules of Article 15 regarding recognition of decisions. In this respect, whatever can be the object of an appeal under Article 13.2 of the IPC Code also had to be the object of (non-)recognition, because both said provisions pursued a similar goal, *i.e.* to review decisions taken by an anti-doping organization in light of the principles of the IPC Code/WADC and to squash the effects of such decision in case of non-compliance. Furthermore according to the Panel, it followed from the wording and structure of Article 15 of the IPC Code (according to which (non-)recognition of decisions is *"subject to the right of appeal"*) and from the fact that Article 15 of the IPC Code only refers to "final adjudications" (*i.e.* adjudications that – because of their finality – are no longer subject to a right of appeal) that under the IPC Code, appeals take precedence over recognition of decisions, and that both articles are mutually exclusive. Accordingly, non-recognition of the Settlement Agreement was only available to the IPC if it did not have the right to appeal that agreement to the CAS. The Panel clarified that despite the above, in circumstances where the requirements for recognition of decisions of Article 15.1 of the IPC Code are not met, the IPC is not necessarily obliged to appeal the decision in question.

2. The Panel thereupon turned to the question whether the IPC had the right to appeal the Settlement Agreement (a right, if existed, the IPC did not use), despite the fact that the potential object of appeal takes the form of an agreement – *i.e.* that it is consensual. In this context, whereas the Athlete contended that in circumstances where the IPC had not been content with the Settlement Agreement it was in fact obliged to appeal that agreement (rather than to refuse recognition thereof), the IPC denied any right (or obligation) to appeal the agreement in question as the latter had no basis under the applicable rules and USADA was entirely lacking authority to conclude such an agreement. The IPC highlighted that it was not a party to the Settlement Agreement and that it was simply irrelevant that USADA and the Athlete purported to give it 'appeal rights' over their separate, private Settlement Agreement.

   The Panel first analysed Article 7.10 of the IPC Code, noting that that provision addresses "notification of Results Management Decisions", and further stipulates that in cases where an anti-doping organization has *"agreed with an athlete to the imposition of a sanction without a hearing"*, the same anti-doping organization shall give notice thereof to other anti-doping organizations with a right to appeal. Therefore in principle, also in the context of appeals under Article 13.2 of the IPC Code, the term "appealable decision" must be construed in a broad sense, *i.e.* encompassing in principle also agreements between an anti-doping organization and an athlete with respect to consequences in relation to an alleged anti-doping rule violation.

3. In the next step the Panel examined whether in the case at hand, the IPC had a right to appeal the Settlement Agreement between the Athlete and USADA (as submitted by the Appellant but negated by the IPC). In this context the Panel first observed that whereas Article 13.2 IPC Code appeared to list the decisions subject to a right of appeal in an exhaustive manner, agreements executed between an anti-doping organization and an athlete at the appeal stage before the CAS are not expressly mentioned in the list of Article 13.2 IPC Code. The Panel further elaborated that the structure of the IPC Code allowed the conclusion that the IPC Code intends to differentiate between a results management stage, including results management hearings, and an

appeal stage, and that the right of appeal is only applicable to decisions emanating from the results management stage. Consequently, any decision taken at the appeal stage – *e.g.* as here the Settlement Agreement concluded between the Athlete and an anti-doping organization which is designed to terminate pending CAS appeal proceedings (coupled with the Termination Order by CAS) and therefore to substitute for the appeal decision before the CAS (rather than to substitute the first instance results management decision) – is not subject to appeals within the meaning of Article 13 of the IPC Code. In conclusion the Panel held that if in the present case, no appeal was available to the IPC, because of the relationship between Article 13 and Article 15 IPC Code (see above under 1.), Article 15 applied and the IPC had to determine whether or not to recognise the Settlement Agreement.

4. The Panel thereupon addressed the Appellant's argument that the IPC had been under a duty to recognise the Settlement Agreement, stating that amongst others, the IPC would indeed have had a respective obligation if the IPC was bound to the Settlement Agreement for some reason. The Panel found that insofar as the IPC had – undisputedly – not signed the Settlement Agreement it was clearly not bound by it for contractual reasons. The Panel further held that it saw no procedural grounds for which the Settlement Agreement could also bind the IPC, highlighting that the Settlement Agreement was not the outcome of an arbitration agreement or a consent award, but of a private agreement reached outside state or arbitration proceedings. The Panel concluded that the IPC was not barred from reviewing the Settlement Agreement by applying Article 15.1 of the IPC Code.

5. The Panel further considered whether the IPC was not obliged to recognise the Settlement Agreement insofar as the Settlement Agreement did not qualify as *"final adjudication"* in the meaning of Article 15.1 of the WADC/IPC Code. In this context the Athlete argued that the IPC had been obliged to recognise the Settlement Agreement insofar as it qualified as *"other final adjudication"* as mentioned in Article 15 of the WADC. The Respondent took the position that reaching a private agreement with an athlete is neither a test, nor a hearing result, nor a final adjudication in the meaning of Article 15 of the WADC. 'Adjudication' required some non-court based dispute resolution where the evidence is independently examined and pronounced upon. Furthermore the private Settlement Agreement between USADA and the Athlete was not consistent with the WADC or within USADA's authority, and therefore does not fall to be recognised under Article 15.1 WADC.

The Panel, underlining that Article 15.1 of the WADC/IPC Code obliges the signatories of the WADC to recognise *"testing, hearing results or other final adjudications"* of other signatories, held that whereas neither the IPC Code nor the WADC foresee a definition of the term "adjudication" used in Article 15.1 of the IPC Code, when looking at the language used, the grammar and the syntax as well as taking into account the intentions of the IPC in drafting the provision it could first be noted that Article 15.1 of the IPC Code does not refer to "decisions" as the object of recognition. Instead, reference is made to parts of the decision-making process, such as "testing" and "hearing results". Thus Article 15.1 of the IPC Code made it clear that the term "adjudication" must be construed in a broad sense and that not only the final outcome of the results-management process or specific forms of decision-making may be the object of recognition,

but also separate parts thereof. *E.g.* also a private agreement between an athlete and an anti-doping organization has to be considered as a "final adjudication". Consequently the IPC cannot refuse recognition of the Settlement Agreement merely because the decision takes the form of an agreement.

6. In terms of the applicable sanctions the Panel acknowledged that it was disputed between the parties if and to what extent a further reduction of the otherwise applicable period of ineligibility under Article 10.5.2 IPC Code/WADC applies, *i.e.* whether – as argued by the Athlete - the definition of the 2015 WADC (according to which cannabis use unrelated to sport performance constitutes an automatic ground for No Significant Fault or Negligence) should also extend to cocaine.

   The Panel – having amongst others considered the legislative history of the 2015 WADC as well as the WADC's rationale - found that the 2015 WADC does not advocate a dual approach when dealing with the consequences of social/recreational drug use depending on the kind of drug consumed by the athlete (*e.g.* cannabinoids or cocaine). On the contrary in principle there were good reasons to also apply Article 10.5.2 of the IPC Code/WADC regarding reduction of the period of ineligibility based on No Significant Fault or Negligence to cases where an athlete has knowingly ingested cocaine outside competition (but tested positive in-competition), thereby taking a harmonized approach with respect to recreational drug use. The Panel however concluded that in circumstances – as in the present case - where the use of cocaine was influenced by an athlete's addiction to alcohol and happened while the athlete was drunk it was not right to say that the degree of fault displayed by the athlete was "light" or "minimal". Instead, the degree of negligence displayed would have to be qualified as "normal".

Decision

The Panel therefore dismissed the appeal by the Athlete, highlighting that the International Paralympic Committee had no obligation to recognize the Settlement Agreement between Mr Patrick Leeper and the United States Anti-Doping Agency dated 15 January 2016.

CAS 2016/A/4534
Mauricio Fiol Villanueva v. Fédération Internationale de Natation (FINA)
16 March 2017

Aquatics (swimming); Doping (stanozolol); Mechanism of proof by an athlete of his/her absence of intent to commit an anti-doping rule violation (ADRV); Inconclusive evidentiary value of results of polygraph tests

Panel
The Hon. Michael Beloff QC (United Kingdom)
Mr Jacques Radoux (Luxembourg)
Mr Ken Lalo (Israel)

Facts

Mr Mauricio Fiol Villanueva (the "Athlete") is a Peruvian swimmer, specializing in the butterfly events. He has competed in several international-level events, including the 2012 Olympic Games.

Fédération Internationale de Natation ("FINA") is the international federation governing the sports of swimming and diving, headquartered in Lausanne, Switzerland. Its responsibilities include the regulation of swimming, including enforcement of its anti-doping program in compliance with the World Anti-Doping Code (the "WADC").

This appeal is brought by the Athlete against the decision of the Doping Panel of the Federation Internationale de Natation (the "FINA Panel"), which found that he had committed an anti-doping rule violation ("ADRV") pursuant to article 2.1 of the FINA Doping Control Rules ("FINA DC") and thereby imposing a four-year ban on the Athlete commencing 12 July 2015 in accordance with FINA DC 10.2.1, including the disqualification of the results and forfeiture of any medals, points and prizes achieved from that date (the "Appealed Decision").

Between 14 and 16 July 2015, the Athlete competed in the 2015 Pan-American Sports Organization (the "PASO") Games (the "Pan-Am Games") in Toronto, Canada. Prior to his competition, on 12 July, 2015, the Athlete underwent a doping control test administered by the PASO.

In the afternoon of 16 July 2015, before he was due to participate in the 100m butterfly race finals, the Athlete received a notification letter from the PASO Medical Commission informing him that his doping control test on 12 July 2015 resulted in an adverse analytical finding for Stanozolol, which is a prohibited but not a specified substance; that he was withdrawn from competition; and that he was provisionally suspended with immediate effect.

On 18 July 2015, the Peruvian Olympic Committee, on behalf of the Athlete, requested that the Athlete's B Sample be tested. The Athlete's B Sample confirmed the A Sample results. In consequence the PASO Medical Commission referred the Athlete's case to FINA.

On 4 December 2105, a hearing was held before the FINA Doping Panel and on 14 March 2016, the FINA Doping Panel issued the Appealed Decision.

In his submissions before the Court of Arbitration for Sport (the "CAS"), in essence, the Athlete submitted the following arguments:

- He neither intended to cheat nor was reckless or negligent in relation to his obligations to avoid an Anti-Doping Rule Violation (ADRV), or knew that there was a significant risk that his conduct might constitute or result in an ADRV and manifestly disregarded that risk.

- He did not know or have any reason to believe that he had taken Stanozolol.
- There was no basis in the FINA DC or in the World Anti-Doping Code (the "WADC") on which it was based for the conclusion of the FINA Doping Panel that an athlete must establish the source of a prohibited substance as a prerequisite of establishing lack of intent to cheat.
- Without prejudice to the foregoing, he had done everything he could to establish the source of the prohibited substance, including the testing of all the supplements he consumed in the months prior to the ADRV.
- He advanced the theory that the source of the prohibited substance was contaminated horse meat sold as beef which he had consumed in Peru before he travelled to Toronto.
- He had taken other measures to prove an absence of intent, including a polygraph test and hair sample analysis.
- Irrespective of any inability to identify the source of the Stanozolol, he had established, on a balance of probability, that he did not knowingly ingest Stanozolol or intend to cheat.

In his submissions before the Court of Arbitration for Sport (the "CAS"), in essence, FINA submitted the following arguments:

- The Athlete bears the burden of proof to persuade the Panel that he did not intend to cheat. If he cannot do so, he must be sanctioned with a four-year period of ineligibility.
- For this purpose, the Athlete must first prove how the prohibited substance came to be present in his system. Absent such proof (which the Athlete did not provide), he cannot show that the ADRV was not intentional.
- Without prejudice to the foregoing, the Athlete tested positive for a steroid (Stanozolol) which is notoriously used for doping. The natural inference is that the Athlete used it for that purpose.
- The Athlete cannot rely on polygraph evidence to prove that he did not intentionally take Stanozolol. Such evidence is not admissible under Swiss law and is widely recognized as unreliable.
- The Athlete cannot rely on hair sample analysis which took place four months after the doping control in question to establish that he did not take Stanozolol prior to the Pan-Am Games.
- The analyses carried out on behalf of the Athlete show no more than that the origin of the prohibited substance is not a contaminated supplement and there is no other evidence to the effect that it was so caused.
- The Athlete's theory that the ADRV could have been caused by his consumption of contaminated horse meat was mere speculation, unsupported by any cogent evidence, and, as the Athlete conceded, impossible to prove.

Reasons

1. Given the contents of the Athlete above-listed arguments, the Panel deemed relevant to first establish whether it is necessary for the Athlete to establish the source ("Proof of Source") of the prohibited substance present in his sample in order to establish an absence of intent for the purposes of the FINA DC.

   The following factors support the proposition that establishment of the source of the prohibited substance in an athlete's sample **is not** a *sine qua non* of proof of absence of intent:

(i) The relevant provisions, *i.e.* FINA DC 10.2.1.1 and 10.2.3, do not refer to any need to establish such source.

(ii) Establishment of such source is required when an athlete seeks to prove no fault or negligence (FINA DC 10.4) or no significant fault or negligence (FINA DC 10.5.1 and 10.5.2) under the definitions of No Fault or Negligence and No Significant Fault or Negligence. This engages the principle *inclusio unius exclusio alterius:* if such establishment is expressly required in one rule, its omission in another must be treated as deliberate and significant.

(iii) The omission in FINA DC modelled on WADC 2015 of the need to establish source as a precondition of proof of lack of intent must be presumed to be deliberate.

(iv) Any ambiguous provisions of a disciplinary code must in principle be construed *contra proferentem* and in accordance with the hallowed statement in CAS 94/129: *"The fight against doping is arduous and it may require strict rules. But the rule makers and the rule appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable"* (para. 34). This is especially so when on the express language of the code the purpose of the concept of intent is to identify athletes *"who cheat"* (sic).

(v) In an illuminating article by four well recognized experts including Antonio Rigozzi and Ulrich Haas "Breaking Down the Process for Determining a Basic Sanction Under the 2015 World Anti-Doping Code" (*International Sports Law Journal, (2015) 15:3-48)* the view is expressed:

"The 2015 Code does not explicitly require an Athlete to show the origin of the substance to establish that the violation was not intentional. While the origin of the substance can be expected to represent an important, or even critical, element of the factual basis of the consideration of an Athlete's level of Fault, in the context of Article 10.2.3, panels are offered flexibility to examine all the objective and subjective circumstances of the case and decide if a finding that the violation was not intentional".

The following factors support the proposition that establishment of the source of a prohibited substance in an athlete's sample is a *sine qua non* of proof of absence of intent:

(i) It is difficult to see how an athlete can establish lack of intent to commit an ADRV demonstrated by presence of a prohibited substance in his sample (*a fortiori* though use of such substance) if s/he cannot even establish the source of such substance.

(ii) The express need to establish lack of intent to commit an ADRV for the purposes of establishing no fault or negligence or no significant fault or negligence is because the same degree of difficulty does not subsist in this different context. Hence it was necessary to make express what in the context referred to in (i) was necessarily implicit.

(iii) There is a consistent line of jurisprudence that establishment of source is necessary when an athlete seeks to establish absence of fault (see CAS 2013/A/3124 at para. 12.2; quoting with approval CAS 2006/A/1130, at para. 39: *"Obviously this precondition is important and necessary; otherwise an athlete's degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could be partly or entirely made up. To allow any such speculation as to the circumstances, in which an athlete ingested a prohibited substance would undermine the strict liability*

rules underlying (…) the [WADC], thereby defeating their purpose").

(iv) That jurisprudence is logically applicable *mutatis mutandis* to a case where the athlete needs to establish absence of intent. Indeed, it has already been applied in cases where intent rather than fault was in issue (see CAS 2016/A/4662 where the Sole Arbitrator said at para. 39 by reference to RADO 10.2.3 (adopting the same provision in 2015 WADC *"The Athlete bears the burden of establishing that the violation was not intentional ... and it naturally follows that the athlete must also establish how the substance entered her body"*); (see also CAS 2016/A/4377 at para. 51 to same effect)). However, in CAS 2016/A/4439, the Panel did not appear to have considered it mandatory for the athlete to establish how the prohibited substance got into his system in order for him to show that the ADRV was not intentional. While noting that the athlete was unable to identify the source, the Panel nevertheless went on to consider whether the athlete could show that the ADRV was not intentional, and, in finding that he could not, relied on various reasons other than such inability (para 41. *et seq*.).

The Panel finds the factors in support of the proposition that establishment of the source of the prohibited substance in an athlete's sample is not a *sine qua non* of proof of absence of intent more compelling than those factors in support of the proposition that establishment of the source of a prohibited substance in an athlete's sample is a *sine qua non* of proof of absence of intent. In particular, it is impressed by the fact that the FINA DC, based on WADC 2015, represents a new version of an anti-doping Code whose own language should be strictly construed without reference to case law which considered earlier versions where the versions are inconsistent. Furthermore, the Panel can envisage the theoretical possibility that it might be persuaded by an athlete's simple assertion of his innocence of intent when considering not only his demeanour, but also his character and history. That said, such a situation would inevitably be extremely rare. Even on the persuasive analysis of Rigozzi, Haas *et al*., proof of source would be *"an important, even critical"* first step in any exculpation of intent. Where an athlete cannot prove source it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him.

The Panel is unpersuaded that the Athlete, if contrary to its preferred view he is required to establish the source of the Stanozolol, has been able to do so. The tests of the supplements he had admitted using showed at best that they were not the source of the Stanazolol.

The foundations of the contaminated horse meat theory were unsound and depended in any event on a series of improbabilities none of which were established to the satisfaction of the Panel.

There was, however, no evidence upon which the Athlete could rely to discharge his burden of proving lack of intent. The absence of evidence as to the source of the Stanozolol closed off one avenue. All that was left were his protestations of innocence, the character evidence given by his coach, the lie detector test, the hair sample analysis and his bare assertion that his recent improvements in terms of times for his events achieved prior to the Pan-Am Games were the product of superior conditioning.

The Appellant's explanation for the recent improvement in his performance, and his coach's sharing of that view is by itself

without sufficient weight to discharge the burden upon him; likewise the trust that Mr. Tabini had in the Appellant's character.

2. The *lex fori* (*i.e.* the law of Switzerland) does not reject as inadmissible *in limine* the results of a polygraph test voluntarily undergone. It will evaluate it and exclude it only if it is found by application of restrictive criteria to be objectively "unsuitable" evidence (Article 152 para. 1 Swiss Civil Procedure Code; BGE 124 I 241, E. 2; BK-ZPO-BRÖNNIMANN, 2013, Art. 152 Rn 19; HK-GS-JÄGER, 3. Aufl. 2013, § 136a Rn 35).

   CAS Panels have in the past considered the suitability of such evidence and in doing so, have never found it dispositive. The high-water mark of its use by a CAS Panel is to be found in CAS 2011/A/2384, where it was stated at para. 384:

   "In light of the foregoing, the Panel takes good note of the fact that the results of the polygraph corroborate [X]'s own assertions, the credibility of which must nonetheless be verified in light of all the other elements of proof adduced. In other words, the Panel considers that the results of the polygraph add some force to [X]'s declaration of innocence but do not, by nature, trump other elements of evidence".

   More circumspectly, in CAS 2014/A/3487, the Panel said, at para. 119, that it did:

   "not consider it necessary to consider the admissibility or reliability of the polygraph evidence. In these circumstances, the Panel therefore concludes that it need place no weight on [X]'s oral testimony or written report, and, while noting that previous CAS cases have considered this issue (see, for example, CAS 2011/A/2384 & 2386 and CAS 2008/A/1515) the Panel expresses no view as to the probative value of this testimony or the written report".

   In the Panel's view, while CAS Panels may have previously found polygraph evidence to be admissible, such evidence is of limited value. Moreover, the cost involved is disproportionate to any probative value of such test. If, in the future, it were not, as a matter of practice to be entertained by CAS Panels, this would have the beneficial consequence that an athlete could not be criticized for failure to submit to such tests as a means of seeking to show lack of intent.

Decision

In light of the foregoing, the Panel upholds the four-year sanction, effective from the date of the Athlete's initial suspension and dismisses the appeal.

CAS 2016/A/4560
Al Arabi SC Kuwait v. Papa Khalifa Sankaré & Asteras Tripolis FC
25 April 2017

Football; Termination of the employment contract with just cause by the player; Inadmissibility of counterclaims or new claims lodged by respondents in appeal proceedings before CAS; Definition of a just cause to terminate a contract of employment; Non-registration of a player by a club as a just cause for the termination of an employment contract; Calculation of the amount of compensation for damages based on the 'positive interest' principle

Panel
Mr Ivaylo Dermendjiev (Bulgaria), President
Mr David Wu (China)
Prof. Stavros Brekoulakis (United Kingdom)

Facts

Al Arabi SC Kuwait (the "Appellant" or the "Club") is a professional football club based in Kuwait City, Kuwait. The Club is affiliated to the Kuwait Football Association ("KFA") which, in turn, is a member of the Fédération Internationale de Football Association ("FIFA").

Mr Papa Khalifa Sankaré (the "First Respondent" or the "Player") is a professional football player of Senegalese nationality, born on 15 August 1984.

Asteras Tripolis FC (the "Second Respondent") is a professional football club affiliated to the Hellenic Football Federation ("HFF") which, in turn, is a member of FIFA.

On 19 June 2013, the Club and the Player concluded an employment contract valid as from 1 August 2013 until 30 June 2016 (the "Employment Contract"). The parties to the Employment Contract agreed to a gross remuneration of USD 900,000 for the duration of the contract and the Player was further entitled to other benefits such as *inter alia* the use of a furnished apartment and a car.

On 5 August 2013, the Club initiated the pertinent International Transfer Certificate ("ITC") request in order to complete registration of the Player through the FIFA TMS, which was finally withdrawn by the Club on 5 September 2013.

On 3 October 2013, the Player put the Club in default of salaries for August and September 2013, noting also the Club's failure to provide a car and an apartment as yet provided in the contract, as well as the exclusion of the Player from the first team training sessions.

On 5 November 2013, the Player formally notified the Club for the unilateral termination of the Employment Contract with just cause and with immediate effect on ground of contractual breaches committed by the Club such as the non-payment of salaries, demands by the Club for returning the sign-on advance payment, denied access to the training process of the team, failure to provide a car and accommodation, all of which in the Player's view clearly demonstrated the Club's intent to part with the Player.

The Player also noted that the Club's allegation for the problem faced with regard to the Player's ITC was subsequently found to be untrue.

On 11 December 2013, the Player filed a claim before the FIFA Dispute Resolution Chamber ("DRC") against the Appellant, contending that he terminated the Employment Contract with just cause and *inter alia* requested that the Club be ordered to pay him compensation. On 2 February

2014, the Club filed a counterclaim before the DRC against the Player and the Second Respondent requesting to be reimbursed of all the amounts paid to the Player, as well as to be awarded an unspecified amount of compensation for the Player's breach of contract. The Club also requested the imposition of sporting sanctions on the Player and the Second Respondent. On 6 April 2014, the Club modified its counterclaim claiming that the aforementioned parties were jointly and severally liable to pay it compensation for breach of contract.

On 1 January 2014, the Player signed a contract with the Second Respondent valid until 30 June 2016 for remuneration in the total amount of EUR 250,000 for the entire term of the contract.

On 15 October 2015, the DRC issued its decision by means of which it partially accepted the Player's claim and ordered the Club to pay the Player compensation for breach of contract in the amount of USD 370,000, plus 5% interest *p.a.* that would fall due as of expiry of the 30 days from the notification of said decision.

Reasons

1. Regarding the jurisdiction of CAS, The CAS Panel notes that in its submissions, the First Respondent acknowledged that he did not appeal the challenged decision but nevertheless claimed that *"he is not deprived of the right to challenge some of the findings of the DRC, which happen to be incorrect"*.

   In this respect, the Panel holds that the CAS Code does not provide for the possibility of a respondent to file in an appeal arbitration proceedings a counterclaim against a decision challenged by an appellant - any party wishing to have the disputed decision set aside or modified has to file an independent appeal.

   With respect to the request for awarding interest on principal amounts, which was initially not claimed by the First Respondent before FIFA, the Panel holds that it goes beyond the permitted scope of review under Article R57 of the CAS Code the review of prayers for relief which have not been included in the subject matter of the claim lodged before the first instance legal body and for which the internal remedies were not exhausted. CAS jurisprudence shows that, in reviewing a case in full, a Panel cannot go beyond the scope of the previous litigation and is limited to the issues arising from the challenged decision (CAS 2007/A/1396 & 1402, CAS 2012/A/2875).

   In addition, with regard to all prayers for relief which seeks an award beyond and above the USD 370,000 already awarded to the First Respondent with the appealed decision, the Panel holds that it is not permitted to review and eventually entertain such prayers since no appeal was formally filed to that effect (CAS 2013/A/3204, CAS 2010/A/2098).

   Accordingly, the First Respondent's requests are inadmissible.

2. In continuation, the central issue to be determined in the present matter is which party was in breach of the Employment Contract and thus whether the Player unilaterally terminated the Employment Contract without just cause or whether the Club breached the Employment Contract, entitling the Player to unilaterally terminate the contract with just cause.

   The FIFA Regulations on the Status and Transfer of Players (RSTP) do not provide the definition of "*just cause*". The Commentary on the RSTP states the following with regard to the concept of

just cause: *"The definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case. Behaviour that is in violation of the terms of an employment contract still cannot justify the termination of a contract for just cause. However, should the violation persist over a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally"* (RSTP Commentary, N2 to Article 14).

The CAS has had the opportunity of specifying in its jurisprudence that while the FIFA RSTP do not define the concept of "just cause", reference should be made to the law subsidiary applicable, *i.e.* Swiss law (CAS 2006/A/1062; CAS 2008/A/1447).

Article 337 para. 2 of the Swiss CO provides that *"a valid reason is considered to be, in particular, any circumstance under which, if existing, the terminating party can in good faith not to be expected to continue the employment relationship"*. The concept of "just cause" as defined in Article 14 RSTP must therefore be linkened to that of "valid reason" within the meaning of Article 337 para. 2 Swiss CO.

According to the practice of the Swiss Federal Tribunal, an employment contract may be terminated immediately for good reason when the main terms and conditions, under which it was entered into are no longer implemented and the party terminating the employment relationship cannot be required to continue it (ATF 101 Ia 545; Judgment 4C.240/2000 of 2 February 2002; Judgment 4C.67/2003 of 5 May 2003; WYLER R., *Droit du travail*, Berne 2002, p. 364; TERCIER P., *Les contrats spéciaux*, Zurich 2003, N3402, p. 496).

When immediate termination is at the initiative of the employee, a serious infringement of the employee's personality rights, consisting, for example, in unilateral or unexpected change in his status which is not related either to company requirements or to organization of the work or the failings of the employee, may be deemed "good reason".

According to Articles 28 *et seq.* of the Swiss Civil Code, any infringement of personality rights caused by another is presumed to be illegal and subject to penalties unless there is a justified reason that overturns this presumption. It is generally accepted in jurisprudence (ATF 120 II 369; ATF 102 II 211; ATF 137 III 303; Judgment of the Swiss Federal Tribunal 4A_558/2011, dated March 27, 2012) that personality rights apply to the world of sport. For athletes, personality rights encompass in particular the development and fulfilment of personality through sporting activity, professional freedom and economic freedom. An athlete who is not actively participating in competitions depreciates on the market and reduces his future career opportunities. Athletes have therefore a right to actively practice their profession. To the extent that Articles 28 *et seq.* Civil Code protect parties from negative actions and require offending parties to refrain therefrom, but do not grant rights to positive actions, such right to actively practice one's profession is resolved notably by labour law (CAS 2013/A/3091, 3092 & 3093).

3. Applying the above principles, the Panel will go on to establish if, considering the particular circumstances of the case, the Player had just cause to unilaterally terminate the Employment Contract. In performing this exercise, the Panel will start from analyzing the ITC issue as the Player's claim was partially upheld by the DRC exactly on the account that the Club

was found to be in breach of the Employment Contract by cancelling the ITC request prior to closing of the transfer window.

After having referred to Articles 5(1) (mandatory registration of players) and 6 (registration periods) of the FIFA RSTP, the Panel refers to its Article 9(1) which states that international transfers cannot take place without an ITC. Article 9 RSTP requires that, in the case of an international transfer, an ITC must be requested and obtained in advance, that is, prior to the registration with a new club. This provision establishes that a player already registered in an association may only be registered with a new association (and a new club) when the latter has received an ITC for the player from the former association. In any case, considering that the procedure for the issuance of an ITC may be initiated only when the club to which the player is moving files an application to its association (Annexe 3 RSTP), this club is also responsible for ensuring that the ITC has been actually issued and received in a timely fashion. Failure to submit the mentioned application and to report the international transfer to the new association represents a breach of Art. 9(1) RSTP.

It is undisputed that no ITC has ever been issued in the present case. In any event, according to the applicable regulations, the ITC request should have been forwarded by the former association (HFF) to the new association (KFA). Indeed, on 25 August 2013, the Appellant requested the KFA to contact the HFF with respect of the delivery of the Player's ITC. No evidence was presented as to whether the KFA actually approached the HFF. As confirmed in letters of the HFF, it was not before 4 January 2014 that the HFF received an ITC request for the Player. Nevertheless, in the Panel's opinion, it was up to the Appellant to pursue its request to the KFA so that the ITC delivery process would be eventually completed within the registration period.

Even if the Second Respondent and/or the HFF were found to be in violation of their TMS obligations and were not responding to the ITC request as a result of which the Player's ITC was not provided, the Appellant could still have applied before the KFA for registering the Player on a provisional basis (Annexe 3 to RSTP, Article 8.2 paragraph 6) had it not cancelled the request and if it really wished to make use of the Player's services.

The Panel holds that among a player's fundamental rights under an employment contract, is not only his right to a timely payment of his remuneration, but also a reasonable opportunity to compete with his fellow team mates in the team's official matches. By not registering the Player, even if it had the legal options to do so, the Club effectively barred in an absolute manner the potential access of the Player to competition and, as such, violated one of his fundamental rights as a football player, thus breaching the contract since it *de facto* prevented the Player from being eligible to play for the Club.

The Employment Contract was therefore unilaterally terminated by the Player with just cause due to the Club's misbehaviour. From the facts stated before, the Panel is satisfied that the unilateral termination was caused by the Appellant in that it cancelled the ITC request on 5 September 2013 in the TMS. This cancellation in the TMS had the effect of a just cause for the Player to terminate the Employment Contract. As mentioned above, according to Article 5 para. 1 RSTP, a player must be registered with an association to play for a club. Only registered players are eligible to participate in organized football. Article 11 RSTP states that any player not

registered with an association who appears for a club in any official match shall be considered to have played illegitimately (ZIMMERMANN M., Vertragsstabilität im internationalen Fussball, Zürich 2015, p. 71). Therefore, the Appellant has barred the First Respondent's access to any official match with its team and it is therefore violating the First Respondent's fundamental right as it employed football player to compete on the highest level possible. Failure to register the Player when opportunities for registration were still not exhausted is therefore a serious breach of contract (similarly in CAS jurisprudence, CAS 2013/A/3091, 3092 & 3093, para. 228) which entitled the Player to terminate the Employment Contract with just cause. The Appellant clearly showed *de facto* that it did not rely on the First Respondent's services anymore when announcing in the TMS the cancelling of the request.

In light of the foregoing, the Panel concludes that the Employment Contract was unilaterally terminated by the Player with just cause.

4. Having established that the Club is to be held liable for the early unilateral termination of the Employment Contract by the Player, the Panel will now proceed to assess the legal consequences of the termination.

In respect of the calculation of compensation in accordance with Article 17 of the RSTP and the application of the principle of "positive interest", the Panel took note of the explanation thereof by a previous CAS Panel: *"When calculating the compensation due, the judging body will have to establish the damage suffered by the injured party, taking in consideration the circumstances of the single case, the arguments raised by the parties and the evidence produced. Of course, it is the injured party that requests compensation who bears the burden of making, as far as possible, sufficient assertions and who bears as well the burden of proof.*

As it is the compensation for the breach or the unjustified termination of a valid contract, the judging authority shall be led by the principle of the so-called positive interest (or "expectation interest"), i.e. it will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur. This principle is not entirely equal, but is similar to the praetorian concept of in integrum restitution, known in other law systems and that aims at setting the injured party to the original state it would have [had] *if no breach had occurred.*

The fact that the judging authority when establishing the amount of compensation due has a considerable scope of discretion has been accepted both in doctrine and jurisprudence (cf. CAS 2008/A/1453-1469, N 9.4; CAS 2007/A/1299, N 134; CAS 2006/A/1100, N 8.4.1. In relation to Swiss employment law, see Streiff/von Kaenel, Arbeitsvertrag, Art. 337d N 6, and Staehelin, Zürcher Kommentar, Art. 337d N 11 – both authors with further references; see also WYLER R., Droit du travail, 2nd ed., p. 523; see also the decision of the Swiss Federal Tribunal BGE 118 II 312f.) (…).

The principle of the 'positive interest' shall apply not only in the event of an unjustified termination or a breach by a player, but also when the party in breach is the club. Accordingly, the judging authority should not satisfy itself in assessing the damage suffered by the player by only calculating the net difference between the remuneration due under the existing contract and a remuneration received by the player from a third party. Rather, the judging authority will have to apply the same degree of diligent and transparent review of all the objective criteria, including the specificity of sport, as foreseen in art. 17 FIFA Regulations" (cf. CAS 2008/A/1519-1520, at §80 et seq.)".

The Panel finds that the legal framework set out above and the principle of positive interest are also applicable to the present case and will now proceed to determine the amount of compensation due to the First Respondent.

Be it as it may, the Employment Contract provides for a total fixed value of USD 900,000. But for the termination of the Employment Contract, the Player would have earned USD 750,000 (USD 900,000 less USD 150,000 already received = USD 750,000). Because these payments became immediately due as a result of the termination of the Employment Contract, the Player is principally entitled to receive these payments. Considering the principle of positive interest, the amount of USD 750,000 is the total amount of salary and bonuses the Player would have received should the Club not have breached the Employment Contract. The Panel therefore finds that this is the amount that shall be used as the basis for calculating the total amount of compensation due.

The Panel, however, notes that it remained undisputed that on 1 January 2014, the Player had concluded a new employment contract with the Second Respondent valid until 30 June 2016 and that the Player was entitled to receive a total amount of EUR 274,475 (equal to approximately USD 380,000 after conversion as of 1 January 2014).

According to generally accepted principles of the law of damages and also of labour law (*cf.* Article 337c of the Swiss CO and Article 17.1 of the RSTP), the Panel therefore finds that the remuneration the Player earned with the Second Respondent during the remaining contractual term of the Employment Contract should be deducted from the amount the Player would have earned with the Club should the Club have properly performed the Employment Contract.

In conclusion, the compensation for termination of the Employment Contract for just cause is in the amount of USD 370,000 (USD 750,000 - USD 380,000 = USD 370,000).

Decision

In light of the foregoing, the Panel holds that the the appeal is dismissed and the Panel confirms the Appealed Decision.

CAS 2016/A/4602
Football Association of Serbia (FSS) v. Union des Associations Européennes de Football (UEFA)
24 January 2017

Football; Membership of an association; Legal interest in general and Legal interest in cases where power of representation and management authority of the association are interdependent; Standing to sue; Standing to be sued; "Recognition by the United Nations as an independent state" as a criterion for membership of the UEFA

Panel
Prof. Ulrich Haas (Germany), President
Mr José Juan Pintó (Spain)
Mr Patrick Lafranchi (Switzerland)

Facts

On 9 March 2015, the Football Federation of Kosovo ("FFK") submitted its application for membership to the Respondent, the Union des Associations Européennes de Football ("UEFA" or "Respondent"). On 17 September 2015, the UEFA Executive Committee decided to place FFK's application on the agenda of the 40th Ordinary UEFA Congress to be held on 3 May 2016 in Budapest.

By Circular Letter 6/2016 dated 3 February 2016, UEFA member associations were notified about the upcoming 40th UEFA Congress. By Circular Letter 10/2016 dated 4 March 2016, the formal notification and invitation to the Congress was sent to the UEFA member associations, including the Congress Agenda. Item X of the Congress Agenda tabled the matter *"Application of the Football Federation of Kosovo for UEFA membership"*. On 21 April 2016, Circular Letter 16/2016 was sent to the member associations, containing the attachments to the Congress Agenda. Neither FFK's original application for membership nor the supporting documents have been enclosed, only a summary thereof.

At the UEFA Congress in Budapest on 3 May 2016, the UEFA Congress passed a resolution thereby accepting FFK to join UEFA as its 55th member association ("the Resolution" or "the Appealed Decision"). The Resolution was taken by secret ballot and resulted in 28 votes in favour of FFK's admission, 24 against and 2 votes being invalid. Before and after passing the Resolution, the Appellant, the Football Association of Serbia (Fudbalski Savez Srbije, "FSS", or "Appellant"), voiced its opposition at the UEFA Congress to FFK's membership.

Ten days later, on 13 May 2016, FFK was admitted as new member of FIFA.

On 13 May 2016, the FSS filed an appeal against the Appealed Decision with the CAS. A hearing took place in Lausanne on 31 October 2016.

In its Statement of Appeal (13 May 2016), Appeal Brief (3 June 2016), and its subsequent submission dated 2 November 2016 the Appellant filed the following prayers for relief: (1) *"The appeal of the Football Association of Serbia is upheld"*; (2) *"The Decision of UEFA, taken at its 40th Ordinary Congress, to admit Kosovo as a member is annulled"*; (3) *"Kosovo cannot be a member of UEFA pursuant to UEFA Statutes and its membership contract is to be declared null and void"*; (4) *"UEFA shall be condemned to pay any and all costs of the present arbitrational proceedings including, without limitation, attorney's fees as well as any eventual further costs and expenses for witnesses and experts. In this respect, the Appellant reserves the right to provide the Panel with all relevant documentation attesting the incurred amounts"*.

Reasons

1. The first question to solve was the legal interest of the Appellant to challenge the Appealed Decision. The Panel started by recalling that in principle, a request was inadmissible, if it lacked legal interest. Thus, a reasonable legal interest was a condition for access to justice. For the Panel, the condition of sufficient legal interest served first and foremost public interests, i.e. to restrict the case load for the courts by striking "purposeless" claims from the court's registry. This public interest was clearly evidenced by the fact that the courts examined this (procedural) condition *sua sponte*. Therefore, a claim was to be deemed inadmissible if it clearly did not serve the purpose of the appellant.

   In the case at hand the Appellant's legal interest with respect to his second request – at least at first sight – appeared questionable with regard to the prerequisite of sufficient legal interest. The goal pursued by the Appellant was – obviously – to ensure that FFK did not become a member of the Respondent. The question, however, was whether the appeal against the Resolution served this purpose. For the Panel, although membership in a Swiss association is acquired through a membership contract and the organ with the power to represent the association when executing the membership contract is, in principle, the board of the association, the association was free to provide in its Statutes that the board before executing certain contracts vis-à-vis a third party (e.g. the execution of a membership contract) had to obtain the (prior) consent or approval of another organ of the association, e.g. the general assembly. In the present case, the existence and validity of the Resolution was a condition precedent for the validity of the membership contract entered into between UEFA and FFK. It was clear to all parties involved, in particular to FFK that the organ internally competent to decide on FFK's application was the UEFA Congress and, thus, that any execution of the membership contract (even orally) required a resolution by the UEFA Congress. This is evidenced by the fact that FFK attended the UEFA Congress. As a result, the power of representation for entering into the membership contract was under the resolutory condition that there was a valid Resolution by the UEFA Congress. Consequently, even if the appeal of the Appellant was primarily directed against the Resolution and not against the membership contract, the Appellant had sufficient legal interest to pursue this request.

2. The next question for the Panel to solve was whether the FFS had standing to appeal against the Resolution.

   The Panel held that under Art. 75 of the Swiss Civil Code (SCC), if a member is (procedurally) entitled to take part in the formation of the will of the respective organ of the association (in this case, the Appellant as a member of UEFA was entitled to participate in the decision-making process leading up to the Resolution), it need not be substantively affected by the decision in order to have standing to appeal. According to the Panel, the wording of Art. 62(2) of the UEFA Statutes according to which only parties *directly affected* by a decision may appeal to the CAS did not change this as the member would always be deemed to be affected by the decision in question, because the (procedural) right to take part in the decision-making process included a member's right to a decision taken by the competent organ in conformity with the rules and regulations of the association.

3. UEFA was of the view that the appeal should have also (or exclusively) been filed against FFK, since the remedy

sought from the CAS aimed at changing the legal status of FFK. The appeal had, therefore, to be lodged against the party substantively or materially affected by the outcome of the appeal procedure, i.e. FFK. Since the Appellant had failed to direct its appeal against the proper defendant(s) the appeal had to be dismissed for lack of standing to be sued.

The Panel did not concur with UEFA's view. It held that the legal literature was unanimous with respect to the standing to be sued in case a resolution of the general assembly forms the matter in dispute of an appeal. In such case the appeal within the meaning of Art. 75 SCC had to be directed (solely) against the association. Furthermore, the remedy sought from the CAS, i.e squashing the Resolution, would not only have affected FFK, but also all the other UEFA members that had participated in the formation of the will of the UEFA Congress and had voted in favour of admitting FFK to membership. Thus, to follow UEFA's argumentation would have meant that the appeal would have had to be directed not only against FFK, but against all members that had voted in favour of the Resolution. In addition to be unreasonable and contrary to the legislative intent of Art. 75 SCC, it would – in a case where the vote is taken by secret ballot – render an appeal against the resolution of a general assembly impossible. According to the Panel, this illustrated clearly, that the party best suited to represent and defend the will of the majority of the UEFA Congress was the association itself.

4. The Appellant was submitting that the Resolution was not in compliance with substantive provisions in the UEFA Statutes and regulations. For the Appellant, FFK did not comply with the conditions for membership in Art. 5 UEFA Statutes which provides that *"Membership of UEFA is open to national football associations situated in the continent of Europe, based in a country which is recognised by the United Nations as an independent state, and which are responsible for the organisation and implementation of football-related matters in the territory of their country"*. In particular, the question was whether FFK is *"based in a country which is recognised by the United Nations as an independent state"*. Although both parties were in agreement, in essence, that the provision – if applied literally – made little sense, because it is undisputed that the United Nations do not recognise countries, but only countries may recognise other countries, they were providing two opposing interpretations. According to the Appellant, the provision had to be read as requiring that the applicant was based *"in a country that is a member of the United Nations"*. "Recognition" by the United Nations was requiring that a country be admitted as a member to the United Nations according to the formal admission procedure which was not the case of Kosovo. The Respondent, on the contrary, was proposing that the rule be read as meaning that the applicant is based *"in a country recognised by the majority of the members of the United Nations"*. According to this line of interpretation, the respective prerequisite for membership were fulfilled, since the simple majority of the member states of the United Nations was recognising Kosovo as an independent state (109 out of 193 UN members as of March 2016).

Both parties and the Panel were of the view that statutes and regulations of an association shall be interpreted and construed according to the principles applicable to the interpretation of the law rather than to contracts. Applying these principles to the case at hand, the Panel came to the conclusion that the reference to the United Nations in Art. 5 (1) UEFA Statutes was not designed or intended to restrict the notion of "independent state" beyond the threshold in public

international law. Consequently, Art. 5 (1) UEFA Statutes ambiguously providing that membership of UEFA was open to national football associations based in a country which is *"recognised by the United Nations as an independent state"* did not require this country to be admitted as a member to the United Nations according to the formal admission procedure, but had to be interpreted as meaning that the territory in which the federation is located be recognised by the majority of the United Nations member states as an "independent state".

For the Panel, this view was further backed when looking at the overall sporting context, i.e. the sporting reality in which the UEFA provisions were embedded. Having defined *"country"* in its Statutes as *"an independent state recognised by the international community"*, FIFA similarly to UEFA had introduced the independence-test as a prerequisite for membership. However, the decisive criteria to determine independence was – according to the FIFA Statutes – not membership in the United Nations, but recognition *"by the international community"*. In application of this provision, FFK – since 13 May 2016 – had become a member of FIFA. A similar definition of "country" as in the FIFA Statutes could be found in Rule 30.1 of the Olympic Charter. The latter read as follows: *"In the Olympic Charter, the expression "country" means an independent State recognised by the international community"*. Consequently, it did not come as a surprise that the national Olympic committee of Kosovo had been recognised by the IOC. For the Panel, it was also noteworthy that the respective sport federation of Kosovo had been admitted as member association by a number of other international federations (e.g. FIBA, FINA, UCI, IAAF, FIS, etc.).

Decision

As a result, the Panel concluded that the Resolution complied with the rules and regulation of UEFA and the provisions of statutory law. Therefore, the appeal lodged by the Appellant against the Resolution had to be dismissed. Consequently, the membership contract entered into between UEFA and FFK was also valid and the request for declaratory relief filed by the Appellant according to which the membership contract shall be declared null and void had to be equally dismissed.

CAS 2016/A/4777
Izzat Artykov v. International Olympic Committee (IOC)
21 April 2017

Weightlifting; Doping (Strychnine); Right to appeal against a decision taken by the CAS Anti-Doping Division (ADD); Standing to be sued; Scope of jurisdiction of the panel in the context of an appeal against a decision of the CAS ADD; Notification of the Adverse Analytical Finding (AAF) to the athlete; Representation of an athlete at the B sample opening; Apparent authority of the NOC during the Olympic Games; Proof of the presence of a prohibited substance

Panel
Prof. Christoph Vedder (Germany), President
Mr Jeffrey Benz (USA)
Prof. Martin Schimke (Germany)

Facts

Mr. Izzat Artykov (the Athlete or the Appellant), is a 23 year old professional weightlifter under the jurisdiction of the Weightlifting Federation of Kyrgystan (WFK) who represented the National Olympic Committee of the Kyrgyz Republic (KNOC) at the Olympic Games 2016 in Rio de Janeiro.

The International Olympic Committee (IOC) is the international non-governmental organization leading the Olympic Movement under the authority of which the Olympic Games are held.

The Athlete participated in the Men's 69 kg Weightlifting competition at the Rio Games which took place on 9 August 2016 and was awarded the bronze medal.

On the same day, right after the competition, the Athlete submitted to an in-competition doping control for a urine sample.

On 10 August 2016, the Athlete and his coach flew back to Kyrgystan.

On 12 August 2016, the IOC notified the Athlete and the KNOC that the results of the analysis of his A sample revealed the presence of strychnine which is a stimulant prohibited under S6 of the 2016 WADA Prohibited List. Strychnine is a specified substance.

The B sample was analysed on 13 August 2016 in the presence of Mr. Ergeshov, the Secretary General of the KNOC. The results of the B sample analysis confirmed the results of the A sample analysis.

On 12 August 2016, the IOC filed an application with the Anti-Doping-Division of the Court of Arbitration for Sport (CAS ADD), a tribunal set up by virtue of the IOC Anti-Doping Rules applicable at the Rio Games (IOC ADR) to adjudicate doping-related disputes arising during the Rio Games.

On 13 August 2016, the CAS ADD suspended the Athlete from competition.

With respect to the award rendered by the CAS ADD on 18 August 2016 (CAS AD 16-07 IOC v. Izzat Artykov) holding that the Athlete committed an Anti-Doping Rule Violation (ADRV), the latter filed a Statement of Appeal, dated 29 August 2016, together with an "Application" dated "21 July/August 2016" against the IOC with the CAS.

By letter of 9 September 2016, the Parties were notified that, pursuant to Article S20 of the Code of Sports-related Arbitration (2016 edition) (the Code), the dispute was assigned to the Appeals Arbitration Division and,

therefore, shall be dealt with in accordance with Articles R47 et seq. of the Code.

Within the time-limit set, the Appeal Brief was filed on 7 October 2016. In the Appeal Brief, the Appellant nominated the KNOC as Second Respondent.

On 22 November 2016, the Respondent filed its Answer after several extensions of the time-limit.

The Athlete did not challenge the results of the analysis. Rather he claimed procedural flaws committed by the KNOC and the IOC invalidating the results of both the A and B samples analysis.

In support of his submission, the Athlete relied on rules set forth in the Olympic Charter and the IOC ADR and submitted that he was neither duly notified of the various steps of the procedure nor duly represented at the opening of the B sample.

The Athlete concludes that *"since the B sample results are inadmissible … no violation of Article 2.1.2* [of the IOC ADR] *can be established to have occurred"*.

The Respondent submits that the analysis of the B sample which was conducted on 13 August in the presence of Mr. Ergeshov, Secretary General of the KNOC, confirmed the results of the A sample analysis which revealed the presence of strychnine, a prohibited substance under S6 of the WADA Prohibited List 2016, and, therefore, an ADRV in the sense of Article 2.1 IOC ADR is established. The Respondent emphasizes that the Athlete did not challenge the analytical finding.

Contrary to the Athlete's submissions, the Respondent claims that the Athlete's rights with regard to the B sample analysis were respected. Pursuant to Article 7.2.4 IOC ADR, the IOC must notify the athlete and his NOC of an Adverse Analytical Finding (AAF) and inform the athlete concerned of his rights in a manner set out in Article 13.1 IOC ADR. Art. 5.2.4.3.2.6. ISL provides for the right of the athlete's or the athlete's representative to attend the B sample analysis.

Reasons

1. Regarding the jurisdiction of CAS, according to Article 12.2 in conjunction with Articles 12. 1 and 12.2 IOC ADR as well as Article 21 of the AR ADD which are the rules applicable to the present dispute, the Athlete has the right to appeal the decision of the CAS ADD exclusively and directly to the permanent CAS. Therefore, the CAS has jurisdiction to hear the present case.

2. The KNOC was designated as Second Respondent by the Athlete in his Appeal Brief dated 7 October 2016. In response, in its letter of 17 October 2016, the CAS Court Office advised the Appellant that *"the Respondent(s) must be designated together with the Statement of Appeal or within the deadline provided for"* in Article R49 of the Code. Since such deadline had expired earlier to the Appeal Brief the CAS Court Office stated that the designation of the KNOC as Respondent *"shall be considered inadmissible"*.

   This clarification was not opposed by the Appellant. Nevertheless, at the hearing, procedural flaws committed by the KNOC were claimed and the Athlete consciously upheld his prayers for relief including for damages caused by the behaviour of the KNOC and for a contribution towards the legal costs to be paid by the KNOC.

   However, the NOC has no standing as a respondent in the present dispute before the Panel. The Appeal dated 21 August 2016 was lodged by using a form called *"Application"* issued by the CAS. It follows

from this *Application* considered as a whole that the KNOC was not named as a formal respondent at that stage. In the following communications between the CAS Court Office and the Parties the case was referred to as *"Artykov v. IOC"*.

For the sake of legal certainty, a person or entity has no standing as a respondent in a dispute before the CAS if the deadline provided for in Article R49 has expired and if the latter is not named as respondent in the "application" issued by the CAS used to fill the appeal. Such participation as a respondent would exceed the jurisdiction of the Panel *ratione personae*. Though, pursuant to Article R57 of the Code, the Panel, in an appeals arbitration, has the full power to review the facts and the law, such scope of review is limited to the subject-matter and the parties of the dispute which lead to the appealed decision.

3. As mentioned above, though the Panel advised the Parties that the proceedings before it were between the Athlete and the IOC exclusively, the Appellant expressly upheld all of his prayers for relief submitted in his Appeal Brief including the claims for damages to be jointly paid by the IOC and the KNOC and submitted alleged procedural flaws committed by the KNOC.

   The subject matter of alleged damages exceeds the jurisdiction of the Panel *ratione materiae*. In this regard, though a CAS panel has jurisdiction *de novo* by virtue of Article R57 of the Code, its appeal jurisdiction is limited to the extent of the jurisdiction allocated to the tribunal whose decision has to be reviewed. Rule 59.2 of the Olympic Charter, in conjunction with the IOC ADR and the AR ADD which implement the transfer of competence from the IOC Executive Board to the CAS ADD, display that the jurisdictional power of the CAS ADD including, in particular, the extent of the sanctions is confined to the range of the Olympic Games. Consequently, the results management should be referred to the federation which means that the sanctions beyond the jurisdiction of the CAS ADD fall under the responsibility of the competent international federation.

4. The Athlete submits that, due to various procedural flaws, the B sample analysis was invalidated and, therefore, the ADRV was not proven.

   Article 13.1 IOC ADR which pertains to, *inter alia,* the information concerning AAFs in general provides that the notice to the athletes *"shall occur as provided under Articles 7 and 13 of these Anti-Doping Rules"*.

   With respect to the Notification of an AAF by the IOC Article 7.2.4 IOC ADR provides *"that (the IOC) … shall notify (d) the Athlete; (e) the Athlete's NOC … of the existence of the [AAF], and the essential details available …"*.

   Article 7.2.4 IOC ADR further stipulates:*"It shall be the responsibility of the NOC to notify the Athlete … [of the AAF]"*.

   Article 13.5 IOC ADR, under the heading of *"Deemed notifications"*, applies to any notification to the athletes: *"Any notification under these Rules to an Athlete … may be accomplished by delivery of the notification to that NOC… Notifications under these Rules to an NOC may be accomplished by delivery of the notification to either the President, or the Secretary General, or the chef de mission, or the deputy chef de mission or another representative of the NOC in question designated for that purpose"*.

   According to the undisputed facts, the Notification of the AAF including the information about the rights concerning the B sample analysis was addressed to both the Athlete and the Chef de Mission of the NOC and was countersigned by the

latter. Therefore, the Panel concludes that the IOC acted in full accordance with the rules applicable to notifications to the athletes, in general, and to the Notification to the Athlete, in particular. Furthermore, in the Notification itself, the IOC explained what follows from the IOC ADR, i.e. the obligation of the countersigned person, in the particular case the Chef de Mission, to exercise best efforts that the letter be countersigned by the Athlete and that the countersignature will be deemed to be equivalent to *"the notice of the contents"* of the letter.

Moreover, throughout the Olympic Charter and related rules, in general, and the IOC ADR, in particular, it is provided that the IOC communicates not directly with the athletes rather than via the NOCs as intermediary and leaves the further steps to the responsible NOC. Therefore, the task to notify the athletes is, by virtue of the IOC ADR, assigned to the NOC which has the responsibility to notify the athlete and the duty *"to exercise best efforts"* i.e. to take any appropriate and possible action under the given circumstances of the case to forward the information to the athlete. There is no *"official"* means of communication between the NOC and the athlete. There is no rule to the effect that the NOC must contact the athlete by the Secretary General or the Chef de Mission, exclusively or in whatever *"official"* way. In this regard, the NOC's Chef de Mission, the Secretary General and the NOC's former Secretary General may take action to contact the athlete by using the channels of communication available to them. For example, they may have contacted the athlete's coach via the national federation while the athlete himself was not reachable so that the coach could inform the athlete. With respect to the receiving and countersigning of the notification of an AAF, the Chef de Mission of an athlete's NOC is authorized to do so by virtue of the applicable rules without any particular authorization by the athlete.

Therefore, the IOC did not violate any right the athlete may have under the IOC ADR or other applicable rules, in particular, regarding the notification of the AAF including the information about the rights concerning the B sample.

5. The Athlete submits that he gave no authorization to the Chef de Mission to require the B sample opening, to nominate himself and the Secretary General as his representatives notably at the B sample opening. He concludes that he was not duly and validly represented at the B sample analysis which, therefore, was invalidated. According to the Athlete, neither Rule 37 par. 2 of the Olympic Charter on the role of the Chef de Mission and Article 13.5 IOC ADR on the notification nor any other rule granted the power to represent the Athlete.

   With respect to the B sample opening, the Panel, based upon the facts established in the written submissions and confirmed by the evidence provided by the Athlete and the witnesses at the hearing, concludes that the Athlete was validly represented at the B sample opening. As determined, the Athlete, when he was called by his coach by phone, was sufficiently notified and in fact informed about the AAF and the opportunity of and the conditions for the B sample analysis. The Athlete did know that the B sample would be analysed upon request by and with the presence of the Chef de Mission of the NOC. The Panel concludes from the Athlete's statement in his Affidavit and from the testimony given at the hearing that the latter deliberately accepted the actions taken by the KNOC and, thus, at least implicitly or even openly authorized the opening of the B sample in the presence of the Secretary General of the KNOC, acting as his representative. The Panel finds that the Athlete was

informed of his rights related to the B sample analysis and exercised these rights by accepting what the KNOC already had initiated to do.

6. In any event, independent of whether there was an authorization by the Athlete, the Panel, based on the rules governing the Olympic Games, finds that the IOC validly could have relied on the behaviour shown by the NOC without violating the applicable regulations.

   According to the Rules of the Olympic Charter, in general, and of the IOC ADR, in particular, during the Olympic Games, NOCs and in particular their Chefs de Mission act as a kind of intermediary between the IOC and the athletes. However, this does not mean that the applicable rules grant to the Chefs de Mission a general power to represent the athletes or their delegations. This remains a matter of the legal regulations and other arrangements which govern the relationship between the athletes and their respective NOCs. Nevertheless, under the specific circumstances during the Olympic Games and given the interaction of the IOC and NOCs, in the light of the applicable rules, in particular sec. 4 of the Bye-law to Rules 27 and 28 of the Olympic Charter, there is an apparent authority of the NOCs which, independent of the internal legal relations between the athletes and their respective NOCs, exclusively and formally applies in external terms vis-á-vis the IOC. This authority, however, solely applies when there is no will or intention to the contrary expressed by the athlete in question or any indication that the athlete does not agree. The Panel finds that there is a clear delimitation of responsibilities between the IOC, on the one hand, and the NOCs, on the another hand, in the relations between NOCs and their athletes. According to the applicable Olympic rules, the IOC acts vis-à-vis the NOCs and, in case the athletes are not available *in persona* at the venue of the Olympic Games, the NOC must ensure the communication and coordination with the athletes. The IOC is not concerned by the internal rules of the NOCs and does not have any knowledge of and cannot be aware of the internal situation of any NOC participating in the Olympic Games. In the present case the IOC did what the applicable rules required to be done and what sec. 4 of the Bye-law to Rules 27 and 28 of the Olympic Charter allowed to do.

   In particular, it can be considered that the IOC, acting as the competent Anti-Doping Organization (ADO), under the applicable rules of the IOC ADR and the Olympic Charter, could reasonably and lawfully have understood the situation to the effect that the athlete had requested the B sample opening and appointed his NOC's Chef de Mission and other representative to represent him at the B sample analysis. Therefore taking into account the established jurisprudence of the CAS, there is no reason to consider the B sample analysis invalidated and, therefore to be disregarded.

7. The IOC has established to the comfortable satisfaction of the panel that the athlete committed an ADRV in the form of the presence of a prohibited substance under Article 2.1 IOC ADR. The valid B sample analysis which revealed the presence of strychnine in the athlete's body has confirmed the results of the A sample analysis. Strychnine is a prohibited substance listed under S6 of the 2016 WADA Prohibited List. Therefore, according to Articled 2.1.2 IOC ADR the IOC has sufficiently established the ADRV.

Decision

In light of the foregoing, the Panel held that the the award of the CAS Anti-Doping Division rendered on 18 August 2016 is upheld: the Athlete committed an ADRV, his result be disqualified, the Athlete be excluded from the Games, and his accreditation be withdrawn. Consequently, the results management is referred to the IWF which means that the sanctions beyond the jurisdiction of the CAS ADD fall under the responsibility of the competent international federation.

CAS 2016/A/4805
Club Atlético de Madrid SAD v. Fédération Internationale de Football Association (FIFA)
1 June 2017

Football; First registration and international transfer of minor players; Compatibility between domestic and international regulations; Binding application of international regulations at national level through references thereto in domestic Statutes; Liability of a club for the infringements to the regulations committed by another as a result of their acting as a unit; Application of the provisions of art. 19 par. 4 FIFA Regulations on the Status and Transfer of Players (RSTP) to first registrations as well as to international transfers of minor players; Distinction between cases of procedural violations and cases of substantive violations of art. 19 RSTP; Definition of "academy" and obligation to report minors attending a youth academy to the relevant association; Conditions for a player's eligibility to participate in organised football

Panel
Mr Efraim Barak (Israel)
Mr Romano Subbiotto QC (United Kingdom)
Prof. Ulrich Haas (Germany)

Facts

Club Atlético de Madrid SAD (the "Appellant", the "Club" or "ATM") is a professional football club with its registered headquarters in Madrid, Spain. The Club is registered with the Royal Spanish Football Federation (Real Federación Española de Fútbol – "RFEF"), which in turn is affiliated to the Fédération Internationale de Football Association.

The Fédération Internationale de Football Association (the "Respondent" or "FIFA") is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the world governing body of football and exercises regulatory, supervisory and disciplinary functions over continental federations, national associations, clubs, officials and football players worldwide.

The present case relates to the events and circumstances during the period falling between 2007 and 2014 relating to the alleged transfer, registration and/or participation in competitions of 183 underage football players at ATM and/or Atlético Madrileño ("ATMadrileño").

In October 2013, FIFA Transfer Matching System ("TMS") became aware of the fact that the Club had allegedly transferred and registered at least 7 underage players without having apparently complied with the relevant mandatory procedure under the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP").

On 28 October 2014, FIFA TMS informed the Club that the case had been referred to the FIFA Disciplinary Committee.

After the Secretariat of the FIFA Disciplinary Committee informed the Club on 11 November 2014 that it had opened a preliminary investigation into possible international transfers of minors and/or first registration of foreign minors in relation to ATM, it *inter alia* requested ATM and ATMadrileño to provide it with various information and confirmations.

On 16 April 2015, the FIFA Disciplinary Committee rendered its decision (the "FIFA DC Decision"), with the following operative part, as translated by FIFA into English from the original Spanish language, which translation remained uncontested by the Club:

"1. The [Club] *is declared guilty of violations of Article 19, paragraph 1 and Article 19, paragraph 3 of the* [FIFA RSTP]*, in relation respectively to the ban on the international transfers of players under the age of 18 and the ban on the registration of players under the age of 18 who have not previously been registered and are not natives of the country in which they wish to register for the first time.*

2. *The* [Club] *is declared guilty of the violations of Article 19, paragraph 4, in conjunction with Annexes 2 and 3 of the* [FIFA RSTP] *(procedure relating to applications for the first registration and international transfer of underage players) and Articles 5, paragraph 1, 9, paragraph 1 and 19bis, paragraph 1 of the* [FIFA RSTP].

3. *According to Article 12(a) and article 23 of the* [FIFA Disciplinary Code (FDC)]*, the* [Club] *is banned from registering players both nationally and internationally for two (2) complete and consecutive transfer periods following service of this decision. The Club may register players both nationally and internationally only as from the next transfer period following the complete compliance of the sanction.*

4. *According to article 10(c) and article 15 of the* [FDC]*, the* [Club] *is ordered to pay a fine of CHF 900,000. This sum must be paid within 30 days of service of this decision. The amount must be paid in Swiss francs (CHF) to the bank (…).*

5. *In application of art. 10(b) and article 14 FDC, the* [Club] *is reprimanded on account of its behaviour and conduct in relation to the facts described above.*

6. *The* [Club] *is granted a period of 90 days to regularise the situation of the underage players at the Club. Specifically, the Club shall without delay present the proper requests to the Sub-Committee of the Players' Status Committee and shall comply with all further relevant procedural requirements in relation to the specific cases. In the event that the Club obtains approval from the Sub-Committee for the registration/transfer of any player in particular, the Club will be exempt from the said transfer ban imposed by this decision for the transfer/registration of the said underage player authorised at the Club".*

On 25 January 2016, the Club submitted before the FIFA Appeal Committee the reasons for the appeal and applied for the suspensive effect of the FIFA DC Decision, which was granted on 29 January 2016.

On 8 April 2016, the FIFA Appeal Committee rendered its decision (the "Appealed Decision"), with *inter alia* the following operative part, as translated by FIFA into English from the original Spanish language, which translation remained uncontested by the Club:

"1. The appeal submitted by the [Club] *is rejected".*

On 29 September 2016, the Club filed a Statement of Appeal with the Court of Arbitration for Sport ("CAS") and *inter alia* submitted the following requests for relief:

"I. annul the FIFA Appeal Committee decision dated 8 April 2016;

II. hold that no sanction shall be imposed on Club Atlético de Madrid SAD".

On 27 January 2017, FIFA filed its Answer, pursuant to Article R55 of the CAS Code, requesting CAS to decide as follows:

"1. To reject all the prayers for relief sought by the Appellant".

Reasons

1. The Panel finds that the Spanish system regarding the registration of minor players indeed contains some particularities that made it not entirely consistent with the provisions concerning minors in the FIFA RSTP. The clearest difference is that, simply put, the FIFA RSTP only permits the transfer and first registration of minor players under limited circumstances (as enshrined in article 19(2) FIFA RSTP),

whereas Spanish law (article 32(2)(2) of the Spanish Sports Act (Act 10/1990 of 15 October 1990)) and article 47(2)(a) of Book IV of the Madrid Regional Association (FFM) General Regulations dictate that any foreigner (without any distinction between adults and minors) legally residing in Spain must be granted a license to participate in non-professional organised sport without any obstacles.

The Panel understands that this discrepancy between the international system and the domestic Spanish system concerns the relationship between a minor player and the entity entrusted with the task of determining whether such player is entitled to participate in official football competitions. Particularly so because article 47(2)(a) of Book IV of the FFM General Regulations specifically allocates a right to foreign players, *i.e.* *"(…) foreign players can register without any kind of limitations, in any of the current categories and in any new that could apply, provided they prove their legal residence in Spain"*, but not to clubs.

It is however unclear to the Panel why this should be of any avail to a club. If a Spanish club voluntarily applies for a minor player to be registered, such club is bound by the FIFA RSTP and Spanish law. The fact that such registration is permissible under Spanish law does not automatically mean that such minor must be registered by the club in violation of the FIFA RSTP, without any consequences for the club in question.

Indeed, in the matter at hand, the Club was in no way obliged to engage foreign minor players in violation of the limited exceptions set out in article 19(2) FIFA RSTP. It must also be recalled that pursuant to article 19(1) FIFA RSTP, clubs are in principle prohibited from internationally transferring players under the age of 18. Therefore, by applying for minor players to be registered with it on the basis of the fact that Spanish law permits such registration, while apparently neglecting the substantive requirements set out for such transfers in the FIFA RSTP, the Panel finds that the Club accepted the risk of sanctions being imposed on it by FIFA.

For the reasons [*inter alia*] set out above, the Panel finds that Spanish law or the regulations of the RFEF and/or the FFM have no impact on the Club's duty to comply with the substantive requirements of article 19(1)-(3) FIFA RSTP.

Notwithstanding the considerations of the Panel in respect of the substantive requirements, the Panel finds that the peculiarities of the Spanish system regarding the registration of minor players have implications for Spanish clubs in respect of the procedure to be followed, most notably in respect of article 19(4) and 5(1) FIFA RSTP. The Panel finds that in case the RFEF and/or the FFM prevented the Club from complying with the procedure envisaged for the international transfer and first registration of minor players in the FIFA RSTP, the Club cannot be sanctioned for such procedural violations.

2. The Panel finds that the FIFA RSTP were directly applicable to the Club and that the lack of codification of article 19 FIFA RSTP in the regulations of the RFEF and the FFM are of no avail to it. Indeed, the Club is a member of the RFEF and the RFEF determined in article 1(4)(c) of its Statutes that its members shall be bound by the Statutes and other rules and regulations of FIFA, *i.e.* the superordinate association of the RFEF.

   The Panel also finds that the Club's argument that it cannot be sanctioned because the players were never registered with the RFEF must be dismissed. The

applicable regulatory framework in Spain prevented the Club from complying with the procedure set out in the FIFA RSTP. More specifically, the Spanish regulations prevented the Club from registering minor players directly with the RFEF. However, this does not take away the Club's duty to ensure that no minor players are registered with it in violation of the substantive requirements of article 19 FIFA RSTP. In order for a violation of article 19(1) or (3) FIFA RSTP to be committed, the Panel does not deem it necessary that minor players are registered with the national association concerned, but that the players have participated in organised football without complying with any of the substantive exceptions set out in article 19(2) FIFA RSTP. Moreover, the fact that a minor player participates in organised football for the Club without being registered with the RFEF and without any evidence of complying with any of the substantive exceptions for registration may indeed be perceived as an aggravating factor.

3. The Panel first of all observes that ATM and ATMadrileño are formally two separate legal entities, but that the relationship between these two clubs in their dealings with minor players is very close. In fact, it remained undisputed that minor players are transferred between ATM and ATMadrileño free of charge, while the most talented players would always play for ATM. ATM was the entity deciding which player would be allocated to which club. The fees paid by the minor players for receiving training and education playing for ATM and ATMadrileño are deposited to the same fund, operated by ATM. For these reasons, the Panel considers the relationship between ATM and ATMadrileño to be uncharacteristically close and that the two can be perceived as acting as a unit. It is furthermore clear to the Panel that ATM was the entity in charge and that ATMadrileño merely acted as an accomplice.

   It is a general principle of law that, if acting in partnership, the conduct of one of the partners can be attributed to the other. The Club cannot on the one hand benefit from the training of minor players by demanding the full amount of the solidarity contribution and training compensation, while on the other hand denying responsibility for deliberately bypassing the mandatory procedure by using ATMadrileño as an accomplice.

   For the reasons set out above, the Panel finds that the Club can indeed be held liable for infringements committed by ATMadrileño.

4. The Panel finds that article 19(4) FIFA RSTP covers both international transfers as well as first registrations. Although the final sentence of article 19(4) FIFA RSTP does not directly refer to first registrations, the first sentence makes it clear that this situation is to be put on the same footing as article 19(1) FIFA RSTP (*"Every international transfer according to paragraph 2 and every first registration according to paragraph 3 is subject to the approval of the subcommittee appointed by the Players' Status Committee for that purpose"*). The penultimate sentence of the provision also clarifies that *"[a]ny violations of this provision will be sanctioned by the Disciplinary Committee in accordance with the FIFA Disciplinary Code"*.

   Although the national association submits a request for approval of a registration to the Sub-Committee, such request is made on the basis of an application from the player's new club. While the intricacies of the Spanish regulatory framework may have consequences for the procedure to be followed in respect of registrations of minors, in particular due to the fact that the RFEF delegated its authority to

approve such registrations to the regional associations in respect of the under-12 exemption and the limited exemption to the regional associations such as the FFM, this does not absolve a club from having to obtain an approval from the Sub-Committee before being entitled to register or field a minor player in case neither the limited exemption nor the under-12 exemption are applicable.

The Panel has no doubt that the Club violated this requirement by failing to obtain the Sub-Committee's approval before certain minor players participated in organised football and there was no evidence that the Club was prevented from requesting the RFEF to request approval for registration from the Sub-Committee.

5. Article 19(4) FIFA RSTP relates to the procedure to be followed in respect of registering these players, and can therefore be distinguished from article 19(1) and (3), which concern substantive violations, *i.e.* whether the players registered complied with the exceptions set out in article 19(2) FIFA RSTP or not. A minor player could objectively comply with one of the exceptions of article 19(2) FIFA RSTP, but the player concerned is still not registered correctly if this exception is not properly invoked and approved by the correct body at the relevant time.

   The Panel finds that the Club can be sanctioned for its failure to timely request for approval from the Sub-Committee where this was required, despite the fact that such approval may have been granted by the Sub-Committee retrospectively. The Club nevertheless committed a procedural violation, by failing to apply for approval from the Sub-Committee at the appropriate time, even though no substantive violation was committed.

6. The Panel notes that the term "academy" is defined as follows in the definitions section of the FIFA RSTP:
   "Academy: an organisation or an independent legal entity whose primary, long-term objective is to provide players with long-term training through the provision of the necessary training facilities and infrastructure. This shall primarily include, but not be limited to, football training centres, football camps, football schools, etc"..

   It is important to distinguish between youth teams in a club and a youth "academy". The Panel finds that the word "academy" implies a purpose, *i.e.* an organisational structure that systematically combs a large reservoir of youth players for talent spotting for the club and tries to attract and tie the young players to the club (in order either to field the players in the future or transfer them for a transfer fee, which is different in respect of the minor players that were part of the Wanda Programme). These kinds of business models entail dangers for minors and may make them the object of (harmful) speculations from which they must be protected. This is completely different from youth squads within a club or trying to form a youth team.

   The majority of the Panel finds that an internal academy, such as the academy operated by the Club together with ATMadrileño, is also an "academy" in the sense of article 19bis(1) FIFA RSTP, with the consequence that minor players receiving training in this academy must be reported to the national association.

7. The Panel finds that the new association must request an ITC from the player's previous association, but that the new association can only proceed to request the ITC upon receipt of an application for registration from the player's new club. Contrary to the Club's position, the Panel finds that such application for registration should also include a request to apply for

the ITC, as the amateur minor player concerned cannot be registered and participate in organised football without such ITC. Obtaining the player's ITC is therefore in the interest of the Club and this entails a responsibility to assure compliance.

The Panel finds that the Club's argument that article 9(1) FIFA RSTP only applies in case a player is registered with the national association must be dismissed. As set out above, the intricacies of the Spanish regulatory framework led clubs to register minors with regional federations rather than with national association. The Panel however finds that this does not absolve the Club from ensuring that an ITC is obtained prior to the registration / participation in organised football of the minor player concerned.

As a result, the Panel finds that the Club can be held responsible for the failure to obtain an ITC before the amateur players concerned were registered / participated in organised football.

The Panel also finds that the Club's argument that article 9(1) FIFA RSTP cannot be violated because there is no duty to obtain an ITC if a player was never registered, but did participate in organised football, must be dismissed. Indeed, both the registration and the ITC are prerequisites for a player to be eligible to participate in organised football. A failure to obtain an ITC must therefore be regarded as a violation separate from the failure to validly register a player. By the same token, a club's failure to obtain an ITC prior to the participation of the player concerned in organised football must be considered as a violation of article 9(1) FIFA RSTP.

Decision

The appeal filed by *Club Atlético de Madrid SAD* on 29 September 2016 against the decision issued on 8 April 2016 by the Appeal Committee of the *Fédération Internationale de Football Association* is partially upheld.

The decision issued on 8 April 2016 by the Appeal Committee of the *Fédération Internationale de Football Association* is confirmed, save for the following amendment:

Club Atlético de Madrid SAD is ordered to pay a fine of CHF 550,000 (five hundred fifty thousand Swiss Francs) to the *Fédération Internationale de Football Association*. This sum must be paid within 30 days of service of this award.

CAS 2016/A/4828
Carlos Iván Oyarzun Guiñez v. Union Cycliste Internationale (UCI) & UCI Anti-Doping Tribunal (UCI-ADT) & Pan American Sports Organization (PASO) and Chilean National Olympic Committee (CNOC)
31 May 2017

Cycling; Doping (molecule FG-4592); Standing to be sued; Validity of the evidence submitted by the parties; Inadmissibility of evidence regarding "presence" of a prohibited substance affected by improper B sample notification and admissibility of evidence regarding the establishment of "use" of a prohibited substance; Reliability of the evidence brought by the UCI; Determination of the applicable sanction

Panel
Mr Jacques Radoux (Luxembourg), President
Mr Jeffrey Benz (USA)
Mr Romano Subiotto QC (United Kingdom)

Facts

Mr Carlos Iván Oyarzun Guiñez ("Mr Oyarzun" or the "Appellant") is a Chilean national, born on 26 October 1981. He is a professional road cyclist since 2008 and a licence holder of the Chilean Cycling Federation ("CCF").

The Union Cycliste Internationale (the "First Respondent" or "UCI") is an association under the Swiss Civil Code ("CC"), having its seat in Aigle, Switzerland. It is the governing international body of the sport of cycling. The CCF is a member of the UCI.

The UCI Anti-Doping Tribunal (the "Second Respondent" or "UCI-ADT") is an international anti-doping tribunal established by the UCI in 2015. The UCI-ADT handles disciplinary proceedings and renders decisions concerning violations of the UCI Anti-Doping Rules (the "UCI-ADR").

The Pan-American Sports Organisation, (the "Third Respondent" or "PASO") is a regional international organisation recognized by the International Olympic Committee ("IOC") and the Association of National Olympic Committees responsible, inter alia, for the celebration and conduct of the Pan-American Games.

The Chilean National Olympic Committee (the "Fourth Respondent" or "CNOC") is an organisation composed of all Chilean sports federations and is recognized by the IOC.

Mr Oyarzun was selected by the CNOC to participate, as a cyclist, in the Road Cycling Competitions of the 2015 Pan-American Games which were held in Toronto (Canada) between 22 and 25 July 2015.

On 15 July 2015, the Rider provided a urine and blood sample as part of an "In-Competition" test carried out by the PASO.

On 16 July 2015, the urine sample was analysed at the World Anti-Doping Agency (the "WADA") accredited Laboratory in Montreal, Canada (the "Laboratory").

On 18 July 2015, the Laboratory reported the presence of FG-4592 (the "Adverse Analytical Finding" or "AAF") in the urine A Sample. The molecule FG-4592 is listed under Class "S2 Peptide Hormones, Growth Factors, Related Substances and Mimetics" on the 2015 and 2016 editions of the WADA Prohibited List. Such molecule is still in test phase and is known to stimulate the production of red cells. It is prohibited both In- and Out-of-Competition.

On 18 July 2015, the PASO especially informed the CNOC of: (a) Mr Oyarzun's AAF; (b) the decision of the PASO to impose on Mr Oyarzun a mandatory provisional suspension, in accordance with Article 7.9.1

UCI-ADR, starting on the date of the notification; (c) Mr Oyarzun's right to request the opening and analysis of his B Sample.

On 19 July 2015, the CNOC informed the PASO that Mr Oyarzun did not admit the alleged anti-doping rule violation and requested the opening and analysis of the urine B Sample.

On 20 July 2015, the PASO informed the CNOC that the analysis of the urine B Sample would take place on 24 July 2015 at 10:00 local time. Mr Oyarzun submitted that he became aware of the date of the B Sample analysis through social media on 23 July 2015. The same day, he contacted the CNOC and the PASO to request the postponement of the urine B Sample analysis for approximately 15 days so that either he or his representative could attend the opening. On the same day, the PASO, after having consulted the CNOC, instructed the Laboratory to proceed with the analysis of the urine B Sample on 24 July 2015, as previously agreed upon.

On 25 July 2015, the Laboratory submitted the test report of the urine B Sample analysis, which confirmed the presence of FG-4592. On the same day, the PASO excluded Mr Oyarzun from the 2015 Pan-American Games.

On 21 August 2015, the UCI contacted Mr Oyarzun to inform him that the UCI alleged that Mr. Oyarzun had committed an anti-doping rule violation ("ADRV") for the "Presence" and "Use" of FG-4592 under Articles 2.1 and 2.2 UCI-ADR.

On 3 September 2015, Mr Oyarzun submitted to the UCI a statement as well as an Expert Report. According to Mr Oyarzun, the urine B Sample results should be disregarded because: (a) the PASO deprived him of his right to attend the opening of the urine B Sample; and (b) the Laboratory committed several departures from the International Standards for Laboratories ("ISL") during the analysis of the urine sample. Thus, Mr Oyarzun requested that the proceedings against him be closed.

On 18 December 2015, at the request of the UCI, the haematological profile of Mr Oyarzun was submitted to an Athlete Biological Passport ("ABP") Expert from the Athlete Passport Management Unit (the "APMU Expert") of the Lausanne Laboratory for a general review and assessment. The APMU Expert was not informed of the AAF for the presence of FG-4592 in the urine sample.

On 21 December 2015, the APMU Expert concluded that the ABP of Mr Oyarzun was "suspicious" and requested "further data" to complete his analysis.

On 8 January 2016, the UCI informed the APMU Expert of the AAF for FG-4592 and requested the APMU Expert's opinion on whether the haematological profile of Mr Oyarzun was consistent with the use of FG-4592.

On 23 February 2016, the APMU Expert confirmed the constituency of the rider's haematological profile with the use of FG-4592.

On 11 May 2016, the UCI filed a petition to the UCI-ADT requesting in particular the latter to: (a) declare that Mr Oyarzun had committed a violation of the ADR; (b) impose on Mr Oyarzun a period of ineligibility of 4 (four) years; (c) disqualify all the results obtained by Mr Oyarzun between 15 and 18 July 2015.

On 26 August 2016, the UCI-ADT rendered the operative part of its decision, the grounds of which were communicated to Mr Oyarzun on 16 September 2016 (the "Appealed Decision").

With regard to Mr Oyarzun's case, the UCI-ADT found, first, that by not communicating the relevant information about the date of the opening of the urine B Sample in a fair and timely manner, the PASO has breached the right conferred to Mr Oyarzun under Article 7.3 (d) of the UCI-ADR and, second, that by doing nothing to accommodate Mr Oyarzun's request to postpone the date of the opening and analysis of the urine B Sample in order to enable him to attend or be represented accordingly, PASO violated the rights vested on Mr Oyarzun by Article 7.3 (e) of the UCI-ADR. The UCI-ADT therefore concluded that the breach of Mr Oyarzun's rights with respect to the urine B Sample was so fundamental that, in accordance with CAS jurisprudence, the results of the urine B Sample analysis could not validly confirm the analytical results of the urine A Sample, with the consequence that a violation of Article 2.1 UCI-ADR for "Presence" of FG-4592 could not be established.

Regarding the alleged violation of Article 2.2 UCI-ADR relating to the "Use" of a prohibited substance by Mr Oyarzun, the UCI-ADT recalled that, according to Article 3.2 of the UCI-ADR, facts related to anti-doping rule violations may be established by any reliable means, such as, inter alia, *"reliable documentary evidence"*. The UCI-ADT found that, in Mr Oyarzun's case, "taken together" the urine and blood analytical results were sufficient to establish a violation of "Use" under Article 2.2 UCI-ADR to its comfortable satisfaction. Thus, the UCI-ADT concluded that it was comfortably satisfied that Mr Oyarzun committed a violation of Article 2.2 of the UCI-ADR and held that a period of ineligibility of 4 (four) years should be imposed.

On 16 October 2016, the Appellant filed his statement of appeal serving as his appeal brief at the Court of Arbitration for Sport (the "CAS") against the Appealed Decision.

The Appellant mainly claims that the analytical results of the urine A and B Samples are invalid and inadmissible evidence for establishing "Presence" in the sense of Article 2.1 UCI-ADR. As the Appellant requested the opening of the urine B Sample, the urine A Sample cannot, in absence of a valid analytical result of the said B Sample, be used to establish an ADVR under Article 2.1. Furthermore, the Appellant submits that the urine A & B samples are inadmissible evidence for the purpose of establishing "Use" under Article 2.2 of the UCI ADR. In support of this claim, the Appellant argues that as the analytical results of the urine A and B Samples cannot be considered as admissible or reliable evidence under Article 2.1 they constitute inadmissible evidence under Article 2.1 UCI-ADR. Thus, contrary to what the UCI has done, these analytical results could not be used to influence the expert responsible for assessing the blood profile of the Appellant. Given that the expert based his second report according to which the blood profile was consistent with the use of FG-4592 on the information that the urine A Sample contained said substance, the expert's second report is not only biased but inadmissible and invalid. Thus, the Appellant's blood sample shall also be deemed invalid and inadmissible evidence.

The UCI's submissions can be summarized as follows. First, the UCI-ADT formally being a body of the UCI and not having legal personality, has no standing to be sued in the present appeal procedure. The Appeal should therefore be dismissed to the extent that it is directed against the UCI-ADT. Further, the Appellant not having given any explanation on the standing of the PASO and the CNOC, the Appeal should equally be dismissed to the extent it is directed against these two organisations.

The UCI sustains that the results of the urine sample analyses should be considered to be

reliable evidence, at the very least as far as an ADRV for "Use" is concerned.

Concerning the admissibility and evidentiary value of the Blood Sample Results, the UCI argues that these results are valid and admissible, given that the relevant blood sample was taken in the context of the Appellant's ABP, that it was tested in the relevant deadlines, that this is not a passport case and that the analysis of the ABP is not produced as evidence of an independent Adverse Passport Finding, but as corroborating evidence of the findings that resulted from the analyses of the urine samples.

Reasons

To start with, the alleged ADRV occurred on 15 July 2015 (date of urine sample collection). Thus, the 2015 rules should apply. Further, in the present case it is undisputed that the Appellant was a licence holder of the CCF, which was a member of the UCI, and that the Appellant was an International-Level Rider in the sense of the 2015 UCI-ADR. According to point C. of the introduction of the 2015 UCI-ADR the said anti-doping rules apply to "any" license holder in general and in particular to International-Level Riders.

It follows from the Appealed Decision as well as from the submissions of the Parties, that the present matter is related to the results management for the anti-doping test conducted at the Pan-American Games in July 2015. In this regard, Article 7.1.2 of the PASO-ADR and Article 7.1.1 of the 2015 WADA Code contains, in substance, the same provision as it states that results management and the conduct of hearings conducted by, inter alia, a Major Event Organization shall be referred to the applicable International Federation in relation to consequences beyond exclusion from the Event. Given that the UCI is the relevant International Federation, the Panel finds that the UCI rules and regulations, in particular the UCI-ADR, are applicable to the present Appeal. In addition, as the UCI has its headquarters in Switzerland, Swiss law will apply subsidiarily.

According to Article 3.1 of the UCI-ADR, the UCI has the burden of proof that an ADRV has occurred and has to establish that proof to the "comfortable satisfaction" of the Panel.

1. As an initial matter, it has to be noted that the question of standing to be sued, raised by the UCI, is a matter related to the merits. This follows from jurisprudence of the Swiss Federal Tribunal [SFT 128 II 50 E.2 b) bb)] as well as from the constant CAS jurisprudence (CAS 2013/A/3047, para. 52, and CAS 2015/A/3910, para. 129 ff.).

   In the present case, the Panel notes, first, that the UCI-ADT is an organ of the UCI and does not, as such, have a legal personality. Second, neither the PASO nor the CNOC were parties in the procedure in front of the UCI-ADT and no relief is being asked against them. In the light of the foregoing, the Panel finds that the Second, Third and Fourth Respondent have no standing to be sued in the present proceedings and that the Appeal must be dismissed in so far as they are concerned.

2. Regarding the validity of the evidence submitted by the Parties, the Panel, first, points out that the fact that the Appellant did not attend the opening of his urine B Sample does not, as such, affect the validity of the results of the urine B Sample analysis. In view of the fact that the analytical results of the urine A Sample are not put into doubt, these results have equally to be considered valid.

   The validity of the analysis of the blood sample taken from the Appellant as well

as the Appellant's ABP are not put into doubt by the Appellant.

The validity of the expert's report cannot either put into question.

3. Concerning the admissibility of the evidence, the Panel recalls that according to well-established CAS jurisprudence, the athlete's right to attend the opening and analysis of the B Sample is of fundamental importance and if not respected, the B Sample results may be disregarded (e.g. CAS 2010/A/2161, Wen Tong v. v. International Judo Federation, para. 9.8). The failure to properly notify the athlete with sufficient, reasonable reaction time to secure his attendance affects the admissibility of the analytical results of both samples for establishing an ADRV for "Presence" under article 2.1 of the UCI-ADR.

   That conclusion does not, however, apply to article 2.2 of the UCI-ADR. Indeed, it equally follows from CAS jurisprudence, that the fact that the analytical results of a B Sample cannot be used to establish an ADRV for "Presence" of the prohibited substance because it was obtained in breach of the athlete's fundamental right to attend the opening and analysis of said sample does not preclude the competent authorities to take this sample into account for a "Use" violation. In such a situation, the sample in question must be regarded with particular care and cannot by itself be sufficient to establish a "Use" violation (CAS 2015/A/3977, WADA v. Belarus Athletic Federation & Mr Vadim Devyatovskiy, para. 173).

   According to the comment to Article 2.2 of the UCI-ADR, Use or Attempted Use may be established by other reliable means which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1. In this respect, valid existing urine samples, blood samples as well as an athlete's blood profile and the conclusions drawn from the correlating expert reports are admissible for establishing an ADRV under Article 2.2 as they constitute corroborating evidence.

4. Regarding the reliability of the evidence brought forward by the UCI, the Panel recalls that pursuant to Article 3.2.2 of the UCI-ADT, WADA-accredited laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. In the present case, the Appellant has not been able to rebut this presumption, as he did not establish that the alleged departures, if any, could have caused the positive analytical findings. On the contrary, he had to acknowledge that the urine A and B Samples contained the substance FG-4592.

   Regarding the reports of the UCI expert responsible for assessing the Appellant's blood profile, the expert evidence given by said expert and the Appellant's expert at the hearing leave hardly any room to question the reliability of these reports.

   In the present case, in view of the fact that it is not contested that the urine A and B Samples contained FG-4592 and of the circumstance that there is reliable evidence that the variations in the blood profile of the Appellant are fully consistent, on temporal, physiological and scientific bases, with the use of FG-4592, the Panel is comfortably satisfied that the Appellant used FG-4592 and, thus, breached Article 2.2 of the UCI-ADT.

5. According to Article 10.2.1.1 of the UCI-ADT, the period of Ineligibility shall be four (4) years where the ADRV does *"not involve a Specified Substance, unless the Rider or other Person can establish that the* [ADRV] *was not intentional"*.

To benefit from a reduced sanction, the athlete bears the burden of establishing that the ADRV was not intentional within the meaning of Article 10.2.3 of the UCI-ADT. The standard of proof imposed on the athlete is a "balance of probability", as provided by Article 3.1 of the UCI-ADR. There could be cases, although extremely rare ones, in which a panel may be willing to accept that an ADRV was not intentional although the source of the substance had not been established. But, as a general matter, proof of source must be considered an important and even critical first step in any exculpation of intent (CAS 2016/A/4534, Mauricio Fiol Villanueva v. Fédération Internationale de Natation, para. 37). In this respect, the fact that the substance used at the time of the ADRV was still in clinical trial and, thus, not available on the market, precludes the athlete to demonstrate that the prohibited substance could have unintentionally entered his body. Consequently, the period of ineligibility to be imposed should be four (4) years with no reduction justified by an established lack of intent. For the same reasons, no reduction of the sanction based on No Fault or Negligence or on "exceptional circumstances" can be granted.

Decision

In light of the foregoing, the Panel concludes that it sees no room for reducing the period of ineligibility set out in the Appealed Decision. As a result, the Appeal has to be dismissed and the Appealed Decision confirmed.

CAS 2016/A/4921 & CAS 2016/A/4922
Maria Dzhumadzuk, Irina Shulga & Equestrian Federation of Ukraine v. Federation Equestre Internationale (FEI)
30 May 2017

Equestrian (Dressage); Disciplinary sanction for engaging in nationalistic judging; *Nulla poena sine lege* and *nulla poena sine lege clara*; *Nulla poena sine lege clara* and disciplinary rules; Evidence required for finding of nationalistic judging under FEI Dressage Judges' Codex; Balance of probabilities as standard of proof; Scope of review by CAS panels of sanctions imposed by disciplinary body

Panel
Prof. Jens Evald (Denmark), President
Ms Vesna Bergant Rakocevic (Slovenia)
The Hon. James Robert Reid QC (United Kingdom)

Facts

Ms. Maria Dzhumadzuk (the "First Appellant" or "Ms. Dzhumadzuk") and Ms. Irina Shulga (the "Second Appellant" or "Ms. Shulga") are members of the Equestrian Federation of Ukraine (the "Ukraine NF") and a 4*/3* FEI dressage judge of Ukrainian nationality, respectively[1].

The Ukraine NF is the national governing body of equestrian sport in Ukraine.

The Federation Equestre Internationale (the "FEI") is the international governing body for several equestrian sport disciplines including dressage. Its headquarter is in Lausanne, Switzerland. Its members are the national bodies of the sport, amongst them the Ukraine NF.

The present dispute arises out of the imposition by the FEI, following a disciplinary process, of a 3 (three) month period of suspension on each of the First and Second Appellant in April 2016 for breach of the FEI Codex for Dressage Judges (the "Dressage Judges' Codex") by engaging in nationalistic judging at an international FEI dressage event in Lier, Belgium in March 2016 (the "Lier Event"). Both suspensions expired at the end of July 2016.

The First and Second Appellant judged at the Grand Prix Special (the "GP Special Competition"), one of the competitions of the Lier Event. As the results of the 4 Grand Prix Competitions counted towards the Olympic rankings for the Rio 2016 Olympic Games the FEI Olympic Ranking Rules applied to the Lier Event.

After the Lier Event - one of the final events at which Olympic Ranking points could be earned - the FEI received complaints/requests from the Polish National Federation and separately from a Portuguese athlete to look into in particular the scores awarded to the Ukrainian athlete Ms. Inna Logutenkova. According to the FEI Olympic Ranking Rules, the FEI Dressage Committee "may decide not to include the scores obtained at an event in the rankings, should the event not have been organized in accordance with general principle of fairness. The Executive Board should confirm the decision of the Dressage Committee" (so called "Fairness Principle").

On 17 March 2016, the FEI Dressage Committee, following a teleconference held to review the Lier Event, decided to apply the Fairness Principle *i.e.* the results of the competition would not count towards the Olympic & World Rankings on the basis that *"nationalistic judging in favour of the UKR Athlete, Inna Logutenkova, by two Ukrainian judges*

[1] According to the Respondent's Answer, FEI Dressage Judges are the judges authorized to judge at international FEI Dressage events. They are ranked according to 4 levels: 2* (being the lowest level) to 5* (being the highest level).

occurred during the Grand Prix Special test of the CDI3 Lier on 2 March 2016"*. On 21 March 2016 the decision by the FEI Dressage Committee to apply the Fairness Principle was confirmed by the FEI Executive Board.

On 22 March 2016, the FEI Secretary General informed the Secretary General of the Ukraine NF of the FEI Dressage Committee decision and its subsequent confirmation by the FEI Executive Board.

Whereas according to the FEI General Regulations, an FEI Dressage Committee decision can be appealed within 30 days of notification, neither the Ukraine NF nor any other person filed an appeal against the decision.

On 1 April 2016, the FEI Secretary General informed each of the First and Second Appellant that it was alleged that they had breached the FEI Codex for Dressage Judges (the "Codex") and that therefore the FEI intended to impose sanctions on them. The basis for this allegation was that in the GP Special Competition, their scores in favour of Ms. Logutenkova exceeded the scores of the other (non-Ukrainian) judges by 8% and 9 % respectively. The FEI Secretary General informed the Appellants that they would be *"afforded the right to be heard prior to the FEI taking a decision on the above matters"*, a right to be exercised by making a written and/or oral submission.

The Appellants provided short written submissions by way of email, both denying the allegations of nationalistic judging. Neither of the Appellants asked to make an oral submission.

The FEI Disciplinary Decisions, taken by the FEI Secretary General and the FEI Legal Director were issued to the First Appellant on 25 April 2016 and to the Second Appellant on 28 April 2016. The FEI Disciplinary Decisions imposed a 3 (three) month period of suspension on each of the Appellants for failure to comply with Article 2 of the Codex at the GP Special Competition.

On 23 May 2016, the Appellants filed appeals against the FEI Disciplinary Decisions with the FEI Tribunal.

On 30 November 2016, following an in-person hearing, the FEI Tribunal issued written decisions dismissing the Appellants' appeals on the merits, finding that both Appellants violated the Codex, *"by not judging in a neutral, independent and fair position towards Ms. Logutenkova, and clearly in favour of Ms. Logutenkova, and by having the same nationality as Ms. Logutenkova"*.

On 20 December 2016, the First and the Second Appellant filed two separate Statements of Appeal against the FEI Tribunal Decision before the CAS in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "CAS Code"). The Ukraine NF was named as an additional Appellant in each Statement of Appeal and Appeal Brief. On 12 January 2017, and with the agreement by the Parties, the procedures were consolidated.

Reasons

1. The Panel first held that any alleged possible infringement of the Appellants' due process rights committed by the FEI were cured by the fact that the CAS appellate arbitration procedure under Article R57 of the CAS Code entails a *de novo* trial and that such review by the CAS, as repeatedly decided by well-established CAS jurisprudence, cures any procedural irregularities in the proceedings below.

   The Appellants' claimed that the suspension imposed on them was lacking a necessary legal basis insofar as the Codex only contained a reference to

"nationalistic judging" but that none of the regulations of the FEI contained a definition of nationalistic judging. Conversely, the Respondent, while agreeing that no *"strict definition of the term"* existed, argued that the term had to be read in the context of the FEI Dressage Rules and the Codex as a whole, and that "nationalistic judging" is an example of a conflict of interest.

The Panel developed that provisions of an association must meet the principle of *nulla poena sine lege*; *i.e.* it is axiomatic that in order for a person to be found guilty of a disciplinary offence, the relevant disciplinary code must proscribe the misconduct with which he or she is charged. Likewise, in accordance with the *contra proferentem* rule, the relevant provision with which the person is charged to be in breach will have to be strictly construed (*nulla poena sine lege clara*). In this respect, it is not sufficient to identify a duty, but that it is also necessary to stipulate that a breach of such duty will attract disciplinary sanctions. The Panel concluded that the Codex - in force as of 1 January 2011 - clearly describes the infringement ("nationalistic judging") and provides directly for the relevant sanction.

2. Furthermore, the Panel – while agreeing with the Appellants that disciplinary regulations must be explicit as otherwise they become a tool of arbitrary decisions - highlighted that a distinction had to be made between broadly drawn provisions and ambiguous provisions. In this respect, disciplinary provisions are not vulnerable to the application of the *nulla poene sine lege clara* rule merely because they are broadly drawn.

   As regards the Codex the Panel found that while that codex was broadly drawn and had to be interpreted (with the FEI Tribunal having the final authority within the FEI for interpretation), it was not ambiguous. In this context the Panel underscored that one of the key issues related to the Codex was the understanding of the term "nationalistic judging". When reading that term in the context of the FEI Dressage Rules and the Codex as a whole and particularly in the light of one sentence of paragraph 2 of the Codex: (*"A Judge must avoid any actual or perceived conflict of interest. A judge must have a neutral, independent and fair position towards riders, owners, trainers, organizers and other officials and integrate well into a team"*, this part of paragraph 2 being followed by different examples of activities that may lead to a "conflict of interest", *e.g.* "nationalistic judging".), it followed that "nationalistic judging" is merely one example of a "conflict of interest" as foreseen in paragraph 2 of the Codex. In conclusion the Panel found that the FEI Tribunal Decision did not violate the *nulla poena sine lege* principle.

3. Whereas the Appellants submitted that they "had no interest" in judging favourable of Ms. Logutenkova, the Respondent claimed that the Appellants' interest was to make sure that their compatriot received a high score. To start with the Panel held that it is not necessary to establish a motive in order to conclude that a violation of the prohibition of nationalistic judging had been committed by an FEI Dressage Judge. Nevertheless, the inability to establish a motive may be a factor in determining whether the case has been proved. The Panel furthermore held that, in order to establish any violation for nationalistic judging, the analytical information obtained (*e.g.* by analysing the results of all athletes that have taken part in the competition in question, any score deviations and whether or not satisfactory explanations are provided therefore) need to be supported by other, different and external

elements pointing in the same direction. Relevant in this context were *e.g.* complaints/requests – directed by third sources/individuals or competitors to the sports governing body – to look into the results in question. As regards the case at hand the majority of the Panel held that in light of the fact that amongst others, immediately after the Lier Event, the FEI had received complaints/requests to look into the event and, in particular, to examine the scores awarded by the Appellants to Ms. Logutenkova. Furthermore – following the FEI Dressage Committee's decision not to count the results of the Lier Event towards the Olympic & World Rankings on the basis of "nationalistic judging" by the Appellants - neither the Ukrainian National Federation nor other persons had filed an appeal against the decision, irrespective of the Appellants' motive. Therefore, all elements pointed in the same direction and supported the assertion that the Appellants had violated the Codex.

4. Turning to the applicable standard of proof the Panel, noting that under Article 19.24 of the FEI Tribunal Regulations the applicable standard of proof is the "balance of probabilities", reminded that according to this standard of proof, the sanctioning authority must establish the disciplinary violation to be more probable than not. The Panel clarified that the standard of proof of "balance of probabilities" is lower than the "comfortable satisfaction" standard widely applied by CAS panels in disciplinary proceedings. Furthermore the Panel unanimously held that the violation of the Codex was strongly indicated given that the Appellants scored considerably in favour of their compatriot; the majority of the Panel further found that the compatriotic scoring taken together with the other external elements (see above under 3.) meet the requisite standard of proof. In conclusion the majority of the Panel, though not the minority, was satisfied that sufficient evidence had been provided in order to find that the Appellants had violated the Codex, by not judging in a natural, independent and fair position towards Ms. Logutenkova.

5. Lastly the Panel addressed the Appellants' contention that the sanctions imposed on them by the appealed decision should be reduced on the basis that they were disproportionate. The Panel acknowledged in this context that even though CAS panels retain the full power to review the factual and legal aspects involved in a disciplinary dispute, they must at the same time exert self-restraint in reviewing the level of sanctions imposed by the disciplinary body and should reassess sanctions only if they are evidently and grossly disproportionate to the offence. As regards the case at hand, having examined the sanctions provided for under the Codex, the Panel found that by imposing a 3 (three) month sanction, the FEI acted within the framework of penalties provided for in the Codex. It further stated that it was not persuaded that the sanctions imposed by the FEI Tribunal were disproportionate, holding that the mitigating factors advanced by the Appellants (*i.e.* the Appellants are first time offenders; both denied having judged in a nationalistic manner; "subjectively and objectively" they had no interest whatsoever in judging the combination Ms. Logutenkova and Fleraro in a 'nationalistic way'") did not qualify as exceptional circumstances which would enable the Panel to modify the sanctions imposed by the FEI Tribunal.

Decision

The Panel therefore dismissed the appeals by the Appellants and confirmed the decisions

rendered by the FEI Tribunal on 30 November 2016.

CAS 2017/A/4973
Chunhong Liu v. International Olympic Committee (IOC)
31 July 2017

Weightlifting; Doping (Growth Hormone Releasing Peptide (GHRP-2) and its metabolites and Sibutramine); Prohibited Substances listed as part of a group; Burden of proof regarding sample analysis; Re-analysis of samples under Article 6.5 IOC ADR; Legality of period of time foreseen for re-analysis

Panel
Mr Christoph Vedder (Germany), Sole Arbitrator

Facts

Ms Chunhong Liu (the "Athlete" or the "Appellant") is a 32 years old weightlifter who participated in the Olympic Games 2008 in Beijing (the "Beijing Games").

The International Olympic Committee (the "IOC" or the "Respondent") is the international non-governmental organization leading the Olympic Movement under the authority of which the Olympic Games are held. The IOC has its seat in Lausanne, Switzerland.

On 13 August 2008 the Athlete participated in the Women's 69 kg Weightlifting competition at the Beijing Games, and was awarded the gold medal. On the same day, the Athlete was submitted to a doping control performed at the request of the IOC.

The Athlete's A sample was analysed by the WADA-accredited laboratory in Beijing during the Beijing Games. The analysis did not result in an Adverse Analytical Finding ("AAF"), at that time.

On the order of the IOC, the Athlete's sample as well as other samples collected at the Beijing Games were transferred to the WADA-accredited laboratory in Lausanne for long-term storage and possible later re-analysis. Following IOC decision a number of samples collected at the Beijing Games, including the Athlete's sample were submitted to a re-analysis, conducted by the Lausanne laboratory in the spring of 2016 in advance of the Olympic Games 2016 in Rio de Janeiro.

In accordance with the applicable provisions of the International Standards for Laboratories ("ISL"), the re-analysis of the samples was performed as follows. An "initial analysis" was conducted on the remains of the A sample. For the transport from the Beijing laboratory to the Lausanne laboratory the A samples, in accordance with the requirements of the then applicable ISL 2008, were not individually resealed or transported in sealed containers. That is why, as a "first phase" of the re-analysis, the B sample was opened and split into a B1 sample and a B2 sample which was latter resealed with the B1 sample analysed. Although, according to the applicable ISL, for this first phase the presence of the Athlete was not required the Athlete was offered the opportunity to attend the first phase of the B sample opening and analysis whenever this was practically possible.

The initial analysis of the remains of the Athlete's A sample resulted in a Presumptive AAF (PAAF), indicating the potential presence of two prohibited substances: GHRP-2 and metabolites and sibutramine.

On 11 July 2016, the Athlete was informed of these findings and of the possibility of attending the opening and splitting of the B sample and the analysis of the B1 sample.

On 25 July 2016, the opening and splitting of the B sample and the analysis of the B1 sample took place in the Lausanne laboratory in the presence of Mr. Peng Zhao, Deputy Secretary General of the Chinese Weightlifting Association, as representative

for the Athlete, and of an independent witness.

The analysis of the B1 sample revealed the presence of the metabolites of GHRP-2, a growth hormone releasing factor, and of sibutramine, a stimulant, both prohibited substances according to the 2008 Prohibited List and constituting an AAF.

On 27 July 2016, the AAF was reported to the IOC. After the verification process according to Article 7.2.2 of the IOC Anti-Doping Rules Applicable to the Beijing Games ("IOC ADR"), a Disciplinary Commission ("IOC DC") was established by the IOC President, in order to hear the case. On the same day the Athlete was notified of the AAF and of the initiation of the IOC DC disciplinary proceedings. She was also informed about the right to request and attend the analysis of the B2 sample.

On 1 August 2016, the Athlete communicated not to accept the AAF and requested analysis of her B2 sample, indicating that she would not attend that event either personally or through a representative.

The opening and analysis of the B2 sample was performed on 9 August 2016 by the Lausanne laboratory in the presence of an independent witness; it confirmed the presence of the two prohibited substances, GHRP-2 and sibutramine. The results were reported to the IOC on 11 August 2016.

On 16 August 2016, the IOC notified the B2 sample analysis results to the Athlete, invited her, *inter alia*, to attend the hearing before the IOC DC which would be scheduled for September 2016, or later.

On 19 August 2016, the Athlete forwarded to the IOC the completed Disciplinary Commission Form and announced, *inter alia*, that she would not attend the hearing personally but would be represented and that she would submit a defence in writing.

On 16 September, 27 September and 3 October 2016, the Athlete was provided with the laboratory documentation packages of the B1 sample and of the B2 sample analyses and additional documents.

On 11 October 2016, the IOC informed the Athlete of the date of the hearing before the IOC DC which was scheduled for 4 November at the IOC Headquarters in Lausanne.

After various extensions of deadlines granted by the IOC, the Athlete's counsels, on 2 December 2016, informed the IOC that the Athlete did not have the necessary funds for an adequate defence and was therefore not in a position to submit a defence and to appear or be represented at the hearing. It was submitted that the Athlete had not committed any ADRV and that GHRP-2 was not listed on the Prohibited List until 2015.

The IOC filed an exchange of communication between the IOC Medical and Scientific Director and the WADA Senior Executive Director according to which GHRP-2 would fall under the 2008 Prohibited List under "S2 Growth Hormone (hGH) and their releasing factors".

On 9 December 2016, the IOC DC determined to render its decision based on the file. Neither the Chinese NOC, nor the Chinese Weightlifting Association or the Athlete herself filed any observations.

On 10 January 2017, the IOC DC issued its decision. On the merits, the IOC DC was satisfied that the analyses conducted on the sample collected from the Athlete's on 13

August 2008 revealed the presence of GHRP-2 (and metabolites) and sibutramine. The IOC DC determined that GHRP-2 is a releasing factor of human growth hormone (hGH) and that the releasing factors of hGH are expressly mentioned in the WADA 2008 Prohibited List (under S2) and in all subsequent lists. It concluded that therefore GHRP-2 was clearly covered by the applicable version of the Prohibited List.

In the appealed decision the Athlete was found to have committed an anti-doping rule violation consisting in the presence of two Prohibited Substances and pursuant to the IOC Anti-Doping Rules applicable to the Beijing Games. Accordingly she was disqualified from all events in which she participated upon the occasion of the Beijing Games, namely the Women's 69 kg weightlifting event and was ordered to return the medal, the medallist pin and the diploma obtained in the event.

On 29 January 2017 the Athlete filed a Statement of Appeal with the Court of Arbitration for Sport against the IOC with respect to the decision by the IOC DC of 10 January 2017.

Reasons

1. Having first of all confirmed the admissibility of the appeal and its jurisdiction regarding the case at hand, the Sole Arbitrator addressed the chief claim of the Athlete *i.e.* that one of the substances found in her samples, namely GHRP-2 would not have appeared on the WADA Prohibited List until 2015 and was thus not expressly included in the WADA 2008 Prohibited List, applicable at the time of the collection of her sample. The Athlete concluded that she should not be penalized as a result on the basis of an alleged substance that was not expressly mentioned in the WADA Prohibited List. In response, the Respondent, explaining that GHRP stands for *"Growth Hormone Releasing Peptide"*, which in turn is a category of the growth hormone releasing factors which are listed in the 2008 Prohibited List under S2, submitted that GHRP-2 was already listed in the 2008 Prohibited List.

   The Sole Arbitrator, accepting that GHPR-2 is a releasing factor for hGH and acknowledging that the 2008 Prohibited List, under *"S2 Hormones and related substances"* provided that *"The following substances and* ***their releasing factors*** *are prohibited: (…)"* and thereupon listed, amongst others *"2. Growth Hormone (hGH)"*, found that as such, and pursuant to the clear wording of what is listed under S2, GHRP-2 was already included in the 2008 Prohibited List. The Sole Arbitrator further clarified that the finding that a substance (*e.g.* Growth Hormone Releasing Peptide (GHRP-2)) - even without being expressly listed by name on a prohibited list - may be covered by the respective prohibited list as belonging to a group of listed Prohibited Substances (*e.g.* "2. Growth Hormone (hGH)"), was true notwithstanding the fact that in a later version of the Prohibited List, a more precise specification of the same group of Prohibited Substances, *e.g.* "GH-Releasing Peptides (GHRPs)", is added and that that version of the Prohibited List explicitly identifies certain substances as examples for the group in question.

2. Addressing the Appellant's claim that it was for the IOC to prove that no departure from the International Standard for Laboratories (ISL) occurred, the Sole Arbitrator first of all determined that it was not the IOC's, but the Athlete's burden to establish *"that a departure from the*

International Standard occurred, which could reasonably have caused" the AAF. Regarding the Appellant's statement that she was *"concerned that mishandling, tampering or inappropriate measures used during transit, transportation or storage could have caused the adverse analytical finding …".*, the Sole Arbitrator reminded that under the WADA Code (and the respective Anti-Doping Rules issued by the IOC for the 2008 Olympic Games (IOC ADR)), WADA-accredited laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with the ISL. Furthermore, the mere allegation (as in the present case) by an athlete that departures of whatever kind might have occurred does not meet the standard of proof necessary under the WADA Code/the respective IOC ADR to rebut the above presumption.

3. The Athlete further contested the results of the analysis arguing that in circumstances where in 2008 her samples were tested negative by one WADA-accredited laboratory and the analysis by another WADA-accredited laboratory in 2016 indicated otherwise it appeared unfair that the inconsistency or contradiction between WADA-accredited laboratories - in the absence of any reasons for the contradiction – would be used to her disadvantage.

   In response the Respondent highlighted that whereas both GHRP-2 and sibutramine could not have been detected in 2008 with the then available means of analysis, both the 2008 and the 2016 results were correct at the time they were obtained. Furthermore the analyses performed in 2016, with methods and instruments which were capable to detect GHRP, were the only relevant analyses, showing that GHRP-2 was already present in 2008.

   The Sole Arbitrator found that for both GHRP-2 and sibutramine, the state of the analytical methods and instruments available at the time of the respective analyses explained the analytical results, *i.e.* the non-detection in 2008 and the detection in 2016. Therefore there was no inconsistency or contradiction between the analytical findings obtained in 2008 and 2016 which might have an impact on the reliability of the analytical results of the Lausanne laboratory. The Sole Arbitrator further underlined that the main function of the re-analysis of samples foreseen under Article 6.5 IOC ADR was to search for Prohibited Substances, which were prohibited at the time of the sample collection, with improved analytical means at a later stage. Accordingly, the mere fact that only on the occasion of the re-analysis, but not on the occasion of the initial analysis, Prohibited Substances were detected, did not constitute a contradiction between the respective results which would justify to disregard the results of the re-analysis.

4. With reference to the statute of limitation of eight (8) years provided for in Article 6.5 IOC ADR for the re-analysis of samples the Athlete submitted that due to the lapse of such a long time it had become next to impossible for her to establish the reason or source of the alleged prohibited substance, with the consequence that she was not in a position to properly defend her case as most otherwise obtainable evidence had been lost or impossible to retrieve. Conversely the Respondent submitted that the 8-year limitation was not in contradiction with fundamental legal principles, pointing out that *e.g.* the Swiss Code of Obligations provides for a regular statute of limitation

of 10 years. In addition, that time is an important factor in the re-analysis process because improvements in methods and laboratory equipment require time.

Underlining that the limitation of eight years provided for in Article 6.5 IOC ADR coincides with the 8-year statute of limitations set forth in Article 17 of the WADA Code 2003 for actions concerning alleged anti-doping rule violations, the Sole Arbitrator held that the aim of the re-analysis, *i.e.* to make use of the improvements of the analytical devices and methods, requires sufficient time which was needed for making new methods operational. He therefore determined that the limitation period was not in violation of legal principles or Swiss public policy. Furthermore and in any event, the Sole Arbitrator held that the fact that the Athlete considered herself unable to establish the reason for and the source of the substances found, is irrelevant for the outcome of the present proceedings. The Sole Arbitrator reminded in this context that the issue of the source of the substance found may, under Article 10.5.2 of the WADA Code, be relevant for establishing no significant fault or negligence which may have an impact on the length of the period of ineligibility. However the dispute at stake was exclusively about the determination of an anti-doping rule violation and the subsequent – automatic - disqualification of the results obtained by the Athlete in the event.

Decision

The Sole Arbitrator therefore dismissed the appeal by the Athlete and confirmed the decision rendered by the Disciplinary Commission of the IOC on 10 January 2017.

CAS 2017/A/5063
Deutscher Fussball-Bund e.V. (DFB) & 1. FC Köln GmBH & Co. KGaA (FC Köln) & Nikolas Terkelsen Nartey v. Fédération Internationale de Football Association (FIFA)
22 May 2017 (operative part 19 April 2017)

Football; Registration of a minor professional player outside the registration period; Regulatory requirements in case of transfer of minor professional football player; Article 6 para. 1 RSTP and its unwritten exception; Interpretation of the statutes and rules of a sport association; Establishment of common (binding) practice; Termination of common (binding) practice; Communication in case of a change of rules or practice

Panel
Prof. Ulrich Haas (Switzerland), Sole Arbitrator

Facts

The Deutscher Fussball-Bund e.V. (the "DFB") is the national governing body of the sport of football in Germany; it is affiliated to the Fédération Internationale de Football Association.

1. FC Köln GmbH & Co KGaA (the "Club") is a professional football club with its registered headquarters in Cologne, Germany. The Club participates in the Bundesliga, the highest league in German male football and is affiliated to the DFB.

Mr Nikolas Terkelsen Nartey (the "Player") is a professional football player born on 22 February 2000. The DFB, the Club and the Player are jointly referred to as the Appellants.

The Fédération Internationale de Football Association (FIFA)- an association of Swiss law headquartered in Zurich, Switzerland - is the world governing body of the sport of football.

The present dispute concerns the registration of the Player – at the time of the transfer a minor - with the DFB in the Transfer Matching System (the "TMS"). The TMS is an online system for the registration of international transfers of football players introduced by FIFA in 2010. The winter registration period 2016/2017, as defined by the DFB, lasted from 1 until 31 January 2017 (the "Registration Period"). In a nutshell, whereas the application for the approval by the FIFA Sub-Committee of the Player's transfer was requested by the DFB within the Registration Period (30 January 2017), the necessary approval by the FIFA Sub-Committee was only granted after the expiry of the respective period (*i.e.* 27 February 2017); hence the DFB was prevented by the applicable regulations (Article 19 para. 4 Regulations on the Status and Transfer of Players (the "RSTP")) to timely request the international transfer certificate (ITC).

On 27 January 2017, the FIFA administration sent an email to a "TMS Manager" of the DFB, in reference to the administrative proceedings for the international transfer of players and the applicable Regulations on the Status and Transfer of Players. The email read as follows:

First of all, we would like to confirm that the approval of the Sub-Committee of the Players' Status Committee (hereinafter: the Sub-Committee) is a compulsory requirement for any international transfer of a minor player and must be obtained prior to any request for an international transfer certificate (ITC; cf. Art. 19 par. 4 of the Regulations).

In this regard, we wish in particular to draw your attention to Art. 8.2 par. 1 of Annexe 3 in combination with Art. 4 par. 3 of Annexe 3 of the Regulations, which stipulate, inter alia, that all data relating to the transfer instruction allowing the new association to request an ITC, including for a professional minor player, shall be entered into the transfer matching system (TMS) by the club wishing

to register the (minor) player during one of the registration periods established by that association. When entering the relevant data, the new club shall, depending on the selected instruction type, upload all mandatory documents prior to the end of relevant registration period.

Furthermore, in consideration of the aforementioned provisions of the Regulations, we would like to clarify that the club wishing to register the minor player must immediately confirm and match the relevant data in TMS as soon as the Sub-Committee's decision, whereby the Sub-Committee accepts the pertinent application for approval, is notified to the association concerned via TMS. Please note that it is the responsibility of the association in question to immediately forward decisions of the Sub-Committee notified to them via the TMS to their affiliated clubs (cf. Art. 2 of Annexe 2 of the Regulations). If the relevant decision of the Sub-Committee is passed and notified to the association concerned during the registration period in question, the new club must therefore not only enter but also confirm and match the relevant data in TMS before the end of the registration period in order to allow the new association to request the ITC for the minor player in the TMS in time (cf. Art. 4 par. 5 of Annexe 3 and Art. 8.1 par. 2 of Annexe 3 of the Regulations).
Finally, please be informed that this information is of a general nature and as such without prejudice whatsoever.
Thank you for your attention and for informing your member associations accordingly".[1]

On the same day, another TMS manager of the DFB responded to the above email, asking whether there was any specific reason as to why the FIFA administration is drawing the attention of the TMS managers of the DFB to regulations that they are already aware of. He continued as follows:
"In line with the practice in previous registration periods, we assume that the (information pertaining to) requests for an ITC for minors that will only be approved by the Sub-Committee following the end of the registration period, only needs to be entered by the new club in FIFA TMS once that approval has been granted. This means that requests that are placed within a registration period approved following the closure of the registration period in question, and only then must the relevant data (transfer agreement and TPO declaration) be uploaded into FIFA TMS by the new club".

On 30 January 2017, the FIFA administration responded to the DFB's email of 27 January 2017:

"[…] We are drawing your attention to the provisions of the Regulations that you are already aware of, because pursuant to the latest decision taken by the Single Judge of the Players' Status Committee on 23 November 2016, those provisions are to be strictly applied in terms of special exemptions from 'validation exceptions' in the transfer matching system (TMS). Pursuant to this decision, 'validation exceptions' in TMS can now only be approved if the prerequisites of the provisions in question are met. […]. We would be happy to discuss anything that is not clear or any questions you may have over the telephone".

A couple of minutes later the same TMS manager of the DFB replied, thanking the FIFA administration and further requested to be sent the decision referred to. Still on the same day, the FIFA administration replied that due to confidentiality reasons the decision in question could not be provided to the DFB. To this reply the TMS manager of the DFB responded as follows:

"Hence, we should observe rules which interpretation we do not know and which we never will know […].
You will understand that neither DFB nor its clubs can work with such remarks. In addition, we note that in case of a validation exemption related to a transfer of a minor it cannot be the duty of the DFB

[1] The email exchanges quoted here are – uncontested - English translations provided by the Appellants.

to inform FIFA that the request for approval has been submitted within the time-limit in the FIFA TMS for minors (same system). Here FIFA has to be able to realize the transfer (or the information) from the Minor – TMS to the Professional player – TMS itself. […]".

Also on 30 January 2017, the Player signed an employment contract (the "Contract") with the Club, conditional upon the registration of the Player by the DFB. On the same day the Club sent the mandatory documents for the request for the approval of the FIFA Sub-Committee to the DFB and the DFB confirmed having submitted the request to the FIFA Sub-Committee. The DFB further advised the Club that the transfer agreement and the tpo-statement had to be uploaded in the TMS after the approval by FIFA *i.e.* that at the moment these documents were not needed.

On 27 February 2017, the FIFA Sub-Committee notified the DFB of its approval of the transfer of the Player and the DFB informed the Club thereof, advising it that the transfer may now be finalized by uploading the relevant data and documents into the TMS. The Club did so on 28 February 2017.

The DFB's request of 1 March 2017, through the TMS, for an ITC was blocked due to a "validation exception" because the request had been filed after the expiry of the Registration Period.

On 2 March 2017, the DFB requested an exemption from the "validation exception" from the FIFA administration, explaining that the request to the FIFA Sub-Committee for the approval of the transfer of the Player had been filed before the end of the Registration Period and, thus, in time.

On 7 March 2017, the FIFA administration rejected the DFB's application. A renewed application by the DFB for an exemption of the "validation exception" was rejected by FIFA on 14 March 2017.

On 16 March 2017, the DFB filed a request with the FIFA Players' Status Committee (the "FIFA PSC") to obtain an exemption of the "validation exception" which was dismissed by the FIFA PSC on 25 March 2017. In the decision with grounds (the "Appealed Decision") - notified to the DFB on 28 March 2017 – the Single Judge of the PSC determined – *inter alia* – that in light of the fact that the Club had not complied with its obligations under the RTPS *"as well as the formal decisions"*, and while *"strictly applying the regulations"* that the petition by the DFB for permission to request an ITC for the Player and the Player's subsequent registration with the Club had to be rejected as it had been made outside the registration period.

Also on 28 March 2017, the DFB forwarded the Appealed Decision to the Club and the Player.

On 4 April 2017, the Appellants filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") with respect to the Appealed Decision and in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "CAS Code").

Reasons

1. To start with the Sole Arbitrator underlined that it was uncontested that in the case of a transfer of minor (professional) football players two sets of rules of the Regulations on the Status and Transfer of Players (RSTP) cumulatively apply, *i.e.* the "normal" (procedural) rules relating to international transfers (Articles 5 *et seq.* RSTP together with Annex 3

RSTP) and – in addition – the "specific" (procedural) rules relating to the international transfer of a minor professional football player (enshrined in Articles 19 *et seq.* RSTP together with Annex 2 RSTP). He further specified that in essence, the ordinary (procedural) rules provide that every international transfer of a professional football player requires an international transfer certificate (ITC) and that the issuance of the ITC mandatorily requires the use of the Transfer Matching System (TMS). Additionally under the specific (procedural) rules an approval of the Sub-Committee of the Players' Status Committee is a compulsory requirement for any international transfer of a minor player and the approval has to be obtained prior to any request for an ITC.

2. Thereupon the Sole Arbitrator turned to the restriction foreseen in Article 6 para. 1 RSTP regarding international transfers of players, *i.e.* players may only be registered during one of the two annual registration periods fixed by the relevant association. The Sole Arbitrator observed that it was uncontested between the parties that an (unwritten) exception had been developed in the case of the transfer of minors, where – as in the case at hand - the application for the approval to the Sub-Committee was made before the end of the Registration Period, but the approval was only issued after the expiry of the relevant period. In those cases fairness required that a request for the issuance of an ITC still had to be possible given that the respective member federation was prevented from complying with the applicable deadlines due to no fault of its own, *i.e.* because of a delayed approval of the transfer by the Sub-Committee.

   The main dispute between the parties however concerned the scope of the above unwritten exception in the context of Article 19 para. 4 RSTP and Annex 2 and Annex 3 of the RSTP. In this context the Appellants submitted that because the Sub-Committee had not granted its approval within the relevant Registration Period the DFB was prevented by Article 19 para. 4 RSTP from requesting the ITC within the Registration Period; therefore the Club also did not have to upload the data and mandatory documents in the TMS before the expiry of the Registration Period. FIFA on the contrary argued that Article 19 para. 4 RSTP did not prevent the Club from fulfilling its obligations within the Registration Period and that therefore, all prior steps to the request for an ITC had to be undertaken within the deadline set by Article 8.1 para. 2 of Annex 3 RSTP, *i.e.* during the relevant Registration Period.
   Having analysed in particular the wording of Article 19 para. 4 RSTP, the context of the relevant provisions of the RSTP and the rationale of the RSTP the Sole Arbitrator concluded that those sources of interpretation did not point to an obvious single possible interpretation of the rules. With regard to the wording of Article 19 para. 4 RSTP the Sole Arbitrator noted that the precise meaning of the term *"any request from an association for an International Transfer Certificate"* appeared questionable, *i.e.* that it was not clear whether the term covered the administrative procedure for obtaining an ITC as such or whether the term only referred to the very last step in said procedure, *i.e.* the final ITC request of the (new) member federation.

   In the absence of a clear answer following its interpretation the Sole Arbitrator referred to the standing practice and understanding of the competent FIFA bodies (see below under 4.), stating that

this so-called "Vereinsübung" was – as generally accepted by the parties - another important source of interpretation. It was undisputed (and evidenced by a large number of cases) that in the past, the FIFA administration had always accepted if clubs uploaded the information/mandatory documents after the expiry of the transfer period, provided that the ITC could not be requested within the registration period due to the fact that the Sub-Committee's approval was still pending. The Sole Arbitrator further concluded that FIFA had not validly put an end to the respective standing practice (see below under 5.) and that therefore at the relevant time the Appellants could still rely on the longstanding FIFA practice in their interpretation and understanding of the relevant rules *i.e.* that clubs could upload the data/mandatory documents once the transfer of the professional minor was approved by the FIFA Sub-Committee, irrespective of the fact that the relevant registration period had expired.

3. By way of explanation of his approach regarding the interpretation of the rules of the RSTP (see above under 2.) the Sole Arbitrator developed that statutes and regulations of an association had to be interpreted and construed according to the principles applicable to the interpretation of the law rather than according to the principles applicable to the interpretation of contracts. The interpretation of the statutes and rules of a sport association had to be rather objective and had to always start with the wording of the rule necessitating interpretation. Any adjudicating body would have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. The adjudicating body would further have to identify the intentions (objectively construed) of the association which drafted the rule, and may also take account of any relevant historical background which illuminates its derivation, as well as the entire regulatory context in which the particular rule is located. The Sole Arbitrator underlined that another aspect potentially relevant as a source of interpretation of the rules is the common practice and understanding of a certain provision by the relevant stakeholders ("Vereinsübung" or "customary law", see below under 4.).

4. The Sole Arbitrator then addressed the Appellants' alternative basis for their claim, *i.e.* customary law ('Observanz', 'Vereinsübung')". According to the Appellants, even if it was accepted that the RSTP should contain an implicit obligation for the clubs to upload the relevant data into the TMS prior to the end of the registration period, such understanding was superseded "by customary law". The Sole Arbitrator held that the main prerequisites for the emergence of such a "binding common practice" are that a certain understanding or application of a rule is practised over a certain period of time (long standing practice) and that such practice reflects the majority opinion of the relevant stakeholders. As regards cases as the one at hand, where the ITC could not be requested within the registration period because the Sub-Committee had not granted its approval, the Sole Arbitrator determined that FIFA's past practice in this context to accept that the clubs uploaded the pertinent information/mandatory documents even after the expiry of the transfer period, qualified as a "binding common practice" ("Vereinsübung" or "Observanz"); this because the practice lasted for a

considerable period of time, concerned a multitude of different cases being treated in an identical manner and therefore reflected a common and binding understanding of the rules by the relevant stakeholders (*opinio necessitates).*

5. The parties also disagreed whether or not the longstanding practice by FIFA had been validly terminated prior to the end of the Registration Period with the consequence that at the relevant time, *i.e.* at the end of the Registration Period, the Appellants could no longer rely on the past standing practice. The Respondent submitted that the alleged long-standing practice had been terminated by means of a formal decision of the Single Judge of the Players' Status Committee passed on 23 November 2016. Conversely the Appellants argued that insofar as the customary law created through constant FIFA practice had the same rank as statutes and/or other regulations, a change of the customary practice required *"a change of the RSTP to the effect that a club must upload the relevant documents within the transfer period because the Sub-Committee's decision is still outstanding"*. However, no such amendment of the RSTP had been enacted. While further accepting that a long standing practice may also be replaced by a new contradicting practice, the Appellants submitted that no such divergent long-standing existed in the present case. In any event, the emails sent by FIFA to the DFB on 27 January 2017 and in the following days were insufficient to set aside the customary law, since the latter cannot be revoked merely by means of an email, much less by one *"which labels itself as 'purely informal in nature'"*. The Sole Arbitrator decided that in order to terminate a common practice, similar principles apply as for the amendment of rules and regulations; that therefore, for a change of rules to become binding upon the association's members it did not suffice that the competent (legislative) body within the association adopted the amendments. In addition, for the new rules to take effect, the termination of the past practice had to be properly communicated to the relevant stakeholders and the members of the association given a chance to obtain knowledge of the contents of the new rules. The Sole Arbitrator concluded that the mere fact that on 23 November 2016, the Single Judge of the FIFA PSC passed a decision deviating from the past practice of the FIFA administration was insufficient to end the "Vereinsübung" insofar as such decision - due to its confidential nature - was only communicated to the respective parties of the proceedings, but not to the Appellants.

6. According to the Appellants, FIFA "failed in the present matter *"to provide the clubs with sufficient time to adapt their operations"*, as required also by CAS jurisprudence. Furthermore, the Club was never informed of the change of practice before the end of the transfer period and FIFA failed to communicate its change of practice in an appropriate and clear manner, even in circumstances where it was obvious that the situation was completely unclear to the DFB. The Respondent disagrees with this position, claiming that by its email of 27 January 2017 FIFA had informed the DFB and its affiliated clubs of the change of the said practice by the Single Judge. Moreover, FIFA and its competent deciding bodies had no obligation to inform member associations, clubs or even players about a change of practice. Furthermore it was the responsibility of the DFB to forward the information received from the FIFA

administration to its affiliated clubs, duty which had been explicitly reminded to the DBF's by FIFA in its email of 27 January 2017. Thus it was the DFB's sole responsibility that the Club was not duly informed of the change of practice.

Taking into account that FIFA had intended to enact a (new) practice without a period of transition, *i.e.* instantaneous, and furthermore amidst an ongoing - but to conclude in a few days - registration period and that FIFA required its member associations to immediately advise and communicate with its affiliated clubs on this change, the Sole Arbitrator found that the threshold for a proper communication of a change of rules or practice had not to be set too low. In the case at hand the required threshold had not been met and therefore, the change of practice was not properly communicated to the Appellants who could therefore still rely on the (longstanding) FIFA practice in their interpretation and understanding of the relevant rules.

Decision

The Sole Arbitrator therefore upheld the appeal filed by the Appellants on 4 April 2017 and set aside the decision rendered on 25 March 2017 by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association.

Jugements du Tribunal fédéral*
Judgements of the Federal Tribunal

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

Arrêt du Tribunal Fédéral 4A_116/2016
13 décembre 2016
X Club (recourant) c. Z Limited (intimée)

Recours en matière civile contre la sentence rendue le 21 décembre 2015 par le Tribunal Arbitral du Sport (TAS)

Extrait des faits

Le 19 juillet 2012, A._____ (ci-après: A._____), un club de football professionnel aaa, et X._____ Club (ci-après: X._____ ou le recourant), un club de football professionnel xxx, ont conclu un contrat relatif au transfert par le premier au second de V._____ (ci-après: V._____ ou le joueur), un footballeur professionnel yyy. L'indemnité de transfert a été fixée à 4'000'000 euros.

Le 23 août 2012, X._____ et V._____ ont signé un contrat de travail valable jusqu'au 30 juin 2017.

Pour financer le transfert du joueur, le club X s'est adressé à Z._____ Limited (ci-après: Z._____ ou l'intimée), une société d'investissement. En résumé, le 23 août 2012, par une convention dénommée "Contrat principal de participation sur les droits économiques" (ci-après: CPDE), Z._____ a mis la somme de 3'000'000 euros (*Grant Fee*) à la disposition de X._____. En contrepartie, le club X lui a cédé 75% des droits économiques relatifs à V._____, le solde de ces droits étant conservés par lui de même que l'intégralité des droits fédératifs. En cas de transfert du joueur à un autre club, entre autres hypothèses, la société d'investissement recevrait ainsi de X._____, au titre du *FUND's Interest*, le 75% de l'indemnité de transfert versée par le nouveau club, sous déduction d'un montant de 450'000 euros, mais en tout cas 4'200'000 euros au minimun (*Fund's Minimum Interest Fee*), montant auquel elle pourrait aussi prétendre, notamment, si le joueur devenait un agent libre avant l'expiration de son contrat de travail. Les deux parties estimant à 8'000'000 euros la valeur de V._____ sur le marché des transferts, une clause du CPDE obligeait X._____, s'il en était requis par Z._____, à accepter une offre de transfert égale ou supérieure à ce montant et à verser à sa cocontractante le 75% de l'indemnité de transfert reçue ou, en cas de refus de l'offre, à indemniser la société d'investissement à hauteur de 75% du montant de cette offre.

Ce type de convention résulte d'une pratique instaurée depuis plusieurs années dans certains pays d'Amérique du Sud et d'Europe qui consiste par la dissociation des droits économiques et des droits fédératifs en rapport avec un joueur. Appelée tierce propriété des droits économiques sur les joueurs de football et plus connue sous sa dénomination anglaise - *Third Party Ownership* (TPO), cette pratique consiste pour un club de football professionnel à céder, totalement ou partiellement, à un tiers investisseur ses droits économiques sur un joueur, de manière à ce que cet investisseur puisse bénéficier de la plus-value que le club réalisera lors du transfert futur du joueur. En contrepartie, l'investisseur fournit une aide financière à ce club pour lui permettre, entre autres motifs, de résoudre des problèmes de trésorerie ou l'aider à acquérir un joueur. Dans cette dernière hypothèse, le club intéressé par un joueur mais n'ayant pas les moyens de payer l'indemnité de transfert exigée par l'employeur actuel de ce joueur fait appel à un investisseur qui lui fournit les fonds nécessaires au paiement de tout ou

partie de l'indemnité de transfert en échange d'un intéressement sur l'indemnité obtenue en cas de transfert ultérieur du joueur. Controversées, les opérations de ce genre ont été interdites, avec effet au 1er mai 2015, par la FIFA, qui a introduit dans le RSTJ un article 18ter.

Régi par le droit suisse, le CPDE, qui incluait une clause compromissoire en faveur du Tribunal Arbitral du Sport (TAS) ainsi qu'une clause de confidentialité, devait prendre fin après que le club X aurait effectué le dernier versement auquel pourrait prétendre la société d'investissement.

Le 19 août 2014, X._____ a accepté de transférer le joueur yyy au E._____ Club (ci-après: E._____), un club de football anglais évoluant dans le championnat de première division (*Premier League*), moyennant une indemnité de transfert de 20'000'000 euros.

Le 23 août 2012, X._____ et Z._____ ont signé un second CPDE en relation avec le transfert du joueur professionnel W._____, transféré du D._____, un club de football professionnel ddd. N'étaient les montants en jeu et quelques points secondaires, le schéma contractuel utilisé pour le financement par Z._____ de l'acquisition de ce joueur ne différait pas de celui auquel les parties avaient eu recours pour intéresser la société d'investissement aux droits économiques concernant V._____.

Le 21 août 2014, Z._____ a adressé à X._____ une facture de 15'000'000 euros. Le club xxx lui ayant versé 4'500'000 euros - 3'000'000 euros pour V._____ et 1'500'000 euros pour W._____ - le 28 août 2014, la société d'investissement a accusé réception de cette somme, le 9 septembre 2014, en lui confirmant qu'elle la considérait comme un paiement partiel de ce qui lui était dû.

Le 16 octobre 2014, X._____ a déposé, auprès du TAS, une requête d'arbitrage visant Z._____. Il a invité ce tribunal arbitral à constater, en substance, que les CPDE étaient nuls ou, subsidiairement, qu'ils avaient été valablement annulés.

Z._____, quant à elle, alléguant la validité des CPDE et le caractère injustifié de leur annulation, a conclu au paiement par X._____, intérêts en sus, du montant de 10'050'000 euros - i.e. 75% de l'indemnité de transfert reçue de E._____, moins la déduction de 450'000 euros prévue par le CPDE concernant V._____ et l'imputation des 4'500'000 euros déjà versés par le demandeur -, d'une somme correspondant à 75% de la valeur du prêt de M._____ ainsi que du 75% de tout montant que le club xxx obtiendrait de E._____ en cas de transfert futur de V._____.

Le 21 décembre 2015, le TAS, statuant dans le cadre de la procédure d'arbitrage ordinaire (art. R38 ss du Code de l'arbitrage en matière de sport), a rendu sa sentence finale. Constatant la validité et le caractère exécutoire des CPDE signés le 23 août 2012 par les parties, il a condamné X._____ à payer à Z._____ 5'050'000 euros avec intérêts à 5% l'an dès le 23 août 2014, 5'000'000 euros avec intérêts à 5% l'an dès le 4 décembre 2014 et 1'433'596,15 livres britanniques avec intérêts à 5% l'an dès le 23 août 2014. En outre, X._____ devra payer à Z._____ 75% de tout montant obtenu par lui au titre de son droit à 20% de toute somme dépassant 23'000'000 euros au cas où E._____ transférerait V._____ à un autre club.

Sur le fond, le TAS a conclu à la validité des CPDE et a fait droit aux prétentions de Z.

Le 22 février 2016, X._____ (ci-après: le recourant) a formé un recours en matière civile au Tribunal fédéral en vue d'obtenir

l'annulation de la sentence du 21 décembre 2015.

Extrait des considérants

Dans un unique moyen divisé en deux branches, le recourant soutient que la sentence attaquée est incompatible à maints égards avec l'ordre public matériel au sens de l'art. 190 al. 2 let. e LDIP.

Une sentence est incompatible avec l'ordre public si elle méconnaît les valeurs essentielles et largement reconnues qui, selon les conceptions prévalant en Suisse, devraient constituer le fondement de tout ordre juridique (ATF 132 III 389 consid. 2.2.3). On distingue un ordre public procédural et un ordre public matériel. Une sentence est contraire à l'ordre public matériel lorsqu'elle viole des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l'ordre juridique et le système de valeurs déterminants; au nombre de ces principes figurent, notamment, la fidélité contractuelle, le respect des règles de la bonne foi, l'interdiction de l'abus de droit, la prohibition des mesures discriminatoires ou spoliatrices, ainsi que la protection des personnes civilement incapables.

Comme l'adverbe "notamment" le fait ressortir sans ambiguïté, la liste d'exemples ainsi dressée par le Tribunal fédéral pour décrire le contenu de l'ordre public matériel n'est pas exhaustive. Au demeurant, qu'un motif retenu par le tribunal arbitral heurte l'ordre public n'est pas suffisant; encore faut-il que le résultat auquel la sentence aboutit soit lui-même incompatible avec l'ordre public (ATF 138 III 322 consid. 4.1; 120 II 155 consid. 6a p. 167; 116 II 634 consid. 4 p. 637).

Le recourant s'emploie, notamment, à démontrer que la sentence attaquée violerait l'ordre public matériel en donnant effet à des contrats *"usuriers, léonins et comportant des engagements excessifs"*.

Dans sa réponse, l'intimée, après avoir contesté la recevabilité du premier moyen soulevé par le recourant et rappelé le fonctionnement des CPDE en citant des extraits de la sentence attaquée, cherche à démontrer l'absence de *"prétendus intérêts usuriers"*.

La Cour de céans, dont la cognition est limitée *in casu* à l'examen du grief tiré de l'incompatibilité de la sentence attaquée avec l'ordre public matériel au sens de l'art. 190 al. 2 let. e LDIP, doit renoncer à pénétrer sur le terrain miné des rapports entre le football et l'argent, où le recourant souhaiterait l'entraîner. Quant à reconnaître, avec le recourant, relativement à la définition du concept d'ordre public matériel, qu'il existe des bonnes moeurs propres au domaine du sport en général et du football en particulier, c'est là un pas que l'on ne saurait franchir en l'état. Hormis le fait qu'il semble difficile de déterminer quelles sont les bonnes moeurs dans le domaine considéré, moduler le concept d'ordre public matériel en fonction de telle ou telle activité et, plus encore, d'une branche particulière de l'activité visée - en l'occurrence, le sport, respectivement le football - reviendrait, d'une certaine manière, à diluer la force et à atténuer la portée de ce concept en laissant à la fédération faîtière de la branche entrant en ligne de compte - en l'espèce, la FIFA - le soin de définir la notion des bonnes moeurs propre à cette branche. En résulteraient un émiettement, une dilution de la notion d'ordre public matériel et, par voie de conséquence, une difficulté accrue à cerner les contours de cette notion, sans parler de la formation d'une casuistique peu propice à la sécurité du droit. Au demeurant, s'il est certes exact que les particularités de l'arbitrage sportif ont été prises en considération par la jurisprudence fédérale dans le traitement de certaines questions de procédure spécifiques, telle la renonciation à recourir (ATF 133 III 235 consid. 4.3.2.2 p.

244), il ne s'ensuit pas pour autant qu'il faille en faire de même à l'égard du moyen de caractère général tiré de l'incompatibilité de la sentence avec l'ordre public matériel, sauf à créer une véritable *lex sportiva* par la voie prétorienne, ce qui pourrait soulever des problèmes du point de vue de la répartition des compétences entre le pouvoir législatif et le pouvoir judiciaire de la Confédération (arrêt 4A_488/2011 du 18 juin 2012 consid. 6.2 avant-dernier par.).

La FIFA a interdit les opérations de type TPO à compter du 1er mai 2015. Quoi qu'il en soit, en vertu de la disposition de droit transitoire figurant à l'art. 18ter al. 3 RSTJ, les deux CPDE signés le 23 août 2012 ne tombaient pas sous le coup de cette interdiction.

En tant qu'il s'en prend directement au raisonnement juridique par lequel la Formation a exclu, notamment, l'application en l'espèce de l'art. 21 CO, pour cause de forclusion, et celle de l'art. 157 CP, pour défaut de réalisation des conditions territoriales et matérielles de l'usure, le recourant confond le Tribunal fédéral avec une cour d'appel qui chapeauterait le TAS et vérifierait librement le bien-fondé des sentences en matière d'arbitrage international rendues par cet organe juridictionnel privé. Il cherche, par ce biais, à obtenir que la Cour de céans examine avec une pleine cognition les questions de droit matériel traitées dans la sentence entreprise, comme elle le ferait à titre préjudiciel si elle était saisie du grief d'incompétence (cf. ATF 140 III 134 consid. 3.1 et les arrêts cités). Or, tel n'est pas le rôle de l'autorité judiciaire suprême du pays lorsqu'elle est saisie d'un recours au sens de l'art. 77 al. 1 let. a LTF dans lequel est invoquée l'incompatibilité de la sentence attaquée avec l'ordre public, ainsi que cela ressort de la définition de cette notion.

Pour en revenir, tout d'abord, aux données chiffrées ressortant des clauses pertinentes du CPDE concernant les droits économiques relatifs à V._____, ainsi qu'au résultat de l'application de ces données aux circonstances du cas concret, force est de constater, avec l'intimée, que les taux de rendement minimums de 12,36% et de 40% qu'elle aurait pu obtenir, dans certaines hypothèses, grâce à son investissement de 3'000'000 euros, correspondent à un calcul effectué sur une durée de trois, respectivement cinq ans, laquelle, ramenée à un an, donne des intérêts inférieurs à 15% et, partant, encore admissibles au regard du droit suisse. C'est le lieu d'observer, en tout état de cause que, selon une jurisprudence récente du Tribunal fédéral, l'application combinée d'un intérêt moratoire stipulé de 12% l'an, d'une peine conventionnelle de 10% du capital dû et d'un intérêt moratoire de 5% l'an sur le montant de cette peine ne rend pas la sentence incriminée incompatible avec l'ordre public matériel au sens de l'art. 190 al. 2 let. e LDIP, nonobstant le fait que l'art. 163 al. 3 CO, qui commande au juge de réduire les peines excessives, est une norme d'ordre public d'après le droit suisse (arrêt 4A_536 et 540/2016 du 26 octobre 2016 consid. 4.3.2).

Aussi bien, raisonner sur ce point en termes d'intérêts, comme il le propose, n'est pas correct, tant il est vrai que, dans ce cas de figure, la rémunération du prêteur n'entre pas dans la définition de l'intérêt conventionnel - i.e. la compensation due au créancier pour le capital dont celui-ci est privé, compensation dont le montant est fixé en fonction de la somme prêtée, du taux appliqué et de la durée du prêt (TERCIER/FAVRE, Les contrats spéciaux, 4e éd. 2009, n. 3038) -, mais dépend uniquement du montant du transfert, s'apparentant ainsi à un prêt partiaire rémunéré par une participation du prêteur au bénéfice réalisé par l'emprunteur lors de l'opération de transfert subséquente. Or, dans un tel cas, les restrictions de droit public concernant le taux d'intérêt ne s'appliquent en principe pas (ROLF H. WEBER, Commentaire bernois, Obligationenrecht, Das Darlehen, Art. 312-318 OR, 2013, n° 38

des Remarques préliminaires aux art. 312-318 CO).

Effectivement et s'agissant ici des seuls rapports entre prêteur et emprunteur, on ne voit pas très bien ce qu'il peut y avoir d'usurier, de léonin ou de simplement immoral, pour une société d'investissement qui prête à un club de football les trois-quarts des fonds nécessaires à l'achat des droits fédératifs concernant un joueur que ce club souhaite intégrer dans son équipe, dans le fait d'acquérir une proportion identique des droits économiques afférents audit joueur et de se faire promettre par le bénéficiaire du prêt le versement d'une part équivalente (i.e. 75%) de la somme payée par le nouveau club, pour le cas où le même joueur ferait l'objet d'un transfert ultérieur. En réalité, le caractère singulier de la présente espèce tient avant tout à la plus-value énorme - 500%, que le joueur V a acquise en peu de temps sur le marché des transferts. Cette plus-value constitue un élément essentiellement aléatoire, qui résulte des excellentes prestations fournies par le joueur V avec son équipe nationale au Brésil lors de la Coupe du monde de football 2014. Or, aucune des parties au CPDE n'avait de prise sur cet élément-là, pas plus qu'elle n'eût pu en avoir dans la situation inverse et radicalement différente d'une diminution drastique de la valeur du joueur. Aussi le recourant ne peut-il rien tirer de cet élément aléatoire en faveur de sa thèse. Toujours est-il que cette opération de transfert lui a procuré un retour sur investissement raisonnable, comme le constate la Formation. L'application *in concreto* des données chiffrées figurant dans les CPDE infirme ainsi les conclusions que le recourant en tire au regard de l'art. 190 al. 2 let. e LDIP.

Le recourant fait encore valoir que les CPDE seraient gravement attentatoires à sa liberté, si bien que la Formation aurait rendu une sentence incompatible avec l'ordre public matériel en permettant à l'intimée d'y fonder ses prétentions. L'art. 27 CC, censé étayer cette thèse, peut certes être invoqué par une personne morale (cf., par ex., arrêt 4A_536 et 540/2016, précité, consid. 4.3.2, 2e par.), même si c'est d'ordinaire une personne physique qui s'en prévaut dans les contestations en matière de sport (cf., par ex., ATF 138 III 322 consid. 4.3). Toutefois, selon la jurisprudence, la violation de cette disposition n'est pas automatiquement contraire à l'ordre public; encore faut-il que l'on ait affaire à un cas grave et net de violation d'un droit fondamental. Or, une restriction contractuelle de la liberté économique n'est considérée comme excessive au regard de l'art. 27 al. 2 CC que si elle livre celui qui s'est obligé à l'arbitraire de son cocontractant, supprime sa liberté économique ou la limite dans une mesure telle que les bases de son existence économique sont mises en danger; l'art. 27 al. 2 CC vise aussi les engagements excessifs en raison de leur objet, c'est-à-dire ceux qui ont trait à certains droits de la personnalité dont l'importance est telle qu'une personne ne peut se lier pour l'avenir à leur égard (ATF 123 III 337 consid. 5 et les arrêts cités). La même réflexion peut être faite, *mutatis mutandis*, en ce qui concerne l'art. 20 al. 1 CO (arrêt 4A_458/2009, précité, consid. 4.4.3.2). Il n'est pas question de cela dans le cas présent, quoi qu'en dise le recourant. En effet, selon les constatations de fait souveraines de la Formation, c'est le club X, lequel n'était du reste pas inexpérimenté en matière de partage des droits économiques sur les joueurs avec des fonds d'investissement, qui a pris l'initiative de contacter l'intimée pour obtenir son aide financière en vue d'acquérir les services de deux joueurs qui l'intéressaient, acquisition qu'il a faite librement au terme d'un mois de négociations conduites avec l'assistance d'experts et d'hommes de loi et dont les membres de sa nouvelle direction n'ont pas remis en cause la validité avant le mois d'août 2014.

Dans la seconde branche de son unique grief, le recourant soutient que la décision attaquée viole l'ordre public matériel en donnant effet

à des contrats qui méconnaissent gravement les droits de la personnalité et les droits fondamentaux des joueurs.

Il sied d'observer ici, comme on l'a fait plus haut au sujet de la première branche du même grief (cf. consid. 4.2.3), que, pour l'essentiel, le recourant en reste au niveau des grands principes, se contentant de soumettre au Tribunal fédéral des réflexions d'ordre théorique touchant les garanties fondamentales susceptibles d'être invoquées par toute personne physique et, singulièrement par un travailleur, sans chercher, en revanche, à démontrer, *in concreto*, en quoi une grave atteinte aurait été portée, par la mise en oeuvre des CPDE, aux droits de la personnalité et aux droits fondamentaux de V._____ et de W._____ en leur qualité d'êtres humains et de travailleurs. Or, ce n'est pas en argumentant ainsi qu'il parviendra à démontrer - ce qui seul importe, étant donné le pouvoir d'examen restreint dont jouit la Cour de céans en matière d'arbitrage international - pourquoi le résultat auquel la Formation est parvenue dans la sentence attaquée n'est pas compatible avec la notion d'ordre public matériel au sens de l'art. 190 al. 2 let. e LDIP.

Aussi bien, il n'est pas établi, ni même allégué semble-t-il, que l'un ou l'autre des deux joueurs visés par les CPDE se serait plaint d'une atteinte grave à sa personnalité. C'est au recourant d'en supporter les conséquences du point de vue du fardeau de la preuve, car c'est à lui qu'il appartenait de démontrer que le CPDE relatif à ce joueur avait porté une atteinte sérieuse aux droits de la personnalité et aux droits fondamentaux de celui-ci. Quant au joueur yyy, non seulement il n'a pas déploré pareille atteinte, mais, qui plus est, il s'est félicité de l'honneur qu'on lui avait fait, par son transfert à E._____, de pouvoir jouer pour le plus grand club au monde.

Décision

Au terme de cet examen, force est de rejeter le recours. Cela étant, le recourant, qui succombe, devra payer les frais de la procédure fédérale (art. 66 al. 1 LTF) et verser des dépens à l'intimée (art. 68 al. 1 et 2 LTF).

Judgment of the Swiss Federal Tribunal 4A_600/2016
29 June 2017
Michel Platini (Appellant) v. Fédération Internationale de Football Associations (FIFA) (Respondent)

*Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 16 September 2016**

Extract of the facts

Michel Platini is a former professional football player, captain and coach of the French National Football Team.

The Fédération Internationale de Football Associations (FIFA), an association under Swiss law, is the governing body of football at international level.

During the first half of 1998, Michel Platini, at the time co-chairman of the organizing committee for the 1998 World Cup in France that took place in 1998 worked for FIFA as an advisor to the newly elected president, Joseph. S. Blatter. This contractual relationship was formalized in a written agreement signed on August 25, 1999, by Michel Platini, then domiciled in France, and Joseph S. Blatter, on behalf of FIFA. The agreement valid for a four-year term, set the amount of annual compensation of the FIFA advisor to the President at CHF 300'000. In 2002, he stopped his activity after being elected to the Executive Committee of the European Football Association (UEFA) on April 25, 2002. He has represented this association on the FIFA Executive Committee since that date. In 2007, he was elected to the presidency of UEFA, then re-elected to this position in 2011, and again on March 24, 2015. He has also been Vice-President of FIFA.

A pension plan was put in place for members of the FIFA Executive Committee in 2005. In 2007, Michel Platini requested an extension of the pension for the years during which he was an advisor to the President of FIFA (1998-2002) in the calculation of his pension rights. This extension was granted by Joseph S. Blatter

On January 17, 2011, Michel Platini sent Markus Kattner, Finance Director and Deputy Secretary-General of FIFA at the time, an invoice for CHF 2'000'000 for the "wages 1998/99, 1999/0, 2000/1, 2001/2". It read as follows i.e CHF 500'000 per year which makes a total of CHF 2'000'000 net, as a final settlement. The President of FIFA confirmed that the bill was correct and signed the invoice. This payment was included in the 2010 FIFA Accounts under the *Special Projects* category.

On June 2, 2015, Joseph S. Blatter, freshly re-elected for a new term as President of FIFA, announced that he was resigning. On January 8, 2016, Michel Platini, whose candidacy had not been accepted by the Election Committee due to ongoing internal proceedings, announced that he had no choice but to withdraw his candidacy for the FIFA presidency.

After a preliminary investigation, the Investigatory Chamber of the FIFA Ethics Committee opened disciplinary proceedings against Michel Platini on September 28, 2015, pursuant to Art. 63(1) CEF. Upon

* The original of the decision is in French. The original text is available on the website of the Federal Tribunal, www.bgr.ch

termination of the investigation, the Adjudicatory Chamber issued its decision on December 18, 2015. Finding that Michel Platini had violated Articles 13, 15, 19, and 20 CEF, the Adjudicatory Chamber prohibited him from engaging in any activity related to football at a national and international level for a period of 8 years from October 8, 2015, and additionally imposed a fine of CHF 80'000.

By a decision of February 15, 2016, communicated to the parties with reasons on the 24th of the same month, the FIFA Appeals Committee (hereinafter "the Appeals Committee"), to which Michel Platini brought his appeal, confirmed the decision of the Adjudicatory Chamber on the infringements of the CEF by Michel Platini. However, it reduced the duration of the imposed ban on football-related activities from 8 years to 6 years, while confirming the amount of the fine.

On February 26, 2016, Michel Platini appealed to the CAS requesting the annulment of the aforementioned decision. On May 9, 2016, the Panel found Michel Platini guilty of violating Art. 19 and 20 of the FIFA Code of Ethics, prohibited the latter to take part in any activity (administrative, sporting or other) related to football at a national and international level for four (4) years instead of six (6) years, and reduced the fine of CHF 80'000 imposed on Michel Platini to CHF 60'000.

Extract of the legal considerations

1. In a first argument, the Respondent submits that the appeal is inadmissible since the contested award closed the international arbitration proceedings, so that the Appellant's only plea – namely, arbitrariness in the determination of the facts and the application of the law within the meaning of Art. 393(e) CPC – is not admissible as it is not included in the exhaustive list of Art. 190(2) PILA.

The Federal Tribunal first extensively analyzed the preliminary issue of "domestic arbitration" in Switzerland, and specifically the pertinent criteria in order to define an arbitration as domestic, but also the scope of review, by the Federal Tribunal, of the arbitral award under Art. 393 lit. e CPC. Art. 77(1) LTF[1] distinguishes international arbitration (a) from domestic arbitration (b). According to Art. 176(1) PILA, an arbitration is international if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties was neither domiciled nor had its habitual residence in Switzerland at the time of the conclusion of the arbitration agreement. On the other hand, arbitration is domestic when the arbitral tribunal has its seat in Switzerland and Chapter 12 PILA does not apply (Art. 353(1) CPC) i.e. both parties are domiciled in Switzerland. The pertinent time for the determination of the domicile or habitual residence of the parties is at the conclusion of the arbitration agreement. This means that an arbitration can be international even when the case no longer has international elements at the outset of the proceedings because one of the parties transferred its domicile to Switzerland after the conclusion of the arbitration agreement (4A_254/2013 of November 19, 2013, paragraph 1.2.1 and the author cited)

In the case, although both FIFA and the CAS have their seat in Switzerland and Platini was also domiciled in Switzerland when the appeal was filed, the only decisive factor was his domicile at the time of the conclusion of

[1] LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.

the arbitration agreement. In view of the particularities of sports arbitration in disciplinary matters (where jurisdiction does not arise directly from the conclusion of an arbitration agreement), the Federal Tribunal set the pertinent time for the conclusion of the arbitration agreement in January 1, 2004, the point in time when the FIFA Statutes recognized the jurisdiction of CAS. At that time Michel Platini was still domiciled in France. However, since the CAS Panel proceeded to a qualification of the arbitration as domestic and referred the arbitral proceedings conducted by it to Art. 353 ff. CPC and since FIFA did not object to it, such qualification had become binding upon the parties and FIFA could no longer raise any objections without violating the principle of good faith.

In this context, Art. 389(1) CPC opens the way for an appeal to the Federal Tribunal against an award rendered in a domestic arbitration and Art. 393(e) CPC exhaustively lists the grounds of appeal. One of these grounds permits to sanction an award which is arbitrary in its result. This has no counterpart in international arbitration because the ground of inconsistency of the award with public policy as contemplated by Art. 190(2)(e) PILA is a more restrictive concept than the one of arbitrariness (judgment 4A_150/20127 of July 12, 2012, at 5.1).

Based on the declarations concerning the applicable procedure, the Appellant filed an appeal to the Federal Tribunal by means of a civil law appeal based on Art. 77(1)(b) LTF (domestic arbitration), exclusively referring to the arbitrariness of the award in its result (Art. 393(e) of the CPC). Arguing the international nature of the arbitral proceedings in order to challenge the admissibility of the present appeal, the Respondent, who had raised no objection when the Chairman of the Panel had indicated to the parties, at the outset of the hearing, that he considered that this was a domestic arbitration, shows a contradictory stance, incompatible with the rules of good faith (*venire contra factum proprium*) and deserves no protection.

The objection of inadmissibility raised by the Respondent must therefore be dismissed and the appeal should be treated as an appeal in civil proceedings against an award made in the context of a domestic arbitration. It follows that the plea of arbitrariness formulated in this appeal is, in principle, admissible.

2. Secondly, the Respondent submits a further ground for the inadmissibility of the appeal in the allegedly appellatory character of the Appellant's action.

In a civil appeal against a domestic arbitral award, only grievances listed exhaustively in Art. 393 CPC are admissible. In addition, the Federal Tribunal only examines the grievances that are raised and reasoned (Art. 77(3) LTF). The reasons must be set out in the appeal itself; a mere reference to the content of previous submissions or documents from the file is insufficient (Judgment 4A_143/2015 of July 14, 2015, at 1.2 and references).

Without referring to a specific part in the Appellant's submissions, the Respondent asserts that the Appellant merely maintained that the disputed Award violated certain provisions of the Swiss Civil Code (CC, RS 210), the Swiss Code of Obligations (CO, SR 220) and the CEF, but fails to establish anything on this subject. Formulated in such general terms, this second submission cannot be relied upon to demonstrate that the action filed by the Appellant to this Tribunal by the Appellant was merely a substitute for an appeal. Therefore, it cannot lead to the immediate and complete inadmissibility of the action.

On the other hand, the Appellant, is particularly affected by the contested decision. He thus has a personal interest, which is current and worthy of protection, to ensure that that decision was not rendered arbitrarily, thereby conferring on it the possibility to appeal (Art. 76(1) LTF).

The appeal was lodged in the form provided for by law (Art. 42(1) LTF). It was filed in a timely manner as provided for by Art. 100(1) LTF i.e. within 30 days of notification. The appeal is therefore admissible.

3. The Appellant criticizes the Panel for making an arbitrary award on the level of facts, law, and even fairness.

The award arising from a domestic arbitration may be challenged, among other reasons, when it is arbitrary in its result because it is based on findings manifestly contrary to the records or because it constitutes a manifest violation of the law or fairness (Art. 393(e) CPC). Only the substantive law is covered, excluding procedural law (ATF 140 III 16, paragraph 2.1 and the judgments cited).
As to the manifest breach of fairness sanctioned by the same provision, it presupposes that the arbitral tribunal has been authorized to decide on an equitable basis or has applied a fairness standard (judgment 5A_978/2015 of February 17, 2016, and the precedents cited).

Before examining the Appellant's grievances against the contested award in the light of those principles, it is necessary to resolve two general issues raised by each of the parties.
In this specific case, the Appellant was subject to the Respondent's regulations when he joined the Respondent's Executive Committee. However, Art. 66(2) of the Statutes invites the CAS to apply in the first place the various regulations of the Respondent, providing for the application of Swiss law only subsidiarily. Accordingly, it does not appear that the Panel violated Art. 75 CC, as alleged by the Appellant, by giving priority to the relevant rules emanating from the Respondent rather than to Swiss substantive law (as the law of the country in which that federation has its registered seat), as required by Art. R58 of the Code.
For its part, the Respondent argues that, according to the case-law, only the arbitrary application of substantive law, that is to say State law, can be sanctioned for the manifest violation of the law referred to in Art. 393(e) CPC. Based on this premise, it concludes that the arbitrary application of Art. 19 and 20 CEF, pleaded by the Applicant, cannot be reviewed by the Federal Tribunal. Such an argument cannot be accepted since Art. 19 and 20 CEF, in so far as they set out the conditions for the conclusion that there is a conflict of interest or the acceptance or distribution of gifts and other benefits, are not procedural rules but fall within the substantive law concerning disciplinary sanctions adopted by an association of private law.

3.1 One of the main points of disagreement concerns the temporal application of the CEF. 3.3.1.

This issue is regulated by Art. 3 CEF. This Code shall apply to conduct whenever it occurred including before the passing of the rules contained in this Code except that no individual shall be sanctioned for breach not provided for by the Code applicable at the time it was committed nor subjected to a sanction greater than the maximum sanction applicable at the time the conduct occurred. This shall, however, not prevent the Ethics Committee from considering the conduct in question and drawing any conclusions from it that are appropriate. In the present case, the relevant facts for the temporal application of the CEF occurred in 2007 (request to extend the retirement plan) and in 2011 (receipt of the disputed payment and attendance at the meeting of the FIFA Finance Committee). Rules potentially applicable to the facts are

included in the 2006, 2009, and 2012 versions of the CEF.
The Appellant argued before the CAS that Art. 11 (version 2006) and 10 (version 2009) of the CEF did not refer to "third parties within or outside FIFA," contrary to Art. 20 CEF, but only referred to "third parties" or "third persons". For the Appellant, the latter two expressions could only refer to persons (natural or moral) completely outside FIFA, which would mean that he had not accepted undue advantages since all he had received was from FIFA and not from third parties. He therefore claimed, by invoking Art. 3 CEF, that his case was adjudicated by the 2006 and 2009 versions of the CEF.
The Panel rejected this argument. In its view, the term "third parties" simply refers to "any person other than the person receiving the benefit," in accordance with the ordinary use of those words. The jurisprudence of the FIFA and CAS bodies confirmed the broad interpretation of the phrase by applying it to a FIFA official who had given an unfair advantage to another FIFA official.
The TF supports that the expression "third parties" is simply aimed at "anyone other than the one receiving the benefit". In the same context, the donor is undoubtedly a third party compared to the donee. The fact that both of them have the status of officials does not change this situation. From that point of view, Joseph S. Blatter, notwithstanding his status as a FIFA official, was a third person, respectively a third party in relation to the Appellant, another FIFA official, for the purposes of the application of Art. 11 (version 2006) and Art. 10 (version 2009) of the CEF. It is in the same sense that the word *third*, as is found in Art. 20(1) (2012) CEF, has to be understood literally: this is a generic term describing persons "within or outside FIFA".
At the end of this interpretative approach, it appears, on balance, that the Panel did not render a legally unsustainable decision by holding that gifts or other benefits given to an official by another official of the FIFA fell within Art. 11 (version 2006) and 10 (version 2009) of the CEF, as Art. 20 CEF (2012 version) merely clarified the notion of *"third parties*". Thus, in deciding the case in light of the latter rule of conduct, did it not arbitrarily infringe Art. 3 CEF, which governs the application in time of the said Code, as well as the principle *nulla poena sine lege*, if we are to assume that it applies by analogy to the question of disciplinary sanctions under private law. The Appellant's first plea is thus doomed to fail.

3.2. On the merits, the Appellant first attacks, the criticism of him in relation to the extension of the retirement plan.

Primarily, the Appellant challenges the applicability of Art. 20 CEF to the act attributed to him with respect the acceptance of an unfair advantage, the act having been committed well before the entry into force of this provision of the 2012 version of the Code of Ethics. According to him, FIFA, by relying on this rule of conduct that was unenforceable *ratione temporis*, sanctioned him without a valid legal reason, thus manifestly violating Art. 75 CC.
In the alternative, the Appellant denounces the allegedly contradictory nature of the arguments adopted by the Arbitrators in order to justify the *in concreto* application of the aforementioned rule of conduct. The contradiction lies in the fact that, for the Panel, Joseph S. Blatter's decision to extend the retirement plan in favor of the Appellant was deemed inoperative, but the Appellant was found guilty of accepting an advantage prohibited by Art. 20 CEF in the form of an inappropriate expectation. In doing so, the Panel arbitrarily applied Art. 55 CC, 75 CC and 20 CEF. The contested award would thus stifle the attempt to obtain an undue advantage, which the CEF did not allow, once again disregarding the *nulla poena sine lege* principle.

It is established that the Appellant was not entitled to benefit from the pension plan for the years 1998 to 2002, as he was not a

member of the FIFA Executive Committee during that period. Art. 20 CEF refers to any acceptance of an undue advantage and does not provide that the benefit must be immediate. Thus, when he spontaneously applied and obtained the extension of the reference years used for the calculation of the pension, far from making a mere attempt, the Appellant indeed accepted such an advantage in the form of an expectation more akin to a term receivable (the future retirement of the Executive Committee being a certain event) than to a conditional claim. In his appeal, he does not demonstrate why it would be unsustainable to incorporate this form of benefit into Art. 20 CEF, assuming that the rule of conduct in question would only penalize the very receipt of the undue financial advantage and not the corresponding expectation. Similarly, he failed to demonstrate how the Panel acted in an arbitrary way by failing to note the contradiction of its own motivation.
Thus, the alternative submission of the appeal to the Swiss Federal Tribunal on this point, if it is admissible, cannot demonstrate how the disciplinary sanction of the Appellant based on Art. 20 CEF with respect to the extension of the retirement plan could be arbitrary.

3.3. The Appellant further seeks to establish that he did not violate Art. 20 CEF by accepting the disputed payment of CHF 2'000'000, holding that his conviction on that count was arbitrary.

Appellant mainly argues that the Panel should have applied Art. 10 (version 2009) of the CEF, instead of Art. 20 CEF. Had it done so, it would have been led to conclude that this provision did not preclude a FIFA official from accepting a gift from another official within the association.
In the alternative, it was for the Respondent, pursuant to Art. 52 CEF and Art. 8 CC to prove that the contested payment had been made without valid cause and that the Appellant had violated the CEF by accepting the payment. In addition, the Panel should have considered the potential violation of Art. 20 CEF from the premise that the payment of CHF 2'000'000 had been made by FIFA, validly represented by Joseph S. Blatter, since it had not accepted and it had not been established that the latter had exceeded his powers of representation (Art. 55 CC). In any event, a different conclusion on this point would not alter the unfairness of FIFA's sanction, which should in any event be attacked for adopting a contradictory attitude, constituting an abuse of rights (Art. 2 para. 2 CC) for validly paying a discretionary amount to one of its officials and subsequently condemning the official for accepting the gift.

The Appellant's main argument, based on the arbitrary application of the relevant rules of inter-temporal law, can no longer be examined for the reasons stated above (cf. at 3.1 last paragraph). There is therefore no need to dwell on it.
As to the subsidiary argument put forward by the Appellant with regard to the disputed payment, its motivation is highly unsatisfactory and there are serious doubts as to its admissibility in view of Art. 77(3) LTF. The Appellant's case sets out his legal point of view as he would do before an appellate court, almost disregarding the reasons given in the Award. He does not attempt to demonstrate, as he is supposed to do at this point, why any of the reasons set out by the Panel were not only wrong under the applicable law, but also – the only point that matters in the procedural framework (*i.e.* arbitrariness within the meaning of Art. 393(e) CPC) – why any of the reasons set out would constitute a manifest infringement of that right so as to render the contested Award arbitrary in its result. In any event, this subsidiary argument is rejected.
By endorsing the decision of the Appeals Committee upon which the Appellant's appeal was based, the panel did not unreasonably disregard Art. 52 CEF, which places the onus of proof on the FIFA Ethics

Commission for violations of the CEF provisions. In this case, the Ethics Commission had to prove that the Appellant's acceptance of the CHF 2'000'000 that FIFA had paid into his account in 2011 involved a breach of the rule of conduct in Art. 20 CEF. It first demonstrated the legal basis of the relationships established by the Appellant and FIFA at the material time (1999-2002) by indicating, with supporting evidence, that those relations were based on a written agreement signed on August 25, 1999, by the Appellant and Joseph S. Blatter, who had acceded to the presidency of FIFA the previous year. The contract provided that the Appellant's services would be remunerated by an annual payment of CHF 300'000. However, in 2011, more than eight years after his activity as a FIFA advisor ended, the Appellant received an amount of CHF 2'000'000 from the FIFA accounts. Since this attribution could not be attached to the abovementioned agreement; its legal basis was not traceable.

The Appellant further attempted to explain its origin by referring to an oral agreement he had made orally with Joseph S. Blatter in 1998 and which, he said, provided him with an annual remuneration equal to CHF 1'000'000 in exchange for his services as a sports or technical advisor to the future president of FIFA. In accordance with Art. 8 CC, it was therefore for him to establish the existence of the alleged verbal agreement. However, the Appellant failed to do so. Thus, the Appellant must accept that the existence of a valid reason that could explain the disputed payment was not established.
Finally, the Appellant is not credible when he asserts, under Art. 55 CC, that as Joseph S. Blatter had the capacity to validly hire him, the Respondent was bound to pay the CHF 2'000'000 in 2011 and would therefore commit an abuse of right (*venire contra factum proprium*) by subsequently questioning the validity of that measure in order to sanction the beneficiary. In conclusion, FIFA's wish could not have been expressed by Mr. Blatter, even if he had concluded the oral agreement, since Art. 55 CC was not applicable due to the bad faith of Mr. Platini and the overriding of the representation power of Mr. Blatter.

4. In his final plea, to which he attributes a subsidiary character, the Appellant attacks the disciplinary sanction imposed on him.

In view of these rules and principles, the pleas raised by the Appellant do not disclose any manifest breach of the law that would render the award arbitrary in its result as regards the disciplinary sanction imposed on him by the Panel. The "legality" of the penalty imposed is not subject to doubt. With regard to its duration, *i.e.* 4 years, the prohibition imposed does not appear to be manifestly excessive on the basis of the criteria set out by the Panel. The arbitrators took into account all the incriminating and exculpatory evidence found in their case. They did not neglect any important circumstance for fixing this duration. In this respect, there is no common measure between the statutory penalty imposed on the active professional Brazilian footballer Matuzalem, namely the threat of an unlimited ban on practicing his profession in the case should he failed to pay a compensation in excess of EUR 11 million at short notice (ATF 138 III 32223), and the one that was imposed on the Appellant

Thus, the Panel did not fall into arbitrariness, within the meaning of Art. 393(e) CPC by prohibiting the exercise of any footballing activity which, duly interpreted, appears to be sustainable both as to its object and to its duration. The fine of CHF 60'000, which accompanies this sanction, is not specifically attacked in the application, so that it is not necessary to consider it (Art. 77(3) LTF).

Decision

Under these circumstances, the present appeal must be dismissed in so far as it is admissible.

Arrêt du Tribunal Fédéral 4A_384/2017
4 octobre 2017
X (recourant) c. Fédération A. et Association B. (intimées)

Recours en matière civile contre l'ordonnance de clôture rendue le 29 mai 2017 par la Présidente de la Chambre arbitrale d'appel du Tribunal Arbitral du Sport

Extrait des faits

X._____ est un coureur de demi-fond de niveau international. Entre le 7 juin 2014 et le 24 août 2015, il a subi trois contrôles antidopage en vue de la mise à jour des données de son passeport biologique. Le profil de l'athlète a été soumis à un groupe d'experts, lequel a conclu à l'usage très probable d'une substance ou d'une méthode prohibée, dans un rapport du 22 février 2016, puis a confirmé sa première opinion après avoir pris connaissance des explications fournies le 10 mars 2016 par l'intéressé à l'Association B._____ (ci-après: B._____).

Suspendu provisoirement le 12 avril 2016, X._____ a été entendu le 14 juin 2016 par la Commission de discipline de la Fédération A._____ (ci-après: A._____), qui a conclu à une violation de la règle 32.2 (b) des Règles de B._____, l'a suspendu pour une durée de quatre ans à compter du 12 avril 2016 et a annulé rétroactivement tous les résultats obtenus par lui dès le 7 juin 2014. Cette décision figure, avec ses motifs, dans le procès-verbal de la réunion de la Commission de discipline daté du 14 juin 2016; son dispositif a été reproduit dans un courrier destiné à l'athlète, qui porte la date du 28 juin 2016 et se réfère au procès-verbal.

Le 30 juin 2016, le PV de la commission de discipline joint à un courriel a été adressé à l'athlète

Le 8 août 2016, X._____ a envoyé le courrier électronique à A._____, à l'Agence Mondiale Antidopage (AMA), à B._____ et au Tribunal Arbitral du Sport (TAS) contestant la décision du 14 juin 2016.

Par courriel du 23 janvier 2017, le Secrétariat du TAS a adressé à l'athlète un message dans lequel il lui a expliqué qu'il ne se considérait pas comme le véritable destinataire du document intitulé "appel", annexé au courriel d'août 2016, et qu'il n'aurait de toute façon pas pu mettre une procédure d'arbitrage en oeuvre sur la base de ce document, lequel ne remplissait aucunement les conditions d'un appel au TAS.

Assisté de son conseil, X._____ aurait déposé au Bureau de A._____, en date du 16 février 2017, une demande de transmission de la décision intégrale et du dossier complet le concernant.

Le 28 février 2017, un responsable du département antidopage de B._____ a écrit à l'athlète en lui indiquant qu'il semblait n'avoir déposé aucun appel à l'encontre de la décision de A._____ du 28 juin 2016 auprès du TAS et en lui demandant *"indépendamment de toute décision ultérieure du Président de la Chambre d'appel du TAS quant au caractère tardif d'un recours contre la décision de A._____ du 28 juin 2016"*, d'entreprendre les démarches nécessaires pour rendre son appel effectif s'il avait toujours l'intention de contester cette décision. L'attention de l'athlète était enfin attirée sur les art. R47 ss du Code de l'arbitrage en matière de sport (ci-après: le Code).

Le 21 mars 2017, X._____, représenté par un avocat..., a adressé au TAS une

déclaration d'appel assortie d'une demande d'effet suspensif.

Le 29 mai 2017, la Présidente de la Chambre arbitrale d'appel du TAS (ci-après: la Présidente), se fondant sur l'art. R49 du Code quant à son pouvoir décisionnel, a rendu une ordonnance de clôture dans le dispositif de laquelle elle a constaté l'irrecevabilité de l'appel déposé le 21 mars 2017 par X._____ à l'encontre de la décision prise le 28 juin 2016 par la Commission de discipline de A._____, a clôturé la procédure arbitrale pendante et a rayé la cause du rôle.

La règle 42.15 des Règles de B._____ fixe la durée du délai d'appel auprès du TAS à 45 jours à compter du jour suivant la réception de la décision dont est appel. X._____ admet avoir reçu le courriel du Dr L._____, daté du 30 juin 2016, et avoir pris connaissance de la décision rendue à son encontre, même s'il ne reconnaît pas avoir reçu le procès-verbal contenant la motivation de la décision. Malgré ses dénégations, force est de tenir pour acquis qu'il a bien reçu la décision du 28 juin 2016 et le procès-verbal contenant les motifs de celle-ci qui lui ont été envoyés par courrier électronique du 30 juin 2016. Le délai d'appel a commencé à courir le 1er juillet 2016 dans le cas présent, si bien que l'appel, déposé le 21 mars 2017, est tardif et, partant, irrecevable. Au demeurant, la règle appliquée étant claire, il n'y a pas lieu de recourir à d'autres règles fixées par B._____ ou tirées des droits vvv, www ou xxx. Par ailleurs, comme les règles applicables de B._____ ne prévoient aucune forme de notification, l'appelant cite à mauvais escient l'arrêt 4A_488/2011 du 18 juin 2012 où il était question d'une décision dont la notification devait se faire par pli recommandé avec accusé de réception. Du reste, la réception par l'appelant de la décision attaquée étant établie, les problèmes de preuve que pourrait soulever une notification faite exclusivement par courrier électronique ne sont pas d'actualité *in casu*. Quoi qu'il en soit, l'athlète ne saurait valablement invoquer la protection de sa bonne foi, alors qu'il avait connaissance de la décision litigieuse et de ses motifs depuis plus de 8 mois quand il a envoyé sa déclaration d'appel au TAS.

Le 12 juillet 2017, X._____ (ci-après: le recourant) a déposé, auprès de l'Ambassade de Suisse de..., un recours dirigé contre l'ordonnance de clôture précitée, recours qui a été transmis au Tribunal fédéral le 20 du même mois. Il a conclu à l'annulation de cette ordonnance et à sa mise au bénéfice de l'assistance judiciaire pour la procédure de recours.

Extrait des considérants

Dans un premier temps, le Tribunal fédéral a examiné la recevabilité du recours.

Dans le domaine de l'arbitrage international, le recours en matière civile est recevable contre les décisions de tribunaux arbitraux aux conditions prévues par les art. 190 à 192 LDIP (art. 77 al. 1 let. a LTF).

Le recours en matière civile visé par l'art. 77 al. 1 let. a LTF en liaison avec les art. 190 à 192 LDIP n'est recevable qu'à l'encontre d'une *sentence*, qu'elle soit finale, partielle, préjudicielle ou incidente. En revanche, une simple ordonnance de procédure pouvant être modifiée ou rapportée en cours d'instance n'est pas susceptible de recours (arrêt 4A_600/2008 du 20 février 2009 consid. 2.3). Il en va de même d'une décision sur mesures provisionnelles visée par l'art. 183 LDIP (ATF 136 III 200 consid. 2.3 et les références). L'acte attaquable, du reste, ne doit pas nécessairement émaner de la Formation qui a été désignée pour statuer dans la cause en litige; il peut aussi être le fait du président d'une Chambre arbitrale du TAS, voire du secrétaire général de ce tribunal arbitral. Au demeurant, pour juger de la recevabilité du recours, ce qui est déterminant n'est pas la dénomination du

prononcé entrepris, mais le contenu de celui-ci (ATF 142 III 284 consid. 1.1.1 et l'arrêt cité). A considérer ne serait-ce déjà que son intitulé (*Ordonnance de clôture*), la décision attaquée n'est pas une simple ordonnance de procédure susceptible d'être modifiée ou rapportée en cours d'instance. En effet, conformément à l'art. R49 du Code, la Présidente de la Chambre d'appel du TAS, donnant suite à une demande formulée par l'intimée n° 1 une fois la procédure arbitrale mise en oeuvre, a décidé de clôturer cette procédure après avoir invité les autres parties à se déterminer. Elle a ainsi rendu une décision d'irrecevabilité qui clôt l'affaire pour un motif tiré des règles de la procédure. Que cette décision émane d'une Présidente de Chambre plutôt que d'une Formation arbitrale, laquelle n'était du reste pas encore constituée, n'empêche pas qu'il s'agit bien d'une décision susceptible de recours au Tribunal fédéral (arrêt 4A_692/2016 du 20 avril 2017 consid. 2.3 et le précédent cité).

Le recourant, qui a pris part à la procédure devant le TAS, est particulièrement touché par la décision attaquée, car celle-ci entraîne le refus de ce tribunal arbitral de donner suite à son appel. Il a ainsi un intérêt personnel, actuel et digne de protection à ce que cette décision n'ait pas été rendue en violation des garanties invoquées par lui, ce qui lui confère la qualité pour recourir (art. 76 al. 1 LTF).

Le recours a été formé en temps utile. En effet, son auteur démontre avoir reçu la décision attaquée le 12 juin 2017 Le délai de recours de 30 jours, fixé à l'art. 100 al. 1 LTF, arrivait donc à échéance le 12 juillet 2017. Il a été sauvegardé par la remise du mémoire, à cette date, à l'attention du Tribunal fédéral, à une représentation diplomatique suisse, qui en a attesté la réception (art. 48 al. 1 LTF).
Rien ne fait obstacle, dès lors, à l'entrée en matière.

Dans un premier moyen, fondé sur l'art. 190 al. 2 let. c LDIP, le recourant fait grief à la Présidente d'avoir omis de se prononcer sur un chef de sa demande.

Selon l'art. 190 al. 2 let. c, seconde hypothèse, LDIP, la sentence peut être attaquée lorsque le tribunal arbitral a omis de se prononcer sur un des chefs de la demande. L'omission de se prononcer vise un déni de justice formel. Par "chefs de la demande" ("Rechtsbegehren", "determinate conclusioni", "claims"), on entend les demandes ou conclusions des parties. Ce qui est visé ici, c'est la sentence incomplète, soit l'hypothèse dans laquelle le tribunal arbitral n'a pas statué sur l'une des conclusions que lui avaient soumises les parties. Le grief en question ne permet pas de faire valoir que le tribunal arbitral a omis de trancher une question importante pour la solution du litige (ATF 128 III 234 consid. 4a p. 242 et les références; voir aussi l'arrêt 4A_173/2016 du 20 juin 2016 consid. 3.2).

En l'espèce, la Présidente, saisie d'un appel interjeté par le recourant contre la décision prise le 28 juin 2016 par la Commission de discipline de A._____ à son encontre, s'est prononcée, à titre préalable, conformément à l'art. R49 du Code et à l'invitation de l'intimée n° 1, sur le point de savoir si la déclaration d'appel était tardive ou non. Retenant la première hypothèse, elle a clos la procédure pendante avant qu'une Formation ait été constituée. Ce faisant, elle a traité la seule question qui se posait à elle à ce stade initial de la procédure d'appel et a statué sur le seul "chef de la demande" entrant alors en ligne de compte, à savoir la conclusion des intimées tendant à la clôture de la procédure pour cause de tardiveté du dépôt de la déclaration d'appel. Dès lors, le grief qui lui est fait d'avoir statué *infra petita* tombe manifestement à faux.

En réalité, le recourant reproche à la Présidente de ne pas avoir examiné son argument d'après lequel A._____ aurait méconnu les règles ADAMS (*Anti-Doping Administration & Management System*), un instrument de gestion en ligne conçu par

l'AMA en vue de simplifier l'administration des opérations antidopage des partenaires et des sportifs au quotidien (voir, à ce sujet, le site internet: https://www.wada-ama.org/fr/nos-activites/adams). Or, l'art. 190 al. 2 let. c LDIP ne permet pas de faire valoir que le tribunal arbitral a omis de trancher une question importante pour la solution du litige.

Dans un second moyen, divisé en trois branches, le recourant soutient que la décision attaquée est incompatible avec l'ordre public (art. 190 al. 2 let. e LDIP).

Dans la première branche du moyen examiné, le recourant fait grief à la Présidente d'avoir violé son droit au respect de la vie privée et à la protection des données concernant sa personne, tel qu'il est garanti par l'art. 8 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (CEDH; RS 0.101) et par l'art. 13 de la Constitution fédérale de la Confédération suisse (Cst.; RS 101), en ne sanctionnant pas le non-respect du système ADAMS par A._____, mais en validant, au contraire, l'utilisation par cette fédération d'un système privé de messagerie électronique gratuite (*Yahoo*) pour la notification de sa décision disciplinaire.
Il n'est pas possible de se ranger à cet avis. D'abord, le recourant n'indique nullement sur quelle base il assoit son affirmation. Ensuite, une partie ne peut pas se plaindre directement, dans le cadre d'un recours en matière civile au Tribunal fédéral formé contre une sentence ou une décision apparentée, de ce que l'auteur de celle-ci aurait violé la CEDH ou la Cst., même si les principes découlant de ces instruments juridiques peuvent servir, le cas échéant, à concrétiser les garanties invoquées par elle sur la base de l'art. 190 al. 2 LDIP (arrêt 4A_246/2014 du 15 juillet 2015 consid. 7.2.2). Du reste, le recourant n'indique pas en quoi le mode de notification utilisé par A._____ aurait, concrètement, porté atteinte à sa vie privée; il ne démontre pas, en particulier, que la décision disciplinaire prise à son encontre aurait bénéficié, de ce fait, d'une large publicité, allant bien au-delà du cercle des personnes intéressées. Enfin, même si c'eût été le cas, on verrait mal en quoi cet état de choses pourrait avoir une quelconque incidence sur la question du respect du délai d'appel.

Dans la deuxième branche du même moyen, le recourant se plaint de la violation des droits fondamentaux de la défense et du droit à un procès équitable. Invoquant l'art. 6 CEDH, il reproche, en substance, à la Présidente d'avoir déclaré son appel tardif alors que, selon lui, elle n'avait pas pu établir, à satisfaction de droit, le moment exact auquel il avait reçu la décision disciplinaire de A._____. Le recours n'est pas plus fondé sur ce point que sur le précédent. La référence faite par son auteur à une disposition de la CEDH appelle la même remarque que celle qui a été formulée ci-dessus. Pour le reste, la Présidente, contrairement à ce que soutient le recourant, a fixé à une date précise - le 30 juin 2016 - le moment auquel il avait reçu la décision contre laquelle il a interjeté appel. Elle l'a fait sur la base des preuves dont elle disposait. La constatation y relative lie la Cour de céans (cf. ci-dessus). Ainsi, la prémisse du raisonnement tenu par le recourant n'est pas correcte, ce qui prive de toute pertinence la conclusion qu'en tire l'intéressé.

Le recourant invoque "la violation du droit au recours à un second degré de juridiction, et du droit à un procès équitable".

Cette dernière partie du second moyen ne résiste pas davantage à l'examen. D'abord, les dispositions de la CEDH, on l'a vu, ne sont pas directement applicables dans la présente procédure. Ensuite, l'exigence d'une double instance ou d'un double degré de juridiction ne relève pas de l'ordre public procédural au sens de l'art. 190 al. 2 let. e LDIP (arrêts 4A_530/2011 du 3 octobre 2011 consid.

3.3.2 et 4A_386/2010 du 3 janvier 2011 consid. 6.2). Par ailleurs, la prétendue bonne foi du recourant ne saurait remédier au non-respect du délai d'appel. De plus, les circonstances invoquées pêle-mêle par l'intéressé dans son mémoire de recours ne suffisent pas, telles qu'elles sont alléguées et à défaut d'une démonstration digne de ce nom, à établir l'incompatibilité de la décision attaquée avec l'ordre public procédural ou matériel. C'est le lieu d'observer, enfin, que les formes procédurales sont nécessaires à la mise en oeuvre des voies de droit pour assurer le déroulement de la procédure conformément à l'égalité de traitement. Au regard de ce principe et sous l'angle de la sécurité du droit, un strict respect des dispositions concernant les délais de recours s'impose (arrêt 4A_690/2016 du 9 février 2017 consid. 4.2). Il n'est donc pas envisageable, à défaut d'une disposition écrite contraire, de sanctionner plus ou moins sévèrement le non-respect d'un délai de recours - au lieu de déclarer toujours le recours irrecevable - suivant le degré de gravité de l'atteinte que la décision susceptible de recours porte à la partie qui n'a pas recouru en temps utile contre cette décision. Cela étant, le recours ne peut qu'être rejeté dans la mesure de sa recevabilité.

Invoquant l'art. 64 al. 1 LTF, le recourant sollicite sa mise au bénéfice de l'assistance judiciaire.

Sur le principe, rien ne s'oppose à l'admission de cette requête, malgré le fait que la décision entreprise a été rendue dans le cadre d'un arbitrage (arrêt 4A_690/2016 du 9 février 2017 consid. 5.1). Cependant, comme le recours était voué à l'échec, l'une des deux conditions cumulatives à la réalisation desquelles la disposition citée subordonne l'octroi de l'assistance judiciaire n'est pas remplie en l'espèce. Ladite requête doit, dès lors, être rejetée. Faisant application de la faculté que lui confère l'art. 66 al. 1 in fine LTF, la Cour de céans renoncera néanmoins à la perception de frais, étant donné les circonstances.

Décision

Le recours est rejeté dans la mesure où il est recevable, la demande d'assistance judiciaire est rejetée, il n'est pas perçu de frais ni alloué de dépens.

Informations diverses
Miscellanous

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