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Editorial

Although 2019 is not an Olympic year, it is a significant year for the CAS in several respects.

First, the permanent CAS Anti-Doping Division (ADD) has been established as of 1 January 2019. Its role is to manage first-instance procedures relating to anti-doping matters, pursuant to the delegation of powers from signatories to the World Anti-Doping Code (WADC). The new list of arbitrators specialized in anti-doping regulations (the CAS ADD list) is separated from the CAS general list of arbitrators in order to avoid that the same arbitrators be eligible in first-instance and in appeal. However, the CAS ADD arbitrators will remain eligible to decide cases submitted to the CAS Ordinary Division (sole instance). The ADD list include 21 arbitrators eligible for party nomination, 24 Panel Presidents / Sole Arbitrators (not eligible for party nomination) and 9 arbitrators eligible for WADC non-compliance issues (article 23.5 WADC). To date, the following 10 International Federations (IF) have delegated their first-instance authority to the CAS ADD: the International Triathlon Union (ITU), the Fédération Internationale de Ski (FIS), the Fédération Internationale de Luge (FIL), the World Archery (WA), the Fédération International des Sociétés d'Aviron (FISA), the International Bobsleigh & Skeleton Federation (FIBT), the International Shooting Sport Federation (ISSF), the International Biathlon Union (IBU), the International Judo Federation (IJF), the International Weightlifting Federation (IWF). More IFs are willing to delegate anti-doping matters to the CAS ADD in the near future. The CAS ADD has already registered its first procedures, mainly filed by the IOC and linked with the Olympic Games, involving the retest of samples from previous Olympic Games. These procedures have been completed in less than seven weeks from the filing of the request for arbitration until the final decision.

The CAS ADD is located in new offices, in the south of Lausanne (avenue de Rhodanie 60). These new premises are temporary, pending the completion of the future new CAS headquarters at the Palais de Beaulieu in Lausanne towards the end of 2021.

Then, for the second time in the history of CAS, a hearing has been held in public on 15 November 2019 in Montreux/Switzerland. The appeal was filed by the World Anti-doping Agency (WADA) at the CAS in relation to a decision issued by the Fédération Internationale de Natation (FINA) Doping Panel dated 3 January 2019 exonerating the Chinese swimmer Sun Yang from any sanction following an out-of-competition doping control. It has always been possible for CAS hearings to be held in public as long as all parties to the procedure agreed to the proceedings being conducted in public. The first public hearing - also involving a swimmer - took place in 1999 in the matter Michelle Smith De Bruin v. FINA. However, at the beginning of 2019, following a decision taken by the European Court of Human Rights (ECHR) in the cases Pechstein & Mutu v. Switzerland, the CAS updated its procedural rules to widen the scope for hearings to be held in public, which can be held at the sole request of the athlete when the dispute is of a disciplinary nature. In the case WADA v/ Sun Yang & FINA, the public hearing was requested by Sun Yang. Neither WADA, nor FINA raised any objection to such request and the CAS Panel confirmed that a public hearing should be organised.

Several conferences will be organised or co-organized by the CAS in 2020. On 30 January 2020, a public seminar will be held in Montréal, Canada, hosted by the CAS and the Sport Dispute Resolution Centre of Canada (SDRCC) entitled *"Fostering Integrity in Sport with Dispute Resolution"*. Moreover, an International Sports Law Conference, supported by the Court of Arbitration for Sport, will be held on 25, 26, 27 March 2020 in Johannesburg, South Africa. The key

issues of the conference will notably include a presentation of the various anti-doping procedures before the CAS, an overview of CAS jurisprudence in anti-doping matters, the new 2021 World Anti-Doping Code and International Standards and a review of CAS procedural issues. Finally, the CAS will play an active role in the annual conference of the US Sports Lawyers Association (SLA) which will take place in Miami, USA, on Friday 15 May 2020. The programme will be announced closer to the event, but it will cover a variety of topics including areas of global football (soccer), anti-doping (the new WADC and CAS ADD), and Olympic issues.

The coming year is also likely to generate more work for the CAS as the Games of the XXXII Olympiad commonly known as Tokyo 2020 scheduled to take place from 24 July to 9 August 2020 in Tokyo, Japan, are approaching. A CAS Ad Hoc Anti-Doping Division (ADD) will be set up by the ICAS to handle first instance doping cases as well as a “regular” Ad Hoc Division (AHD) that 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 majority of the so called “Leading cases” selected for this issue are related to football. Three cases, including 2 related to football, deal with doping issues whereas one handball case addresses questions of governance.

We are pleased to publish in this issue an article entitled “*CAS procedures and their efficiency*” co-written by Laurence Boisson de Chazournes, CAS arbitrator, and Ségolène

Couturier. Furthermore, an interesting analysis of the concept of *ex aequo et bono* in arbitration has been prepared by Hubert Radke, former professional basketball player in Europe, currently a sports lawyer. Lastly, an overview of the new FIFA disciplinary Code written by Estelle de La Rochefoucauld, CAS counsel, has been included in this issue.

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. In this respect, the Valcke decision is of particular interest. The case relates to a disciplinary sanction issued by FIFA upon its former Secretary General Jérôme Valcke (the Appellant) over various breaches of the FIFA Code of Ethics. In his application for annulment of the CAS award, the appellant mainly put forward arbitrariness, a ground only valid in domestic arbitrations governed by the Swiss Code of Civil Procedure (CCP). The Swiss Federal Tribunal reiterated the practical consequences of the distinction, in particular with regard to the more comprehensive examination within the CCP. Yet, pursuant to the CCP, the parties have the right to opt out of the CCP and agree to a (more limited) review of the arbitral award under the PILA: this agreement would constitute a “choice of law” under section 176 (2) PILA).

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

Matthieu REEB
CAS Secretary General

Articles et commentaires
Articles and Commentaries



CAS procedures and their efficiency*

Laurence Boisson de Chazournes & Ségolène Couturier**

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I. Introduction

Efficiency is intended to be one of arbitration's key attributes. It is an aspect that has been fairly widely described and debated in the commercial field,¹ but much less in sports arbitration. This article intends to provide both practical and theoretical insights that demonstrate the efficiency of CAS procedures.

The reasons that can lead to the choice of arbitration are manifold.² One of the most prominent reasons is the wide margin of freedom in determining and conducting the

proceedings. On the other hand, arbitration rules frequently empower arbitral tribunals with procedural discretion to ensure effective case management and to avoid unnecessary delay or expense. Indeed, too much unconstrained freedom for the parties can lead to dilatory tactics that impact the efficiency of the procedure.

Given that all stakeholders in arbitration are concerned with the efficiency of proceedings, many guidelines, rules, and protocols have been published to assist in the management of disputes.³ Recently, a Working Group comprised of representatives from around 30

* This article draws on: BOISSON DE CHAZOURNES / COUTURIER, "Comment rendre les procédures du TAS aussi efficaces que possible? Le rôle des conseils de parties", in: *International Sport Arbitration*, 7th Conference CAS&SAV/FSA, Lausanne 2018, BERNASCONI M. (Ed.), Editions Weblaw, Bern, (forthcoming).

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¹ FORTESE / HEMMI, "Procedural Fairness and Efficiency in International Arbitration", *Groningen Journal of International Law*, vol 3(1): *International Arbitration and Procedure*, 2015, pp. 110-124; CLAXTON J., "Tailoring International Arbitration for

Efficiency, Harmonizing Trade Law to Enable Private Sector Regional Development", *Hors Serie Volume XX*, 2016, Victoria University Wellington; HEISKANEN V., "[Key to Efficiency in International Arbitration](#)", *Kluwer Blog Arbitration*, 29 May 2015; EARNEST / GALLARDO / GUNNARSSON / KACZOR, with Foreword by BERNARDINI P., "Four ways to sharpen the sword of efficiency in international arbitration", *Young ICCA Group Paper*, 2012; "Towards Greater Efficiency in International Arbitration", 11th AIJA Annual Arbitration Conference, Zurich, June 2019.

² KAUFMANN-KOHLER / RIGOZZI, "Arbitrage international: droit et pratique à la lumière de la LDIP", 2nd ed. Bern: Weblaw, 2010.

³ For instance, the IBA Guidelines on Conflict of Interest in International Arbitration ("IBA Rules"), approved by the IBA Council on 22 May 2004, contain

– mainly civil law – countries adopted Rules on the Efficient Conduct of Proceedings in International Arbitration.⁴⁵ These initiatives show that efficiency is at the core of arbitration concerns and that there is a willingness to achieve this objective.

On closer observation, however, the notion of efficiency is not easy to grasp.⁶ It is often seen as the mere pursuit of optimizing time and cost in the procedure.⁷ However, in the field of justice the understanding of efficiency cannot be limited to this restrictive utilitarian approach. Indeed, the quest of time and cost optimization can be at the expense of quality. That is the reason why the metaphor of the triangle is frequently used to consider the issue of the efficiency of arbitral proceedings.⁸ In this context, efficiency is imagined as the optimal balance achieved between three aspects in tension: speed, economy and quality.⁹

The issue of efficiency is particularly important in sports arbitration where decisions can directly affect the outcome of an ongoing competition or championship. This has made the timeliness of proceedings an unavoidable objective of the CAS. The other key objective of the CAS is to offer a cost-efficient procedure accessible to all athletes. The latter is particularly important in an arbitration context often qualified as

“forced”, or imposed by law, by the rules and statutes of sports federations or associations. While predictability was not initially a formalized objective, it has become a feature of dispute resolution before the CAS. Indeed, special needs related to the field of sport have led to a specific organization that increase the consistency of the awards and the predictability of the outcome of the litigated issues. This feature significantly contributes to improving the quality of procedures.

This article aims at assessing whether the CAS has struck the right balance between timeliness, cost-effectiveness and quality of the rendered decision. This evaluation of the efficiency of the CAS proceedings will only focus on those before the permanent Divisions, i.e. the procedure before the “Ordinary Arbitration Division” which determines first-instance disputes between sporting stakeholders that are generally commercial (rather than disciplinary) in nature, the procedure before the Anti-Doping Division (created in 2019) which hears first-instance anti-doping cases and the Appeals Arbitration Division which hears disputes arising from first-instance decisions made by sports governing bodies.¹⁰ Due to their contextual specificity, the proceedings before the ad hoc Divisions will not be dealt with.

a number of provisions that enable efficient proceedings.

⁴ *Rules on the Efficient Conduct of Proceedings in International Arbitration* (Prague Rules), Prague, 14 December 2018, <https://praguerules.com>; ARGERICH S., A Comparison of the IBA and the Prague Rules: Comparing Two of the Same, Kluwer Arbitration Blog, 2 March 2019: “The Prague Rules are intended as a framework providing guidance to conduct effective arbitration proceedings. They do not replace institutional rules which govern arbitral procedure and are only applicable upon the parties’ agreement or at the arbitral tribunal’s own initiative after consultation with the parties and, even then, only to the extent to which the parties have agreed”.

⁵ STAMPA G., “The Prague rules”, *Arbitration International*, Volume 35, Issue 2, June 2019, Pages 221–244.

⁶ It is worth noting that a distinction can be made between effectiveness and efficiency. The two terms, which are often wrongly amalgamated, reflect in reality

different phenomena. Indeed, effectiveness is based solely on the capacity to achieve a determined result, while efficiency deals with the means used to attain that result. Therefore, a procedure can be effective but not efficient if it uses disproportionate means. Efficiency can therefore be seen as the intention not to allow the fulfillment of objectives at all costs.

⁷ CLAXTON J., “Tailoring International Arbitration for efficiency”, *Harmonising Trade Law to Enable Private Sector Regional Development*, Hors Serie Volume XX, 2016, Victoria University Wellington.

⁸ FORTESE / HEMMI, “Procedural Fairness and Efficiency in International Arbitration”, *Groningen Journal of International Law*, vol 3(1): *International Arbitration and Procedure*, 2015, pp. 110-124.

⁹ HEISKANEN V., “Key to Efficiency in International Arbitration”, *ICSID Review - Foreign Investment Law Journal*, Volume 30, Issue 3, Fall 2015, pages 481–485.

¹⁰ Art. S3 of the Code of Sports-related Arbitration (“the Code”).

The mandatory nature of sports arbitration could have been a disadvantage or even a problem. It has been well handled by the CAS with the provision of high-quality procedures (I). In addition, the CAS has not hesitated to implement particularly rigorous procedures to meet the expectations of stakeholders (II).

II. An obligatory arbitration: consequences on efficiency

The issue of consent to arbitration is one of the *raisons d'être* of arbitration. It is addressed in a very different way in the context of the settlement of sports-related disputes than in other arbitration fields. The purpose of this section will be to understand the causes and consequences of such an approach on the efficiency of CAS procedures.

A. A forced arbitration

To be properly understood, the issue of the use of forced arbitration must be contextualized. To this end, it is necessary to look back to the beginnings of sports justice, where sport institutions had their own judicial bodies to enforce their regulations and to hear appeals against their disciplinary decisions. While sports disputes often involved sports institutions, athletes and clubs were reluctant to lodge a case before the judicial bodies of these institutions. For their part, the national courts have long been rather reluctant to review the decisions of these bodies.¹¹

Over time, in view of the growing importance of the economic interests at stake, athletes and clubs have been less reluctant to lodge a case before the mechanisms of sport justice.

National courts positioned themselves differently and began to abandon their initial inhibition to intervene in sports disputes. However, sport inherently needs a level playing field for athletes, which cannot be ensured in the context of fragmented justice rendered by different national authorities.¹² The sporting community could not accept different outcomes in disputes dealing with the same issues. The sport sector presents many peculiarities that can be better understood by specialized bodies than by ordinary judges. The general consensus among the sport sector's stakeholders is that arbitration is preferable over ordinary litigation before State courts. Consequently, in order to harmonize sport justice and offer a single procedure for more equality and legal security, the CAS was created in 1984.¹³

The CAS has now been accepted by almost all sport federations as the supreme instance in sports arbitration. According to the Swiss Federal Tribunal ("SFT"), the CAS has become the "*Supreme court of world sport*" and "*an inescapable institution in the world of sport*".¹⁴ Every sport association has its own internal instances, whose decisions are subject to appeal to the CAS. Most of the time, the athletes are therefore subject to standard arbitration agreements contained in statutes, regulations and athletes' declarations (i.e. by reference) and not to negotiated arbitration agreements.

This indirect and forced consent, from which athletes cannot escape, has opened the door to ethical debates. Nevertheless, arbitration clauses by reference to statutes or athletes' declarations are usually accepted by state courts and especially by the SFT.¹⁵ The latter

¹¹ Many sports federations provided for the exclusion of members who dared to turn to the courts. See, OSWALD D., "Le pouvoir juridictionnel des organisations sportives et ses limites" in: Séminaire "Droit et Sport" du 11 septembre 2002, Publications FSA (vol. 18), Berne 2003, pp. 41–52, 44; RIGOZZI A., "L'arbitrage international en matière de sport", Basel 2005, para. 178.

¹² COCCIA M., "Sports Arbitration: Which Features Can Be "Exported" to Other Fields of Arbitration?", in: *Sports Arbitration: A Coach for Other Players?*, ASA

Special Series No. 41, GEISINGER / TRABALDO / DE MESTRAL (eds.), 2015, p. 12.

¹³ RIGOZZI A., "L'arbitrabilité des litiges", ASA Bulletin, 3/2003.

¹⁴ PATOCCHI P.M., "Justice by Specialists: Advantages and Risks (Real and Perceived)", in: *Sports Arbitration: A Coach for Other Players?*, ASA Special Series No. 41, GEISINGER / TRABALDO / DE MESTRAL (eds.), 2015, p. 34.

¹⁵ SFT 133 III 235 (Canas), E.4.4.

recognized that sports arbitration is a forced arbitration but confirmed its validity, due to the fact that it constitutes a genuine alternative to state courts, for several reasons. First of all, given that it is a specialized institution, the CAS is the most appropriate forum to render justice in this area. Secondly, it provides sufficient guarantees of independence and impartiality. Finally, there is the possibility of challenging CAS awards before a national court, in this case the SFT, in the event of an arbitration going wrong.¹⁶

The European Court of Human Rights ('EctHR') in the Mutu and Pechstein case¹⁷ has stressed that if arbitration is compulsory, in the sense of it being required by law, it must afford the safeguards secured by Article 6 para. 1 of the Convention.¹⁸ This clarification brought by the Court shows that the validity of a forced arbitration clause is conditioned by the respect of procedural rights guaranteed by the Convention.¹⁹ The fact that consent to the CAS' jurisdiction is, in many cases, not voluntary, has led the CAS to adopt high quality procedures and be extremely vigilant with regard to respect for the procedural rights of the parties.

B. The application of Swiss law: a safeguard

¹⁶ RIGOZZI A., "Le recours contre les sentences du Tribunal arbitral du sport (TAS)", in *Annuaire Revue de l'arbitrage*, 16 November 2015.

¹⁷ Mutu and Pechstein v. Switzerland (Applications no. 40575/10 and no. 67474/10) (ECHR 324 (2018)), para. 95.

¹⁸ In support of this argument, the Court in the Mutu and Pechstein case (para. 95) refers to a precedent: Suda v. Czech Republic, no. 1643/06, 28 October 2010, para. 49.

¹⁹ Ibid. para. 92: "The Court reiterates that Article 6 § 1 of the Convention secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only (see Lupeni Greek Catholic Parish and Others v. Romania [GC], no. 76943/11, § 84, 29 November 2016, and Golder v. the United Kingdom, 21 February 1975, § 36, Series A no. 18)".

²⁰ Art. R28 of the Code

The CAS has a fixed seat in Lausanne for all arbitration proceedings and parties are not allowed to change it.²⁰ The establishment of a fixed arbitral seat in a given country can be seen as an element of legal security. Indeed, the arbitration proceedings will be governed by the law of the country of the seat, irrespective of where the hearings actually take place. This favours procedural uniformity that contributes to greater predictability. The choice of seat is therefore particularly important since arbitration proceedings will be influenced in many ways by the legal system of the chosen country.²¹ The permanent location of the seat in Lausanne means that all CAS arbitrations are governed by Swiss arbitration law and in particular by Chapter 12 of the Private International Law Act ("PILA") which deals with international arbitrations.²² This almost systematic submission of CAS arbitrations to the PILA is a guarantee of an equal "procedural" treatment between athletes, regardless of their own domicile or to that of the sports federation in question, or even the place where the disputed competition took place.²³

Moreover, this submission to Swiss law gives jurisdiction to the SFT to hear cases concerning CAS awards under certain conditions.²⁴ This control confers rather

²¹ COCCIA M., op. cit., p 11.

²² The vast majority of arbitral proceedings before the CAS are governed by Chapter 12, but it should be noted that for the arbitration to be submitted to Chapter 12 it is imperative that at least one of the parties had not, at the time the arbitration agreement was concluded, his other domicile or habitual residence in Switzerland (art. 176 para. 1 of the PILA).

²³ Art. 176.1 of the PILA: "The provisions of this chapter shall apply to arbitrations if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland".

²⁴ Art. R46 and R59 of the Code: The award, notified by the CAS Court Office, shall be final and binding upon the parties subject to recourse available in certain circumstances pursuant to Swiss Law within 30 days from the notification of the award by mail or courier. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in

broad prerogatives on the SFT.²⁵ Indeed, the latter may rule on: the irregular constitution of the arbitral tribunal, the jurisdiction or lack of jurisdiction of an arbitral tribunal, an *ultra petita* decision and a denial of justice, the violation of fundamental procedural principles and a conflict with substantive public policy.²⁶ The SFT therefore participates directly and actively in the development of sports law by promoting the emergence of key principles which will be referred to by the CAS.²⁷ As such it contributes to the consistency and predictability of arbitral awards in sports.

Finally, the fact that the Swiss system has only one instance of appeal is advantageous in terms of speed compared to other systems. In this context, the parties may reasonably consider that they will be definitively determined on the fate of their arbitration within four to six months from the filing of the appeal against an award.²⁸

C. Cost-accessible justice?

While, for many reasons, arbitration is desirable in sport, it is a choice that is far from being a trivial issue from a financial perspective for athletes. The procedures of the CAS have a reputation for being cost-effective. This affirmation has been recognized on several occasions by the SFT

and recently by the EctHR. According to the SFT: “*It is not certain that other solutions exist that could replace an institution [the CAS] capable of resolving international disputes in the field of sport quickly and inexpensively*”.²⁹ For its part, the EctHR in the Mutu and Pechstein case, recognized that the CAS is able to rule in a timely and cost-effective manner.³⁰

CAS proceedings, whose cost varies depending on the composition of the arbitration panel are deemed to be cost-effective compared to certain other arbitration proceedings.³¹ They can nevertheless remain costly for some athletes. In accordance with its objective of making CAS procedures accessible to all athletes, CAS has set up a number of facilities to assist athletes who may be in financial difficulty. First of all, it should be remembered that arbitration procedures before the CAS are free of charge for “*disciplinary disputes of an international nature judged on appeal*”, the latter include a large proportion of so-called forced arbitration cases.³² Secondly, the International Council of Arbitration for Sport (“ICAS”) has established a fund to provide assistance.³³ Athletes in difficulty may in particular be granted an exemption from paying the procedural fees and a flat-rate amount to cover the travel and accommodation expenses of the beneficiary as well as those of witnesses, experts,

Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration.

²⁵ Section 190 of the PILA lists the grounds for lodging a complaint before the SFT. This is considered by some to be too limited for the remedy before a State jurisdiction to be considered alone as sufficiently burdensome in the face of forced arbitration.

²⁶ Art. 190 para. 2 of the PILA.

²⁷ See in particular the question of pathological clauses, which is discussed below.

²⁸ RIGOZZI A., “Le recours contre les sentences du Tribunal arbitral du sport (TAS)”, in *Annuaire Revue de l’Avocat*, 16 November 2015, pp. 216-222.

²⁹ STF 129 III 445 c. 3.3.3.3 p. 462 [Larissa Lazutina and Olga Danilova v. IOC, FIS and CAS].

³⁰ Mutu and Pechstein, op. cit., para. 98.

³¹ The CAS makes available online to the parties a schedule arbitration costs, with the administrative costs and the arbitrators’ costs and fees, both of which

are indexed to the amount in dispute. The arbitrators’ costs and fees are also fixed, but the final amount will vary depending on the hours spent on the file and therefore on the complexity of the case. However, these hourly rates are considered reasonable by the literature as a whole in comparison to other areas of arbitration.

³² Art. R64 and R65 of the Code: Free arbitral proceedings before an ad hoc arbitral tribunal constituted for a major sporting event must also be reserved; in particular, free arbitral proceedings before the ad hoc Chamber for the Olympic Games, which issues an award within 24 hours to ensure the continuity of the competition (for more details on this ad hoc chamber, see RIGOZZI A., “L’arbitrage international en matière de sport”, Basel 2005, pp. 137-138, n° 242-244, pp. 682- 684, n° 1348-1352).

³³ *Guidelines on legal aid from the Court of Arbitration for Sport* (entered into force on 1 September 2013; amended on 1 January 2016).

interpreters and public defenders. The services of a *pro bono* counsel approved by the CAS are also available.³⁴

These efforts of the CAS with respect to the costs of proceedings contribute significantly to their efficiency. Indeed, this allows the institution to achieve one of its main objectives, that of economy which is also one of the three poles of the efficiency triangle (speed-economy-quality).

They are essential in the context of arbitration considered as forced. The consent to arbitration implies a waiver of state jurisdiction, which raises difficulties when this arbitration is deemed to be forced. As we have already seen, the validity of the obligatory character of arbitration is conditioned by the respect of certain fundamental rights, such as compliance with Article 6 para. 1 of the ECHR³⁵ or Article 30 par. 1 of the Swiss Federal Constitution, and both guarantee the right of access to justice. This compliance can only be ensured as long as there is a genuine and effective “compensation” for the dismissal of state jurisdiction. This is the case, in the present case, insofar as the CAS is unanimously recognised as the most appropriate court in the field of sport. In addition, its constant efforts to make procedures financially accessible to everyone lead to the conclusion that this renunciation of state justice has been counter-balanced by a valuable judicial alternative.

Lastly, it should be borne in mind that the CAS, like all permanent institutions, has incompressible administrative costs. Reducing prices without affecting the operating costs and quality of the services provided by the CAS would require funding support that can only be provided by sports institutions directly involved in the settlement

of the disputes. In this context, independence challenges have resulted. The SFT has consistently held that the CAS is an independent and impartial institution. In 2017, in the *Seraing* case, the SFT confirmed the independence and impartiality of the CAS with regard to the issue of CAS funding by sports organizations. It firstly pointed out that it is not appropriate to ask athletes and sports organizations to contribute equally to the operating costs of the CAS as it is the case in an *ad hoc* commercial arbitration.³⁶ It further added that it has never been proved by statistical analyses or in any other way that the CAS would be inclined to support a sports body, in this case FIFA, when it is a party to an arbitration procedure conducted by it.³⁷

D. The closed list of arbitrators: an issue of independence and impartiality

The independence and impartiality of the CAS has also been an issue of attention due to the fact that the list of arbitrators is a closed one established by the ICAS. To this challenge, the SFT and the EctHR have consistently replied that the list was sufficiently broad³⁸ to guarantee the parties' freedom of choice.³⁹

In the *Lazutina* case, dating from 2003, the SFT considered that even though athletes were not free to choose “their” arbitrator since their choice was limited to arbitrators on a closed list, the list was now extensive enough to allow sufficient choice while ensuring “*a rapid, simple, flexible and inexpensive settlement of disputes, by specialists with both legal and sporting backgrounds, [...] essential both for athletes and for the proper conduct of competitions*”.⁴⁰ In this case, the SFT had confirmed the validity of the CAS' closed list of arbitrators system, as it was suitable for promoting the effective resolution of sports disputes and

³⁴ For more details on eligibility requirements, refer to the *Guidelines on legal aid from the Court of Arbitration for Sport*

³⁵ Mutu and Pechstein, op. cit., para. 95.

³⁶ SFT 4A 260/2017.

³⁷ Ibid, para. 3.4.3.

³⁸ It currently has around 400 arbitrators.

³⁹ REEB M., *Revue*, p. 10; BADDELEY M., *L'Association Sportive Face au Droit*, p. 267.

⁴⁰ SFT 129 III 445 S.457, [*Larissa Lazutina and Olga Danilova v. IOC, FIS and CAS*], 21 ASA Bull. 601, 605-620 (2003).

was compatible with the “*constitutional requirements of independence and impartiality applicable to arbitral tribunals*”.⁴¹

In turn, the EctHR in its joint Mutu and Pechstein cases of 2018 had to rule on the independence and impartiality of the CAS in particular in the light of Article 6 of the ECHR. The Court recognized that organizations which may oppose athletes before the CAS have a real influence on the appointment of arbitrators. However, this influence alone is not sufficient to conclude that arbitrators are dependent on or biased towards these organizations. The Court concluded that the CAS’ closed list system of arbitrators itself complies with the requirements of independence and impartiality applicable to arbitral tribunals and there has been no violation of Article 6 para. 1 of the Convention on account of an alleged lack of independence and impartiality on the part of the CAS.⁴² In addition, it should be remembered that the CAS has taken rather drastic measures to prevent the accumulation of certain mandates. Indeed, since 1 January 2010 CAS arbitrators may not act as counsel for a party before the CAS.⁴³ This has not yet happened in other arbitration areas.

Although the EctHR’s 2018 “*tilts the balance of European human rights justice in favor of CAS arbitration*”⁴⁴, the CAS Code was reformed in 2019 in order to strengthen the independence and good governance of the Tribunal. On this occasion, three commissions have been created in ICAS. Each of them is in charge of the CAS’s main missions, namely: the CAS Membership Commission, the Legal Aid Commission, and the Challenge Commission. The composition of these commissions has been elaborated to ensure

that athletes are more effectively represented within the ICAS.⁴⁵

III. Public and detailed procedures

It is well known that arbitral procedures are much more flexible than judicial procedures, because they are chosen and tailored by the parties. Institutional arbitration – to which the CAS belongs – is at a crossroads between freedom for the parties to adjust the organization of the dispute settlement and the rigor of judicial proceedings. Within this category, the CAS holds a special place that stands out from other arbitration procedures. Indeed, in order to keep control over the conduct of the proceedings and in consideration of the specificities of the sporting field, the CAS did not hesitate to implement rigorous procedures, leaving little room for the choice of the parties. This unusual interventionism for arbitration, as well as the public nature of a number of its procedures, brings the CAS closer to judicial institutions than to classical arbitral tribunals, which has implications with regard to its efficiency. The CAS has to be vigilant, to the extent that, excessive rigidity and control run counter to the values of arbitration, which could lead to an imbalance between the three aspects of the efficiency triangle: speed, economy, quality. The purpose of the following section will be to assess the balance that has been struck.

A. Completeness and rigor of the CAS proceedings

CAS procedures recognized for their efficiency in terms of length, are short in comparison with other arbitration systems.⁴⁶ It is not the ordinary procedure, which lasts about one year that makes the CAS different from other arbitration procedures, but rather

⁴¹ Ibid

⁴² Mutu and Pechstein, op. cit., para. 157.

⁴³ Art. S18.3 of the Code.

⁴⁴ LATTY F., “Le TAS marque des points devant la CEDH”, *Jurisport* 192, December 2018, pp. 31- 36.

⁴⁵ Art. S7 of the Code.

⁴⁶ COCCIA M., “Sports Arbitration: Which Features Can Be “Exported” to Other Fields of Arbitration?”

and NETZLE S., “Sports Arbitration: What Are Its Limits as a Model for Other Fields of Arbitration?” in: *Sports Arbitration: A Coach for Other Players?*, GEISINGER / TRABALDO / DE MESTRAL (eds), ASA Special Series No. 41, 2015 ; MORONEY / RAHMAN, “An introduction to sports arbitration in the UAE”, LawInSport, 20 June 2019.

the appeal procedure, which is particularly expeditious. Indeed, the procedural code sets a three-month target for communicating the operative part of the award to the parties from the time the case is transferred to the arbitration panel.⁴⁷

This time efficiency does not mean that CAS procedures may not be affected by hurdles that may elongate the process, which many arbitral institutions face.⁴⁸ The three-month time limit is in fact often closer to 5 or 6 months. The attractiveness of an institution is a reason for this situation and the CAS may be a victim of its own success in this respect. The Court has experienced an exponential increase of cases since its creation, from two cases handled in 1986 to 599 in 2016.⁴⁹ The phenomenon has rather been well absorbed and managed. But combined with the ever-growing sophistication of the cases presented, particularly in doping or commercial matters, the institution's task has not been made easier. It should be kept in mind that the time spent on a file is not compressible *ad libitum* if one does not want to affect the quality of the procedure. Adjudicative institutions must be careful not to trade quality for speed.

The promptness of CAS proceedings is the result of several procedural measures that are unusual in arbitration. The strength of the CAS system, compared to other arbitral fora, in dealing with the length issue is the rigor of

its procedure associated with the completeness of its code. Indeed, these two characteristics, which are not really attuned to arbitration, allow the Court to limit the influence of the parties on the procedures and the possible dilatory tactics that may result from it. In the context of the appeal procedure the appellant has 21 days for filing the application through a Statement of appeal.⁵⁰ Within the 10-day time limit after the expiry of the time limit for the appeal, the appellant has to file an appeal brief or shall inform the CAS Court Office in writing whether the statement of appeal shall be considered as the appeal brief.⁵¹ The appeal brief must contain all the documents which the appellant intends to rely on during the procedure, namely all the written evidence, the list of witnesses with their written testimony and finally the list of experts who will intervene.⁵² The appeal shall be deemed to have been withdrawn if the appellant fails to meet such time limit.⁵³ The answer of the Respondent shall contain the same documents.⁵⁴ After the exchange of the written submissions, the parties are no longer authorized to produce further written evidence, except by mutual agreement, or if the Panel so permits, based on exceptional circumstances. It should be stressed that only the appeal procedure is concerned by these strict procedural rules since in the ordinary procedure there are more exchanges of written submissions.⁵⁵

⁴⁷ Art. R59 of the Code.

⁴⁸ REICH A., "The effectiveness of the WTO Dispute Settlement System: A statistical analysis", European University Institute Working Papers, Law 2017/11, Department of Law, p. 21; "2018 International Arbitration Survey regarding the Evolution of International Arbitration", Queen Mary University of London; J. CLAXTON, "Tailoring International Arbitration for Efficiency, Harmonizing Trade Law to Enable Private Sector Regional Development", Hors Serie Volume XX, 2016, Victoria University Wellington; D. HACKING and M. E. SCHNEIDER, "Towards More Cost-Effective Arbitration"; International Bar Association Newsletter Arbitration and ADR, (1998) Vol. 3, No. 1.; C. DAVIES, "More Efficient and Cost-Effective Arbitration: Changes made to the ICC and Swiss Rules in 2012", P. BERNARDINI, "International Arbitration: How to Make it More Effective", in *Liber Amicorum en*

l'Honneur de Serge Lazareff, LEVY / DERAIS (eds.), 2011; ESQUIRE / JOHNSON, "The Top 10 Ways to Make Arbitration Faster and more Cost effective", American Arbitration Association 114, www.adr.org.

⁴⁹ See on the CAS website, in the statistics, the table lists the cases submitted to the CAS since its creation. (1986-2016).

⁵⁰ It should be noted that federations are free to determine a longer time limit.

⁵¹ MAVROMATI / REEB, "The Code Court of Arbitration for Sport, Commentary, Cases and Materials", Wolters Kluwer, The Netherlands, 2015, p. 453.

⁵² Art R48 of the Code.

⁵³ Art. R51 of the Code.

⁵⁴ Art. R55 of the Code.

⁵⁵ Art R44.1 of the Code for the Ordinary procedure and art. R51 for the Appeal procedure.

Taking into consideration the particularly short and peremptory deadlines of the appeal procedure, the CAS had to be vigilant and find a balance between the rigor of a procedure and the rights of the parties. Indeed, the right of the parties to bring evidence to the attention of the Panel is one of the primary procedural rights. As has been said, “[s]uch evidence must be relevant and adduced in due time and in due form”.⁵⁶ The fact that article R44.2 and R.44.3 apply *mutatis mutandis* to appeal proceedings for both the appeal brief and the answer allow the Panel at any time to order the production of additional documents.⁵⁷

B. Elements beyond the control of the CAS

A procedure may be effective and rigorous, but if the arbitration clause is poorly drafted (referred to as a “pathological clause”), its efficiency will necessarily be negatively impacted. Indeed, the general or unclear wording of the arbitration clause can lead to doubts with regard to the will of the parties to consent to CAS jurisdiction. In this context, the validity of the clause⁵⁸ could be challenged either at the stage of preliminary objections before the CAS, or later in the context of an application before the SFT. This would slow down and lengthen the overall dispute resolution process.

On several occasions, the SFT has had the opportunity to clarify what it meant by a pathological clause.⁵⁹ In a 2011 ruling it characterized this clause as an incomplete, ambiguous, or inconsistent clause.⁶⁰ On this basis, the CAS in a 2017 award drew up a non-exhaustive list of criteria for recognizing the pathology of a clause. Among the characteristics mentioned by the SFT, the vague or ambiguous nature of the clause was taken up, to which were added, *inter alia*, statements containing contradictory statements or lacking precision in the designation of the institution chosen by the parties. Finally, the non-exclusion of the intervention of State courts or any other court (at least before the award is rendered) may, according to the CAS, lead to competition in the establishment of its jurisdiction and result in the invalidity of the arbitration clause.⁶¹

Although the quality of the clause is not a component as such of the CAS procedure, the Court did not ignore this phenomenon and acted in response. Party counsel in their drafting role are central to avoiding these procedural inconveniences. This is why CAS regularly offers training. In addition, standard clauses are at the disposal of the drafters on the Tribunal’s website. Finally, the publication of the case law provides a corpus to which arbitrators can refer to avoid certain pitfalls.

⁵⁶ MAVROMATI / REEB, op. cit.; and see ATF 119 II 386 of September 1993, F. SpA, c. 1b.

⁵⁷ Art R57 of the Code.

⁵⁸ In the context of an international arbitration having its seat in Switzerland, as is the case for arbitration before the CAS, to verify the validity of a clause, reference should be made to the Federal Act on Private International Law (PILA). Under Swiss law, to be considered valid, a clause must meet formal and substantive requirements set out in Article 178 (1) (2) of the PILA.

⁵⁹ Judgment of the SFT of 21 November 2003 No. 130 III 66; judgment of the Federal Court 4A_246/2011.

⁶⁰ Judgment of the SFT No. 4A_246/2011, para. 2.2.3.

⁶¹ Heap sentence of 25 October 2017 (2017/A/5065): “A clause is therefore generally said to be pathological

if it contains any of the following features that are not common in arbitration agreements:

(A) if it is vague or ambiguous as regards private jurisdiction contains gold contradicting provisions;
 B) if it fails to mention with precision the institution which will fill the of referee’s body chosen by the parties;
 C) if it fails to produce procedural mandatory consequences for the parties in the event of a dispute;
 (D) if it fails to exclude the intervention of state courts in the settlement of the disputes, at least before the issuance of the award;
 E) if it does not vest powers to the arbitrators to resolve the disputes likely to arise between the parties; and
 F) if it does not permit the putting in place of a procedure leading sous le best conditions of efficiency and speed to the rendering of an award *that is likely of judicial enforcement*”.

CAS procedures are not only unusual in the field of arbitration because of their rigor but as well because they are more transparent than other procedures, at least in some aspects. It remains to be seen what role this transparency plays with regard to the efficiency of CAS procedures.

C. Transparency

Today, in arbitration, there is a trend towards increasing transparency. This is exemplified with the United Nations Commission on International Trade Law (UNCITRAL) “Rules on transparency in investor-state arbitration” adopted in 2013. It is a well-known example of this proclivity which generally concerns modern governance.⁶² However, this objective of transparency is especially difficult to achieve in arbitration, where confidentiality is one of the main pillars.

As regards the CAS, it has a particular relationship with transparency since, in comparison with other arbitral fora, most of its awards are published. Indeed, before the appellate procedure, which represents about 85 percent of CAS cases, the award and summary and/or a press release setting forth the results of the proceedings shall be made public by CAS (unless the parties agree otherwise).⁶³ This specificity is mainly explained by the fact that the decisions appealed to the CAS are first instance decisions adopted by federations, associations or sports organizations which are generally made public⁶⁴. It would therefore make little sense, if any, to make them confidential later on. In addition to the availability of awards on the CAS database

which is public, summaries and press releases are also provided for important cases. Finally, in some situations, the cases concern renowned figures in sport or concerns the ranking of a well-known championship, which necessarily involves significant media coverage.

By contrast, confidentiality remains the rule before the Ordinary Division. Indeed, when the CAS rules in first instance, the award may only be made public if the parties agree.⁶⁵ In this context, only 10 or 20 percent of cases are published.⁶⁶

This procedural feature of the CAS combined with universal access to the awards via the online database, make the CAS system a unique model in arbitration and contribute to its legitimacy and its efficiency.

For a variety of reasons, this pooling of CAS awards and their publication on the CAS website contribute to the efficiency of the proceedings. It can be firstly considered as a guarantee of equality between individuals which is especially necessary in doping disputes. In addition, this system facilitates the emergence of key principles that ensure the consistency of case law. This process leads to the development of a *lex sportiva* which fosters the consistency and predictability of sports law.⁶⁷

Another facet of transparency is the publicity of hearings. With regard to this issue, Article 6 (1) ECHR entitles everyone “*to a public (...) hearing (...) by an impartial and independent tribunal*” and expressly provides for various exceptions to this principle. The total or partial in camera hearing must be strictly

⁶² The UNCITRAL rules on transparency in arbitration between investors and States based on the treaties (the ‘Rules on transparency’), which entered into force on 1 April 2014; BOISSON DE CHAZOURNES / BARUTI, *Transparency in Investor-State arbitration: Year incremental approach*. In: *Bahrain Chamber for Dispute Resolution International Arbitration Review*, 2015, vol. 2, No. 1, p. 59–76.

⁶³ Art. R59 of the Code.

⁶⁴ In this respect, the new FIFA Disciplinary Code entered into force on 15 July 2019 provides in its

Article 51.7 that the FIFA General Secretariat publishes the decisions taken by FIFA’s judicial bodies.

⁶⁵ Art. R43 of the Code.

⁶⁶ Information given by the Registry of the CAS.

⁶⁷ CASINI L., “The Making of a Lex Sportiva by the Court of Arbitration for Sport”, Vol. 12 No. 05, *Beyond Dispute International Judicial Institutions as Lawmakers*, 1 May 2011, German Law Journal.

determined by the circumstances of the case. In the Pechstein case, the SFT had concluded that article 6 (1) did not apply to the proceedings before the CAS, since, according to it, it was a voluntary arbitration.⁶⁸ The European Court, by recognizing the forced character of the Pechstein arbitration, found article 6 (1) of the ECHR applicable, and concluded that a breach of the same article had occurred due to the fact that the proceedings before the CAS had not been made public when the athlete had made the request. The Court considered that the controversy concerning the infamous nature of the sanction for the athlete should have required that the hearing be held under public control. This was understood as a way of preserving confidence in the justice system in question.

In 2019, the CAS Code was subsequently adapted to the requirements of Article 6 of the Convention. Previously, Article R57 of the CAS Code provided that, at the hearing, the proceedings take place in camera, unless the parties agree otherwise. With the 2019 reform of the Code, the new Article R57 provides that: *“at the request of a physical person who is party to the proceedings, a public hearing should be held if the matter is of a disciplinary nature”*. The implementation of this new provision will not have been long in coming as on 15 November 2019 a public hearing was held in the context of an appeal procedure before the CAS involving the World Anti-Doping Agency (WADA) against the Chinese swimmer Sun Yang and the Fédération Internationale de Natation (FINA). In this context, a public viewing area was available for written media and members of the public to observe the proceedings, and in parallel, the hearings were available by livestream on the internet.⁶⁹

IV. Concluding remarks

Sports arbitration is a specialized model of arbitration with peculiar features of its own.

The explosion of the number of cases handled since the CAS was created demonstrates that the institution has for now managed to strike an appropriate balance between the efficiency of its procedures in terms of length and costs, and has at the same time been able to maintain a rather unique quality in the conduct of the procedures.

These qualities, although consciously cultivated and developed, stem from the specificities of the field of sport. In other words, the CAS has taken advantage of the particular expectations of litigants to impose an unusual regime of arbitration, midway between arbitral procedure and judicial procedure.

This particular regime has been and continues to be the subject of attention, especially with regard to issues relating to independence and impartiality. That said, the CAS is unanimously recognized as the supreme court in sport, is often taken as an example for other areas of arbitration, and continues to be a reference for efficiency. It is also important to bear in mind that efficiency is a continuous quest that requires constant effort, which for the time being the CAS appears to be making.

⁶⁸ SFT, 10 February 2010, Pechstein v. ISU, 4A_612/2009, para 4.1, and para. 23 of the ECtHR award.

⁶⁹ Media release, CAS public hearing – WADA v. Sun Yang & FINA, Registration for the public viewing area, 4 November 2019.

Aperçu du nouveau Code disciplinaire FIFA 2019

Estelle de La Rochefoucauld*

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I. Introduction

Le nouveau Code Disciplinaire FIFA, entré en vigueur le 15 juillet 2019, a été développé en consultation avec les six confédérations de football et d'autres acteurs clés du football, à savoir, l'Association des Clubs Européens (European Club Association – ECA), la Fédération Internationale des Associations de Footballeurs Professionnels (FIFpro) et le Football Against Racism in Europe (FARE), réseau créé pour lutter contre la discrimination dans le football européen. Le Code 2019 intègre des changements majeurs à la fois structurels et substantiels. A noter que le champ d'application de l'édition 2019 du Code Disciplinaire FIFA est plus large puisqu'il s'applique non seulement à *“tous les matches et toutes les compétitions organisé(e)s par la FIFA”* mais aussi *“aux matches et compétitions de football qui ne sont pas sous la juridiction des confédérations et/ou des associations membres”*¹

Les deux éléments clés qui ont présidé à l'élaboration du nouveau Code sont une approche simplifiée et un esprit novateur. Comparé au Code 2017, la version actuelle est

plus concise avec 72 articles au lieu des 147 composant l'édition précédente du Code, et 5 chapitres remplaçant les 2 chapitres subdivisés en 3 sous-chapitres du Code 2017. Par ailleurs, trois modifications innovantes ont été apportées dans le cadre de la procédure disciplinaire FIFA. Il s'agit (i) de l'engagement à faire respecter les décisions financières et non financières rendues par le TAS en procédure ordinaire, (ii) de l'application d'un régime de sanctions plus efficaces avec l'imposition d'une interdiction de transfert aux clubs débiteurs et (iii) d'une action à l'encontre du successeur d'un club débiteur.

Le nouveau Code innove également en actualisant le principe de tolérance zéro à l'égard de toute forme de racisme ou de discrimination, en simplifiant la lutte contre la manipulation de matches et en renforçant l'accès à la procédure judiciaire avec la mise en place d'une assistance judiciaire devant la FIFA et la transparence.

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¹ Article 2 Code Disciplinaire FIFA.

L'objectif de cet article est de mettre l'accent sur les principaux amendements du nouveau Code.

II. Les principaux amendements en matière disciplinaire

A. L'engagement de la FIFA à faire respecter les décisions financières et non-financières rendues par un organe de la FIFA et par le TAS

L'article 15 du nouveau Code Disciplinaire permet à la FIFA de faire non seulement respecter les décisions financières et non-financières prises par un organe de la FIFA ou par le TAS en appel à l'encontre des clubs, des entraîneurs et des joueurs qui ne respecteraient pas ces décisions mais aussi les sentences ordinaires rendues par le TAS (article 15.1). Avant l'entrée en vigueur du Code Disciplinaire 2019, les décisions rendues par le TAS en première instance – sentences ordinaires – étaient exécutoires uniquement par le biais de la convention de New York. Ainsi, les parties ayant obtenu gain de cause ne pouvaient pas obtenir la condamnation de la partie ne respectant pas les décisions rendues par la chambre ordinaire du TAS à des sanctions sportives, sachant que ces dernières sont le moyen le plus efficace pour faire exécuter les décisions qui s'imposent à des parties réticentes². Cet amendement est un élément clé du nouveau

Code car il permet à la FIFA d'utiliser sa position mondiale prédominante pour faire respecter la justice en matière de football.

En outre, sous le nouveau régime, la mesure disciplinaire applicable par défaut à l'encontre d'un club à l'expiration du dernier délai accordé s'il persiste à ne pas effectuer un paiement dû ou à ne pas se conformer entièrement à une décision prise par la FIFA ou le TAS (en appel ou en première instance) est une interdiction de transferts³. Une déduction de point(s) et une relégation dans une division inférieure peuvent aussi être prononcées en cas d'infraction grave ou répétée. Pour des raisons d'efficacité, le nouveau Code Disciplinaire FIFA a donc inversé le régime de sanctions applicable sous le Code 2017, l'interdiction de transfert s'avérant un outil plus dissuasif pour les clubs que la déduction de points et la relégation (article 15.1 c).

Le nouveau Code Disciplinaire permet également de prononcer une interdiction d'exercer toute activité liée au football à l'encontre des personnes physiques pour une durée spécifique à l'expiration du dernier délai accordé si cette personne se trouve toujours en défaut de paiement ou ne s'est toujours pas conformationnée entièrement à une décision prise par la FIFA ou le TAS (appel ou première instance) (article 15.1.e).

² L'article 6 Code disciplinaire FIFA 2019 prévoit les mesures disciplinaires/sportives applicables aux personnes physiques et personnes morales

1. Les mesures disciplinaires suivantes peuvent être prononcées à l'encontre de personnes physiques et personnes morales:

a) mise en garde; b) blâme; c) amende; d) restitution de prix; e) retrait d'un titre.

2. Les mesures disciplinaires suivantes peuvent être prononcées à l'encontre de personnes physiques uniquement:

a) suspension pour un nombre déterminé de matches ou pour une période déterminée; b) interdiction de vestiaires et/ou de banc de touche; c) interdiction d'exercer toute activité liée au football; d) travaux d'intérêt général au service de la communauté du football.

3. Les mesures disciplinaires suivantes peuvent être prononcées à l'encontre de personnes morales uniquement:

a) interdiction de transferts; b) obligation de jouer à huis-clos; c) obligation de jouer avec un nombre limité de spectateurs; d) obligation de jouer sur terrain neutre; e) interdiction de jouer dans un stade particulier; f) annulation du résultat d'un match; g) déduction de point(s); h) relégation dans une division inférieure; i) exclusion d'une compétition en cours ou de compétitions à venir; j) forfait; k) obligation de rejouer un match; l) mise en œuvre d'un programme de prévention.

³ Voir par exemple décisions de la Commission de Discipline de la FIFA du 15 août 2019 dans l'affaire Club Africain (Tunisie) (Décision 190554 PST), du 5 Septembre 2019 dans l'affaire Giresunspor SK, Turkey (Decision 190580 PST) concernant le non-respect de l'article 15 du Code disciplinaire de la FIFA (éd. 2019) / l'article 64 du Code disciplinaire de la FIFA (éd. 2017).

Autre nouveauté, en application de l'article 15.4, la FIFA a la possibilité de faire respecter des décisions en imposant des sanctions au successeur sportif d'une autre partie coupable du non-respect d'une décision. Cet amendement correspond à une codification de la jurisprudence du TAS⁴.

B. Actualisation du principe de tolérance zéro à l'égard de toute forme de racisme ou de discrimination

Le principe de tolérance zéro à l'égard de toute forme de racisme ou de discrimination a été mis à jour dans le Code Disciplinaire 2019 en consultation avec le FARE (réseau créé pour lutter contre la discrimination dans le football européen).

L'article 13 du Code Disciplinaire de la FIFA 2019 élargit le champ d'application de la discrimination qui inclut comme auparavant toute discrimination relative à la couleur de peau, à l'origine ethnique, nationale ou sociale mais dorénavant également toute discrimination liée au sexe, au handicap, à l'orientation sexuelle (lutte contre l'homophobie), à l'opinion politique, à la richesse et à la naissance. Par ailleurs, la liste des discriminations n'est pas exhaustive et les sanctions sont renforcées à l'égard des auteurs de discriminations et d'infractions racistes, la suspension minimum passant de 5 à 10 matches de suspension au minimum pour les auteurs responsables (Article 13.1).

La FIFA s'efforce également de résoudre le problème par le biais des clubs et des associations. Ainsi, comme déjà prévu par le Code 2017, les clubs restent responsables du comportement raciste ou discriminatoire de leurs supporters et feront l'objet, pour une première infraction, de l'obligation de disputer un match avec un nombre limité de spectateurs et d'une amende d'au moins CHF

20,000 (Article 13.2). Le fait de combiner ces deux sanctions a potentiellement pour effet de nuire financièrement au club davantage que si le club était uniquement sujet à une amende de CHF 30,000 comme prévu sous l'ancien régime.

En outre, afin de favoriser l'éducation à la diversité et la lutte contre la discrimination dans le football, un programme de prévention peut désormais être imposé par la FIFA à un club ou à une association en cas de récidive ou si les circonstances l'exigent (Article 13.2.b).

Un autre amendement permet à la FIFA d'entendre directement les victimes d'un comportement potentiellement discriminatoire. Ces dernières peuvent ainsi être invitées par l'organe juridictionnel concerné de la FIFA à effectuer une déclaration par écrit ou par oral et à participer à la procédure. Cette mesure met l'accent sur la volonté de la FIFA de ne pas laisser de côté les victimes en leur donnant la possibilité d'avoir un impact direct sur les procédures disciplinaires et marque une volonté de reconnaissance à l'égard des victimes (Article 13.3).

Enfin, les arbitres ont la possibilité d'arrêter définitivement un match pour cause de comportement raciste et/ou discriminatoire. Dans ce cas, le match en question sera perdu par forfait par le club responsable (Article 13.4)⁵.

C. Simplification de la lutte contre la manipulation de matches

L'article 18 du Code Disciplinaire de la FIFA 2019 prévoit que c'est la Commission de Discipline de la FIFA et non plus la Commission d'Ethique qui est compétente pour traiter tous les cas de manipulation de

⁴ Cette jurisprudence est établie notamment dans l'affaire CAS 2016/A/4450.

⁵ A ce jour, des matchs ont été interrompus pour cause de comportement discriminatoire ou raciste mais pas suspendus. Par exemple Nice-Marseille a été interrompu douze minutes en raison de chants

homophobes, en match de la troisième journée de Ligue 1, mercredi 28 août 2019 et un match de Ligue 1 entre Metz et Paris a été brièvement interrompu par l'arbitre le 30 août 2019, après le déploiement d'une banderole jugée homophobe.

matches sur le terrain comme en dehors. Cet amendement permet à la Commission d’Ethique de la FIFA, autrefois compétente, de se consacrer uniquement aux comportements non-éthiques et de simplifier et clarifier la lutte contre la manipulation de matches.

Par ailleurs, le nouveau Code a modifié le régime de sanctions applicables aux cas de manipulation de matches. Le Code distingue dorénavant 3 infractions:

- La manipulation directe ou indirecte de matches par des personnes physiques, sanctionnée par une amende de CHF 100,000 et par une suspension minimum de 5 ans de toutes activités liées au football.
- La responsabilité des clubs et fédérations auxquels les joueurs coupables sont affiliés. Ces dernier(e)s peuvent être sanctionnés par la perte de match par forfait ou être déclarés inéligibles pour une autre compétition ou encore être sanctionnés par d’autres mesures disciplinaires⁶.
- L’absence de coopération visant à signaler / informer toute approche liée à des activités concernant directement ou indirectement la possible manipulation d’une compétition sanctionnée par une

amende de CHF 15,000 et au moins 2 ans de suspension de toutes activités liées au football.

D. Identification des incorrections commises par les joueurs et officiels

Dans son article 12, l’édition 2019 du Code Disciplinaire de la FIFA identifie 11 infractions lors d’un match ou en compétition, c’est-à-dire sur le terrain, pour lesquelles joueurs ou officiels peuvent être sanctionnés - amendés ou suspendus -. Ces comportements incluent notamment le fait d’empêcher un but pour un joueur, tout comportement antisportif à l’encontre d’un adversaire, le fait de manifester sa désapprobation par la parole ou par les gestes pour un officiel, de rechercher délibérément un carton rouge ou jaune pour un joueur afin d’être suspendu pour un match à venir et de ne plus être par la suite sous la menace d’une suspension, de provoquer les spectateurs lors d’un match, d’agresser un adversaire, de provoquer ou intimider un officiel de match⁷.

Le texte du Code prévoit que certaines de ces infractions seront également sanctionnées si elles sont commises en dehors du terrain, par exemple, sur les réseaux sociaux. Cette modification a pour but d’établir une règle

⁶ Voir Article 6 para. 1 et 3 Code Disciplinaire FIFA 2019.

⁷ Incorrection de joueurs et officiels (Article 12)

1.

Les suspensions suivantes sont applicables aux joueurs ou officiels et peuvent être assorties d’une amende :

- a) un match pour un joueur exclu pour avoir empêché un but ou annihilé une occasion de but manifeste pour l’adversaire ;
- b) au moins un match ou une durée appropriée pour un comportement antisportif à l’encontre d’un adversaire ou de toute personne autre qu’un officiel de match ;
- c) au moins un match pour un officiel exclu pour avoir manifesté sa désapprobation par la parole ou par les gestes ;
- d) au moins un match pour avoir délibérément cherché à recevoir un carton jaune ou rouge, notamment afin d’être suspendu pour un match à venir et par la suite ne plus être sous la menace d’une suspension ;
- e) au moins deux matches pour une faute grossière ;

- f) au moins deux matches pour avoir provoqué les spectateurs lors d’un match, et ce de quelque manière que ce soit ;

- g) au moins deux matches ou une durée appropriée pour avoir clairement agi afin de pousser un officiel de match à prendre une mauvaise décision ou de le conforter dans son erreur de jugement pour qu’il prenne une mauvaise décision ;

- h) au moins trois matches ou une durée appropriée pour une agression (coup de poing, coup de coude, coup de tête, coup de pied, morsure, crachat, etc.) à l’encontre d’un adversaire ou de toute personne autre qu’un officiel de match ;

- i) au moins quatre matches ou une durée appropriée pour un comportement antisportif à l’encontre d’un officiel de match ;

- j) au moins dix matches ou une durée appropriée pour une provocation ou intimidation d’un officiel de match ;

- k) au moins 15 matches ou une durée appropriée pour une agression (coup de poing, coup de coude, coup de tête, coup de pied, morsure, crachat, etc.) à l’encontre d’un officiel de match.

universelle pour l'utilisation et l'abus des réseaux sociaux par les joueurs et officiels. Les infractions concernées par cet amendement sont le comportement antisportif à l'encontre d'un adversaire ou d'un officiel de match, la provocation de spectateurs et la provocation ou l'intimidation d'un officiel de match (Article 12.2).

III. Renforcement de l'accès à la justice et transparence

Le Code Disciplinaire FIFA 2019 intègre plusieurs dispositions visant à renforcer l'accès à la procédure judiciaire devant la FIFA et la transparence.

A cet effet, l'article 42 du Code institue une procédure d'assistance judiciaire destinée aux personnes physiques ayant des moyens financiers insuffisants et désireux d'accéder à une procédure devant les organes juridictionnels de la FIFA. L'assistance judiciaire de la FIFA a pour objet de fournir un soutien financier ainsi qu'un accès à un conseil adéquat.

L'assistance judiciaire doit faire l'objet d'une demande motivée et documentée transmise au secrétariat de la FIFA. Cette demande sera tranchée définitivement par le président de la Commission de Discipline.

L'assistance judiciaire peut bénéficier au requérant de trois manières:

- Le requérant peut être exempté de payer les frais de procédure;
- Un conseiller *pro bono* ou conseiller bénévole peut être choisi par le requérant sur la liste fournie par le secrétariat;
- Dans la mesure du raisonnable, les frais de voyage et d'hébergement du requérant et ceux des témoins et experts peuvent être couverts par la FIFA ainsi que ceux du conseiller bénévole.

De même, l'article 45.2 prévoit que les frais de procédure devant la Commission de Discipline sont supportés par la FIFA, sauf dans les cas de réclamation où ils sont à la charge de la partie déboutée.

Par ailleurs, selon l'article 50.1 et 2, en règle générale, aucune audience n'est organisée et l'organe juridictionnel de la FIFA concerné statue sur la base du dossier en sa possession. Cependant, une audience peut être organisée à la demande motivée d'une des parties ou à la discrétion du président de l'organe juridictionnel concerné. En outre, l'article 50.7 ouvre, pour la première fois, la possibilité de demander une audience publique sur demande de l'accusé en cas de violation de la réglementation antidopage. En cas de manipulation de matches, le président de l'organe juridictionnel concerné a également toute discrétion pour décider d'une audience publique.

Enfin, selon l'article 51.7 du Code, le secrétariat général de la FIFA publie les décisions prises par les organes juridictionnels de la FIFA. Lorsqu'une telle décision contient des informations confidentielles, la FIFA peut décider, d'office ou à la demande d'une partie, de publier une version anonyme ou expurgée. La FIFA publie toutes les décisions motivées rendues par la Commission de Discipline de la FIFA. Les décisions sans motifs sont publiées dans un document séparé et combiné produit par le Secrétariat de la FIFA. Les nouvelles décisions de la Commission de Discipline de la FIFA sont publiées tous les quatre mois. Le lancement de legal.fifa.com au dernier trimestre 2019 va faciliter l'accès à ces décisions qui seront publiées sur le site ainsi qu'à des ressources juridiques utiles⁸. Cette mesure va dans le sens de la transparence et permettra aux parties d'avoir une meilleure connaissance de la pratique de la FIFA et de

⁸ Publication de la liste des arbitres du TAS désignés par la FIFA au sein des ligues de football et publication du nombre de fois où ces arbitres ont été désignés dans les cas impliquant la FIFA, publication de toutes les

décisions motivées rendues par la chambre de jugement du Comité d'Éthique, cf. GARCIA E., FIFA Football Law Annual Review Part I, Zurich, 15/02/2019.

préparer leurs cas devant les organes concernés en connaissance de cause⁹.

IV. Rapidité et efficacité de la procédure

Plusieurs dispositions du Code Disciplinaire 2019 prévoient des mécanismes permettant d'accélérer la procédure.

D'abord adoptée par le Code d'Ethique de la FIFA, une disposition allant dans le sens de la rapidité et de l'efficacité procédurale a été transposée dans le Code Disciplinaire. Ainsi, en application de l'article 50.8, une partie peut, à tout moment, avant une séance fixée pour qu'un cas soit tranché par l'organe juridictionnel compétent, accepter la responsabilité et demander à ce que l'organe juridictionnel de la FIFA lui impose une sanction spécifique. Ledit organe peut se prononcer sur la base de cette requête mais demeure libre de rendre la décision qu'il estime appropriée dans le cadre du présent code. Ce système pourrait s'avérer efficace pour obtenir des décisions rapidement et raccourcir les délais de résolution des litiges.

L'article 54.3 permet également au président de la Commission de Discipline ou à son suppléant, dans les domaines réservés au juge unique¹⁰, de proposer une sanction sur la base du dossier existant avant même que la procédure disciplinaire ne débute. La partie concernée peut rejeter la sanction proposée et demander l'ouverture d'une procédure disciplinaire dans les cinq jours suivant la notification de la sanction proposée, faute de quoi la sanction deviendra définitive et contraignante.

⁹ cf. FIFA Media Release 11 July 2019

¹⁰ Article 54.3 Code Disciplinaire FIFA 2019

1 .Le président de la commission peut statuer seul en tant que juge unique et peut déléguer ses fonctions à un autre membre de la Commission de Discipline. Le président de la commission ou son suppléant désigné agissant en tant que juge unique peut notamment prendre des décisions concernant les sujets suivants :

a) réclamations ou cas urgents ;
b) ouverture, suspension ou clôture d'une procédure disciplinaire ;
c) suspension d'une personne jusqu'à quatre matches ou pour une durée inférieure ou égale à trois mois ;

V. Autres modifications

A. Codification de la jurisprudence du TAS relativement au niveau de preuve applicable aux procédures disciplinaires de la FIFA

Avec l'adoption de l'article 35.3, le Code Disciplinaire FIFA 2019 précise le niveau de preuve applicable aux procédures disciplinaires de la FIFA, à savoir la "*satisfaction raisonnable*" de l'organe juridictionnel compétent. Ce niveau de preuve remplace la "*conviction personnelle*" prévue par les anciennes versions du Code Disciplinaire de la FIFA mais non expliquée. Dans sa jurisprudence, le TAS a en effet assimilé la "*conviction personnelle*" au concept de "*satisfaction raisonnable*"¹¹.

B. Statut de l'intermédiaire

Depuis le 15 juillet 2019, l'article 3 du Code Disciplinaire de la FIFA s'applique aux intermédiaires, au même titre qu'aux associations, aux joueurs, officiels de matches et agents. Concrètement, cela signifie que les intermédiaires sont dorénavant soumis au régime disciplinaire du Code.

VI. Conclusion

Les changements prévus par le Code Disciplinaire 2019 qu'ils soient relatifs à la transparence, au respect des décisions financières et non-financières, aux sanctions, à l'accès à la justice, au principe de tolérance zéro à l'égard de toute forme de discrimination et à la simplification de la lutte contre la manipulation de matches, répondent à un

d) amende inférieure ou égale à CHF 50 000 ;

e) extension d'une sanction ;

f) litige en matière de récusation des membres de la Commission de Discipline ;

g) annonce, modification et annulation de mesures provisoires ;

h) cas relevant de l'art. 15 du présent code ;

i) autres infractions uniquement passibles d'une amende.

¹¹ Voir par exemple CAS 2011/A/2625 Mohamed Bin Hammam v. FIFA.

souci d'efficacité et à un besoin exprimé par les différents acteurs du football. Les nouvelles sanctions disciplinaires ont commencé à être mises en œuvre par la Commission de Discipline de la FIFA. Cependant, il reste à voir comment les différentes options en matière de sanctions à la disposition des autorités compétentes au niveau national – par exemple la possibilité offerte aux arbitres d'arrêter définitivement et non de suspendre temporairement un match pour cause de comportement raciste et/ou discriminatoire - seront utilisées.

Sports arbitration *ex aequo et bono*: basketball as a groundbreaker

Hubert Radke*

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I. Introduction

The renowned American Judge Richard A. Posner once said: “*There is a very strong formalist tradition in the law. Judges are simply applying rules, and the rules come from somewhere else, like the Constitution, and the Constitution is sacred. And statutes, unless they’re unconstitutional, are sacred also*”. Such a judicial approach to resolving disputes seems to be quintessential in the

Western legal culture. Nonetheless, Judge Posner for a reason is called as judicial provocateur, as he admits: “*I pay very little attention to legal rules, statutes, constitutional provisions. A case is just a dispute. The first thing you do is ask yourself – forget about the law – what is a sensible resolution of this dispute?*”¹ These words may reflect the concept of *ex aequo et bono*, which is a distinctive feature of arbitration². After all, resolving the disputes

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¹ See LIPTAK A., *An Exit Interview with Richard Posner, Judicial Provocateur*, New York Times 11 September 2017, available online

<https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html>

² Courts of law do not rule *ex aequo et bono*, but are obliged to follow the legal rules. Only when the law explicitly so provides, the courts can refer to equitable principles, what, however, cannot be considered as ruling *ex aequo et bono*. See BLACKABY / PARTASIDES / REDFERN / HUNTER, *Redfern and Hunter on International Arbitration*, Oxford 2015, para. 3.197; KAUFMANN-

apart from the legal rules is the very nature of it. The *ex aequo et bono* literally means ruling “according to what is equitable and good”. Thus, the arbitrator decides the dispute with respect to what he/she believes to be just and fair under the circumstances. In essence, at the heart of *ex aequo et bono* adjudication is – using Judge’s Posner words – a sensible solution of a given dispute.

The authority of the arbitral tribunal to decide *ex aequo et bono* is embedded in the principle of party autonomy, that reigns in modern arbitration³. In line with that, the power of the parties to the arbitration to have their dispute decided *ex aequo et bono* is reflected in a vast majority of modern arbitration laws in various jurisdictions. Nevertheless, parties to arbitration ordinarily have their disputes resolved *ex aequo et bono* only as an exception, not as a rule⁴.

The concept of *ex aequo et bono* is often criticized on the grounds that it operates outside the law, or is even deemed to be contrary to the law⁵. Furthermore, arbitration *ex aequo et bono* is accused of being far less predictable than arbitration *ex lege*. Lawyers, who usually present a strong inclination to rely in their practice on strict rules, are often skeptical towards settling the disputes *ex aequo et bono*, which they consider to be too vague.

The concept of *ex aequo et bono* may, however, play a valuable role in solving international disputes. On the one hand, it appears to be ideally suited to resolve disputes arising in the international relations, between the parties that are engaged in complex and long-term

relationships, in the emerging fields in which the law is either inadequately developed or unsuitable to handle specific disputes⁶. On the other, it may be considered as a practical equivalent to natural justice, as it aims at overcoming the rigidity of the rules of law and mitigate their severity. Importantly, the discretion granted to the *ex aequo et bono* arbitrators shall not be equal to arbitrariness. The decision-making process is not unlimited, as the arbitrators face certain legal constraints. One may even say that *ex aequo et bono* is a fluent concept that operates along a continuum between law and non-law for the sake of justice. In consequence, *ex aequo et bono* invigorates the settlement of the disputes, by enabling the arbitrator to tailor his or her decision to the specificity of a given case.

In sports, both in its national and international dimension, the arbitration is widely considered as a go-to dispute resolution method. Nonetheless, sports arbitration based on the concept of *ex aequo et bono* – quite similarly as in the other areas of life – seems to be an exception, rather than a real alternative. Interestingly, the first ever decision of the Swiss based⁷ Court of Arbitration for Sport (CAS) – commonly regarded as the “supreme court for sports”⁸ – was rendered *ex aequo et bono*⁹. Therefore, one could say that *ex aequo et bono* is inherently inscribed into the idea of sports arbitration. Though, CAS which primarily decides the appeals from the decisions of sport-governing bodies, in general rarely decides *ex*

KOHLER / RIGOZZI, *International Arbitration. Law and Practice in Switzerland*, Oxford 2015, para. 7.65;

³ KAUFMANN-KOHLER/RIGOZZI, paras. 2.56, 7.07.

⁴ TRAKMAN L., *Ex Aequo et Bono: Demystifying an Ancient Concept*, Chicago Journal of International Law, Vol 8, No. 2, Article 11, 2008, p. 634.

⁵ TRAKMAN, p. 621.

⁶ *Ibid.*

⁷ Switzerland is internationally recognized as one of Europe’s, and the world’s leading centers for international arbitration. The primary reason for that in the arbitration-friendly legal regime of Chapter 12 of Swiss Act on Private International Law (PILA) dedicated to international arbitration. See *inter alia*

KAUFMANN-KOHLER/RIGOZZI, paras. 1.86-1.103; BERGER / KELLERHALS, *International and Domestic Arbitration in Switzerland*, Bern 2015, para. 146.

⁸ See e.g. Netze S., *Sports Arbitration: What Are Its Limits as a Model for Other Fields of Arbitration?*, in GEISINGER / TRABALDO / DE MESTRAL (eds.), *Sports Arbitration: A Coach for Other Players?*, ASA Special Series No. 4, 2015, p. 24.

⁹ See. HASLER E., *Back to the Future: The First CAS Arbitrators on CAS’s First Award (TAS 86/1, HC X c. LSHG) and Its Evolution Since Then*, in A. Duval and RIGOZZI A. (eds.), *Yearbook of International Sports Arbitration 2016*, The Hague 2018, p. 6.

*aequo et bono*¹⁰. Instead, the CAS arbitral decision-making process is based on the amalgam of different sport regulations, national laws, Swiss law and even transnational laws specific for sports – the so-called *lex sportiva* – that are not always easy to decipher and apply by the arbitrators in a particular case¹¹. Nonetheless, there is yet another sports arbitration body located in the international arbitration-friendly legal regime of Switzerland that made *ex aequo et bono* its default decisional standard. Namely, the Basketball Arbitral Tribunal (BAT) that is devoted to solving purely commercial disputes between players (also coaches), agents and clubs in basketball¹². Interestingly, BAT's approach enabled to dust off the *ex aequo et bono* concept within the sports arbitration in general.

This paper aims to demonstrate the way basketball has become a groundbreaker in regard to sports arbitration *ex aequo et bono*. First, the scope of the *ex aequo et bono* concept in relation to arbitration in overall is presented. General remarks are necessary, as the *ex aequo et bono* concept is rather uncommon in arbitral practice, thus also rarely comprehensively discussed. Secondly, the regulatory framework and practical application of *ex aequo et bono* in international sports arbitration under CAS Code¹³ and BAT Rules¹⁴ is analyzed. Particular attention

is paid to the peculiarities of sports arbitration *ex aequo et bono*.

II. The *ex aequo et bono* concept in arbitration

A. The prerequisite – authorization of the parties

The concept of *ex aequo et bono* has a long tradition in arbitration. The possibility to decide *ex aequo et bono* is available in commercial arbitration, both in domestic and international, as well as in the investment arbitration¹⁵. Notwithstanding, also the international law disputes may be settled *ex aequo et bono*¹⁶. In any case, the prerequisite to *ex aequo et bono* adjudication is the authorization of the parties to the dispute.

According to the principle of party autonomy, the parties are free to decide on the law governing the merits of the dispute. This is best illustrated by the UNCITRAL Model Law¹⁷ – that has become a universal guide in modernizing and reforming states' laws on arbitration – Article 28(1). No different, under Chapter 12 of Swiss PILA¹⁸ – crucial as far as the international sports arbitral tribunals discussed in this paper are concerned – the *lex causae* provision of Article 187(1) reflects the principle of party autonomy. The parties' choice of law is made

¹⁰ MAVROMATI / REEB, *The Code of the Court of Arbitration for Sport. Commentary, Cases and Materials*, Wolters Kluwer 2015, p. 356.

¹¹ See e.g. on the problems of applicable law in football-related disputes HAAS U., *Applicable Law in Football related Disputes – The Relationship between CAS Code, the FIFA Statutes and the Agreement of the Parties on the Application of National Law*, CAS Bulletin 2015/2, p. 7.

¹² BAT is second largest international sports arbitral tribunal in the world after CAS, as far as the number of cases decided on a yearly basis is concerned. See H. Kahlert, *Facts and Figures – a Few Statistics on BAT Activities*, 8 March 2019, available online http://martens-lawyers.com/wp-content/themes/martens/downloads/events-talks/Heiner_Kahlert_Facts-and-numbers_Statistics_on_BAT_%20activities.pdf

¹³ Code of Sports-related Arbitration in force as from 1 January 2019, available online https://www.tas-cas.org/fileadmin/user_upload/Code_2019__en_.pdf

¹⁴ Basketball Arbitral Tribunal (BAT) Arbitration Rules 1 January 2017 version, available online <http://www.fiba.basketball/bat/process/arbitration-rules-january-1-2017>

¹⁵ For examples see BERGER/KELLERHALS, p. 504, ref. 98.

¹⁶ See, e.g. Article 38(2) of the Statute of International Court of Justice of 26 June 1945, available online <https://www.icj-cij.org/en/statute>

¹⁷ United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 With Amendments as adopted in 2006, available online https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

¹⁸ Chapter 12 of Swiss Act on Private International Law of 18 December 1987, English language version available online https://www.swissarbitration.org/files/34/Swiss%20International%20Arbitration%20Law/IPRG_english.pdf

through the contract, usually contained in a specific clause of the so-called main contract. Such a designation of law applicable to the merits by the parties to the dispute is both direct and express (explicit). It must be borne in mind, however, that under Swiss law the choice of law contract is not subject to any formal requirements¹⁹. Therefore, the parties can choose the law governing the dispute also in an indirect manner. The parties frequently submit to a set of arbitration rules of the arbitral tribunal, which in turn contain a conflict of laws provision to determine the law applicable to the merits of the dispute²⁰. The rules of major arbitral tribunals contain provision of this kind²¹. Furthermore, the parties' choice of law may be implicit (tacit; implied). The reference to the arbitral institution is considered to be sufficient to trigger the application of that institution's arbitration rules²². In any case, however, an implied choice of law must be established with the reasonable certainty²³.

The authority of the arbitral tribunal to rule *ex aequo et bono* is conferred upon the will of the parties to the dispute. The arbitral tribunal settles a case *ex aequo et bono* not because of the inherent virtue of resorting to such a process, but because the parties have agreed so²⁴. Article 28(3) UNCITRAL Model Law provides: "*The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so*". The arbitration laws of certain states, though, go further, as they assume that the arbitrators will decide *ex aequo et bono*, unless it is expressly stated that they must decide in law. As prominent commentators noticed, this

recalls a time when arbitration was considered "a friendly" method of dispute resolution, rather than the law-based process that it has currently become²⁵. Said approach, however, is not a case under the vast majority of arbitration laws, including Swiss *lex arbitri* dedicated to international arbitration. Article 187(2) PILA states: "*The parties may authorize the arbitral tribunal to decide ex aequo et bono*". In the absence of such an authorization, the arbitral tribunal shall apply the rules of law according to Article 187(1) PILA.

In line with Article 28(3) UNCITRAL Model Law, most national laws authorize arbitrators to decide *ex aequo et bono*, only upon an express agreement of the parties²⁶. However, Article 187(2) PILA does not require the authorization to resolve the dispute *ex aequo et bono* to be given explicitly. According to the prevailing view in the Swiss legal doctrine the parties' agreement on *ex aequo et bono* arbitration needs to be neither direct, nor explicit, but can be indirect and/or tacit²⁷.

In sum, under Swiss *lex arbitri* related to the international arbitration the following scenarios are possible: (1) the parties' authorization to settle the dispute *ex aequo et bono* is made directly and explicitly in the choice of law agreement; (2) the parties' authorization to settle the dispute *ex aequo et bono* is made indirectly, e.g. through the submission to the given arbitration rules, that in turn provide for *ex aequo et bono* as a default decisional standard; (3) the parties' authorization to settle the dispute *ex aequo et bono* is made in an implied manner, e.g. when agreeing on the jurisdiction of a given arbitral tribunal the parties agree with the application

¹⁹ BERGER/KELLERHALS, para. 1387; KAUFMANN-KOHLER/RIGOZZI, para. 7.24.

²⁰ KAUFMANN-KOHLER/RIGOZZI, para. 7.08

²¹ ARROYO M., *Arbitration in Switzerland. The Practitioner's Guide*, Kluwer Law International 2013, p. 1048.

²² KAUFMANN-KOHLER/RIGOZZI, paras. 1.72-1.74.

²³ There must be specific signs allowing the arbitral tribunal to infer parties' intention to choose a particular law; the arbitral tribunal cannot merely assume the choice of law based on the hypothetical will of the parties. See BERGER/KELLERHALS, paras. 1387-1388; HAAS, p. 8.

²⁴ TRAKMAN, p. 631.

²⁵ BLACKABY/PARTASIDES/REDFERN/HUNTER, para. 3.197.

²⁶ BORN G., *International Arbitration: Law and Practice*, London 2015, para. 13.04.

²⁷ The issues of consent concerning an agreement on a decision *ex aequo et bono* are subject to the same requirements as a choice of law agreement. This may be different only in case the parties refer to arbitration rules, which in turn require an express agreement. Then the specific provision contained in the arbitration rules supersedes the general rule of Article 187(2) PILA. See BERGER/KELLERHALS, para. 1449; KAUFMANN-KOHLER/RIGOZZI, para. 7.76; NOTH/HAAS in ARROYO, p. 1563.

of the arbitration rules of this tribunal, that in turn provide for *ex aequo et bono* as a default decisional standard. In anticipation hereof the above scenarios are exercised in relation to BAT arbitration. In contrast the first (1) scenario is available, but rarely used under Article R45 CAS Code. The fourth (4) possible scenario for the dispute to be decided *ex aequo et bono* – a sport specific and for some a controversial one – is practiced on the basis of the conflict of law provision of Article R58 CAS Code.

B. The delimitation of the *ex aequo et bono* arbitration

1. Arbitration *ex aequo et bono* vs. arbitration *ex lege*

The arbitration *ex aequo et bono* (fr. *en équité*), i.e. based on the considerations of what is equitable and good, is set in opposition to arbitration *ex lege* (fr. *en droit*), i.e. based on specific body of law. As a matter of principle an arbitrator empowered to decide the case *ex aequo et bono* is relieved from the duty to apply a law of any nature. An authorization to settle the dispute *ex aequo et bono* entitles an arbitral tribunal to find a solution based on the assessment of a concrete case. Hence, when compared with arbitration *en droit*, arbitration *en équité* means that the arbitral tribunal shall decide the case without consideration of any general-abstract legal provisions, but rather create an individual-concrete, case specific rule, which it considers appropriate to solve a case at hand²⁸. In essence, an arbitrator deciding *ex aequo et bono* must take account of what is just and fair under the circumstances. Naturally the question remains – citing prominent Swiss arbitration scholars – ‘*But how to assess what is just and fair?*’²⁹. From a different perspective, one may ask, what circumstances are relevant in the evaluation of a given case?

The basis of the decision-making process in the arbitration *ex lege* in principle is clear. Once the parties make the contractual choice of law or – in the absence hereof – the arbitral tribunal determines the law governing the merits of the dispute itself, with respect to the applicable conflict of law provisions, the decision shall be made on the basis of a given body of law. As far as the reference to the law chosen by the parties, it needs to be observed that, as a rule, it concerns the particular substantive law, e.g. the law of a given state. In such case the choice of law encompasses the entirety of the relevant national legal system, including: the principles and rules of law in force in the state, whether belonging to public or private law, international treaties a given state is a party to, as well as case law and/or scholarly writings with the authority conferred to them by the chosen legal system³⁰. It needs to be added that the arbitral tribunal is also bound to respect the mandatory rules of the applicable *lex causae* and – to a certain extent – also “foreign” mandatory rules of law with which the case has a closest connection³¹.

It needs to be noted, though, that Article 187(1) PILA – in line with Article 28(1) UNICTRAL Model Law – refers to the “rules of law” and not merely to the “law”. Said solution allows for the transnational (non-national) legal rules to be applied³². It is agreed that the notion of transnational rules of law in the negative meaning relates neither to national, nor to public international law. What is the positive meaning of this notion remains debatable, though, *lex mercatoria*, as well as UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law are emblematic. Nonetheless, the arbitral tribunal may have recourse to the latter two also in an instance the parties indicate that the general principles of law shall be applied to solve their dispute³³. Interestingly, one may observe an

²⁸ BERGER/KELLERHALS, para. 1440; KAUFMANN-KOHLER/RIGOZZI, para. 7.67.

²⁹ KAUFMANN-KOHLER/RIGOZZI, para. 7.68.

³⁰ *Ibid.*, para. 7.14.

³¹ BERGER/KELLERHALS, para. 1424-1431; KAUFMANN-KOHLER/RIGOZZI, paras. 7.91-7.101.

³² BERGER/KELLERHALS, paras. 1382-1385; KAUFMANN-KOHLER/RIGOZZI, para. 7.52

³³ BERGER/KELLERHALS, para. 1395; KAUFMANN-KOHLER/RIGOZZI, paras. 7.57-7.59.

ongoing and growing trend to treat *lex sportiva* as a truly transnational law that may be chosen as the law governing the merits of the dispute³⁴. Generally speaking, arbitration *ex lege* is based on a given set of legal rules, regardless of their national or non-national origin.

The power of an arbitral tribunal to decide *ex aequo et bono* remains open to several different interpretations. First, it is accepted that nothing prevents an arbitrator ruling *ex aequo et bono* first from applying the legal rules – a tendency common to many lawyers – relevant to the case at hand³⁵. Secondly, while referring to a particular set of legal rules an arbitrator may ignore any rules that are purely formalistic or the rules that appear to operate harshly or unfairly in the particular case. Thirdly, the dispute may also be decided according to general principles of law, i.e. principles that, besides being truly general in nature and acknowledged by the legal systems of civilized nations, can operate independently in the international realm, separately from national orders, and thus are truly delocalized³⁶. In general, as one arbitral scholar convincingly noted, the mandate to decide *ex aequo et bono* does not exclude the arbitrator to consider the relevant or otherwise applicable legal rules, including general principles; it only entails that the arbitrator is not bound to apply the law³⁷. In any case, however, the arbitrator shall ascertain that the outcome is “equitable and good” under the circumstances. The fourth interpretation allows the arbitrator to completely ignore any legal rules and decide the case on its merits, as appeal to him. In this regard, the question remains open: what tests may be applied by an arbitrator? Apart from

the law the arbitrator may eventually reach out to morality, ethics, culture, social standards and even religion. As some do persuasively claim, to what extent any of these tests plays an important role in the decision-making process is difficult, if not impossible to detect³⁸. Nonetheless, certain benchmarks in the *ex aequo et bono* decision-making process can still be identified.

On the one hand, it is generally acknowledged that the arbitration *ex aequo et bono* – similarly as arbitration *ex lege* – shall not disregard the terms of the contract between the parties. In other words, the starting point of reference for the arbitral tribunal is always the contract from which the dispute has arisen, i.e. the “rules of law” created by the parties themselves³⁹. Article 28(4) UNCITRAL Model Law makes it clear that in all cases, the arbitral tribunal must decide in accordance with the terms of the contract. In the same spirit various rules of arbitration provide that the arbitral tribunal shall always take into account the provisions of the contract⁴⁰. Despite the lack of a similar provision under Chapter 12 of PILA, the prevailing view under Swiss law is that the arbitral tribunals are required to apply the contract even when they rule *ex aequo et bono*⁴¹. In fact, the outcome of the case is often much less dependent on the rules of applicable *lex causae* than on the complexity of the contract, the relationship between the parties at the time the contract was concluded, and the evolution of the contractual relationship thereafter⁴².

Furthermore, according to Article 28(4) UNCITRAL Model Law, as well as various arbitration rules, the arbitral tribunal shall

³⁴ See, e.g. FOSTER K., *Lex Sportiva and lex Ludica: the Court of Arbitration for Sports's Jurisprudence*, in: R. Siekmann, J. Soek (eds.), *Lex Sportiva: What is Sports Law?*, The Hague 2012, p. 125 referring to CAS 2002/O/372, *Norwegian Olympic Committee and Confederation of Sports (NOCCS) & others v. International Olympic Committee (IOC)*, para. 65.

³⁵ KAUFMANN-KOHLER/RIGOZZI, para. 7.71.

³⁶ KOTUBY JR / SOBOTA, *General principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes*, Oxford 2017, p. 18.

³⁷ HASLER E., *The Basketball Arbitral Tribunal – An Overview of Its Process and Decisions*, in DUVAL / RIGOZZI (eds.), *Yearbook of International Sports Arbitration 2015*, The Hague 2016, p. 133.

³⁸ KAUFMANN-KOHLER/RIGOZZI, para. 7.68.

³⁹ BERGER/KELLERHALS, para. 1452.

⁴⁰ *Ibid.*

⁴¹ BERGER/KELLERHALS, para. 1452; KAUFMANN-KOHLER/RIGOZZI, para. 7.72.

⁴² BERGER/KELLERHALS, para. 1445.

take into account the trade usages applicable to the transaction. These are commonly understood as practices and customs generally followed in a given industry or business. The primary role of trade usages is to serve as means in the process of contract interpretation or when lacunae in the contract need to be filled⁴³.

Nevertheless, the arbitral tribunal deciding *ex aequo et bono* is authorized to depart from the contract when its application would result in an unfair, unjust or inequitable outcome. In particular, the arbitral tribunal is entitled to close the gaps in the contract, mitigate the strictness of the contractual provisions or even order an adaptation of the contract⁴⁴.

On the other hand, international arbitration commentators agree that an arbitral tribunal that decides *ex aequo et bono* must act in accordance with the general principles of law⁴⁵. For the international arbitral tribunal acting under Swiss *lex arbitri* these principles are embodied under the concept of *ordre public*, in the meaning of Article 190(2)(e) PILA. In other words, the arbitrators ruling *ex aequo et bono* shall not go beyond the limits sets by the concept of public policy⁴⁶.

Basically, under every national legal system the incompatibility of an arbitral award with the *ordre public* constitutes one of the legal

grounds to set aside that award⁴⁷. No different, under the so-called New York Convention⁴⁸, the recognition or enforcement of a foreign arbitral award may be refused in the country where recognition and enforcement is sought, if this award is contrary to the public policy of that country⁴⁹. The concept of public policy under domestic arbitration encompasses the basic principles of law, to a certain extent even mandatory laws, either way the foundations of a given national system. The specificity of international arbitration, though, in contrast to domestic arbitration calls for a different approach⁵⁰. Since international arbitral tribunals do not have a *forum*, international arbitrators deciding a given dispute do not have a domestic legal order to evoke. Nonetheless, they do not act in a legal vacuum and are not called upon to decide as if they did not belong to this world⁵¹. Due to that the concept of a “*transnational or truly international public policy*”, otherwise called as “*universal public policy*”, is applied for the purposes of evaluating the process and outcome of international arbitration. According to the views of the Swiss legal doctrine, supported by the position of the Swiss Federal Tribunal (SFT), the universal public policy is not as broad as domestic public policy, since it comprises “*the fundamental legal and moral concepts applying in all civilized nations and thus at the supra-national level*”

⁴³ In principle, the concept of rules of law does not encompass trade usages. Therefore, the trade usages shall not be confused with customary rules, which apply as an integral part of relevant substantive law. See BERGER/KELLERHALS, para. 1453; KAUFMANN-KOHLER/RIGOZZI, para. 7.61.

⁴⁴ BERGER/KELLERHALS, para. 1444; KAUFMANN-KOHLER/RIGOZZI, para. 7.72.

⁴⁵ BLACKABY/PARTASIDES/REDFER/HUNTER, para. 3.193

⁴⁶ Nevertheless, as distinguished Swiss arbitration scholars remarked that “*it is more than doubtful that the mere fact of deciding ex aequo et bono without authorization would constitute a violation of public policy*”. At the same time, despite in principle the parties’ authorization to decide a case *ex aequo et bono* is not merely a right, but a duty of an arbitral tribunal, an award will not be incompatible with *ordre public* simply because the case was decided at law rather than *ex aequo et bono*. See BERGER/KELLERHALS, para. 1450; KAUFMANN-KOHLER/RIGOZZI, para. 7.80.

⁴⁷ See Article 34(2)(b)(ii) UNCITRAL Model Law, however, it is different in Switzerland under the *lex arbitri* on domestic arbitration, as Article 393 of Swiss Civil Procedure Code does not provide for the violation of public policy as the ground to set aside the award.

⁴⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, available online <http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf>

⁴⁹ See Article V(2)(b) New York Convention.

⁵⁰ BLACKABY/PARTASIDES/REDFER/HUNTER, para. 10.34.

⁵¹ LALIVE P., *Transnational (or Truly International) Public Policy and International Arbitration*, in: SANDERS P (ed), *Comparative Arbitration Practice and Public Policy in Arbitration*, ICAA Congress Series, 1986, p. 270.

rather than specifically Swiss fundamental principles and values. Thus, universal public policy, in the meaning of Article 190(2)(e) PILA, comprises “*the essential and widely accepted values which, pursuant to the concepts that prevail in Switzerland, should constitute the fundament of any legal system*”⁵².

Is sum, in perhaps the most number of cases, an international arbitral tribunal ruling *ex aequo et bono* will base its decision largely on the provisions of the contract and on the facts surrounding the contractual relation, whilst trying to ensure that these provisions and the relevant conduct of the parties under the contract do not contravene the general principles of law encoded under the concept of transnational public policy⁵³.

2. *Ex aequo et bono* vs. equity

Arbitration *ex aequo et bono* interchangeably is named as arbitration in equity. Both notions, *ex aequo et bono* and equity, are deemed to have almost the same meaning⁵⁴. Frequently, the contractual choice of law clauses refer to the notion of equity, instead of *ex aequo et bono*⁵⁵. Nonetheless, in principle, the notion of

equity is separate from the *ex aequo et bono*, despite the demarcation between these two may cause difficulties⁵⁶.

In the course of the history of legal systems the term equity has been used to define various legal concepts. Under probably the most common one equity is understood as “*the recourse to principles of justice to correct or supplement the law as applied to particular circumstances*”⁵⁷. In this meaning the concept of equity is related to the process of applying the law by the courts.

It needs to be observed that the judges sitting at the courts of law can exercise certain degree of discretion in applying the law, under the condition the law expressly permits so. At the national level said discretion is usually conferred upon the so-called general clauses (ger. *Generalklauseln*; fr. *clauses generales*) that refer to the principles of justice and equity as the basis for the courts’ decision⁵⁸. The authority of the arbitral tribunal to decide a case *ex aequo et bono* is related, but not equal to the discretion of the court (or arbitral tribunal) to decide the case on the basis of equitable principles. As distinguished Swiss

⁵² Under Article 190(2)(e) PILA, the SFT distinguished between procedural and substantive dimensions of universal public policy. The violation of the former occurs ‘*when generally recognised fundamental [procedural] principles have been breached causing an intolerable conflict with one’s sense of justice, such that the decision appears contrary to the values accepted in a state abiding by the rule of law*’, while the latter refers to violating ‘*principles of substantive law in such a serious way that it is no longer consistent with the legal system and the accepted set of values*’. This general understanding is being clarified through an evolving list of general principles of law pertaining to international (transnational) public policy, developed in SFT jurisprudence that the international arbitral tribunals having their seat in Switzerland must abide by. Among such principles one finds, *inter alia*, the doctrine of sanctity of contracts (*pacta sunt servanda*), the rules of good faith (*bona fides*), the prohibition against abuse of rights, the prohibition against discriminatory and spoliatory measures, the protection of persons lacking legal capacity and the principle of *res judicata* related to a prohibition of taking the same action between the same parties. For a comprehensive discussion on the concept of universal public policy in Swiss law see BERGER/KELLERHALS, paras. 1761-1788; KAUFMANN-KOHLER/RIGOZZI, paras. 8.188-8.206.

⁵³ BLACKABY/PARTASIDES/REDFER/HUNTER, para. 3.193.

⁵⁴ MAVROMATI/REEB, p. 355.

⁵⁵ In general, the contractual *ex aequo et bono* clauses are called as equity clauses. The wording of said clauses may even not contain a term *ex aequo et bono* or equity, but e.g. both parties refer to the equality arbitration or fairness of the outcome without reference to any legal rules. Furthermore, the arbitration rules of certain arbitral tribunals refer to the notion of equity, while the others stick to the notion *ex aequo et bono*. This terminology, though, does not preclude settling the dispute according to what is “equitable and good”. See KAUFMANN-KOHLER/RIGOZZI, para. 7.76; MAVROMATI/REEB, p. 355.

⁵⁶ TRAKMAN, p. 628.

⁵⁷ GARNER B. (ed) et al., *Black’s Law Dictionary*, Thomson West 2004, p. 579.

⁵⁸ See, e.g. Article 4 of the Swiss Civil Code, which provides that where the law confers discretion on the court or makes reference to an assessment of the circumstances or to good cause, the court must reach its decisions in accordance with the principles of justice and equity. English translation provided by KAUFMANN-KOHLER/RIGOZZI, para. 7.65, ref. 114.

commentators convincingly remarked: “It is related insofar as the court, where the law provides it with discretionary power, also decides according to ‘*aequitas*’ rather than ‘*jus*’. However, it is different insofar as a decision *ex aequo et bono* shall not be made according to *jus* in any respect but based on *equitas*.”⁵⁹ In consequence, courts do not rule *ex aequo et bono*, but may only exceptionally rule on the basis of equitable considerations.

Similarly, under the international law, the International Court of Justice (ICJ) provided in the seminal case of *Continental Shelf* that “[t]he legal concept of equity is a general principle directly applicable as law. (...) Application of equitable principles to be distinguished from a decision *ex aequo et bono*”. On several other occasions the ICJ has asserted that, when it applied “equity” or “equitable principles”, or based itself “on the elementary considerations of justice” was not deciding *ex aequo et bono*⁶⁰.

Consequently, also the arbitration in equity should be distinguished from the arbitration *ex aequo et bono*. The former concept should be considered in the terms of arbitration *en droit*, while the latter as arbitration *en équité*. After all the power of an arbitral tribunal to decide in equity – same as the power of courts – may result directly from the law chosen by the parties to the dispute, while the basis for the arbitration *ex aequo et bono* is the will of the parties itself. Therefore, when an arbitral tribunal applies legal rules or principles that imply the exercise of discretion, it does not decide *ex aequo et bono*. An arbitral tribunal authorized to decide the case *ex aequo et bono* enjoys a global discretion, while such a discretion is limited to specifically defined aspects, if the dispute shall be decided according to law, with respect to equitable principles⁶¹.

3. *Ex aequo et bono* vs. amiable composition

It is noteworthy that Article 28(3) UNCITRAL Model Rules refers to *amiable compositeur* and *ex aequo et bono* as distinct legal concepts. Such a distinction is not made under Article 187(2) PILA. Nonetheless, according to the views of Swiss legal doctrine, the parties that submit their dispute to the international arbitration in Switzerland, are entitled to empower the arbitrators to decide the case either *ex aequo et bono* or as *amiable compositeur*⁶². Despite the historical distinction that has been drawn between both legal concepts, the practice of international arbitral tribunals operating in the various jurisdictions seems to view both of them as granting a discretion to arbitral tribunals to put aside strict legal rules and to settle a dispute with equitable considerations⁶³. Under Article 187(2) PILA, however, ruling *ex aequo et bono*, shall not be confused with deciding *amiable composition*.

The concept of *amiable composition* – having its roots in the French law⁶⁴ – is considered to be less far reaching than the concept of *ex aequo et bono*. The arbitral tribunal deciding as *amiable compositeur* shall apply the law governing the subject matter of the case, but at the same time is authorized by the parties to mitigate the effects of such law, if they appear unfair in the circumstances of the case, including the power to mitigate the effects of any mandatory provisions of the applicable law⁶⁵. In other words, *amiable compositeur* applies the relevant rules of law and then corrects the result if it is unjust. The arbitrator empowered to decide as *amiable compositeur* begins the analysis with the applicable law and may not even be forced to reach out to what is “equitable and good” in order to take a decision. As a result, *amiable*

⁵⁹ BERGER/KELLERHALS, para. 1439.

⁶⁰ In reality, so far the ICJ has never been invited to decide – at least positively, on the basis of Article 38(2) of the Statute of ICJ – *ex aequo et bono*. See more A. PELLET, in ZIMMERMANN / TOMUSCHAT / OELLERS-FRAHM (eds), *The Statute of the International Court of Justice. A Commentary*, 2012, p. 733.

⁶¹ BERGER/KELLERHALS, para. 1439.

⁶² BERGER/KELLERHALS, para. 1448; KAUFMANN-KOHLER/RIGOZZI, para. 7.70.

⁶³ BLACKABY/PARTASIDES/REDFER/HUNTER, para. 3.196.

⁶⁴ See Article 12 of the French Civil Procedure Code, under which also the judge can decide as *amiable compositeur*. English translation available online <https://www.legifrance.gouv.fr>

⁶⁵ BERGER/KELLERHALS, para. 1448

composition is less flexible than *ex aequo et bono*, as the arbitrator authorized to decide *ex aequo et bono* focuses entirely on the circumstances of the case and rather exceptionally refers to the specific rules of law. Therefore, the parties should clearly state the degree of flexibility they intend to give to the arbitral tribunal to depart from the law⁶⁶. Despite the authorization of the parties to the dispute is necessary for any of these concepts to be applied by the arbitral tribunal, *amiable composition* seems to resemble more arbitration *en droit* than arbitration *en équité*. In practice, both concepts seem to operate along the same continuum, only at different stages.

III. *Ex aequo et bono* in international sports arbitration under Swiss *lex arbitrii*

A. Court of Arbitration for Sport (CAS) – *ex aequo et bono* as an uncommon option

1. *Ex aequo et bono* under Article R45 CAS Code

Arbitration *ex aequo et bono* is an option available under the CAS Ordinary Arbitration Procedure, that is dedicated to solving disputes as a first or sole instance. In essence, the CAS Ordinary Arbitration Procedure was created with the view to handle the disputes of purely commercial nature. On the contrary, the CAS Appeal Arbitration Procedure was initially reserved to the so-called disciplinary cases, when CAS panels heard the appeals from the disciplinary decisions of international sport governing bodies. Currently, however, the commercial disputes can be handled also in the appeal procedure, i.e. appeals against the decisions rendered by the judicial bodies of FIFA, i.e. FIFA Dispute Resolution Chamber (FIFA DRC) and FIFA Players' Status Committee (FIFA PSC), in relation to the employment and/or transfer agreements in football⁶⁷.

Article R45 *in fine* CAS Code entitled "Law Applicable to the Merits" provides: "*The parties may authorize the Panel to decide ex aequo et bono*". Said provision reproduces verbatim Article 187(2) PILA. In line with that CAS Panels have emphasized a number of times that a given dispute can be decided *ex aequo et bono* only upon authorization of both parties⁶⁸. At the same time, though, in CAS practice it is uncommon to have disputes decided *ex aequo et bono* under ordinary arbitration procedure⁶⁹. This may indicate that the parties rarely expressly decide on *ex aequo et bono* clause in the contracts submitted to CAS. Furthermore, as *ex aequo et bono* is "only" optional under CAS Ordinary Arbitration Procedure, also the indirect and/or tacit choice of *ex aequo et bono*, e.g. through merely agreeing on the jurisdiction of CAS and/or the submission to the CAS Code, is out of the question. Eventually, a tacit choice of *ex aequo et bono* could be adopted by the parties during the arbitration procedure, where both parties would refer to, e.g. considerations of justice and fairness, in their submissions to the panel. Nonetheless, due to the default confidentiality rule specified in Article R43 of the CAS Code, one can hardly find a published CAS award, in the dispute decided *ex aequo et bono*. Hence, the comprehensive examination of the circumstances under which the parties opt into *ex aequo et bono* arbitration under CAS Ordinary Arbitration Procedure, seems technically unfeasible. For the same reason, also the possibility of getting familiar with the way the concept *ex aequo et bono* is applied in the cases decided under CAS Ordinary Arbitration Procedure, is significantly restricted and available basically to CAS insiders. Therefore, the parties to the disputes may be discouraged to enter the "unknown land" of *ex aequo et bono* arbitration. The issue of publication of CAS arbitral awards – both in relation to ordinary and appeal arbitration procedure – is long overdue and not fully settled⁷⁰. One may say that with respect to *ex aequo et bono* arbitration in the sport industry,

⁶⁶ KAUFMANN-KOHLER/RIGOZZI, para. 7.70.

⁶⁷ MAVROMATI/REEB, p. 381.

⁶⁸ See MAVROMATI/REEB, p. 356.

⁶⁹ *Ibid.*

⁷⁰ COCCIA M., *Sports Arbitration: Which Features Can Be "Exported" to Other Fields of Arbitration?*, in GEISINGER/TRABALDO, p. 13.

transparency at the expense of confidentiality could definitely have a breakthrough effect.

Amongst the disputes decided *ex aequo et bono* under CAS Ordinary Arbitration Procedures – which are known through secondary sources – first it is noteworthy to refer to the one reflecting the CAS Panel’s approach towards the tacit choice of *ex aequo et bono*. In this respect, the phrase “*equality arbitration*” was considered to be sufficient to show the parties’ intentions to settle their dispute *ex aequo et bono*⁷¹. Due to that, the following conclusion can be drawn – the reference to the equitable arbitration needs to be made unambiguously in order to be preserved⁷².

Secondly, one should pay attention to the awards explaining the application of *ex aequo et bono* under Article R45 CAS Code. In one of them the CAS states that when the parties authorize the CAS Panel to decide the case *ex aequo et bono*, the Panel is bound by the considerations of law and ruminates only what the arbitrators believe to be fair and equitable in the case at hand (limited only by the *ordre public*); to consider what is fair and equitable in a specific case, the CAS Panel deliberates general principles such as *pacta sunt servanda* and *bona fides*⁷³. In yet another award, the CAS notes that the outcome of the case may be the same or almost the same whether the case is decided *ex aequo et bono* or *ex lege*⁷⁴.

2. *Ex aequo et bono* under Article R58 CAS Code

Article R58 CAS Code, that provides for a conflict of law rule on the basis of which the law applicable under the CAS Appeal Arbitration Procedure shall be determined, does not provide for the *ex aequo et bono* powers. Said difference in contrast to Article

R45 CAS Code is commonly explained by the fact that the appeal proceedings usually concern the contested decision of an international sport governing body, that is based on its internal rules and regulations. The fundamental purpose of sport regulations is to guarantee equal treatment of athletes and/or the clubs worldwide. Therefore, also a uniform decisional standard shall be applied in CAS Appeal Arbitration Proceedings. After all, the reason for concentrating appeals against decision of international sport governing bodies within CAS is the desire to ensure that the sport rules and regulations are applied to the athletes and/or the clubs in equal measure, in particular in the disciplinary cases⁷⁵. This is precisely what Article R58 of CAS Code endeavors to ensure, by stating that the rules and regulations of a sport organization that issued the decision (that is the subject of the dispute) are primarily applicable⁷⁶. Therefore, ruling *ex aequo et bono* – as it would equip the arbitral tribunal in a certain degree of discretion and allow to depart from the provisions of the otherwise applicable regulations – is considered to be not appropriate for disputes opposing athletes and/or clubs to a sport governing body⁷⁷. In this regard, as one CAS Panel noted, the *ex aequo et bono* may be seen as the antithesis to the objective criteria⁷⁸.

Due to that, the CAS Panels consistently repeat: “*The possibility for a CAS panel to decide a case ex aequo et bono is established by art. R45 of CAS Code only with respect to ordinary arbitration and is not applicable to appeal arbitration proceedings. In any case, according to art. R45 of the CAS Code, the possibility that the CAS panel decide ex aequo et bono is subject to the authorisation of both parties*”⁷⁹, or, in other words: “*In appeals proceedings before the CAS, when an agreement between parties does not provide any choice of law*

⁷¹ CAS 2010/O/2156, *T. v. R.*, award of 26 September 2011, para 6.1. See MAVROMATI/REEB, p. 355.

⁷² NOTH/HAAS in ARROYO, p. 1563.

⁷³ CAS 2008/O/1645 *J. v. F.*, award of 14 July 2009, para. 4.6. See MAVROMATI/REEB, p. 356.

⁷⁴ CAS 2010/O/2156, *T. v. R.*, award of 26 September 2011, para 6.1. see MAVROMATI/REEB, p. 355.

⁷⁵ MAVROMATI/REEB, p. 355;

⁷⁶ HAAS, p. 13.

⁷⁷ KAUFMANN-KOHLER/RIGOZZI, para. 7.84.

⁷⁸ CAS 2003/O/482, *Ariel Ortega v. Fenerbahçe & Fédération Internationale de Football Association (FIFA)*, award of 5 November 2002, para. 36.

⁷⁹ CAS 2015/A/4346, *Gaziantepspor Kulübü Derneği v. Darydas Sernas*, award of 5 July 2016.

provision, the parties cannot authorise the arbitral tribunal to render an arbitral award based on the principle ex aequo et bono, as there is no provision in Article R58 of the CAS Code authorising the arbitral tribunal to decide ex aequo et bono or in equity”⁸⁰.

Bearing the above position of CAS in mind, one could ask: what if the parties explicitly decide for *ex aequo et bono* in their choice of law agreement, as provided by Article 187(2) PILA? According to the unanimous opinion of the Swiss legal doctrine in relation to commercial arbitration in general, an explicit choice of law always takes precedence over an implicit choice of law⁸¹. In line with that, if both parties would directly choose *ex aequo et bono* and submit their dispute to CAS appeal arbitration, the direct choice of *ex aequo et bono* should prevail and there would be no room for the indirect and/or implicit determination of the applicable rules of law through the provisions of Article R58 CAS Code. Nonetheless, with respect to CAS Appeal Arbitration Procedures, the opposite approach is taken, i.e. a sport specific legal view is followed. Namely, Article R58 CAS Code always takes precedence over any explicit (direct or indirect) choice of law by the parties. This undisputed restriction to the parties’ freedom of choice of law is justified – similar to the lack of *ex aequo et bono* solution under Article R58 CAS Code – on the grounds that equal decisional standard needs to be applied in the appeal proceedings⁸².

The choice of law provision of Article R58 of CAS Code provides that – regardless of primarily applying the given sport regulations – the CAS Panel shall subsidiarily decide the dispute according “*to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision*”. In

this regard one may ask: does the possibility to apply “*the rules of law the Panel deems appropriate*” entitles arbitral tribunal to decide *ex aequo et bono*? In the common view the answer to this question should be negative, as this provision is considered to be a clarification of the closest connection rule of the Article 187(1) PILA, that in practice enables the arbitrators to apply the law that they want to see applied to the merits of the dispute⁸³. Nonetheless, the CAS arbitrators could be still empowered to rule in equity (in the meaning not equivalent to *ex aequo et bono*), on the condition that “*the rules of law the Panel deems appropriate*” provide for such a solution. Furthermore, on one occasion a CAS Panel stated: “*to the extent that it deems it appropriate, the Panel may apply general principles of law, which are applicable as a type of lex mercatoria for sports regardless of their explicit presence in the applicable [sport regulations]*”⁸⁴. Nevertheless, ruling according to general principles of law, as well as ruling on the basis of *lex mercatoria* for sports, or in other words *lex sportiva*, shall neither be considered as ruling *ex aequo et bono*, nor ruling in equity⁸⁵.

Notwithstanding the above restrictions of Article R58 CAS Code, it actually turns out that CAS Panels opened the doors to rule *ex aequo et bono* also under the CAS Appeal Arbitration Procedure. Interestingly, BAT arbitration has become the key.

B. Basketball Arbitral Tribunal (BAT) – *ex aequo et bono* as a default solution

1. BAT under FIBA Statutes and FIBA regulations

The origin of the BAT dates back to 2006, when the meeting between FIBA (fr. *Fédération Internationale de Basketball*), the Swiss-based world basketball governing body, and basketball players’ agents was held. Back then the transnational free movement of labour and services had become an

⁸⁰ CAS 2014/A/3836, *Admir Aganovic v. Cvijan Milosevic*, award of 28 September 2015.

⁸¹ See HAAS, p. 10.

⁸² HAAS, p. 13..

⁸³ See MAVROMATI/REEB, p. 555.

⁸⁴ CAS 2002/O/410, *The Gibraltar Football Association (GFA)/Union des Associations Européennes de Football (UEFA)*, award of 7 October 2003.

⁸⁵ *Contra* MAVROMATI/REEB, p. 357.

everyday reality of basketball. At the same time, however, honouring the basketball contracts left a lot to be desired. In consequence, the credibility of the basketball markets worldwide suffered. Thus, the player agents requested FIBA to implement a dispute resolution mechanism that would effectively “*compel the parties’ to players’ contracts to adhere to these contracts*” in the global perspective⁸⁶. In order to tackle this weighty problem FIBA decided to step in and established BAT in 2007.

BAT has been constituted under Article 33 FIBA General Statutes (FIBA GS), located in Chapter 4 entitled “Organizations officially recognized by FIBA”⁸⁷. This provision outlines BAT as a body founded for the resolution of disputes within the world of basketball, provided that FIBA and its bodies or divisions are not involved in such a dispute. This regulation also informs that BAT’s awards are final and binding upon communication to the parties. Further operational arrangements for BAT are set out in the FIBA Internal Regulations (FIBA IR).

The essence of BAT arbitration has been specified in Book 3, Chapter VIII, Section: General Principles of FIBA IR⁸⁸. Article 3-320 FIBA IR – known as BAT’s “mission statement”⁸⁹ – reads: “*FIBA established an independent tribunal, named the Basketball Arbitral Tribunal (BAT, formerly known as FIBA Arbitral Tribunal) for the simple, quick and inexpensive resolution of disputes arising within the world of basketball in which FIBA, its Zones, or their respective divisions are not directly involved and with*

respect to which the parties to the dispute have agreed in writing to submit the same to the BAT”. Thereafter, according to Article 3-321 FIBA IR: “*The BAT awards shall be final and binding upon communication to the parties*”. Article 3-321 FIBA IR further reads: “*The BAT is primarily designed to resolve the disputes between the clubs, players and agents*”. Finally, in Article 3-323 FIBA IR, the model arbitration clause to be included in basketball contracts is recommended.

In order to fully understand the conception of BAT, one needs to take a look at the underlying FIBA’s policy. Traditionally FIBA was not involved in the financial disputes between players, agents and clubs. In principle, nothing has changed upon the setting up of BAT, as FIBA – in contrast e.g. to FIFA – has opted for a “stay-away” approach in relation to basketball employment contracts and related disputes⁹⁰. Thus, FIBA IR has neither imposed the content of the contracts, nor the choice of the dispute resolution mechanism. On the one hand, players, agents and clubs can relatively freely decide about the form and terms of their contractual relationship. FIBA merely suggests the main points to be covered in the employment contract⁹¹. This situation is fundamentally different from, e.g. FIFA, which through its regulations significantly shapes the employment relations in football. On the other hand – unlike e.g. FIFA DRC or FIFA PSC – BAT is not an internal judicial body of FIBA, but an independent arbitral tribunal. Furthermore, BAT’s jurisdiction is based on a completely voluntary agreement.

⁸⁶ See Interview with Dirk-Reiner Martens available online <http://martens-lawyers.com/en/interview-en/>

⁸⁷ FIBA General Statutes edition 29 August 2019, available online <https://www.fiba.basketball/documents/fiba-general-statutes.pdf>

⁸⁸ FIBA Internal regulations, Book 3, in force as of 28 August 2019, available online <https://www.fiba.basketball/internal-regulations/book1/general-provisions.pdf>

⁸⁹ D-R. Martens, *Basketball Arbitral Tribunal – An Innovative System for Resolving Disputes in Sport (Only in Sport?)*, International Sports Law Journal 2001/1–2, p. 54.

⁹⁰ In order to preserve the respect for contracts and contractual stability in football, FIFA takes relatively

interventionist approach. The system is built on the Regulations on the Status and Transfer of Players (FIFA RSTP), which strictly regulate the contractual relationship between the players and clubs. Disputes are automatically referred to the internal dispute resolution system: the FIFA Dispute Resolution Chamber (FIFA DRC) that is supplemented by an appeal path to the Court of Arbitration for Sport (CAS). See ZAGKLIS A., *Lex sportiva – from Theory to Practice: Lessons to Be Learned from the Jurisprudence of the Court of Arbitration for Sport (CAS) and of the Basketball Arbitral Tribunal (BAT)*, in: VIEWEG K. (ed.), *Lex Sportiva*, Duncker Humblot 2015, p. 184.

⁹¹ See Appendix 3 to Book 3 of the FIBA IR.

FIBA merely nudges the parties to choose BAT as a dispute resolution body. This approach, despite being unique in sports, has turned out to be extremely successful⁹². As a consequence, one needs to emphasize that BAT, despite certain anchoring in the institutional system of FIBA, was designed to be a true arbitration⁹³.

2. The rationale for *ex aequo et bono* under BAT arbitration

BAT is commonly considered as an innovative model of sports arbitration⁹⁴. In essence, the mission of a cutting-edge arbitration model introduced with the establishment of BAT is presented as “*simplifying the dispute resolution system while ensuring a fair outcome*”. This is reflected in the BAT Rules, where a number of built in features designed to facilitate simple, quick, cost-effective and just dispute resolution, are included⁹⁵. Nonetheless, the defining feature of BAT, its hallmark and the key to understand its innovation – both in terms of simplicity of the process, as well as the fairness of the outcome – is the *ex aequo et bono* as a default decisional standard applicable to the merits⁹⁶. Thus, the following question needs to be raised: what are the reasons for the reliance on the *ex aequo et bono* concept as the most suitable for solving basketball disputes?

In order to find an answer, one must realize that BAT was created primarily to solve the disputes with international component⁹⁷. After all, both the idiosyncrasies of a given

national legal system, and the practical difficulties of taking a legal action in a foreign country that worked to an advantage to the clubs and disadvantage to the international basketball players and their agents, lead to the idea of calling for a body with a global competence to solve contractual disputes in basketball⁹⁸. Therefore, shall a given national legal system underlying the disputed contractual relationship be chosen in BAT arbitration, a substantial delay in the proceedings, as well as a disadvantage to one of the parties of the dispute would continue to occur. The arbitrators would have to deal with the provisions of the applicable legal system they are unfamiliar with. As such, they would either have to spend time to catch up on these provisions, and/or rely on the expert opinion in this regard. Furthermore, the defence lawyers could delay and complicate the proceedings by questioning arbitrators’ knowledge on the particular features of a given body of law⁹⁹. Regardless of the above, FIBA’s “hands-off” approach to the regulation of basketball contracts needs to be reminded. In consequence, BAT designers faced the problem of finding the standard of review that could lead to the results considered as just and fair on the global basis.

The *ex aequo et bono* allows the BAT to settle the basketball disputes worldwide on an equal footing. Instead of manoeuvring in the jungle of specific national provisions, the arbitrators can focus on the particular case and consider what is equitable and good under the circumstances. Interestingly, what may be seen through BAT’s practice is that such a

⁹² The popularity of BAT may be denoted by the constantly growing number of disputes submitted to BAT. See more KAHLERT H., *Facts and Figures – a Few Statistics on BAT Activities*, 8 March 2019, available online http://martens-lawyers.com/wp-content/themes/martens/downloads/events-talks/Heiner_Kahlert_Facts-and-numbers_Statistics_on_BAT_%20activities.pdf

⁹³ BAT’s status as a true arbitral tribunal under Swiss *lex arbitri* was confirmed by SFT in 4A_198/2012 rendered on 14 December 2012.

⁹⁴ See e.g. HASLER 2016, p. 111; MARTENS, p. 54.

⁹⁵ For a comprehensive overview of BAT proceedings See e.g. HASLER 2016, pp. 116-121.

⁹⁶ See e.g. HASLER 2016, p. 121; MARTENS, p. 55; MANARKIS S., *Applying the Applicable Law the Ex Aequo*

et Bono Provision of the FIBA Rules, in PANAGIOTOPOULOS D.(ed.) ISLR PANDEKTIS 2011/1-2, p. 176; RADKE H., *Basketball Arbitral Tribunal (BAT) as a ‘lawmaker’: the creation of global standards of basketball contracts through consistent arbitral decision-making*, International Sports Law Journal 2019/1-2, p. 64.

⁹⁷ Nowadays, despite the vast majority of BAT proceedings have an international component, more and more parties with the same national origin refers their disputes to BAT. See more KAHLERT.

⁹⁸ See more RADKE, p. 60.

⁹⁹ See more MARTENS D.-R., *The Basketball Arbitral Tribunal and its Commercial Brother*, International Sports Law Review 2016/2, p. 44.

system does not sacrifice the predictability of the outcome, but – paradoxically – allows to reinforce it, through the consistent arbitral decision-making. As a result, *ex aequo et bono* not only delocalizes the dispute, but also the contract itself. Thus, it empowers the arbitrators to search for globally applicable standards for solving the basketball disputes.

3. *Ex aequo et bono* under BAT model arbitration clause

The rules of arbitration provided by arbitral institutions quite often include the model arbitration clauses. If the parties intend to take advantage of the arbitration rules of a given arbitral institution, they should preferably do so by simply reproducing the model arbitration clause in their contract¹⁰⁰. In fact, model arbitration clauses may be seen as inherent feature of institutional arbitration.

In regard to BAT arbitration, both the FIBA IR under Article 3-323, and BAT Rules under Article 0.3. recommend the following arbitration clause: “Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties’ domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute *ex aequo et bono*”.

In fact, the use of BAT’s model of arbitration to the full advantage of the parties to basketball contract, is dependent upon implementing the recommended arbitration clause. It allows the parties not only to rely on the arbitration friendly regime of Chapter 12 PILA and the simple procedure as provided by BAT Rules, but – most importantly – expressly provides for *ex aequo et bono* as a decisional standard applicable to the merits. As BAT practice shows, parties have

consistently adopted the recommended arbitration clause into their contracts verbatim¹⁰¹. As a result, *ex aequo et bono* has become the primary legal basis for solving the disputes in basketball.

4. *Ex aequo et bono* under BAT Rules

Article 15 BAT Rules, entitled “*Law Applicable to the Merits*”, provides for a conflict of law rule that shall be applied by the arbitrator, absent a direct choice of law by the parties. What is peculiar about Article 15 BAT Rules is that it reverses the principle envisioned by Article 187(2) PILA by making *ex aequo et bono* a default decisional standard¹⁰². This is also the fundamental difference between BAT Rules and the rules of the major international arbitral institutions, including the CAS Code.

Article 15.1. *ab initio* BAT Rules provides: “*Unless the parties have agreed otherwise, the Arbitrator shall decide the dispute ex aequo et bono*”. In line with that Article 15.2. BAT Arbitration Rules states: “*If according to the parties’ agreement the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate*”. Therefore, the BAT arbitrator is authorized not to decide *ex aequo et bono*, only under the express agreement to the contrary.

The parties’ agreement excluding *ex aequo et bono* as a decisional standard can be made as a direct positive choice of law, i.e. when the parties expressly decide on a particular substantive law. As BAT jurisprudence shows there may be two different situations of this kind that, however, lead to a different outcome as far as the applicable standard of review is concerned.

First, what is not so rare, the parties to the basketball contracts alongside BAT model arbitration clause provide for a separate choice of law clause stipulating that the contract shall be “governed” or “construed,

¹⁰⁰ KAUFMANN-KOHLER/RIGOZZI, para. 3.24

¹⁰¹ See HASLER 2016, p. 122.

¹⁰² KAUFMANN-KOHLER/RIGOZZI, para. 7.85

interpreted and enforced according to the laws of" a given country, or a similar wording to the same effect¹⁰³. Interestingly, despite an express choice of a substantive law made by the parties, the arbitrators tend to decide *ex aequo et bono*, when the provision of this kind has been included in the arbitration clause. This approach may be best illustrated by the following excerpt of a BAT award: "The reference to 'ex aequo et bono' on the one hand and to 'the laws of Greece' on the other hand is – at first sight – somewhat contradictory. The Arbitrator holds, however, that the contents of the mission conferred upon him by the Parties to the Contract derive first and foremost from the part of Clause 9 which is directly addressed to him, i.e. that part of the clause which says that the Arbitrator 'shall decide the dispute ex aequo et bono'. This interpretation does not deprive the reference to 'the laws of Greece' of any meaning. According to Clause 9 the competence of the Arbitrator in relation to potential disputes arising out of the Contract is restricted. The provision limits the jurisdiction of the Arbitrator 'exclusively' to 'financial disputes that may arise out of the terms [the Contract]'. Hence, the reference to the 'laws of Greece' remains applicable whenever an institution/adjudicating body – other than the BAT – is called upon to interpret or enforce the provisions of the Contract. To sum up, therefore, the Arbitrator holds that the Parties agreed on BAT arbitration and the respective set of rules applicable to BAT proceedings, including the concept of *ex aequo et bono*. This is evidenced by the part of Clause 9 of the Contract in which the powers of the Arbitrator are addressed, i.e. to determine the Parties' 'dispute ex aequo et bono'"¹⁰⁴.

Secondly, in a few instances the parties had expressly chosen a given national law as the law applicable to the merits of the dispute, by changing the text of BAT model arbitration clause by clearly providing that "[t]he Arbitrator shall decide the dispute according to the laws of [a given country]". In such cases the *ex aequo et bono* clause was expressly omitted and the BAT arbitrators had applied the law

chosen by the parties in line with their mandate under the Article 15.2 BAT Rules and the Article 187(1) PILA¹⁰⁵.

Regardless of the above one needs to note that BAT decided *ex aequo et bono* in these cases where the parties made no express choice of law, but simply referred to arbitration by BAT and/or arbitration in accordance with BAT Rules¹⁰⁶. In such instances the arbitrators applied *ex aequo et bono* as chosen implicitly by the parties to the dispute.

The parties to BAT arbitration could possibly exclude the application of *ex aequo et bono* by making an express negative choice of law¹⁰⁷. In such instances, however, the parties would either have to decide on a given substantive law, or, absent a positive choice of law by the parties, the applicable rules of law would need to be determined by the arbitrator in line with Article 15.2. *in fine* BAT Rules. Then the dispute would be decided according to the rules of law the arbitrator "deems appropriate", what in turn may be seen as a clarification of the closest connection principle¹⁰⁸. Nonetheless, at this point, such a problem is purely academic.

In general, the analysis and findings as to the *lex causae* in the BAT jurisprudence indicate that the arbitrators' applied *ex aequo et bono* in all the ambiguous situations. This leads to a conclusion, shall the parties wish to have their dispute decided on the basis of given substantive law, they need to choose this law not only expressly, but also exclusively¹⁰⁹. Bearing in mind the objectives of applying *ex aequo et bono* as a default decisional standard in BAT arbitration such an approach appears to be justified.

Last but not least it needs to be highlighted that Article 15.1. *in fine* BAT Rules explains *ex aequo et bono* as "applying general considerations of

¹⁰³ HASLER 2016, p. 122-123.

¹⁰⁴ BAT 0107/10, para. 47, available online <http://www.fiba.basketball/bat/awards>.

¹⁰⁵ See more HASLER 2016, p. 124.

¹⁰⁶ HASLER, p. 123-124.

¹⁰⁷ A negative choice of law is possible under Swiss *lex arbitri* under certain conditions. See BERGER/KELLERHALS, para. 1394.

¹⁰⁸ In relation to the similar provision of Article R58 CAS Code see MAVROMATI/REEB, p. 550.

¹⁰⁹ HASLER 2016, p. 123-124.

justice and fairness without reference to any particular national or international law". In general, making such a clarification already on the normative level is rather unprecedented. As aforementioned, certain arbitration laws, in line with Article 28(4) UNCITRAL Model Law, sets the restrictions to the *ex aequo et bono* ruling. Otherwise, these are usually demarcated by the legal doctrine and/or jurisprudence of arbitral tribunals. The atypical solution of Article 15.1. *in fine* BAT Rules – as one can imagine – may be explained by the fact, that the creators of BAT might have been aware that the concept *ex aequo et bono* has not been deeply explored under CAS arbitration, thus may be relatively unknown to the parties of sport disputes. Furthermore, this normative clarification does not depart from the understanding of *ex aequo et bono* provided in the Swiss legal literature. Notwithstanding that, the concept of *ex aequo et bono* is further explained in the BAT jurisprudence.

5. *Ex aequo et bono* in BAT jurisprudence

a. The concept of *ex aequo et bono* as applied by BAT

The concept of *ex aequo et bono* was explained in details in the reasons to BAT's first award¹¹⁰. Interestingly, this explanation referred to the understanding of the statutory concept of *ex aequo et bono*, as originated under Article 31(3) of the Swiss Concordat¹¹¹. The aforementioned general views on *ex aequo et bono* presented by Swiss legal doctrine, reflected also in the SFT jurisprudence, are built upon this understanding. Since the first BAT award was issued, the discussed explanation has become a foundation of every BAT arbitration based on *ex aequo et bono*. Therefore, it may be also regarded as a beacon for the scholars and practitioners of BAT arbitration.

¹¹⁰ Said explanation was provided by distinguished sport arbitrator Prof. ULRICH HAAS in FAT 0001/07 rendered on 16 August 2007.

¹¹¹ Concordat on Arbitration of 27 March 1969 is the Swiss statute that governed international and domestic arbitration before the enactment of the Part 3 of the

It follows therefore: "*Unlike an amiable compositeur under French law, an arbitrator deciding en équité according to Article 187(2) PIL will not begin with an analysis of the applicable law and of the contract to possibly moderate their effects if they are too rigorous. He/she will rather ignore the law and focus exclusively on the specific circumstances of the case in hand. The concept of équité (or ex aequo et bono) used in Article 187(2) PIL-A originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage (Concordat), under which Swiss courts have held that arbitration en équité is fundamentally different from arbitration en droit: 'When deciding the dispute ex aequo et bono, the arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules'. In substance, it is generally considered that the arbitrator deciding ex aequo et bono receives 'a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules he/she must stick to the circumstances of the case'. This is confirmed by the provision in Article 15.1 of the FAT Rules in fine that the arbitrator applies 'general considerations of justice and fairness without reference to any particular national or international law'*".

In general, the above explanation by BAT is not any different from the understanding of the concept by different arbitral tribunals. In this regard one may ask, should it be any different with regard to sport? The answer to this question may be found by the reference to the limits of *ex aequo et bono* arbitration, applied in the BAT jurisprudence.

b. Universal limits to *ex aequo et bono* decisions

In the first BAT award, the general understanding of the *ex aequo et bono* concept, was followed by the demarcation of the limits of the arbitrator's mandate to decide *ex aequo et bono*. In this regard, as it was remarked: "*It is generally acknowledged that the arbitrator deciding ex aequo et bono is not required to apply mandatory*

Swiss Civil Procedure Code of 19 December 2008 that regulates the domestic arbitration under Swiss law and Chapter 12 PILA of 18 December 1987 that is related to international arbitration in Switzerland. See more BERGER/KELLERHALS.

provisions of the law that would otherwise be applicable to the dispute. Under the PIL, the only limit to the arbitrator's freedom in deciding a dispute *ex aequo et bono* is international public policy. When the parties authorize the arbitrator to decide *ex aequo et bono*, the arbitrator is required to decide *ex aequo et bono*. That said, this duty does not prevent the arbitrator from referring to the solution which arises from the application of the law before reaching a decision *ex aequo et bono*, in particular to 'guide or reinforce' his/her own understanding of fairness'¹¹². The *ordre public* constitutes a universal constraint to international arbitrators' powers; it is not related exclusively to ruling *ex aequo et bono*. It demarcates the limits of decision-making process, in order to have it legitimized in the forum that may be potentially called to set aside or enforce the arbitral award. Thus, the general principles of law embodied under *ordre public* have to be always taken into consideration in order for the outcome of *ex aequo et bono* arbitration to attain a worldwide acceptance. BAT arbitration strictly follows this approach.

As far as arbitration in general, another limit of universal character may be identified. Namely, the one related to the obligation to follow the terms of the contract, as well as refer to the trade usages relevant in the given industry while interpreting the contract. This limit is explicitly specified in Article 28(4) of UNCITRAL Model Law, and – despite the lack of explicit legal provisions thereof – recognized by the Swiss legal doctrine and jurisprudence.

The case-by-case analysis of BAT's jurisprudence shows that the contract is always the point of departure for the arbitrator ruling *ex aequo et bono* and the parties' performance is evaluated on the basis of what they have agreed on. Thus, the principle *pacta sunt servanda*, that emphasizes the sanctity of the contracts and is commonly

recognized in all civilized legal systems, is also one of the leading principles in BAT arbitration. This approach is best exemplified with the following assertion, frequently referred to in BAT's jurisprudence: "*The doctrine of pacta sunt servanda (which is consistent with justice and equity – parties who make a bargain are expected to stick to that bargain) is the principle by which the Arbitrator will examine the merits of the claims*". Nonetheless, the principle *pacta sunt servanda* does not mean that an arbitrator is not entitled to depart from the contract by any means. The validity of the contract can be always questioned on the basis of commonly accepted defects of consent. Additionally, the departure from the contract is necessary when one of the parties commits a serious breach, making the continuation of the contract impossible¹¹³. What seems to be of a special interest, however, is that the nature and purpose of *ex aequo et bono* empowers an arbitrator to disregard the strict meaning of the contract when its application could result in an outcome that would be unfair, unjust or inequitable¹¹⁴. Therefore, it is right to say that the concept of *ex aequo et bono* may function – to a certain extent – in a corrective manner¹¹⁵.

In conclusion, the following decision by BAT¹¹⁶ may be cited as a representative summary of BAT's position in regard to the universal limits to *ex aequo et bono* arbitration: "*In principle the clear wording of a contract is to be upheld. While the principle pacta sunt servanda must be respected, the wording of the contract is an important but not the only element which must be examined and weighed to determine what the true intention of the parties was when they signed the agreement. There are indeed exceptions to the rule that the clear wording of a contractual provision must be followed, e.g. if the provision violates public policy principles or if it becomes obvious that the provision does not reflect the true intention of the parties (e.g. in case of fundamental error of a party) or if one party exploited the inexperience of the other party which*

¹¹² See FAT 0001/07, paras. 6.1.1–6.1.2., available online <http://www.fiba.basketball/bat/awards>.

¹¹³ HASLER 2016, p. 143.

¹¹⁴ KAUFMANN-KOHLER AND RIGOZZI (2015), para 7.72.

¹¹⁵ SIBLEY P., *The Basketball Arbitral Tribunal Part 2 (Of 3) – Corrective Equity, Not the Chancellor's Foot or the*

Weather of the Hague, available online <https://www.morgansl.com/en/latest/basketball-arbitral-tribunal-part-2-3-corrective-equity-not-chancellors-foot-or-weather-hague>

¹¹⁶ BAT 0634/14, paras. 69-70, available online <http://www.fiba.basketball/bat/awards>.

resulted in a clear discrepancy between performance and consideration. On the other hand, an unambiguous contractual provision must stand regardless if it does not comply with Swiss law or another national legal order, even if that national law is considered to be mandatory: the parties have explicitly empowered the Arbitrator to decide the dispute *ex aequo et bono* and excluded the application of a national law. Also, the concept of *ex aequo et bono* does not entitle the Arbitrator to simply rewrite the parties' agreement at his discretion in order to establish a more balanced solution. The Arbitrator is still guided by the parties' consensus which is reflected by their contract. That is however subject to interpretation. The wording of a contract is the starting point of the interpretation to determine the true intention of the parties. Other facts may also be taken into consideration, especially if the wording is unclear or if a literal interpretation leads to a manifestly unfair and unjust result under the specific circumstances. Only in such cases, the Arbitrator is entitled under the concept of *ex aequo et bono* to deviate from the wording of the contract".

c. BAT specific limits to *ex aequo et bono* decisions

As a distinguished sports arbitration scholar and the BAT arbitrator once remarked: "[i]n order not to stray off into the thicket of arbitrariness the *ex aequo et bono* approach requires the arbitrators to pay close attention to precedents"¹¹⁷. Remarkably, this legal view seems to be reflected in – or even may be based on – Article 16.1 BAT Rules that read as follows: "Subject to Article 16.2, the Arbitrator shall give a written, dated and signed award with reasons. Before signing the award the Arbitrator shall transmit a draft to the BAT President who may make suggestions as to the form of the award and, without affecting the Arbitrator's liberty of decision, may also draw his/her attention to points of substance. In the interest of the development of consistent BAT case law, the BAT President may consult with other BAT Arbitrators, or permit BAT Arbitrators to consult amongst themselves, on issues of principle raised by a pending case". This provision may be seen as an effective tool to safeguard the consistency of BAT's

jurisprudence. In fact, similar provisions allowing for the scrutiny of the awards by the arbitral institution, are present also under CAS Code¹¹⁸. Nonetheless, despite a coherent approach to basketball disputes is not embodied under BAT's "mission statement", BAT's reliance on its case law – for the sake of legal certainty – seems to be substantial¹¹⁹. Therefore, Article 16.1 *in fine* BAT Rules may be considered as the specific limit to *ex aequo et bono* decisions.

Article 16.1 second sentence of the BAT Rules empowers the BAT President to scrutinize BAT award in a given case not only in relation to the form of the award, but also – without affecting the arbitrator's freedom to decide in a given case – to draw the attention to the substance. This solution resembles these available under Articles R46 sentence 4 and R59 para. 2 CAS Code, that entitle the CAS Secretary General to "make rectifications of pure form and (...) draw attention of the Panel to fundamental issues of principle". In terms of the merits, the review by the CAS Secretary General is supposed to ensure that there is no unjustified change in the CAS established case law under the same or similar conditions. At the same time, however, the advice given by the CAS Secretary General is not binding on the arbitrators and they remain solely responsible for the award to be rendered. Although, in the prevailing views of the Swiss sports legal doctrine, this practice is certainly sensible to the extent that it promotes consistency in the case law¹²⁰. By analogy, one may say that also Article 16.1 second sentence BAT Rules truly promotes consistent jurisprudence.

The presented view is all the more true with respect to Article 16.1 *in fine* BAT Rules. This provision opens up the possibility to BAT arbitrators – upon BAT's President approval – to seek the views of their colleagues on unsettled questions of general interest at any stage of the arbitral proceedings, in the interest of creating a consistent case law.

¹¹⁷ NETZLE, p. 27.

¹¹⁸ *Ibid.*, p. 28.

¹¹⁹ ZAGKLIS, pp. 184-188.

¹²⁰ See MAVROMATI/REEB, p. 366-367; NETZLE, p. 28; NOTH/HAAS in ARROYO, p. 1696.

Interestingly, this solution was unknown under the original BAT Rules and was added recently, to their newest version. It needs to be emphasized that such an approach to the jurisprudence is rather unique in sports arbitration, as under CAS Code there is no provision for CAS arbitrators to consult between themselves on such issues¹²¹. Said solution is further reinforced by the well-established practice of BAT. Firstly, BAT holds – what resembles CAS practice – annual meetings for its arbitrators, where recent case law and any questions or significant developments that may arise from it, are discussed collectively¹²². In this regard it shall not be overlooked that BAT – in contrast to CAS – consists of a very narrow group of arbitrators, carefully chosen by BAT's President based on their background. As Article 3-330(b) *in fine* FIBA IR indicates, the arbitrators shall have a legal training and experience with regard to sport. Secondly, the newly appointed BAT arbitrators, before taking their duties, obtain a special legal training oriented at making them familiarized not only with the procedural aspects of BAT arbitration, but also with the specificity of basketball contracts, disputes and the existing case law¹²³.

Generally speaking, aiming at the development of a body of a case law has been one of the ambitions of BAT arbitration. As a consequence, the existence of a separate – as one may call – institutional restrictions to the mandate of arbitrators' deciding *ex aequo et bono*, associated with pursuing a coherent approach to basketball disputes under Article 16.1 BAT Rules, has become undeniable.

d. *Ex aequo et bono* as a basis for arbitral law-making?

In principle, the awards issued by the international arbitral tribunals do not operate as *de iure* precedents. The arbitrators deciding disputes under the given rules of arbitration are not legally bound by the prior decisions issued within the same institutional arbitration. Nonetheless the arbitrators quite commonly refer to and rely on the decisions and argumentation presented in earlier arbitral cases. It is even argued that the solutions that the arbitrators create in individual cases not only tend to be generalized, constituting *de facto* precedents, but said generalization is a necessity for certain types of disputes and for the sake of the rule of law¹²⁴.

Sport arbitration is often indicated as a prime example of the aforementioned process. In particular, CAS arbitration with its strong reliance on past precedents resulted in a development of coherent *corpus iuris*, commonly referred to as *lex sportiva*¹²⁵. It is believed that the credibility of the whole system of sport – established by international sport governing bodies exercising dominant position in almost every corner of the world and every piece of sport competition – is dependent on the certainty, predictability, thus also consistency of the jurisprudence in order to guarantee an equal treatment of the interested parties and adhere to the rule of law¹²⁶. After all, in sport “the level playing field” and abiding by the rules shall be regarded as highest values.

The freedom given to the BAT arbitrators deciding *ex aequo et bono* may *prima facie* appear as clearly opposite to the very idea of precedent. It shall be remembered, however, that the BAT arbitrators are not completely free while ruling “*according to what is equitable and good*”, as they face certain constraints –

¹²¹ HASLER 2016, p. 105.

¹²² *Ibid.*, p. 106.

¹²³ Information obtained by the author of present paper during the lecture of MARTENS D-R. at ISDE in Madrid, 15 December 2017.

¹²⁴ KAUFMANN-KOHLER G., *Arbitral Precedent: Dream, Necessity or Excuse?*, Arbitration International 2006/3, p. 367.

¹²⁵ The notion of *lex sportiva* has been a subject of numerous academic and legal debates and there is no one clear and commonly agreed understanding of it. Nevertheless, it is commonly agreed that it was developed within CAS jurisprudence. See e.g. R. Siekmann, *What is Sports Law? A Reassessment of Content and Terminology*, in SIEKMANN/SOEK, pp. 367–368 and 388.

¹²⁶ KAUFMANN-KOHLER, pp. 376 and 378.

universal, as well as institutional – in their decision-making process. In consequence, the tension between the freedom inherent to *ex aequo et bono* and these constraints gives rise to consistent arbitral solutions on a wide range of procedural and substantive issues.

In light of the foregoing, one may say that – contrary to the overall concerns – the concept of *ex aequo et bono* as applied in BAT arbitration has proven to be capable of creating consistent and predictable legal solutions. The nature of *ex aequo et bono* arbitration empowered the BAT arbitrators to apply the general principles of law embodied under *ordre public* in the specific context of basketball, where the terms of the contracts and practices of the parties shall not be overlooked. As a result, BAT arbitrators have developed a series of general principles (standards) of basketball contracts, becoming *de facto* “lawmakers”¹²⁷.

Having in mind that the parties to basketball contracts heavily rely on BAT’s jurisprudence, the issue which is not resolved yet concerns the accessibility to the reasoned BAT awards. It appears emblematic, that the financial restrictions on issuing the reasoned awards, arising out of Article 16.2 BAT Rules, not only undermine BAT’s “lawmaking” process, but also the general trust in BAT’s arbitral decision-making¹²⁸. After all, an arbitral tribunal deciding *ex aequo et bono* must render a reasoned award, in order to explain to the parties, why the reached solution is just and fair¹²⁹.

¹²⁷ For the comprehensive overview of the general principles governing basketball contracts developed by BAT see HASLER, pp. 134-152; RADKE, pp. 73-85; MANARKIS, pp. 180-186.

¹²⁸ For a comprehensive discussion on the financial restrictions on issuing reasoned awards by BAT see RADKE, pp. 71-73; JANSSENS W., *The Basketball Arbitral Tribunal’s policy on publishing written reasons – does it strike the right balance between speed and legal certainty?*, available online <https://www.lawinsport.com/topics/articles/item/the-e-basketball-arbit...it-strike-the-right-balance-between-speed-legal-certainty#references>

¹²⁹ KAUFMANN-KOHLER/RIGOZZI, para. 7.75.

¹³⁰ BAT was previously known as FIBA Arbitral Tribunal (FAT) and has been renamed as of 1 April 2011 in order to accentuate its independence. The

C. From BAT to CAS – exploring *ex aequo et bono* in sports arbitration

1. BAT awards under CAS Appeal Arbitration Procedure

Initially the BAT Rules provided as a default for two stages of arbitration proceedings, with a possibility of an appeal from the BAT awards to be submitted to CAS, more specifically to the CAS Appeals Arbitration Division. In this regard Article 17 of the original BAT (FAT) Rules¹³⁰, entitled “Appeal”, clearly provided: “*Awards of the FAT can only be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland and any such appeal must be lodged with CAS within 21 days from the communication of the award. The CAS shall decide the appeal ex aequo et bono and in accordance with the Code of Sports-related Arbitration, in particular the Special Provisions Applicable to the Appeal Arbitration Procedure*”¹³¹. Moreover, also the provisions of the FIBA GS, as well as of the FIBA IR, provided for the possibility of appeals from the BAT awards to CAS.

Said approach was reflected in the recommended BAT model arbitration clause, specified in the FIBA IR, as well as in the Preamble to the original BAT Rules, which read as follows: “*Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator*

original FAT Rules in their versions of 15 March 2007, 9 December 2007 and 30 May 2009 provided for an appeal to CAS, before this option was eliminated in the version 1 May 2010. See HASLER, p. 129.

¹³¹ At the same time the parties to BAT arbitration were obliged to waive the annulment action before the SFT, what was reflected in Article 18 of the original FAT Rules, entitled “Recourse to the Swiss Federal Tribunal: “*By agreeing to submit their dispute to these Rules, the parties explicitly waive any right to challenge the award of the FAT and the award of CAS upon appeal (Article 17 above) before the Swiss Federal Tribunal as provided in Article 192 of the Swiss Act on Private International Law*”. The SFT annulment action waiver was eliminated from the original FAT Rules along with the abolishment of appeals to CAS. See MARTENS, p. 56.

appointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile. The language of the arbitration shall be English. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. (...) The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono"¹³².

With respect to the above approach, it should be noted that, despite the fact that Article 190(1) PILA, which states that the arbitral award is final from its notification, may *prima facie* mean the contrary, the possibility for the parties to agree on appellate arbitration (or second level arbitration) is not ruled out under the provisions of Chapter 12 PILA¹³³. In other words, the parties to the arbitration, on the grounds of the principle of autonomy, can always expressly provide for a multi-level arbitration in the arbitration agreement.

The jurisdiction of CAS to act as an appeal body is based on Article R47 CAS Code that provides *ab initio*: "*An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body*". Since 2004, whenever a case is brought before CAS against a decision of an organ of a federation, association or sports-related body, the case is attributed to the CAS Appeal Arbitration Division, irrespective of its disciplinary or commercial nature¹³⁴. Thus, the appeal procedures are open to all the disputes resulting from the

decisions of sport organizations of any kind, leaving them the discretion to decide, which decisions or which disputes in general could be submitted to CAS¹³⁵.

As the CAS Panel once emphasized in a BAT-related appeal case, Article R47 CAS Code requires three separate criteria in order for the CAS to have jurisdiction over the claim: (1) A decision of a federation, association or sports-related body, and; (2) An express grant of jurisdiction either through: (i) the statutes or regulations of that sports-related body, or; (ii) a specific arbitration agreement concluded by the parties, and; (3) The Appellant has exhausted all legal remedies available to him prior the appeal¹³⁶.

As far as the first criterion is concerned the CAS Panels that were examining the jurisdiction of CAS in the BAT-related cases, either never contested that the BAT awards are decisions of a sports-related body, or expressly admitted that the appealed BAT awards are undoubtedly the decisions, which emanate from BAT, that is a sports-related body¹³⁷. In light of the foregoing one needs to ask, if a genuine arbitral award issued by BAT should be treated as an appealable decision within the meaning of Article R47 CAS Code. On the one hand, an argument against could be raised taking into account that the primary purpose of Article 47 CAS Code is to establish an appeal path for the decisions of sport governing bodies¹³⁸. However, BAT is not – unlike e.g. FIFA DRC – a judicial body of FIBA, but an independent arbitral tribunal. Given that according to Article R57 CAS Code the CAS Panel hears the dispute *de novo*¹³⁹, one may wonder whether it is

¹³² In addition, said clause included a waiver of the annulment action before SFT that read as follows: "*The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law*".

¹³³ BERGER/KELLERHALS, para. 1635; KAUFMANN-KOHLER/RIGOZZI, paras. 7.198, 8.15.

¹³⁴ This determination is administrative in nature and cannot be appealed. MAVROMATI/REEB, p. 381.

¹³⁵ MAVROMATI/REEB, p. 381.

¹³⁶ CAS 2013/A/3099, *Beşiktaş Jimnastik Kulübü Derneği v. Allen Iverson*, award of 30 August 2013, para. 5.7.

¹³⁷ *Ibid.*, para. 5.8.

¹³⁸ NOTH/HAAS in ARROYO, p. 1570.

¹³⁹ It needs to be noted, however that since the the 2013 edition of the CAS Code expressly provides that the Panel will have discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered, i.e. in the first instance proceedings. See NOTH/HAAS in ARROYO, p. 1586, ref. 94.

reasonable to have two fully-fledged arbitration proceedings to decide a single basketball contractual dispute. Furthermore, it needs to be kept in mind that Article R47 *in fine* CAS Code forms specific conditions for an appeal to the arbitral awards rendered by the CAS, acting as a first instance tribunal. This rule was adopted to allow for appeals against the arbitral awards issued by the CAS acting under the Ordinary Arbitration Procedure, and also by national arbitral tribunals using the CAS system¹⁴⁰. The clarifications were important because the parties, after receiving a CAS award in an ordinary procedure, were filing an appeal to CAS on the basis of Article R57 CAS Code¹⁴¹. Therefore – reasoning by analogy – the lack of a specific provision related to the awards of other arbitral tribunals, e.g. BAT, could potentially be an obstacle in filing an appeal under Article R47 CAS Code. On the other hand, both the legal literature and consistent jurisprudence of CAS, confirm that the term “decision” must be interpreted in a broad manner, so as not to restraint the relief available to the persons affected¹⁴². In general, however Article R47 CAS Code does not seem to be well-tailored for the purpose of establishing an appeal path for the arbitral awards of BAT.

With respect to the second criterion, CAS jurisdiction – as the case may be – was grounded on Article 17 of original BAT Rules¹⁴³ and/or on the specific provision of the recommended BAT model arbitration clause, implemented into the parties’

contract¹⁴⁴. Interestingly, jurisdiction has never been established in a CAS case solely on the basis of Article 17 BAT Rules. The third criterion was tested once, when the CAS Panel noticed that a contractual clause required as a condition precedent to the resolution of the dispute by arbitration that the parties took all measures to resolve the dispute by negotiations¹⁴⁵. In that case, the result of the third criterion test was positive, meaning that the Panel found that all other available legal remedies had been exhausted; In all the other BAT-related CAS jurisprudence, the third criterion (i.e. the exhaustion of all legal remedies prior to appeal) did not raise any doubts. Regardless of the above, CAS jurisdiction was confirmed also on the basis of the acceptance of the Order of Procedure by the parties to the dispute¹⁴⁶.

The possibility to file appeals before the CAS was eliminated in the BAT Rules in the Spring of 2010. Nevertheless, the parties remained free to provide – in BAT arbitration clauses implemented into the main contracts – for an appeal or a second level arbitration before the CAS¹⁴⁷. In fact, despite the fact that the default provisions of the BAT Rules has done away with the possibility of an appeal to CAS, the basketball market actors occasionally insert CAS appeal options into BAT arbitration clauses. On the one hand, the inclusion of the possibility of CAS appeal into BAT arbitration clauses is a matter of fully informed choice made by the parties to the basketball contracts, which want to protect

¹⁴⁰ NOTH/HAAS in ARROYO, p. 1586.

¹⁴¹ MAVROMATI/REEB, p. 394.

¹⁴² MAVROMATI/REEB, p. 383; NOTH/HAAS in ARROYO, p. 1580.

¹⁴³ See CAS 2009/A/1854, *Viesoji Istaiga Kauno “Zalgirio” Remejas v. Ratko Varda & Obrad Fimic*, award of 30 November 2009, para. 2; CAS 2009/A/1901, *AEP Olympias Patras v. Ante Grguragic*, award of 8 February 2010, para. 11; CAS 2009/A/1921, *Non-Profit Partnership Women Basketball Club “Spartak” St. Petersburg v. Tigran Petrosian*, award of 5 March 2010, para. 1; CAS 2009/A/1952, *Azovmash Mariupol Basketball Club v. Panagiotis Liadelis*, award of 9 February 2010, para. 1; CAS 2010/A/2234, *Basquet Menorca SAD v. Vladimir Boisa*, award of 18 January 2011, para. 1.

¹⁴⁴ CAS 2009/A/1854, *Viesoji Istaiga Kauno “Zalgirio” Remejas v. Ratko Varda & Obrad Fimic*, award of 30 November 2009, para. 3;

¹⁴⁵ CAS 2009/A/1901, *AEP Olympias Patras v. Ante Grguragic*, award of 8 February 2010

¹⁴⁶ CAS 2009/A/1854, *Viesoji Istaiga Kauno “Zalgirio” Remejas v. Ratko Varda & Obrad Fimic*, award of 30 November 2009, para. 23; CAS 2009/A/1921, *Non-Profit Partnership Women Basketball Club “Spartak” St. Petersburg v. Tigran Petrosian*, award of 5 March 2010, para. 2; CAS 2009/A/1952 *Azovmash Mariupol Basketball Club v. Panagiotis Liadelis*, award of 9 February 2010, para. 2.

¹⁴⁷ The appeal to CAS can be provided whether instead or in addition to the annulment action before the SFT and/or to waive their right to bring an annulment action. HASLER, p. 129.

their interests by securing an additional legal remedy. On the other hand, however, the parties often mechanically reproduce the old version of the recommended BAT model arbitration clause. Hence, one may say that appeals of BAT awards before CAS have never been fully abandoned by the parties to basketball contracts.

The BAT-related CAS awards clearly provide that, shall the parties to the basketball contract expressly decide for an optional CAS appeal in the BAT arbitration clause, the CAS jurisdiction cannot be questioned¹⁴⁸. This is so, despite the current versions of the BAT Rules, as well as of FIBA GS and FIBA IR stating that the BAT awards are “*final and binding upon communication to the parties*”. In this regard, as a Sole Arbitrator noted in one of the BAT-related CAS awards: “*the parties included an explicit arbitration agreement pursuant to which either party shall have the right to appeal against the BAT Award with CAS within the Agreement. This explicit agreement prevails over the rules set out in the FIBA Statutes*”¹⁴⁹. In line with that, the CAS Panel emphasized in yet another BAT-related award: “*In case a contract between a club and a player incorporates the rules of the Basketball Arbitral Tribunal (BAT), which provide that awards of the BAT are final and binding, and in the absence of any specific agreement between the parties to foresee CAS jurisdiction, the CAS does not have jurisdiction*”¹⁵⁰.

In general, the total number of BAT-related appeals lodged to CAS have never been impressive – neither in general, nor in comparison to the total number of BAT awards – even when the BAT Rules and recommended BAT model arbitration clause

provided such a solution¹⁵¹. One reason for that may be the clear-cut cases, as well as the efficiency of single-stage BAT arbitration procedure appreciated by the BAT users. The other appears to be more mundane, as some simply cannot afford or do not want to carry the financial burden of an appeal arbitration, in particular when the chances to succeed are not very high. Nonetheless, despite only a handful of BAT awards was appealed to CAS, the strong reliance of the parties to the basketball contracts on the *ex aequo et bono* as a decisional standard applicable to the merits, enabled to somewhat rediscover said concept within the framework of CAS arbitration.

2. The concept of *ex aequo et bono* in BAT-related CAS awards

The discussion about applying *ex aequo et bono* under CAS Appeal Arbitration Procedures needs to be started with recalling that the overarching purpose of Article R58 CAS Code is to guarantee equal treatment of athletes and/or clubs worldwide, by providing a uniform decisional standard in relation to the appealed decisions of sport governing bodies. Therefore, CAS arbitrators shall decide the appeal cases primarily according to the sport regulations that formed the legal basis of the appealed decisions. Further to this purpose, Article R58 CAS Code grants the parties scope for determining the applicable law only subsidiarily. The parties’ freedom under Article 187(2) PILA, to have their disputes decided *ex aequo et bono*, is thus affected¹⁵².

The equality/uniformity objective – as one may call it – commonly considered as

¹⁴⁸ TAS 2016/A/4851, *Club Ittibad Riadi de Tanger de Basket-ball c. Danilo Mitrovic*, sentence du 5 Octobre 2017, para 7.2.; CAS 2013/A/3126, *Xinjiang Guanghui Basketball Club Ltd. v. C.*, award of 20 December 2013, para. 33; CAS 2014/A/3524, *BC VEF Riga v. Kaspars Berzins & Bill A. Duffy International Inc., dba BDA Sports Management*, award of 6 October 2014, para. 57; CAS 2015/A/4288 *El Jaish Sports Club v. Giovanni Funicello*, award of 28 April 2016, para. 68; CAS 2017/A/5072, *Shanxi Fenjiu Basketball Club v. Jeffrey Curtis Ayres*, award of 28 November 2017, paras. 41-54.

¹⁴⁹ CAS 2013/A/3126, *Xinjiang Guanghui Basketball Club Ltd. v. C.*, award of 20 December 2013, para. 34;

CAS 2015/A/4288, *El Jaish Sports Club v. Giovanni Funicello*, award of 28 April 2016, paras.67-72.

¹⁵⁰ CAS 2017/A/5072, *Shanxi Fenjiu Basketball Club v. Jeffrey Curtis Ayres*, award of 28 November 2017

¹⁵¹ Interestingly, less (5) appeals were lodged under the original version of FAT Arbitration Rules, than after the default recourse to CAS was abolished by BAT and – as a result – deleted from the text of the recommended BAT arbitration clause (7).

¹⁵² See HAAS, p. 13; KAUFMANN-KOHLER/RIGOZZI, para. 7.84.

legitimate in relation to appeals from the decisions of sport governing bodies, in particular in disciplinary cases, is not necessarily justified in relation to the appeals from the BAT awards. After all BAT is an arbitral tribunal, in principle independent from FIBA, called for deciding the disputes of a purely commercial nature. BAT's jurisdiction is based on the completely voluntary agreement. Furthermore – unlike e.g. the judicial bodies of FIFA, that form their decisions related to employment disputes in football on the basis of internal regulations of FIFA, aiming at implementing certain equal standards of football contracts worldwide – BAT is not bound by any regulations of FIBA related to basketball employment contracts. FIBA simply does not regulate said issue, leaving to the basketball market actors the freedom to shape their contractual relationship. Hence, there is no reason not to allow the BAT-related appeals to be decided *ex aequo et bono* by the CAS.

Notwithstanding the above, it cannot be forgotten, that the consistent jurisprudence of BAT in the cases decided *ex aequo et bono*, resulted in the creation of global standards of basketball contracts. The uniform decision-making, thus, turned out to be possible also within the framework of *ex aequo et bono* concept. With respect to that the *ex aequo et bono* seems to meet the objectives of Article R58 CAS Code.

The abovementioned approach has been reflected in the practice of CAS in BAT-related cases, which resulted in the appeals to be decided according to “*what is equitable and good*”. It is interesting, though, to trace the paths that have been followed by CAS operating under Article R58 CAS Code, in order to apply *ex aequo et bono*. The CAS jurisprudence in the BAT-related cases shows that the CAS arbitrators accepted that the

decision in the CAS Appeal Arbitration Procedure can be made *ex aequo et bono*, as long as: (1) *ex aequo et bono* is inserted into the BAT Rules as a default decisional standard, for BAT and/or CAS arbitration, what in turn may be considered as an indirect and/or implicit choice of law made by the parties, and/or; (2) both parties explicitly and expressly agree for the *ex aequo et bono* in the arbitration clause, both in regard to BAT and CAS arbitration.

The first scenario had been exercised under the original BAT Rules, before the default option to appeal to CAS was eliminated. At that time, CAS arbitrators referred to Article 15.1. and/or Article 17 BAT Rules, treating them as the “*applicable regulations*” under Article R58 CAS Code. Hence, CAS arbitrators recognized that the parties, through the acceptance of the BAT Rules, made an indirect and implied choice of *ex aequo et bono* as a decisional standard. In any case, however, the CAS arbitrators referred additionally to the explicit and direct choice of *ex aequo et bono* made by the parties through the adoption of recommended arbitration clause into their contracts¹⁵³. Thus, one could say that the relevant provision of BAT model arbitration clause inserted into the contracts was the key to establish *ex aequo et bono* as a decisional standard.

Regardless of the above, the explicit and direct choice of *ex aequo et bono* has become basically the discrete legal basis after the CAS Appeals were abolished in FAT Arbitration Rules. In one case, however, the Sole Arbitrator referred in addition to Article 15.1. BAT Rules, that provides for *ex aequo et bono* as a default decisional standard applicable to BAT arbitration. This, in turn, could be considered as the reference to the “*applicable regulations*” under Article R58 CAS Code and an implied choice of law¹⁵⁴. Notably, in yet

¹⁵³ CAS 2009/A/1854, *Viesoji Istaiga Kauno “Zalgiris” Remejas v. Ratko Varda & Obrad Fimic*, award of 30 November 2009, paras. 6-14; CAS 2009/A/1921, *Non-Profit Partnership Women Basketball Club “Spartak” St. Petersburg v. Tigran Petrosean*, award of 5 March 2010, paras. 3-10; CAS 2009/A/1952, *Azovmash Mariupol Basketball Club v. Panagiotis Liadelis*, award of 9 February

2010, paras. 5-12; CAS 2010/A/2234, *Basquet Menorca SAD v. Vladimir Boisa*, award of 18 January 2011, paras. 3-8.

¹⁵⁴ CAS 2014/A/3524, *BC VEF Riga v. Kaspars Berzins & Bill A. Duffy International Inc., dba BDA Sports Management*, award of 6 October 2014, para. 61.

another case, CAS Panel deciding under CAS Appeal Arbitration Procedure referred both to the contractual arbitration clause and to Article R45 CAS Code (related to CAS Ordinary Arbitration Procedure), as the legal basis for deciding *ex aequo et bono*¹⁵⁵. In sum – what seems to be confirmed in the view of prominent commentators of the CAS Code – it is accepted that the arbitral tribunal could decide *ex aequo et bono* also under the appeal procedure if the parties so agree¹⁵⁶.

As far as the interpretation of *ex aequo et bono*, CAS followed the general understanding of the concept in the Swiss legal doctrine, which may best be explained by the following statement: “When deciding *ex aequo et bono*, the arbitral tribunal pursues a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules. The arbitral tribunal deciding *ex aequo et bono* receives a mandate to render a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, it must stick to the circumstances of the case, while enjoying a “global discretion” as compared to limited discretion if the dispute is decided according to the law. Hence, when compared to a decision in accordance with Swiss substantive law, a decision *ex aequo et bono* means that the arbitral tribunal shall not apply a general-abstract legal provision, but rather create an individual-concrete, case-specific rule which it considers just and appropriate for the case at issue. Even if an arbitral tribunal decides *ex aequo et bono* it may normally not derogate from the wording of a contract; it may however disregard an unnecessarily (...) abusive (...) clause (...) and is also empowered to order an adaptation of the contract”¹⁵⁷.

Interestingly, despite the similar understanding of the *ex aequo et bono* concept to the one presented by BAT, in certain cases

CAS upheld the appeals and decided either to set aside or to change the BAT awards¹⁵⁸. Nonetheless, it cannot come as a surprise, as also the outcome of the *ex lege* adjudication in the first or second instance may differ, depending on the assessment of the evidence and the application of the legal rules to a given circumstances.

V. Conclusions

As a distinguished sports law professor and experienced CAS arbitrator once remarked: “BAT is proving to be an effective and, therefore, popular body for resolving disputes in sport of basketball and, perhaps, this winning formula/model may be adopted by other sport bodies for the settlement of their disputes”¹⁵⁹. It stands to reason that *ex aequo et bono* concept is the primary key to the success of the BAT formula. Due to *ex aequo et bono* the process of the resolution of disputes in basketball not only has become effective, but – what seems to be of a major importance – equitable at the same time. BAT has not only demystified the *ex aequo et bono* concept through the consistent decision-making, but used it as a mean to create global standards of basketball contracts. Thus, the equal treatment of the basketball players, agents and clubs involved in the contractual disputes has become possible on the worldwide basis. In fact, BAT has proven that *ex aequo et bono* decision making is suitable for sports arbitration. Furthermore, BAT’s commitment to *ex aequo et bono* allowed to dust off said concept also within the framework of CAS. Nevertheless, *ex aequo et bono* still has a long way to go before gaining an acceptance as the desired formula of

¹⁵⁵ TAS 2016/A/4851, *Club Ittihad Riadi de Tanger de Basket-ball c. Danilo Mitrovic*, sentence du 5 Octobre 2017, para. 6.

¹⁵⁶ MAVROMATI/REEB, p. 555.

¹⁵⁷ CAS 2014/A/3524, *BC VEF Riga v. Kaspars Berzins & Bill A. Duffy International Inc., dba BDA Sports Management*, award of 6 October 2014, paras 63-68; CAS 2009/A/1952, *Azovmash Mariupol Basketball Club v. Panagiotis Liadelis*, award of 9 February 2010, para. 12; CAS 2009/A/1921, *Non-Profit Partnership Women*

Basketball Club “Spartak” St. Petersburg v. Tigran Petrosian, award of 5 March 2010, para. 10.

¹⁵⁸ In sum, out of the twelve (12) in total BAT-related CAS cases, CAS dismissed three appeals (3) due to lack of jurisdiction, five (5) times the appeal was dismissed on the merits, two (2) times CAS upheld the appeal in the entirety, while the other two (2) times appeal was upheld partially.

¹⁵⁹ BLACKSHAW I., *The FIBA Arbitral Tribunal (FAT)*, *International Sports Law Journal* 2009/1–2, p. 67.

dispute resolution outside the world of basketball¹⁶⁰.

Without any doubts the first breakthrough step was taken. Further steps should be definitely considered. After all, the concept *ex aequo et bono*, as it envisions sensible settlement of the disputes away from the rigors of law, lies at the very foundation of arbitration. And sport needs a true arbitration, in every sense.

¹⁶⁰ As for now, the symptoms of wider interest in *ex aequo et bono* decision-making may be observed thanks to Court of Innovative Arbitration (COIA) and FIVB Tribunal. COIA is a commercial arbitration tribunal based on the concept of BAT. Despite *ex aequo et bono* is not positioned as a default decisional standard under COIA Arbitration Rules, the model arbitration clause favours this approach to solving disputes through its model arbitration clauses. FIVB Tribunal is a judicial body of FIVB – international volleyball federation. Under FIVB Tribunal Regulations *ex aequo et bono* – similarly as under BAT Rules – is a default decisional standard. Interestingly, the decisions of FIVB may be

appealed to CAS and – according to FIVB Tribunal Regulations – CAS shall decide an appeal *ex aequo et bono*. Nonetheless to date CAS has never decided any FIVB Tribunal related appeal. See more MARTENS 2016, p. 44; A. MAVROMATIS and A. ZAGKLIS, *Winds of Change: The New Dispute Resolution System of the Federation Internationale de Volleybal*, in: M. COLLUCI AND K. JONES (eds.), *International and Comparative Sports Justice*, European Sports Law and Policy Bulletin 2013, Vol 1, p. 144.

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 2018/A/5580

Blagovest Krasimirov Bozhinovski v. Anti-Doping Centre of the Republic of Bulgaria (ADC) & Bulgarian Olympic Committee (BOC)

8 March 2019

Aquatics; Doping (Ostarine); World Anti-Doping Code as interpretative tool; Status of sports justice body in CAS appeals; Sanction for ADRV not involving a specified substance; Interpretation of statutes and principle of confidence; Determining intent of minor in the absence of establishment of source of the prohibited substance; Determining level of fault/negligence of minor in the absence of establishment of source of the prohibited substance

Panel

Mr Patrick Lafranchi (Switzerland), Sole Arbitrator

Facts

Mr Blagovest Krasimirov Bozhinovski (the “Athlete” or “Appellant”) is a swimmer born on 25 March 2000. At the moment of the doping control the Athlete was a registered swimmer for the Swimming Sports Club Chernomorets Varna (the “Club”), a Bulgarian Swimming Club that is a member of the Bulgarian Swimming Federation (“BSF”).

The Anti-Doping Centre of the Republic of Bulgaria (“ADC” or the “First Respondent”), is an entity of the Ministry of Youth and Sport of the Republic of Bulgaria, responsible for testing national athletes in and out-of-competition, as well as athletes from other countries competing within that nation’s borders; adjudicating Anti-Doping rules

violations; and Anti-Doping education. Its responsibilities hence include the enforcement of its Anti-Doping program in compliance with the World Anti-Doping Code (the “WADC”).

The Second Respondent, the Bulgarian Olympic Committee (“BOC”), headquartered in Sofia, Bulgaria, is the National Olympic Committee of Bulgaria.

On 5 May 2017 at 8 am, the Athlete underwent a doping control test and provided a urine sample to the ADC, in the hotel Diana 3 in Sofia.

The sample was analysed by the WADA accredited laboratory in Austria, the Seibersdorf Laboratories which reported the presence of a prohibited substance, Ostarine, in the A sample. Ostarine is a substance prohibited at all times, both in-and-out of competition, and is not a specified substance under the applicable 2017 WADA Prohibited List.

On 15 June 2017, the Athlete was notified of an Adverse Analytical Finding for Ostarine in the sample provided on 5 May 2017. Also on 15 June 2017, the BSF provisionally suspended the Athlete from his sport rights and competitive rights until the final clarification of the case at review.

On 19 June 2017, a preliminary hearing took place at the ADC. The Athlete declared that he would waive his rights for the opening of the B sample and that the analytical result from the A sample was accepted as final.

On 19 October 2017, a hearing was conducted before the Disciplinary Commission of the Bulgarian Olympic Committee (“DC”). The factual conclusions taken by the DC can be summarized as follows:

- The presence of Ostarine in the Athlete's sample was indisputably established.
- The Athlete did not succeed to prove how the detected substance had entered his system. The explanation provided by the Athlete, *i.e.* that the prohibited substance originated from a polluted product, remained unproven.
- The Athlete was a minor at the moment of testing.
- The Athlete has rendered full assistance for the disclosure of the absolute and objective truth.
- The Athlete has taken food supplements given to him by his father in whom he had absolute confidence. The DC was further of the opinion that such confidence in a parent on the part of a minor child is completely normal.

By decision of 3 November 2017, the DC decided to suspend the Athlete for a period of one year.

With letter issued on 22 November 2017, the BSF confirmed the one-year ban imposed by the DC, starting on 3 November 2017, but deducted the period of provisional suspension from this period.

On 27 November 2017, the ADC submitted an appeal against the decision of the DC to the Bulgarian Sports Arbitration at the Bulgarian Olympic Committee ("BSA").

On 19 January 2018, the BSA rendered a decision by which it found that the Athlete had committed an Anti-Doping Rule Violation ("ADRV") pursuant to Article 6 para. 2 of the Bulgarian State Regulations on Doping Control in Training and Competition Activity ("RDCTCA") and imposed a period of

ineligibility of four years on the Athlete in accordance with Article 70 para. 1 RDCTCA (the "Appealed Decision"). The BSA motivated its decision *inter alia* providing the following grounds:

- The provision allowing the sanction for non-specified prohibited substances to be reduced from 4 to 2 years is inapplicable. As evident from the WADA 2017 Prohibited List, Ostarine is part of class S1 Anabolic Agents, which are prohibited at all times (and not only in-competition such as the substances in classes S6 to S9 of the 2017 WADA Prohibited List).
- The correct qualification for determination of the sanction for the detected non-specified substance Ostarine, namely under Article 70, para. 2, sec.1, read together with Article 70, para. 2, sec. 2 RDCTCA, deprives the DC of the possibility to consider "*mitigating the fault*" circumstances for the purpose of determining the sanction. Neither the minor age, nor the fact that the positive finding resulted from out-of-competition testing are relevant to the above mentioned provisions. As regards the remaining circumstances taken into account by the DC, the BSA held that they fortified the conviction for the presumption of risky behaviour committed by the Athlete. Specifically, as the Athlete was taking not only a small amount of various different nutritional supplements which had been "*prescribed to him*" by his father, he should have been aware that his conduct bears a significant risk to breach the Anti-Doping rules, and that the Athlete had apparently disregarded that risk. Moreover, the father of the Athlete is neither his coach, nor a medical person. And, as followed from Protocol No 25 of 19 June 2017, related to the preliminary hearing of the Athlete, the Athlete's coach does not provide him with food supplements because he is afraid of them being

contaminated. Despite this, and as expressly explained during the hearings, the Athlete had taken the food supplements in order to improve his physical endurance.

- In view of the above, the ABS concluded that the DC decision, as regards the sanction, appeared to be incorrect due to non-compliance with the RDCTCA, and lacking grounds. The ABS therefore held that based on the information collected by the DC, the DC had no legal ground to determine a sanction lower than the 4 years suspension provided for in Article 70, para. 1, sec.1 RDCTCA.

The Appealed Decision was notified to the Appellant on 31 January 2018.

On 21 February 2018, in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the “Code”), the Athlete filed his statement of appeal at the Court of Arbitration for Sport (the “CAS”) against the ADC. He further identified the BSF and the BOC as “*interested/ affected parties*”.

On 26 February 2018, upon request by the CAS Court Office, the Appellant explained that indeed, the BOC had to be considered as second respondent, and further explained his reasons for identifying the BSF as interested party.

With letter issued on 14 March 2018, the BOC objected to its status as a party in the present proceedings, alleging that it does not have capacity to be respondent.

On 14 August 2018, a hearing was held in Lausanne, Switzerland.

Reasons

The main question in the present case results from the change in the 2015 WADC related to minors. In fact, under the 2015 WADC, in order to determine whether “*No fault or negligence*” or “*No significant fault or negligence*” applies, minors do not have to prove how the prohibited substance entered his or her system. The present decision assesses whether the above mentioned change has any consequences on the assessment of anti-doping rule violations committed by minors.

1. World Anti-Doping Code as interpretative tool

According to Article R58 of the Code, the Arbitral Tribunal decides the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association, or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Court deems appropriate. In the latter case CAS shall give reasons for its decision. In the case at hand, the “*applicable regulations*” within the meaning of Article R58 of the Code are the RDCTCA. With regards to the Appellant’s argument that in addition to the RDCTCA, the Sole Arbitrator could directly apply the WADC as regulation applicable to the dispute due to the general harmonization of the Bulgarian Anti-Doping legislation with the WADC, the Sole Arbitrator held that the WADC has no direct application in proceedings as the one at hand. Rather, the WADC may only be used as an aid in interpreting the applicable Anti-Doping regulations.

2. Status of sports justice body in CAS appeals

Turning to the merits of the appeal, the Sole Arbitrator started by dealing with an issue

of preliminary nature, *i.e.* the position of the BOC in this arbitration, specifically the BOC's request to be removed from the CAS proceedings, based on the argument that the dispute had evolved exclusively between the ADC and the Athlete. Specifically, the Second Respondent argued that the BOC is an appellate instance exercising control over the decisions of the Disciplinary Committee, and that those proceedings do not involve any other subjects as parties. Therefore, only the ADC shall be brought as respondent to the Athlete's appeal.

The Sole Arbitrator noted, however, that according to CAS jurisprudence, an appeal can be made "*against the National Federation that made the contested decision and/or the body that acted on its behalf*". The BOC is the "*Federation*" in the above meaning and the BSA is the body that acted on its behalf. The Sole Arbitrator further relied on the well-recognised "*stand-alone test*" as the decisive test to reveal whether or not a given sports justice body pertains in some way to the structure of a given sports organisation: if it appears that, would the sports organization not exist, the sports justice body would not exist and would not perform any function, then the sports justice body has no autonomous legal personality and may not be considered as a respondent on its own in a CAS appeal arbitration concerning one of its rulings. Consequently, the procedural position of the sports justice body before the CAS must be encompassed within that of the sports organization. The Sole Arbitrator determined that would the BOC not exist, the BSA with BOC would not exist either and would not perform any function. Accordingly, the Second Respondent *i.e.* BOC has standing to be sued and shall thus be considered as a party in the present proceedings.

3. Sanction for ADRV not involving a specified substance

Considering further that it was common ground between the parties that Ostarine was present in the Athlete's sample and that the Athlete was guilty of an Anti-Doping-Rule-Violation ("ADRV") under Article 6 RDCTCA, the Sole Arbitrator underlined that a finding of an ADRV that does not involve a specified substance - such as Ostarine - results, *prima facie*, in a period of ineligibility of four (4) years under the 2015 WADC. In order for the period of ineligibility to be reduced to two (2) years, the athlete has to first establish, on the balance of probability, that he did not commit the ADRV intentionally, evaluated in light of the definition of intent in Article 70 para. 4 RDCTCA.

4. Interpretation of statutes and principle of confidence

Turning thereupon to the concrete sanctions applicable to the rule violation the Sole Arbitrator started by analysing whether the Athlete - who undisputedly had not established the source of the prohibited substance - had established lack of intent for the ADRV in the meaning of Article 70 RDCTCA; following an analysis of the definitions of "*intent*" as well as of "*No fault or negligence*" and "*No significant fault or negligence*", at the outset the Sole Arbitrator noted that while the definitions of "*No fault or negligence*" and "*No significant fault or negligence*" explicitly exclude minors from the duty to establish the source of the prohibited substance, the definition of "*intent*" does not either explicitly mention minors nor the obligation to establish the source of the prohibited substance. It was therefore questionable whether minors, similar to when establishing "*No fault or*

negligence” or “*No significant fault or negligence*”, also at the stage of intent do not have to establish how the prohibited substance entered their system. In order to answer such question, the relevant regulations of the RDCTCA had to be interpreted. In this context the Sole Arbitrator contemplated that while the RDCTCA themselves contained some rules of interpretation, they do not define general rules of how to interpret the RDCTCA (*i.e.* whether the RDCTCA shall be interpreted in the same manner as a law or rather in the same manner as a contract). The Sole Arbitrator therefore decided that in order to define general interpretation rules of the RDCTCA, he had to turn to Swiss law, noting that it is longstanding CAS jurisprudence that statutes or similar instruments shall be interpreted according to Swiss law. The Sole Arbitrator further developed that under Swiss law, statutes are being interpreted in the same manner as declarations of intent, the latter following the ‘principle of confidence’, *i.e.* the declaration is neither understood in the sense of what the declaring party may have had in mind nor in accordance with the literal meaning of the wording, but in the meaning the addressee could in good faith attribute to it. This being a somehow ‘objective’ approach, the addressee himself is deemed to be obliged to give all possible attention to the ‘subjective element’, *i.e.* to consider all aspects allowing the understanding of the declared intent. Under these two aspects interpretation is less strict than under the English and American tradition, *i.e.* focused on the “objective” meaning of the existing texts. Such “objective” interpretation is justified as usually, at the moment of the drafting of the statutes/regulations, the future addressees of them are not privy to them.

5. Determining intent of minor in the absence

of establishment of source of the prohibited substance

In the following, the Sole Arbitrator, guided by the objective approach of interpretation of the RDCTCA, developed that when considering the objective meanings of the definitions of “*intent*” and “*No fault or negligence*”/ “*No significant fault or negligence*”, an addressee could in good faith conclude that – as a minor does not have to prove how the prohibited substance entered his system at the stage of “*No fault or negligence*”/ “*No significant fault or negligence*” – also at the stage of establishing that the ADRV was not committed intentionally, a minor should not – contrary to established CAS jurisprudence according to which in the context of proving absence of intent athletes are mandatorily obliged to prove the source of the prohibited substance - be mandatorily obliged to establish how the prohibited substance entered his system. The Sole Arbitrator found that any other reading would be illogical and against the principle of good faith; that rather, in case a minor is not able to prove the source of the prohibited substance, one has to evaluate – based on the overall circumstances of the specific case – if the respective athlete acted with or without intent. In this context various criteria may be taken into account, *e.g.* an athlete’s credible testimony or evidence *e.g.* by an athlete’s staff that he had no intent to use a prohibited substance. Having considered the overall circumstances of the case, the Sole Arbitrator concluded that the Athlete had established, by a balance of probability that he did not act with intent and that therefore the sanction applicable lies in the spectrum of 0 to 24 months.

6. Determining level of fault/negligence of minor in the absence of establishment of source of the prohibited substance

Lastly the Sole Arbitrator determined that it follows from the 2015 WADC that in case a minor is not able to prove how the prohibited substance entered his or her system, this shall not be held against him or her. Rather, in order to determine whether “*No fault or negligence*” or “*No significant fault or negligence*” applies, CAS panels have to evaluate the surrounding circumstances of the ADRV.

Decision

The Sole Arbitrator concluded that the appeal filed on 21 February 2018 by Mr. Blagovest Krasimirov Bozhinovski against the decision of the BSA of 19 January 2018 is partially upheld, and amended the decision of the BSA of January 2018 as follows:

- Mr. Blagovest Krasimirov Bozhinovski is suspended from participation in any swimming-related activity for a period of twenty-one (21) months, commencing on 15 June 2017.

CAS 2018/A/5607

SA Royal Sporting Club Anderlecht (RSCA) v. Matías Ezequiel Suárez & Club Atlético Belgrano de Córdoba (CA Belgrano) &

CAS 2018/A/5608

Matías Ezequiel Suárez & CA Belgrano v. RSCA

22 January 2019

Football; Contractual dispute; Termination of contract without just cause; Force majeure; *Ex officio* analysis of a violation of a player's right to actively participate in his profession/personality rights; Non-violation of players' rights to actively participate in their profession/personality rights; Disclosure of grounds to terminate a contract; Application of art. 17 of the FIFA Regulations on the Status and Transfer of Players (RSTP, edition 2016); Application of the principle of positive interest to calculate compensation under art. 17 para. 1 FIFA RSTP; Determination of the value of a player's services based on clubs' offers; Proof of the recruitment of a "replacement" player; Non-application of the average residual value of a player's old and new contracts of employment; Concept of specificity of sport; Correction of the amount of compensation to be awarded as a result of specificity of sport requirements

Panel

Prof. Massimo Coccia (Italy), President

Mr Bernard Hanotiau (Belgium)

Mr Gonzalo Bossart (Chile)

Facts

On 18 January 2008, CA Belgrano and RSCA signed an agreement to definitively transfer Mr Suárez (the Player) from the former to the latter club for EUR 2.6 million. On 30 March 2008, the Player signed an employment contract with RSCA and renewed it twice - first on 6 May 2010 until 30 June 2015 and again on 1 July 2013 until 30 June 2017 (the "Employment Contract"). Under Article 2 of the last extension agreement, RSCA agreed to pay the Player EUR 42,000 gross per month plus a yearly gross signing bonus of EUR 505,380. In addition, RSCA agreed in that same provision to provide the Player a maximum monthly allowance of EUR 1,000 for the leasing of a car, and EUR 2,000 for housing. RSCA was also responsible to pay the Player loyalty bonus (Article 3), employer's contribution valued at EUR 310,000 (Article 4), and double holiday pay (Article 16).

On 13-14 November 2015 and 22 March 2016, a series of terrorist attacks occurred in Paris, France and Brussels, Belgium, respectively.

On 11 June 2016, CA Belgrano expressed an interest in acquiring the Player on loan for the 2016-2017 season. CA Belgrano wrote the following to RSCA: "*Atletico Belgrano is interested in employing the services of the player Matias Suarez. Accordingly, we have met with his agent, Mr Cristiano Colazo, who has confirmed to us that the player, for family and affective reasons, would like to stay in Córdoba for a while to recover his football skills, surrounded by his family and friends, his customs, and his culture, which are essential to improve his spirit and form*" (translated from the Spanish original). In the same email, CA Belgrano went on to propose to RSCA that the latter (i) extend the Employment Contract (which was set to expire on 30 June 2017), (ii) loan the Player to CA Belgrano for free, and (iii) after the loan and the Player's possible increase in value, trade the Player's rights to a third club.

On 13 June 2016, RSCA replied as follows: *“After having spoken to Mr van Holsbeeck [RSCA’s manager], RSCA is not opposed to transferring the player but not as a loan. If CA Belgrano is interested in Matías Suárez it should pay the price: 4,000,000 Euros (4 million Euros)”* (translated from the Spanish original). The same day the Player’s agent entered the discussions between RSCA and CA Belgrano and explained to RSCA by email that *“Given the reply which Herman sent Belgrano, I should tell you that Matías needs to stay in Argentina for 6 months for his family, following the attacks which have taken place. We confirm that he would indeed like to leave the club. This is a request made given Matías’ time with Anderlecht, for the championships which we have won together. May I please ask you to respect this so that Matías can go to Belgrano. With so few matches played, he cannot leave for 4 million”* (translated from the Spanish original).

Neither the free loan proposed by CA Belgrano nor the definitive transfer for 4 million proposed by RSCA were eventually agreed; hence, the Player remained under contract with RSCA. The Player was scheduled to return to Belgium to resume training on 20 June 2016. However, on 17 June 2016, the Player’s agent informed RSCA that *“For health reasons (...) it is possible that the player Matías Suárez will not be able to attend training”* (translated from the Spanish original). On 28 June 2016, the Player’s agent explained by email to RSCA that the Player had gastroenteritis and that he had not yet recovered from it. The Player’s agent informed the Belgian club that he had a medical certificate excusing his absence until 4 July 2016. However, no medical certificate was attached to such email or ever sent to RSCA.

On 1 July 2016, the Player sent a termination letter to RSCA (hereinafter the “Termination Letter”), which RSCA received on 4 July 2016.

The letter read:

“I hereby inform you that I have decided, with effect from this communication, to terminate the sports employment relationship contract entered into with you, effective from 1 July 2013 to 30 June 2017, pursuant to and in accordance with the provisions of the FIFA Regulations on the Status and Transfer of Players.

The termination is based on personal, family and sports reasons. Given that lately I have not been considered by the coach of Anderlecht as a starting player, and after 8 seasons as a player of that club where I have performed at all times as a great professional, I made the decision, together with my family, to return home to Argentina.

This is a fundamental personal and family decision because after more than 8 years of rootlessness and detachment of my affections, I understand that the best for my family at this time is to be near our beloved ones.

Crucial to this decision is the situation experienced in the last semester as a result of the terrorist attacks in Brussels. My family and I have lived months of high tension, fear, and anxiety in our daily life with the distressing uncertainty that it could happen again at any time, especially when similar attacks have taken place again in different parts of Europe and it is a war that seems endless. In addition, I should specifically mention my mother’s health, which is in a delicate state, so I need to be close to her.

I have told all this to the authorities of Anderlecht repeatedly, but unfortunately they have only obstructed my departure, with demands that have no relation to my sports position in the club, leaving me with no alternative but to write this.

Notwithstanding this, I am very grateful to the club for the years I spent there and hope my decision is understood and accepted” (translated from the Spanish original).

On 4 July 2016 and 6 July 2016, RSCA, through its counsel, attempted without success to contact the Player and his agent. On 5 July 2016, the Player signed a three-year employment contract with CA Belgrano until 30 June 2019. Under this contract, CA

Belgrano agreed to pay the Player the following remuneration: ARS 120,000 per month between July 2016 and June 2017, ARS 144,000 per month between July 2017 and June 2018, and ARS 175,000 per month between July 2018 and June 2019. Additionally, CA Belgrano agreed to pay the Player a signing bonus of ARS 7,755,000 between July 2016 and June 2017, ARS 9,843,000 between July 2017 and June 2018, and ARS 11,840,000 between July 2018 and June 2019.

On 7 July 2016, CA Belgrano officially presented the Player to the Argentinian media and club supporters. At the press conference, the President of CA Belgrano explained that *“The contractual situation is very complicated. Matías Suárez thus decided to be free. His wish to come back and that of supporters to see him again were the most important thing”*. The Player declared that his *“only intention for several years now (...) was to return [to CA Belgrano]”* and that he was completely fit and ready to play. On 11 July 2016, RSCA demanded EUR 4 million for the Player’s early termination of his Employment Contract, warning that a failure to pay such amount would result in a claim before FIFA. On 12 July 2016, the Player replied directly to RSCA, explaining that he had just cause to terminate the Employment Contract and that his decision to end his employment relationship with the Belgian club was final.

On 30 August 2016, RSCA acquired the [...] player [A], on loan from [...]. Pursuant to the loan agreement, RSCA had to pay [...] EUR 500,000 as a loan fee in two equal installments of EUR 250,000 payable on 1 September 2016 and 1 January 2017. Additionally, RSCA had a purchase option for a definitive transfer, which it ultimately elected not to exercise. On the same day, RSCA also signed an employment contract with Mr [A] valid from 30 August 2016 until 30 June 2017, under which he would receive EUR 270,000 gross in salary (*i.e.* EUR 22,500 per month) and EUR 1,000,000 gross

in signing bonus, as well as a maximum monthly allowance of EUR 1,500 for leasing a car, loyalty bonus to be calculated pursuant to the collective bargaining agreement, double holiday pay, and an employer’s contribution with an estimated yearly value of EUR 124,000 (which eventually became an amount actually paid by RSCA of EUR 156,232.89). The employment contract with Mr [A] also included certain performance bonuses, which ultimately yielded EUR 164,787 for this player.

On 14 July 2016, RSCA filed a complaint against the Player and CA Belgrano before the FIFA Dispute Resolution Chamber (hereinafter the “DRC”). On 8 February 2018, the DRC issued the grounds of its decision passed on 21 September 2017. It ordered the Player to pay RSCA the amount of EUR 540,350, plus five percent interest *per annum* from 14 July 2016 until the date of effective payment, for the early termination without just cause of his Employment Contract with RSCA and held that CA Belgrano was jointly liable for that amount (the “Appealed Decision”).

On 21 February 2018, in accordance with Articles R47 and R48 of the Code of Sport-related Arbitration (the “CAS Code”), RSCA filed its statement of appeal. On 1 March 2018, in accordance with the same provisions of the CAS Code, Mr Suárez and CA Belgrano filed their joint statement of appeal. On 3 April 2018, in accordance with Article R55 of the CAS Code, Mr Suárez and CA Belgrano filed their joint answer. On 26 April 2018, RSCA filed its answer. On 18 October 2018, the hearing took place at CAS Headquarters in Lausanne, Switzerland. At the end of the hearing, the parties made no procedural objections and acknowledged that the Panel had fully respected their rights to be heard and to be treated equally throughout the proceedings.

Reasons

1. Termination of contract without just cause

According to Mr Suárez and CA Belgrano, the Player had just cause to terminate the Employment Contract. The Player terminated his Employment Contract with RSCA because of (a) a *force majeure* event, *i.e.* the continuous, alarming terrorist attacks that occurred in Belgium and in Europe, which caused him and his family fear and anguish and rendered the continuation of the employment relationship in good faith unconscionable, (b) his declining role at the Belgian club, and (c) his mother's poor health. The causes invoked by the Player to terminate his Employment Contract should not be analyzed individually but rather in consideration of an overall assessment of the situation

According to RSCA, the Player colluded with CA Belgrano and unilaterally terminated the Employment Contract without just cause in order to have him sign with the Argentinian club. The reasons invoked by the Player in the Termination Letter of 1 July 2016 do not constitute a just cause.

The concept of "*just cause*" is not defined in the RSTP. However, it has often been analyzed by CAS panels, relying on Swiss law and in particular on the Swiss Code of Obligations ("CO"). It is now well-established by CAS jurisprudence that: "*Under Swiss law, such a 'just cause' exists whenever the terminating party can in good faith not be expected to continue the employment relationship (Article 337 para. 2 CO). The definition of 'just cause', as well as the question whether 'just cause' in fact existed, shall be established in accordance with the merits of each particular case (ATF 127 III 153 consid. 1 a). As it is an exceptional measure, the immediate termination of a contract for 'just cause' must be accepted only under a narrow*

set of circumstances (ibidem). Only a particularly severe breach of the labour contract will result in the immediate dismissal of the employee, or, conversely, in the immediate abandonment of the employment position by the latter. In the presence of less serious infringement, an immediate termination is possible only if the party at fault persisted in its breach after being warned (ATF 129 III 380 consid. 2.2, p. 382). The judging body determines at its discretion whether there is 'just cause' (Article 337 para. 3 CO). As a result, only a violation of a certain severity justifies the early termination of a contract; and a breach is sufficiently severe only if it excludes the reasonable expectation of continuation of the employment relationship" (CAS 2015/A/4046 & 4047, referring to Article 337 para. 2 CO; CAS 2014/A/3463 & 3464; CAS 2008/A/1447).

2. Force majeure

According to CAS jurisprudence, for *force majeure* to exist there must be "*an objective (rather than a personal) impediment, beyond the control of the 'obliged party', that is unforeseeable, that cannot be resisted and that renders the performance of the obligation impossible*" (CAS 2013/A/3471; CAS 2015/A/3909). This definition of *force majeure* must be narrowly interpreted, because, as a justification for non-performance, it represents an exception to the fundamental obligation of *pacta sunt servanda*, which is at the basis of the football system and necessary for maintaining contractual stability.

The Panel notes that (a) there is no evidence whatsoever that the Player and/or his family and/or any other professional athletes in Belgium were directly targeted by, or were victims of, terrorist threats or attacks, (b) the Player produced no expert evidence, such as a medical report, which could objectively support his allegation of subjective feelings of fear and anguish, (c) the Panel was shown no evidence

whatsoever that, after the first few days of unrest, the terrorist attacks caused a disruption to life in Brussels preventing it from going on normally (indeed, there is no proof on record that the Belgian population suffered a meaningful change in its everyday behavior and lifestyle (nor is the Panel able to take judicial notice of any fact demonstrating such a change)), (d) there is no evidence on file that the terrorist attacks prevented the Belgian First Division A, any other Belgian or European competition held in Belgium, or RSCA's matches and training sessions from taking place normally, (e) no incidents of terrorism occurred at football training grounds or at a Belgian stadium during the relevant period; nor is there any evidence that the Player's safety was ever at risk at those places or at home, (f) the Player only had one year remaining on his Employment Contract with RSCA when he terminated it (to ease his safety concerns, his family could have simply returned to Argentina for that year and he could have rejoined them once the contract ended in June 2017).

The Panel takes judicial notice of the fact that, in recent times, significant terrorist attacks have troubled several European cities where important football clubs (playing both in top national leagues and in UEFA competitions) are located: besides Brussels and Paris, one can mention for example Barcelona, Berlin, Istanbul, Nice and London. However, the Panel also takes judicial notice that it has seen no evidence and heard no news that any of those prominent football competitions has been halted or that - besides Mr Matías Suárez - any footballer playing for a club in one of those cities has invoked such circumstances as a justification to terminate his Employment Contract.

In view of the above, the Panel concludes that the terrorist attacks were not an objective impediment which rendered impossible or unreasonable the Player's duty to perform his contractual obligations and finish the remaining year of his Employment Contract with RSCA. Accordingly, the Player was not justified on this ground to prematurely terminate his Employment Contract with RSCA. If a player were permitted to simply terminate his Employment Contract based on subjective feelings of fear and angst, with no objective evidence of any actual threat to his safety or of anything that would prevent him from carrying out said contract as agreed, contractual stability would be seriously undermined, thereby damaging the sport and all those involved therein.

3. *Ex officio* analysis of a violation of a player's rights to actively participate in his profession/personality rights

It could be argued that, conceivably, a footballer could invoke the lack of playing time as a violation of his personality rights under Swiss law - in particular, the personality right consisting in a professional's right to actively participate in his profession - in order to terminate an employment contract. This legal ground was not explicitly raised by the Player but his attorneys perhaps alluded to it when they mentioned the right to work and the right to free movement of players. In any event, given the public policy character of the protection of personality rights in Swiss law, the Panel deems opportune even *ex officio* to address whether RSCA violated the Player's right to actively participate in his profession.

4. Non-violation of players' rights to actively participate in their profession/personality rights

On this issue, the Panel first notes that a coach is entitled to manage the team as he sees fit, provided that he does so on proper football related or sporting reasons and does not abuse his rights and arbitrarily infringe on the player's own rights (CAS 2013/A/3091, 3092 & 3093; CAS 2014/A/3642). Save for a contractual provision stating otherwise, a player does not have a right to be a starter. In the present case, no such contractual provision existed. On the contrary, Article 1.2 of the Employment Contract provided that the *"Player shall participate as a starter, reserve player or spectator to all the matches of all the teams for which he is designated by the competent body of the Club"* (translation from French). The Panel then observes that the Player was never deregistered, and that he remained eligible to play, always trained with the first team, and played 69 percent of RSCA's first team official matches (even if his role may have slightly decreased). Moreover, there are no signs that the coach abused his right to manage the team. Under the circumstances, the Panel finds that no violation of the Player's right to actively participate in his profession occurred and that, accordingly, no violation of his personality rights occurred.

For the foregoing reasons, the Panel concludes that the grounds invoked by the Player to terminate his Employment Contract with RSCA, viewed either individually or collectively, do not constitute a *"just cause"*. Therefore, the Player breached the Employment Contract and, pursuant to Article 17 RSTP, he must pay compensation to RSCA for such breach.

5. Disclosure of grounds to terminate a contract

The Panel notes that, pursuant to the Swiss Supreme Court's jurisprudence, a party generally may not, in order to justify the termination of an employment contract, rely on circumstances which the terminating party was aware of at the time of termination but did not then invoke (ATF 127 III 310 consid. 4 a); it may only do so *"under restrictive conditions"*.

6. Application of art. 17 of the FIFA RSTP.

It is common ground between the parties - and rightfully so - that compensation for the unilateral, unjustified termination of an employment contract is to be calculated pursuant to Article 17, para. 1 RSTP. However, both sides disagree with the calculations made by the DRC.

According to the Player and CA Belgrano, no compensation would be due since RSCA incurred no damages. Indeed, RSCA saved more in not having to pay the Player's salary in 2016-2017 than the average residual value of the old and new contracts.

In case compensation was due (*quod non*), the Player asserts that the following should be taken into account while calculating compensation: the residual value of the Employment Contract, the time remaining on the Employment Contract, that all acquisition costs were fully amortized, that the early termination occurred outside the Protected Period, that there are no replacement costs, that RSCA had no expectation of transferring the Player and obtaining a profit, the savings RSCA made for not having to pay the Player's remaining salary, that the new employment contract with CA Belgrano was considerably lower than the Employment Contract with RSCA, that RSCA did not receive a third party offer for the Player.

According to RSCA, due to the Player's unilateral termination of the Employment Contract without just cause, the Player violated Article 16 RSTP and RSCA is entitled to receive compensation for the damages suffered. To calculate the damages for the Player's termination of the Employment Contract without just cause, the Panel must apply the "positive interest" approach pursuant to CAS jurisprudence and Swiss law:

- (i) RSCA's damages can be assessed at EUR 4,000,000.
- (ii) Alternatively, RSCA's damages can be assessed at EUR 3,014,001.33 by taking into account the following elements of calculation: (a) the average residual value between the old and new contract, amounting to at least EUR 1,023,304, (b) the unamortized part of the agency fees paid by RSCA to the Player's agent, amounting to EUR 262,500, (c) the replacement costs of the Player amounting to EUR 2,078,910.22, (d) RSCA's savings for not having to pay the Player's salary of EUR 1,355,380 for the 2016-2017 season, (e) the specificity of sport and aggravating circumstances, which warrant adjusting the compensation by an increase of 50 percent.

Additionally, RSCA requests that in accordance with Article 17, para. 2 RSTP, CA Belgrano is jointly and severally liable with the Player to pay the amounts awarded.

As repeatedly confirmed in CAS jurisprudence, the list of criteria set out in Article 17, para. 1 RSTP is illustrative and not exhaustive. Other objective factors can and should be considered, such as the loss of a possible transfer fee and the replacement costs, provided that there exists a logical nexus between the breach

and loss claimed (CAS 2010/A/2145, 2146 & 2147; CAS 2008/A/1519 & 1520; CAS 2009/A/1880 & 1881). CAS precedents also indicate that the order by which those criteria are set forth by Art. 17, para. 1 RSTP is irrelevant and need not be exactly followed (see CAS 2009/A/1880 & 1881). According to CAS jurisprudence, it is for the judging authority to carefully assess, on a case by case basis, all the factors and determine how much weight, if any, each of them should carry in calculating compensation under Article 17, para. 1 RSTP (CAS 2008/A/1519 & 1520; CAS 2010/A/2145, 2146, & 2147). In particular, CAS precedents indicate that while each of the factors set out in Article 17, para. 1 or in CAS jurisprudence may be relevant, any of them may be decisive on the facts of a particular case (CAS 2009/A/1880 & 1881). According to said CAS case law, while the judging authority has a "*wide margin of appreciation*" or a "*considerable scope of discretion*", it must not set the amount of compensation in a fully arbitrary way, but rather in a fair and comprehensible manner (CAS 2009/A/1880 & 1881; CAS 2008/A/1519 & 1520). At the same time, as the CAS Code sets forth an adversarial rather than inquisitorial system of arbitral justice, a CAS panel has no duty to analyse and give weight to any specific factor listed in Article 17 para. 1 or set out in the CAS jurisprudence, if the parties do not actively substantiate their allegations with evidence and arguments based on such factor (CAS 2009/A/1880 & 1881).

7. Application of the principle of positive interest to calculate compensation under art. 17 para. 1 FIFA RSTP

The Panel also observes that there is an established consensus in CAS jurisprudence that the "positive interest" principle must apply in calculating compensation for an

unjustified, unilateral termination of a contract (it has been applied, among other cases, in CAS 2008/A/1519 & 1520, CAS 2009/A/1880 & 1881, CAS 2013/A/3411, and CAS 2015/A/4046 & 4047).

8. Determination of the value of a player's services based on clubs' offers

The Panel recognizes that, with the exception of the *Webster* case (nowadays an isolated and overturned precedent), the CAS has accepted the possibility, in line with Swiss employment law on the loss of earnings (*lucrum cessans*), that the loss of a transfer fee can be considered as a compensable damage, provided that there is a necessary logical nexus between the unjustified, unilateral termination of the employment contract and the lost opportunity to realize that profit (CAS 2008/A1519-1520; CAS 2009/A/1880 & 1881).

While the Panel concurs with this approach, it notes that in the present case it cannot be said that RSCA lost out on a transfer fee of EUR 4 million. CA Belgrano only inquired about possibly obtaining the player on a *free* loan (then it did not respond to RSCA's proposal) and such hypothetical price was set out by RSCA itself with no evidence on the record that in the market there could be any club interested in spending that amount for the Player.

Moreover, in the Panel's view, only a third party offer made in good faith may be a relevant indicator of the Player's value. As *Matuzalem* held, a third party offer "*can provide important information on the value of the services of the player, and a panel shall take into consideration a third party good faith offer made to the club as an additional element to assess the value of the services of the player*" (CAS 2008/A/1519 & 1520). Conversely, the Panel considers

that an offer made by the damaged club, even if made *in tempore non suspecto*, does not necessarily reflect the true player's value. The Panel sees it as very plausible for a selling club to begin negotiations putting forward a much higher price than the concerned player's actual market value. Moreover, it is not uncommon for a club to set as a price tag an unreasonable amount far above the market value in the situation where it does not truly wish to part with the player. An offer from the damaged club is therefore too subjective and unreliable to be considered.

The specialized website *transfermarkt.com* valued the Player at EUR 3.2 million when he prematurely terminated the Employment Contract and it currently values him at EUR 2.5 million. The Panel does not consider this valuation to be reliable for the purposes of this arbitration. The Panel is unaware of how *transfermarkt.com* assessed the value of the Player. RSCA has merely submitted the website's valuation of the Player, without explaining how it was calculated and whether objective criteria were used in the calculation, such as a comparison to players of the same position, attributes, age, career path, etc.. RSCA has also not substantiated the *transfermarkt.com* valuation with any expert evidence, reports or statements which could objectively appraise the value of the Player's services.

RSCA also argues that since CA Belgrano knew the Player had terminated his Employment Contract without just cause, it assumed the risk of having to pay EUR 4 million. The Panel finds that by signing the Player, CA Belgrano may have assumed the risk of potentially having to pay *some* compensation under Article 17, para. 2 RSTP, but not necessarily the EUR 4 million. To conclude, the Panel finds that the offer of EUR 4 million made by RSCA

to CA Belgrano is irrelevant for the purposes of determining compensation due under Article 17, para. 1 RSTP.

9. Proof of the recruitment of a “replacement” player

According to CAS jurisprudence, in the absence of any concrete evidence with respect to the value of the Player, the judging authority may also take into account the cost incurred by the club to acquire the services of a new player to replace the outgoing player (CAS 2010/A/2145, 2146 & 2147). Here, the parties disagree as to whether RSCA replaced the Player with Mr [A].

In order for RSCA to successfully claim replacement costs, RSCA must substantiate that Mr [A] was hired to replace the Player. Only then can Mr [A]’s acquisition costs be claimed as compensation under Article 17, para. 1 RSTP. Following *Matuszalem*, this requires RSCA to prove (i) that the players played in more or less the same position on the field, and (ii) that there is a link between the Player’s premature termination of the Employment Contract and the hiring of the new player (CAS 2008/A/1519-1520). The Panel finds that RSCA satisfied both requisites. First, the evidence before the Panel confirms that Mr [A] and the Player played more or less the same position. Second, there is a clear link between Mr [A] and the Player’s premature termination of his Employment Contract. This link is established by the following circumstances: (i) as stated above, the Player and Mr [A] played by and large in the same position; (ii) RSCA signed Mr [A] on 30 August 2016, *i.e.* after the Player left the Belgian club and within the same transfer window; (iii) the guaranteed salary plus signing bonus the Player was set to receive in 2016-2017 (EUR 1,009,380) is comparable to what RSCA

agreed to pay Mr [A] as salary plus signing bonus in that same season (EUR 1,270,000), and (v) the other players who left RSCA during that transfer window played a less similar position. In any event, the fact that other players also moved from RSCA to third clubs in the summer of 2016 cannot erase the undeniable fact that the Player suddenly left RSCA and forced this club to look for an alternate player with comparable features, as Mr [A] definitely is. In light of the foregoing, the Panel is comfortably satisfied that RSCA acquired Mr [A] to replace the Player and that, therefore, the Belgian club suffered actual damages in replacement costs.

The Panel calculates the actual replacement costs for the Player were EUR 2,131,519.89, as follows: (i) EUR 500,000 for the transfer fee that RSCA paid to [...] to acquire [Mr A] on loan, plus (ii) EUR 1,270,000 for [Mr A]’s remuneration for his services during the 2016-2017 season (*i.e.* EUR 270,000 in salary, plus EUR 1,000,000 in signing bonus), plus (iii) EUR 22,500 in double holiday pay, plus (iv) EUR 18,000 as allowance for leasing a car, plus (v) EUR 156,232.89 in employer’s contribution, plus (vi) EUR 164,787 in performance bonuses paid to [Mr A].

10. Non-application of the average residual value of a player’s old and new contracts of employment

The Panel acknowledges that a player’s remuneration with his new employer can in principle provide some insight as to the value of that player’s services and aid in calculating compensation under Article 17, para. 1 RSTP (CAS 2009/A/1960 & 1961; CAS 2009/A/1880 & 1881).

In the present case, however, the Panel holds that the Player’s remuneration with

CA Belgrano does not provide any insight on the value of his services. As the Player admitted, he sacrificed a considerable amount of remuneration to move back to Argentina. Therefore, the Player's remuneration at CA Belgrano does not accurately reflect the value of the services of the Player and, thus, the amount that RSCA would have to spend on the open market to hire a player of analogous value. The Panel considers that in order for RSCA to replace the Player with one of analogous value, it would have had to pay the incoming player a European-level salary - as it did with Mr [A]. Therefore, the Panel shall not consider the Player's remuneration with CA Belgrano in assessing the compensation due to RSCA under Article 17, para. 1 RSTP.

11. Concept of specificity of sport

Article 17, para. 1 RSTP also lists the "*specificity of sport*" as a factor to take into account in determining the amount of compensation due for an unjustified, premature termination of an employment contract. In this regard, a CAS panel has previously explained: "*the concept of specificity of sport only serves the purpose of verifying the solution reached otherwise prior to assessing the final amount of compensation. In other words, the specificity of sport is subordinated, as a possible correcting factor, to the other factors. In particular, according to CAS jurisprudence, this criterion 'is not meant to award additional amounts where the facts and circumstances of the case have been taken already sufficiently into account when calculating a specific damage head. Furthermore, the element of the specificity of sport may not be misused to undermine the purpose of art. 17 para. 1, i.e. to determine the amount necessary to put the injured party in the position that the same party would have had if the contract was performed properly'* (CAS 2008/A/1519-1520, at para. 156)" (CAS 2009/A/1880 & 1881; CAS 2013/A/3411).

12. Correction of the amount of compensation to be awarded as a result of specificity of sport requirements

In the case at hand, RSCA suffered actual damages for the Player's unjustified, premature termination of his Employment Contract. However, the Panel is not convinced that the replacement costs incurred plus unamortized agency fees minus costs saved (amounting to a total of EUR 969,780.19) would fully compensate RSCA for the loss it suffered.

According to CAS jurisprudence, one of the factors to consider when deciding whether the specificity of sport requires a correction in the amount of compensation awarded is the behavior of the parties, in particular, of the side that failed to respect its contractual obligation (CAS 2008/A/1519-1520). The Panel observes that the Player and CA Belgrano acted in an ill-advised manner leading up to the Player's sudden and unjustified termination of the RSCA Employment Contract. Not only did the Player wait until the first day after the Protected Period to send the Termination Letter, but the reasons for his departure have been rather inconsistent. The Panel observes, in particular, that: (a) on 11 June 2016, CA Belgrano explained to RSCA that the Player's agent had informed it of the Player's wish to move back to Argentina for "*family and affective reasons*"; (b) only two days later, RSCA made clear that it was not interested in loaning the Player for free; on the same day, the Player's agent insisted with RSCA that the Player wished to part to CA Belgrano, (c) when no transfer agreement was reached between RSCA and CA Belgrano, the Player remained absent from training camp; his agent claimed on 17 June 2016 that the Player's absence was for "*health reasons*"; then on 28 June 2016 the Player's agent specified that the Player was

suffering from gastroenteritis but that he had not recovered from it; the Player's agent claimed to have a medical certificate excusing the Player's absence until 4 July 2016; however, he never sent this medical certificate to RSCA, and, in fact, did not reveal it until sometime during the DRC proceeding; instead of returning to RSCA on 4 July, the Player (i) on 1 July 2016 prematurely terminated his Employment Contract with RSCA without just cause, (ii) on 5 July 2016 signed a new employment agreement with CA Belgrano, and (iii) on 7 July 2016 declared at his first press conference in Argentina that he was completely fit and ready to play for CA Belgrano, (d) in the Termination Letter, the Player added two new reasons not mentioned before. The Player explained that he wished to terminate his Employment Contract not only because of the terrorist attacks, but also because of his wish to be closer to his ailing mother and of his diminishing role within RSCA, (e) during his first press conference on 7 July 2016, the Player declared that *"My only intention for several years now (...) was to return [to CA Belgrano]"*, without mentioning any of the reasons cited in the Termination Letter, (f) during the DRC proceeding, the Player referred to an alleged oral agreement between the RSCA and the Player's agent, under which RSCA supposedly agreed to facilitate the Player's departure following the conclusion of the 2015-2016 season, (g) on 7 February 2018, the Player declared, without expressing any safety concerns about Belgium, that if the situation presented itself, he would like to return to Brussels and play for RSCA, and that the principal reason for leaving in the first place was not the terrorist attacks but the sore relationship with some RSCA's executives. In the Panel's view, the above conduct of the Player denotes lack of consistency, transparency and correctness on his part,

tainting the justifications he advanced as excuses to do what he wished, disregarding his contractual commitments.

As for CA Belgrano, the Panel observes that the Argentinian club knew it was hiring a Player who had a contract until 30 June 2017 with RSCA, a club which CA Belgrano had contacted less than a month before to inquire about possibly acquiring the Player on loan and which had in turn requested a substantial transfer fee to trade him. Nevertheless, CA Belgrano went ahead and signed the Player without contacting again RSCA to probe the situation and try and reach an agreement. Moreover, there is reason to believe that CA Belgrano may have been long before in contact with the Player to discuss a potential move to Argentina. In fact, in his first press conference with CA Belgrano, the Player admitted that he had spoken to the head coach of CA Belgrano a month before.

In addition, neither the Player nor CA Belgrano did anything to attempt to mitigate RSCA's damages. All this must be juxtaposed to the fact that there is no evidence of RSCA acting in an ill-advised manner or breaching the Employment Contract.

The Panel recognizes that the exact damage caused by the above is hard to establish. Therefore, considering Articles 99, para. 3 and 42, para. 2 of the Swiss Code of Obligations ("CO"), under which a judging authority may estimate the value of damages at its discretion in light of the normal course of events and the measures taken by the damaged party to limit the damages, the Panel finds it is appropriate to set an additional indemnity equal to 25 percent of the amount of compensation initially calculated, *i.e.* 25 percent of EUR 969,780.19. This additional amount of EUR

242,445.04 is less than six months of the Player's remuneration under the Employment Contract, which is in line with what other CAS panels have awarded by way of the specificity of sport (CAS 2008/A/1519 & 1520; CAS 2010/A/2145, 2146 & 2147). The Panel considers that the 50 percent adjustment increase requested by RSCA would be excessive and a misuse of the specificity of sport's correcting factor, particularly because of the short time remaining in his contractual relationship with RSCA. The Panel notes that only one year remained on the Employment Contract out of the four-year term, meaning that (i) it was a short period of time with only two transfer windows before the Player became "free agent", making it quite difficult to obtain a substantial fee for the sale of the Player's rights, and (ii) when the Player terminated the contract on 1 July 2016, he was only six months away from being allowed to freely negotiate his next contract with a new club pursuant to Article 18, para. 3 RSTP.

In accordance with Article 17, para. 1 RSTP and the "positive interest" notion, the Panel concludes that RSCA is entitled to a total amount of EUR 1,212,225.23 as compensation for the Player's unjustified, premature termination of the Employment Contract. The Panel calculated this amount as follows: EUR 2,131,519.89 for replacement costs, plus EUR 262,500 in unamortized Player's agent fees, minus EUR 1,424,239.70 as costs saved by RSCA, plus EUR 242,445.04 based on specificity of sport.

Decision

The appeal filed by SA Royal Sporting Club Anderlecht is partially upheld whereas the appeal filed by Mr Matías Ezequiel Suárez and Club Atlético Belgrano de Córdoba is

dismissed. Mr Matías Ezequiel Suárez and Club Atlético Belgrano de Córdoba are ordered to pay SA Royal Sporting Club Anderlecht, jointly and severally, EUR 1,212,225.23, plus five percent interest *per annum* on this sum from 4 July 2016 until effective payment.

CAS 2018/A/5615

Jared Higgs v. Bahamas Football Association (BFA)

25 March 2019

Football; Doping (failure to submit to sample collection/doping control); Sample collection for anti-doping purposes; Ex post substitution of grounds for the conduct of tests; Duty and onus to substantiate; Threshold of sufficient substantiation

Panel

Prof. Cameron Myler (USA), President

Mr Mark Hovell (United Kingdom)

Prof. Ulrich Haas (Germany)

Facts

Mr Jared Higgs (the “Appellant” or “Player”) is a former member of the Bahamas Beach Soccer National Training Team.

The Bahamas Football Association (the “Respondent” or “BFA”) is the national football federation of the Bahamas. It governs all aspects of beach soccer in the Bahamas, including its anti-doping program.

From March 2016 to early January 2017, the Player worked out and trained with the Bahamas Beach Soccer National Training Squad prior to the 2017 CONCACAF Beach Soccer Championships in February 2017 and 2017 FIFA Beach Soccer World Cup in May 2017 (“2017 Beach Soccer Events”).

In December 2016, the Deputy General Secretary of CONCACAF, Ted Howard, forwarded Circular No. 372 (2017 CONCACAF Beach Soccer Championship – Medical and Doping Control) to the ‘General Secretaries of Participating Member

Associations’ including the General Secretary of the BFA, Frederick Lunn. Attached to Circular No. 372 were three documents: a Pre-Competition Medical Assessment (“PCMA”) Form; a Participating Member Association (“PMA”) Declaration of Agreement to the PCMA; and a Therapeutic Use Exemption (“TUE”) Application. CONCACAF Circular No. 372 stated, *inter alia*, that:

*“A. In order to protect players’ health as well as to prevent sudden cardiac death during matches at the Competition, each Participating Member Association shall endure and confirm to the Organizing Committee that its players underwent a pre-competition medical assessment (PCMA) prior to the start of the Competition. **The PCMA will include a full medical assessment as well as an echocardiogram and EKG to identify any cardiac abnormality.** The medical assessment must be carried out between 270 days and 35 days prior to the start of the Competition. The Organizing Committee will provide the PCMA form to all Participating Member Associations (emphasis added).*

(...)

J. Doping is the use of certain substances or methods capable of artificially enhancing the physical and/or mental performance of a player, with a view to improving athletic and/or mental performance. If there is medical need as defined by the player’s doctor, then a Therapeutic Use Exemption (TUE) application must be filed 21 days prior to competition for chronic conditions and as soon as possible for acute situations. The TUE approval system includes a designated administrative and functional committee that will review applications and certify the exemption as the committee defines”.

On 16 January 2017, all members of the national Beach Soccer team were allegedly informed that on the following day, doping testing would take place pursuant to the PCMA. On 17 January 2017, at 7 am, doping testing took place at the Bonaventure Medical Centre near to the offices of the BFA. The

Player was not in attendance for these tests. As such, he received a WhatsApp message from Jason McDowall, a Vice President of the BFA.

On 18 January 2017, the BFA provisionally suspended the Player.

It was agreed between the parties that the Player was not notified of the BFA Suspension Letter until sometime in June 2017. In between January and June 2017, the BFA claimed that it repeatedly attempted to contact the Player through calls and messages, but the Player ignored them. The Player did not reach out to the BFA either. It was agreed between the parties that during this period, the Player and the BFA had no communication whatsoever.

On 10 June 2017, the Player went to the BFA's Beach Sand Soccer facilities to play a game in the Bahamas Beach Soccer Super League, a BFA-sanctioned competition. When he arrived at the football pitch, the Player was informed by Mr McDowall about his provisional suspension, and stated that he was not permitted to play in the league. The Player asked to see evidence of his suspension in writing. He became upset, yelled at Mr McDowall, and ultimately was asked to leave the soccer pitch.

In or around 20 June 2017, the Player went to see Mr Lunn who tried to give him a copy of the BFA Suspension Letter, but Mr Lunn ended up reading the contents to the Player instead. Mr Lunn invited him to return to the office to discuss the suspension and other matters at 6:00 pm on 23 June 2017. On 23 June 2017, the Player arrived at the BFA office to discuss the contents of the BFA Suspension Letter. Mr Lunn and Mr McDowall were present, but so were Carl Lynch, James Thompson, Andre Moss, and Ivan James. The Player was informed that Messrs. Lynch, Thompson, Moss and James were a

disciplinary committee appointed by the BFA ("BFA Disciplinary Committee") to conduct a hearing with respect to the Player's alleged anti-doping violation, as well as his conduct on 10 June 2017. On that same day, a hearing was held. On 19 July 2017, the BFA Disciplinary Committee rendered a decision as follows ("BFA Disciplinary Committee Decision"):

"We refer to the [BFA]'s Disciplinary Committee hearing on Friday, the 23rd. June, 2017 concerning your automatic suspension from all Senior Men's Football Competition and National Teams Competition as reflected in a letter from the Association's General Secretary (...) dated the 18th. January, 2017, due to your failure to present yourself for the anti -doping test back in the month of January, 2017. We also considered the facts surrounding your use of abusive foul language directed at Mr. Jason McDowall (...).

Firstly, the members of the Disciplinary Committee provided you with the facts surrounding your failure to take the randomly selected anti-doping test in the month of January, 2017, which is a mandatory test required by (...) "FIFA" (...). You were a member of the pool of registered players selected to try out for the Bahamas's Beach Soccer Men's National Team for the upcoming FIFA Beach Soccer World Cup (...). Consequently, you were subject to an anti-doping test (...). During the hearing before the Disciplinary Committee, you admitted that you had notice of the anti-doping testing even though you said that it was "short notice". You said that you were unable to attend (...) due to family obligations but you never provided the [BFA] with this excuse until the said hearing. You also stated at the hearing that you became disinterested in the selection process but you never informed the [BFA] of this fact (...). In any event, since the month of January, 2017 until now, you have failed to present yourself for the anti-doping testing, which is required before the [BFA] can lift your suspension. Your suspension is not a ban from future participation in local soccer competition in the Bahamas but it can only be lifted once you have taken the anti-doping testing (...). We considered the hearing to be a fair one since you were given an opportunity to refute your failure to take the anti-doping

test (...). As a result, the members of the Disciplinary Committee will advise the [BFA] that your suspension will not be lifted until you have presented yourself for an anti-doping test (...).

Secondly, you were also given an opportunity to refute the allegation about your use of abusive language directed at Mr. Jason McDowall (...). You were made aware of the language used by you which was reported to the [BFA] and you denied using such language as reported by Mr. Wilson Da Costa, a FIFA Referee. According to the Referee's report, he alleged that you said, '[t]his is fucking shit, I did not receive any fucking letter'. 'This is shit'. 'You will see what the fuck will happen to you'. You denied that you used such language (...) but we reject your denial and accept the report of the Referee. As a result, the members of the Disciplinary Committee will impose a ban of 4 matches and you are to pay a fine of \$40.00. However, any future competition is subject to you completing the anti-doping test as required".

On 24 July 2017, the Player was notified of the BFA Disciplinary Committee Decision. On 14 August 2017, the Player filed a Notice of Appeal with the BFA Appeals Committee against the BFA Disciplinary Committee Decision. On 22 January 2018, the BFA Appeals Committee rendered a decision as follows (the "Appealed Decision"):

"The Appeals Committee has concluded its investigation and the decision have been made to impose a ban of four (4) years in compliance with WADA Anti-doping Code 2015 V1.10.2.1 and 10.2.1.2 and FIFA's Anti-Doping Regulations 5-3 and 8. The issue is a simple one. [The Player's] refusal to take a drug test is in direct non-compliance with FIFA and WADA rules and policies in Anti-doping of which the [BFA] is a signatory".

On 26 January 2018, the BFA sent a letter to the Player to notify him the Appealed Decision ("Appealed Decision Notification Letter").

On 19 February 2018, the Player was notified of the findings of the Appealed Decision. On

12 March 2018, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code"), the Player filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the BFA Disciplinary Committee Decision and the Appealed Decision. On 22 March 2018, in accordance with Article R51 of the CAS Code, the Player filed his Appeal Brief with the CAS Court Office.

On 26 April 2018, the BFA filed its Answer with the CAS Court Office.

Upon closing the hearing, the parties expressly stated that they had no objections in relation to their respective rights to be heard and that they had been treated equally in these arbitration proceedings.

Reasons

Considering the parties' submissions and the testimonies of the witnesses and experts at the hearing, the Panel observes that the main issues to be resolved are:

Appellant's conduct on 16 January 2017

- Did the Player's failure to report to the BFA offices on 16 January 2017 constitute an Anti-Doping Rule Violation?
- If not, did Higgs' conduct violate any other rules of the BFA?
- Were the sanctions imposed in the Appealed Decision appropriate?

Appellant's conduct on 10 June 2017

- Did the Player's conduct on 10 June 2017 at the Beach Soccer Stadium violate BFA rules?
- If so, were the sanctions imposed in the BFA Disciplinary Committee Decision and/or the Appealed Decision appropriate?

In general

- Is the Player entitled to damages?

1. Sample collection for anti-doping purposes

The parties were in agreement that the Player failed to report to the BFA offices on 17 January 2017. The Panel notes that the crux of this dispute is whether his failure to attend constituted an Anti-Doping Rule Violation (ADRV) under the FIFA Anti-Doping Regulations (ADR) and/or the Bahamas ADR. The Player insisted that he was not aware of the testing that would occur that day, while the BFA insisted that he was fully aware. The important issue here is whether the Player had been “*notified*”, as required for a “*refusal*” or a “*failure*” to submit to sample collection, but notification would not be an issue for “*evading*” Sample Collection.

However, before considering such matters as notification, the Panel needs first to determine if there was a “*Sample collection*” process that he was required to attend, as envisaged by the FIFA ADR and/or Bahamas ADR. A “*Sample*” is defined as “*any biological material collected for the purposes of Doping Control*”. “*Doping Control*” is the entire official process undertaken by a sport on its athletes. What is questionable in the case at hand is whether or not the BFA tried to collect a sample from the Appellant for “*anti-doping purposes*”. The Panel is not convinced that the sample collection foreseen on the 17 January 2017 was for anti-doping purposes. If the sample collection was not for anti-doping purposes, then the Appellant could not commit an ADRV by not submitting to doping control. The Panel bases its findings on the following findings:

The WADC, the FIFA ADR and the Bahamas ADR all refer to the aim of setting and enforcing “*in a global and harmonised manner*” anti-doping principles. These include standard, *i.e.* highly formalised processes for selecting athletes to be tested, notifying them, collecting any samples, transporting the same to WADA-accredited laboratories, analysing the samples, results management and hearings. The Panel notes that any anti-doping testing by the BFA must comply with the FIFA ADR, WADC and the International Standard for Testing and Investigations (ISTI).

These provisions of the FIFA ADR and ISTI were – to a very large extent – not respected in the case at hand. First, as emphasised repeatedly by the BFA, all the players (including allegedly the Player who disputed the fact) were given notice about the test by the BFA representatives the day before the testing occurred. However, pursuant to Article 40(5) of the FIFA ADR, the Out-of-Competition testing of individual players must be performed with no advance notice. This is consistent with Article 5.3 of the ISTI. Second, based on the evidence available, no DCO or chaperone were present on the day of sample collection. Rather, the players were sent to the Bonaventure Medical Centre where they “*peed in a cup*”. While a lady from the Centre was present, she looked away. It also appears that she was not a Doping Control Personnel. Where the Samples went from there was not clear. There was no splitting of the Samples into “A” and “B” bottles, no Doping Control Form, or the like, including to notify the players (including the Player) of the consequences for failing to comply with the FIFA ADR. Third, in relation to the sample processing, Article 46(1) of the FIFA ADR states that analysis of samples must be carried out by WADA-accredited laboratories or as

otherwise approved by WADA. However, the testing of the samples collected was conducted at the Bonaventure Medical Centre, which is not included on WADA's list of laboratories that are accredited to conduct human doping control sample analyses. Such lack of formalities clearly point into the direction that the sample collection on 17 January 2017 was not for anti-doping purposes, but for other reasons.

The Panel is backed in its finding by the fact that each member of the team needed to complete a PCMA in order to be eligible for the 2017 Beach Soccer Events. However, the Panel considered that the PCMA, on the face of it, did not require a mandatory anti-doping test. Circular 372 does refer to anti-doping, but appears to tackle only health issues. This is not contradicted by the reference to TUEs. In particular, the PCMA does not state that an anti-doping test must be passed by the individual participant. It only states that "*a full medical assessment*" must be completed by each player. This reinforces the Panel's impression that the sample collection conducted was more akin to a drug test for health and safety reasons.

The conclusion reached by the Panel is consistent with Mr McDowall's WhatsApp texts to the Player. Therein, Mr McDowall asked the Player why he was not at the BFA office for a "*medical*". Moreover, in the transcript of the hearing held by the BFA Disciplinary Committee, Mr Lunn admitted that Pre-Competition Testing "*could but doesn't have to*" include a drug test. The Panel notes the difference between an optional drug test which appears to have taken place, and the mandatory nature of anti-doping tests conducted under the FIFA ADR, WADC and ISTI.

Further evidence of the view held here can be found in the BFA Suspension Letter. Mr

Lunn on behalf of the BFA provisionally suspended the Player. This letter clearly describes the (failed) test by the Appellant as part of the "*Pre-Competition Testing*" and, consequently, not as a test for anti-doping purposes. The Panel further notes that the Player also identified that on the same date that BFA posted a notice on its website informing of the Player's 4-year ban (27 February 2018), it also posted a notice about the penalties imposed on 4 other players who had tested positive for THC. No consequence typical for an ADRV was imposed on those players. Instead, in accordance with Article 2 and the schedule of the BFA Code of Conduct, they were suspended for 4 weeks, fined USD 150 and, *inter alia*, required to undertake another drug test before their suspensions were lifted. By the time of these Appeal proceedings, the BFA stated that two of those players had been reinstated. The Panel considers that the BFA's conduct relating to these other players is inconsistent with the FIFA ADR and/or WADC. The Panel notes that a sample collection does not automatically fall under the FIFA ADR or WADC simply because it was conducted by a national association on national team players, nor does it fall under those regulations simply because the players had been warned beforehand that they could be subject to anti-doping tests at any time.

The Panel appreciates that the BFA took steps to educate its players on anti-doping and the consequences of failing a doping test, but that too does not, in and of itself, result in any sample collection by the BFA automatically falling under the FIFA ADR, the Bahamas ADR or WADC. In case of doubt, it must be assessed and interpreted from a reasonable person's perspective whether the sample collection was conducted for anti-doping or for other (permissible) medical purposes. When

doing so, the Panel takes into account that, absent any indication to the contrary, a sports organisation would opt for the alternative most in line with the applicable regulations. Regulations such as the FIFA ADR, WADC and ISTI were all drafted with a view to safeguarding “*the principles of respect for human rights, proportionality, and other applicable legal principles*”, so any tests conducted under its guise must abide by all its mandatory requirements (2014/A/3639):

“Doping is an offence which requires the application of strict rules. If a Player is to be sanctioned solely on the basis of the provable presence of a prohibited substance in his body, it is his or her fundamental right to know that the Respondent, as the Testing Authority, including the WADA-accredited laboratory (...), has strictly observed the mandatory safeguards. Strict application of the rules is the quid pro quo for the imposition of a regime of strict liability for doping offenses (...). 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”.

For all the reasons set out above, the Panel considered that sample collection conducted by the BFA was not intended to fall under the FIFA ADR, the WADC, the Bahamas ADR and the ISTI. Instead, BFA’s intention was to test its entire squad for educational and/or medical reasons in order to ensure that if any players failed the drug test, they could be sanctioned under the Code of Conduct, effectively reprimanded and given an opportunity to stop taking whatever drug (detectable by the local laboratory) they had been taking, then take the same test again at the Centre and if they passed, be allowed back on the team for the upcoming World Cup. All of those efforts were fine and understandable, but it is equally clear that to such processes and procedures, not the FIFA ADR, Bahamas ADR or the WADC, but – instead – the

Code of Conduct applied. It follows that the Player’s failure to participate in the testing cannot be qualified as an ADRV, since the sample collection was – clearly – not for anti-doping purposes.

2. *Ex post* substitution of grounds for the conduct of tests

The Panel additionally finds that the original purpose of the testing cannot be substituted with another purpose at a later point in time. Instead, it must be clear from the outset for the subject of the test, for what purpose the testing is being conducted and what rules shall apply to it.

3. Duty and onus to substantiate

It follows from the Panel’s conclusion above, that the Player should not have been sanctioned under the FIFA ADR or the WADC. As such, the Appealed Decision, as far as it relates to the Player’s suspension under said regulations, is set aside. Instead, the Panel finds that the Player – in principle – should have been disciplined under the Code of Conduct for not complying with the Pre-Competition Testing. The Panel finds that the Player was part of the wider national team training squad and, consequently, was submitted to the rules applicable to the team members. The Player did not show up for the test despite receiving a message by Mr McDowall. Whether this justifies the imposition of a disciplinary sanction akin to those players that failed to pass the drug test, may be questionable. There are – at least at first sight – good reasons to do so in the Panel’s view. However, this may be left unanswered, since according to the Panel even a proportionate sanction for not showing up to the Pre-Competition Testing under the Code of Conduct cannot be upheld in view of the specific circumstances

of this case, in particular considering the *ex post* substitution of the very purpose of the sample collection by the BFA. In addition, the BFA has failed – unlike with respect to other players – to offer the Player the opportunity to retake the test. This shall not go to the detriment of the Player.

The Player admitted that he lost his temper on 10 June 2017, however it was disputed between the parties whether profanity was used by the Player. The Panel took note of the various witness reports submitted and the submissions of the parties and on balance, was satisfied that the Player did use “*offensive, insulting or abusive language or gestures*”. The Panel notes that the Appealed Decision failed to address this sanction. However, as noted by the BFA, the Panel has the power to conduct a *de novo* review under Article R57 of the CAS Code, so is able to consider the appropriateness or proportionality of this sanction. Nevertheless, there is a consistent line of CAS jurisprudence which states that disciplinary sanctions can only be amended by CAS panels if they are “*evidently and grossly disproportionate*” (CAS 2016/A/4595). The Player was fined USD 40 and banned for 4 matches. The BFA’s “*Beach Soccer Infractions Fines 2017*” sets out the relevant range of fines and suspensions for general infractions. The relevant fine for “*using offensive, insulting or abusive language or gestures*” is USD 40, while the range of suspensions is two to six matches. In light of the aforementioned, the Panel does not consider a fine of USD 40 and a four-match suspension to be “*evidently and grossly disproportionate*”. Accordingly, the sanctions imposed on the Player in this regard in the BFA Disciplinary Committee Decision are upheld.

Turning its attention to the next question, the Panel focussed on the Player’s request

for relief for damages. The duty to substantiate and, in particular the prerequisites that a party must fulfil in order to dispose of its duty to sufficiently substantiate its submissions is intrinsically linked to the principle of party presentation and, thus, clearly is a procedural question (KuKo-ZPO/OBERHAMMER, 2nd ed. 2014, Art. 55 N. 12; BSK-IPRG/SCHNEIDER/SCHERRER, 3rd ed. 2013, Art. 184 N 8). Consequently, Article 182 of the PILA applies in respect of the applicable law. In qualifying the above question as a matter of procedure the Panel does not ignore that there are links also to the law applicable to the merits. This is particularly true in respect of what must be submitted by a party, since the latter will be dictated by the law applicable to the merits. Furthermore, the onus of substantiation, *i.e.*, which party has the onus of presenting and submitting the facts is linked to the law applicable to the merits, because the onus of presentation follows from the burden of proof. The latter is, however, a question governed by the law applicable to the merits. The burden of proof does not only allocate the risk among the parties of a given fact not being ascertained, but also allocates who bears the duty to submit the relevant facts before the tribunal (CAS 2011/A/2384 & 2386). It is, in principle, the obligation of the party that bears the burden of proof in relation to certain facts to also submit them to the tribunal in a sufficient manner (SFT 97 II 216, 218 E. 1). The party that has the burden of proof, thus, in principle has also the burden of presenting the relevant facts to the tribunal.

4. Threshold of sufficient substantiation

With respect to the procedural question when a party’s submission is deemed sufficiently substantiated, the Panel refers primarily to the procedural rules agreed

upon by the parties (Article 182 para 1 of the PILA). Since the CAS Code does not contain any provisions with respect to the threshold of substantiation, this Panel – in application of Article 182 para 2 of the PILA – takes guidance and inspiration in Swiss procedural law. Consequently, this Panel is inspired by the jurisprudence of the SFT, according to which submissions are – in principle – sufficiently substantiated, if they are detailed enough for the panel/tribunal to determine and assess the legal position claimed (SFT 4A_42/2011; 4A_68/2011, E. 8.1); and detailed enough for the counterparty to be able to defend itself (SFT 4A_501/2014, E. 3.1).

A party that fails to sufficiently substantiate its submissions according to the above prerequisites is treated as if it had failed to submit the relevant facts altogether. In this specific case the Appellant failed to sufficiently substantiate the facts in a manner for the Panel to assess the legal position claimed by the Appellant. Therefore, the Appellant must be treated as if it had not made any submissions at all on the quantum of the damage. Since the Player did not substantiate its request for damages and failed to provide the Panel with any evidence at all demonstrating a financial loss, the Player's request for damages must be rejected.

Decision

The appeal filed on 12 March 2018 by Jared Higgs against the decision rendered by the Bahamas Football Association Appeals Committee on 22 January 2018 is upheld. The decision rendered by the Bahamas Football Association Appeals Committee on 22 January 2018 is set aside, and replaced as follows: Jared Higgs shall serve (to the extent he has not already done so) a ban of four (4) matches and

pay a fine or USD 40 to the Bahamas Football Association.

CAS 2018/A/5746

Trabzonspor Sportif Yatirim ve Futbol Isletmeciligi A.S., Trabzonspor Sportif Yatirim Futbol Isletmeciligi A.S. & Trabzonspor Kulübü Dernegi v. Turkish Football Federation (TFF), Fenerbahçe Futbol A.S., Fenerbahçe Spor Kulübü & Fédération Internationale de Football Association (FIFA)

30 July 2019

Football; Match-fixing; Decision not to hold a public hearing; Application of the principle of good faith; Possible characterisation of a letter as a decision; Standing to sue/to appeal; Differentiation of directly affected from indirectly affected parties (status of a denunciator as party to the proceedings)

Panel

Prof. Luigi Fumagalli (Italy), President
Mr Philippe Sands QC (United Kingdom)
Mr Patrick Lafranchi (Switzerland)

Facts

In the season 2010/2011 of the Turkish Süper Lig, Fenerbahçe won the first place, while Trabzonspor was ranked second. The two teams had the same number of points, but Trabzonspor scored fewer goals in the matches against Fenerbahçe. This latter therefore became the Turkish champion and qualified for the group stage of the 2011/2012 UEFA Champions League.

On 3 July 2011, several football officials of different clubs were arrested in Turkey, because of their potential involvement in a wide-spread manipulation of the matches of the 2010/2011 Süper Lig.

On 24 August 2011, TFF decided to withdraw Fenerbahçe from the 2011/2012 UEFA Champions League and UEFA replaced it with Trabzonspor. On 20 December 2011, the TFF Executive Committee issued a report, holding that several acts of match-fixing involved officials of Fenerbahçe.

On 13 April 2012, Trabzonspor filed a request with TFF, demanding it to declare Trabzonspor as the Turkish champion for that season.

The TFF Disciplinary Committee issued a decision on 6 May 2012, sanctioning three officials of Fenerbahçe for having attempted match-fixing during the 2010/2011 Süper Lig season. The Disciplinary Committee did not impose any sanctions on Fenerbahçe, because the match-fixing activities were held not to be attributable to the club. On 4 June 2012, the TFF Arbitration Body dismissed Trabzonspor's appeal against the decision of 6 May 2012, holding that Trabzonspor did not have the right to file an appeal against a decision refusing to sanction another club.

On 2 July 2012, the 16th High Criminal Court of Istanbul found that a criminal organisation had been formed under the leadership of Mr Aziz Yıldırım, President of Fenerbahçe, and that match-fixing and incentive bonus activity by officials of this club had taken place with respect to 13 matches of the 2010/2011 Süper Lig. Several officials of Fenerbahçe, including its President and Vice-President, were convicted. This criminal judgment was to be later reversed by a decision issued on 28 October 2015. In this new judgment, the 13th High Criminal Court of Istanbul acquitted all Fenerbahçe's officials, chiefly based on the lack of evidence.

During the months of August and November 2012, as well as in October 2013, Trabzonspor repeatedly asked the TFF to annul the results

of the fixed matches and to award Trabzonspor the 2010/2011 Süper Lig title. Trabzonspor's requests and appeals were rejected by the TFF's competent bodies.

On 10 July 2013, the UEFA Appeals Body excluded Fenerbahçe from two consecutive UEFA club competitions for which it would qualify. This decision was confirmed by the Court of Arbitration for Sports ("CAS"), on 28 August 2013 (CAS 2013/A/3256).

On 31 January 2014, Trabzonspor wrote to UEFA, requesting it to intervene in the Turkish Süper Lig to sanction teams and individuals who had committed acts of match-fixing, to take measures to ensure that Trabzonspor's losses were compensated and that this club was awarded the 2010/2011 Süper Lig title. Following this request, on 30 May 2014, UEFA wrote to TFF and Fenerbahçe informing them that disciplinary proceedings had been instigated against them. A first decision was issued on 11 December 2014 by the UEFA CEDB, dismissing Trabzonspor's complaint. Upon Trabzonspor's appeal, the UEFA Appeals Body confirmed that decision, based on UEFA's lack of competence to intervene at a domestic level. The CAS also dismissed Trabzonspor's appeal and confirmed UEFA's lack of jurisdiction (CAS 2015/A/4343).

On 31 January and 9 May 2014, Trabzonspor wrote to FIFA, requesting it to intervene in the Turkish Süper Lig to sanction teams and individuals who had committed acts of match-fixing, to take measures to ensure that Trabzonspor's losses were compensated and that this club was awarded the 2010/2011 Süper Lig title. On 25 July 2014, FIFA replied to Trabzonspor, explaining that, given the disciplinary proceedings instigated by UEFA, the Chairman of the FIFA Disciplinary Committee had deemed that the intervention of the said committee was inopportune, at that

stage. Following the decision to be taken by UEFA, FIFA announced that the Chairman would reassess the matter.

On 3 July 2017, Trabzonspor filed a complaint with the FIFA Ethics Committee and the FIFA Disciplinary Committee ("the FIFA DC") against TFF and Fenerbahçe.

On 5 February 2018, the Secretary to the FIFA DC sent the following letter to Trabzonspor ("First FIFA DC Letter"): *"(...) we hereby inform you, on behalf of the Chairman of the FIFA Disciplinary Committee, that the FIFA Disciplinary Committee is not in a position to intervene in the present matter as it appears that the matter was prosecuted in compliance with the fundamental principles of law. Finally, we would like to point out that the foregoing is of a purely informative nature and, therefore, without prejudice to any decision whatsoever. (...)".*

On 14 February 2018, Trabzonspor replied, expressing its disagreement with the position contained in FIFA's letter, because in its view TFF had indeed violated the fundamental principles of law and, by failing to prosecute match-fixing, had committed a serious infringement within the terms of Art. 70 §2 of the FIFA Disciplinary Code. For these reasons, Trabzonspor maintained its complaint, asked FIFA to continue or open officially the proceedings and to issue a formal decision which could be appealed. On 20 March 2018, Trabzonspor wrote again to FIFA, reiterating the contents of its letter dated 14 February 2018.

The Secretary to the FIFA DC answered, on 17 April 2018, in the following terms ("Second FIFA DC Letter"): *"(...) on behalf of the Chairman of the FIFA Disciplinary Committee, we would like to draw your attention to the content of our letter dated 5 February 2018 and reiterate that the FIFA Disciplinary Committee is not in a position to intervene – and therefore render a decision – in the present matter. Finally, we would also like to remind*

you that the foregoing is of a purely informative nature and, therefore, without prejudice to any decision whatsoever. (...)”.

On 20 April 2018, Trabzonspor filed an appeal with the FIFA Appeal Committee (“FIFA AC”), stating: “(...) *We herewith inform you, within the deadline according to article 120 of the FIFA Disciplinary Code that we intend to appeal in this matter for denial of justice reasons. (...)*”.

On 27 April 2018, the Deputy Secretary to the FIFA AC sent the following letter to Trabzonspor (“FIFA AC Letter”): “(...) *we refer you to art. 118 of the FIFA Disciplinary Code (FDC), which is clear in establishing that ‘an appeal may be lodged with the Appeal Committee against a decision passed by the Disciplinary Committee (...)’.* In this same line, art. 119 FDC requires any appellant to have ‘been a party to the proceedings before the first instance (...)’. (...) *please be informed that as you do not appear to fulfil the requirements to lodge an appeal before the FIFA Appeal Committee in accordance with the FDC and the FIFA Appeal Committee is not in a position to intervene in a case in which the FIFA Disciplinary Committee has no jurisdiction, your request cannot be accepted. We would like to remind you that the foregoing is of a purely informative nature and we thank you for taking note of the above*”.

On 8 May 2018, Trabzonspor filed a Statement of Appeal with the CAS against the “*Letter of FIFA Disciplinary Committee dated 17 April 2018 / Letter of FIFA Appeal Committee dated 27 April 2018*”. The Appellants explained that their appeal was directed against the “*Refusal to Issue a Decision by the FIFA Disciplinary Committee*”, dated 17 April 2018, as well as against the “*FIFA Appeal Committee Decision*” of 27 April 2018.

On 23 August 2018, TFF applied for the bifurcation of the proceedings and requested that the Panel issue a “preliminary award” on the “specific preliminary issues” related to the CAS jurisdiction, to the admissibility of the

appeal and to the standing to appeal of Trabzonspor. On 24 August 2018, Fenerbahçe expressed its support with TFF’s request for bifurcation. Trabzonspor expressed its disagreement with the requests for bifurcation, in a letter dated 27 August 2018.

On 5 October 2018, the parties were informed that the Panel had decided to hold a hearing for discussing the preliminary objections raised by the Respondents (admissibility, jurisdiction and standing to appeal). On 23 October 2018, Trabzonspor requested a public hearing to be held. In a letter dated 30 October 2018, FIFA opposed the hearing to be public. In their letters dated 31 October 2018, TFF and Fenerbahçe expressed the same view. The parties were advised on 7 November 2018 by the CAS Court Office that the Panel had decided the hearing not to be public, in the absence of agreement between the parties and because the preliminary hearing would only concern points of law and highly technical questions. The CAS Court Office added that this decision would not prejudice the position of the Panel regarding the hearing on the merits, if any.

A hearing took place in Lausanne on 15 March 2019

Reasons

1. Decision not to hold a public hearing

In the Appellants’ view, the hearing scheduled on 15 March 2019 should have been public, as there was a public interest, this case being the “biggest match-fixing scandal in European football”. The Appellants based their position on Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) and the case-law of the European Court of Human Rights (“ECtHR”), more specifically the

Judgement of 2 October 2018 in the case Mutu and Pechstein v. Switzerland. They were of the opinion that no exceptional circumstances existed which could justify an exception to the principle of publicity of hearings. Although the legal issues might be technical, the facts were disputed and the legal questions complex.

The Panel noted at the outset that the applicable provision, given that the Statement of Appeal was filed before 1 January 2019, was the non-modified version of Art. R57 §2 of the Code, which provides: “(...) *At the hearing, the proceedings take place in camera, unless the parties agree otherwise*”. Having regard to this provision and in the absence of agreement between the parties, the Panel therefore held that it was entitled to decide that the hearing was not public.

However, given the recent Mutu and Pechstein Judgment, the Panel decided to also consider the question under the aspect of Art. 6 ECHR. It recalled that in said Judgment, the ECtHR had held that Art. 6 §1 ECHR applied to CAS proceedings, to the extent the choice to refer the case to CAS was “forced” or “not unequivocal”, and that the right to a public hearing was guaranteed by such provision, in order to allow a public control on the administration of justice. At the same time, however, the ECtHR had underlined that Art. 6 §1 ECHR allowed derogations from this principle, in case, inter alia, the guarantee of public order so required. The ECtHR had also underlined that procedures which regarded exclusively points of law or highly technical questions could satisfy the requirements of Art. 6 §1 ECHR even in the absence of a public hearing.

On the basis of this jurisprudence, the Panel held that in the present case, since the hearing of 15 March 2019 was of a

preliminary nature and only concerned points of law and highly technical questions, such as the jurisdiction of CAS, the admissibility of the appeal and the standing to appeal of Trabzonspor, it was entitled to decide not to hold a public hearing.

2. Application of the principle of good faith

In order to determine whether CAS had jurisdiction, the Panel first had to decide whether the appeal had been filed against a decision within the meaning of Art. R47 §1 of the Code and Art. 58 §1 of the FIFA Statutes, i.e. a final decision passed by FIFA against which the internal legal remedies have been exhausted. In analysing whether the different communications which had occurred in this case could be defined as decisions, the Panel recalled that it would be particularly attentive to the principle of good faith, according to which citizens are protected in the legitimate trust they have in the declarations or the behaviour of authorities which must not act in a contradictory or abusive manner. In the Panel’s view, although stemming from public law, this principle could be applied by analogy in arbitration.

3. Possible characterisation of a letter as a decision

After having endorsed the definition of “decision” and the characteristic features of a “decision” stated in several previous CAS precedents, the Panel found that the First and Second FIFA DC Letter as well as the FIFA AC Letter in which FIFA had declared itself incompetent to decide the claims put before it in the complaint filed by Trabzonspor on 3 July 2017 and had not indicated any other competent judicial body, constituted rulings capable of affecting the addressees’ legal position and their form as simple letters had no

relevance. Despite being formulated as letters, these documents contained a conclusion which was the result of a legal analysis. The sentence regarding the “*purely informative nature*” of the documents did not have any legal consequences; it was a purely rhetoric formula, which cannot in itself undo the legal effects contained in the said letters. The Panel therefore considered that the First and Second FIFA DC Letter, as well as the FIFA AC Letter, were decisions. Although the Panel deemed that CAS had no jurisdiction to rule on the First FIFA DC Letter as the latter had not been appealed by Trabzonspor which therefore had not exhausted the legal remedies offered by FIFA, it also found that the Second FIFA DC Letter and the FIFA AC Letter had been appealed in time and that CAS could therefore retain jurisdiction to rule upon the dispute.

4. Standing to sue/to appeal

According to the Respondents, Trabzonspor had no standing to appeal to the CAS, because it was to be considered as a third party, only indirectly touched, in the disciplinary proceedings which FIFA could have opened against TFF or Fenerbahçe. Trabzonspor had no legitimate interest to appeal to CAS, because it is not invoking a substantive right of its own or a legally protected interest. In addition, the Appellants had no legally protected interest in the disciplinary proceedings which FIFA could potentially impose on TFF and/or Fenerbahçe. Trabzonspor had a right to report incorrect conduct, but Art. 108 §2 of the FIFA Disciplinary Code did not confer third parties any right of party in the disciplinary proceedings. Trabzonspor was a competitor, which could only be indirectly touched, because there was no rule imposing that if the club winning the title of the Turkish Süper Lig is deprived of its title,

the runner-up club would be awarded the title and TFF should organise a new trophy ceremony.

In the Appellants’ view, on the other hand, they could not be considered as mere third parties, because they had participated in the previous instance and were entitled to invoke substantive rights of their own. Indeed, they were directly affected because they had finished the season with the same number of points as Fenerbahçe (while Fenerbahçe had more goals). If FIFA had sanctioned Fenerbahçe, Trabzonspor would have been the 2010/2011 Turkish Süper Lig champion. This constituted an interest worthy of protection and a direct effect on Trabzonspor’s rights. At the hearing, Trabzonspor added that Art. 9 §2 and Art. 26 §4 of the TFF Competition Regulation lead to the conclusion that it would have received the championship title instead of Fenerbahçe, if this latter would have been sanctioned by a points deduction.

In its determination, the Panel started with recalling that standing to sue (or to appeal) is attributed to a party which can validly invoke the rights which it puts forward, on the basis that it has a legally protectible and tangible interest at stake in litigation. This corresponds to the Swiss legal notions of “*légitimation active*” or “*qualité pour agir*”. Parties which have a direct, personal and actual interest are considered to have legal standing to appeal to the CAS. Such an interest can exist not only when a party is the addressee of a measure, but also when it is a directly affected third party. This is consistent with the general definition of standing that parties, who are sufficiently affected by a decision, and who have a tangible interest of a financial or sporting nature at stake, may bring a claim, even if they are not addressees of the measure being challenged. The Panel also underlined

that according to CAS jurisprudence, the notion of “directly affected” when applied to third parties who are not the addressees of a measure was to be interpreted in a restrictive manner.

5. Differentiation of directly affected from indirectly affected parties; status of a denunciator as party to the proceedings

The Panel then explained that there was a category of third party applicants who, in principle, had no standing, namely those deemed “*indirectly affected*” by a measure. Where the third party was affected because he was a competitor of the addressee of the measure/decision taken by the association, – unless otherwise provided by the association’s rules and regulations – the third party did not have a right of appeal. Although every decision affecting a competitor had *de facto* effects on the other competitors, these effects did not entitle the other competitors to claim an advantage in *legal* terms. Effects that ensued only from competition were only *indirect* consequences of the association’s decision/measure. If, however, the association disposed in its measure/decision not only of the rights of the addressee, but also of those of the third party, the latter was directly affected with the consequence that the third party then also had a right of appeal. The correct approach when dealing with standing was to deem mere competitors indirectly affected –and thus exclude them from standing – when the measure did not have tangible and immediate direct consequences for them beyond its generic influence on the competitive relationship as such.

In the case under scrutiny, as all parties agreed, including the Appellants, Trabzonspor would not have been a party to the disciplinary proceedings that FIFA would have started against TFF and/or

Fenerbahçe. The Panel had therefore to examine whether Trabzonspor could be considered as a directly affected third party. In the Panel’s view, it was not the case for several reasons.

First, there was no enforceable right for Trabzonspor to obtain under Art. 70 §2 of the FIFA Disciplinary Code that FIFA opened proceedings and took sanctions against TFF and Fenerbahçe and that the 2010/2011 Turkish Süper Lig title be awarded to Trabzonspor. By “reserving the right” of FIFA, the wording of the provision made it clear that FIFA had discretion to open disciplinary proceedings and adopt sanctions.

Second, although the text of Art. 108 §2 of the FIFA Disciplinary Code providing that “*Any person or body may report conduct that he or it considers incompatible with the regulations of FIFA to the judicial bodies*” was not clear in this regard, it was a general principle under Swiss law, confirmed by CAS jurisprudence, that a person or entity denouncing an irregular conduct did not become a party to the proceedings which could result from the denunciation. In addition, FIFA was not obliged, on the basis of Art. 108 §2 FDC, to start disciplinary proceedings. Although in its Complaint, Trabzonspor had not only brought a violation to the attention of FIFA judicial bodies, but made several requests for itself, the consequences touching Trabzonspor would only have been indirect, as already set out.

Third, in order to justify their standing to appeal, the Appellants should have proved that the FIFA proceedings once opened would have led to the imposition of sanctions on TFF and that such sanctions would have consisted in the awarding (or order to award) to Trabzonspor of the title of Turkish champion for 2010/2011, i.e.

that Trabzonspor would directly and automatically have replaced Fenerbahçe as Turkish champion, had this latter club been deprived of that title. However, it was of particular significance that the TFF regulations did not include a rule allowing the second-ranked team to be automatically declared champion instead of the first, if this latter is excluded. Even the provisions of the TFF Competition Regulation filed at the hearing did not clearly entail such a consequence. These provisions did not create a system where the Süper Lig championship title of the first team would be given to the second team if there was a point deduction. Art. 9 §2 of the TFF Competition Regulation provided that the team having the highest number of points was ranked first, the following team should be second, etc. As to Art. 26 §4 of the TFF Competition Regulation, it provided that if the result of a match was found to have been fixed after its result was registered, the registration was cancelled; this did not provide compensation or any other rights to clubs. The text of these two provisions did not demonstrate Trabzonspor's right to automatically replace Fenerbahçe. The last part of Art. 26 §4 even seemed to indicate the contrary, because it had the consequence that the competitors of the excluded club could not benefit from the cancellation of the registration of match results.

Therefore, the Panel held that Trabzonspor did not have standing to sue in front of the FIFA DC and, consequently, it did not have standing to appeal in front of the FIFA AC. In the Panel's view, the FIFA AC should have held that Trabzonspor did not have standing to appeal in front of it, as its legal interests were not directly affected. By way of consequence, if Trabzonspor did not have standing to appeal to the FIFA AC, it did not have standing to appeal to CAS

either. Indeed, the standing to act before FIFA and before CAS is the same. The relief which the CAS could award in this matter could not have had any direct effect for Trabzonspor. Just like FIFA, this Panel could not take decisions which were not foreseen in any legal provision. The lack of standing to appeal also made it impossible for the Panel to examine whether the Second FIFA DC Letter and the FIFA AC Letter were correct when holding that the proceedings conducted in Turkey had complied with the fundamental principles of law.

Decision

As a result, the Panel found that the appeal should be dismissed and the FIFA AC Letter upheld.

2018/A/5771

Al Wakra FC v. Gastón Maximiliano Sangoy & Fédération Internationale de Football Association (FIFA) & CAS 2018/A/5772

Gastón Maximiliano Sangoy v. Al Wakra FC

11 March 2019 (operative part of 3 December 2018)

Football; Breach of contract of employment; Applicable law; Serious reasons needed for a stay of the proceedings; No reason to stay the proceedings due to lis pendens; Just cause to terminate the contract; deregistration of the player; Disproportionality of the liquidated damage clause; Application of article 17 FIFA RSTP

Panel

Mr Hendrik Willem Kesler (the Netherlands),
President

Mr Mark Hovell (United Kingdom)

Mr Juan Pablo Arriagada (Chile)

Facts

Al Wakra Football Club Company (the “Club”) is a professional football club with its registered office in Wakra, Qatar. The Club is registered with the Qatar Football Association (the “QFA”), which in turn is affiliated to the Fédération Internationale de Football Association.

Mr Gastón Maximiliano Sangoy (the “Player”) is a professional football player of Argentinian nationality.

The Fédération Internationale de Football Association (“FIFA”) is an association under Swiss law and has its registered office in

Zurich, Switzerland. FIFA is the world governing body of international football.

On 11 July 2015, the Player and the Club entered into an employment contract (the “Employment Contract”) for a period of two sporting seasons, i.e. valid as from 1 July 2015 until 30 June 2017. The Employment Contract contains the following relevant terms:

“Article (9) Termination by the Club or the Player:

1. *If the Player wishes to terminate this Contract before its expiring term without just cause, by fifteen (15) days’ notice in writing, the player must return all financial amounts that he taken [sic] during the contract period, and he does not deserve any of the remaining amounts stipulated in the contract.*
2. *When the termination of the Contract is not due to a just cause or a mutual agreement between the Parties concerned, the [Club] or the Player shall be entitled to receive from the other party in breach of the Contract a compensation for a net amount of*
 - *To the [Club]: Al Wakra Football Club Company*
The total amount of the contract
 - *To the Player:*
Two months of salaries”
(...)”.

The “Schedule” (the “Annex”) attached to the Employment Contract contains the following relevant provisions regarding the Player’s salary and other benefits:

“A) First sports Season 2015/2016.

(§ 730.000) seven hundred thirty thousand dollar will be as follows:

- *Amount of (§ 71.000) seventy one thousand as Introduction contract Batch contract first [sic] at 31/08/2015.*

- Amount of (\$ 71.000) seventy one thousand as Introduction contract Batch contract Second [sic] at 31/12/2015.
- Amount of (\$ 49.000) forty nine thousand monthly salary form [sic] 01/07/2015 to 30/06/2016.

B) Second sports Season 2016/2017.

(\$ 730.000) seven hundred thirty thousand dollar will be as follows:

- Amount of (\$ 71.000) seventy one thousand as Introduction contract Batch contract first [sic] at 31/08/2016.
- Amount of (\$ 71.000) seventy one thousand as Introduction contract Batch contract Second [sic] at 31/12/2016.
- Amount of (\$ 49.000) forty nine thousand monthly salary form [sic] 01/07/2015 to. [sic]

(B) Other benefits in favour of the player:

[...]

3. (4) Business class tickets for the player and his family per season”.

The Player played in the first three matches of the Club in the Qatar Stars League on 12, 17 and 27 September 2015.

On 30 September 2015, the Club deregistered the Player from the QFA. As from this date, the Player did not play in any other match for the Club.

On 1 and 6 October 2015, the Player's sent an email to the Club (which the Club denies having received), asking to clarify the Player's actual situation informing whether he has been registered in the [QFA] by the Club and confirming whether he is eligible to play any official match of the Qatar Stars League for the Club's first team in the period ranging from 1 October 2015 to 31 December 2015.

The Club denies having received these emails.

On 7 October 2015, the Player sent the same email again, but now also to the Club's TMS Manager (which the Club denies having received).

On 8 October 2015, the same email was also forwarded to the QFA, requesting the QFA to forward it to the Club.

On 13 October 2015 (received on 17 October 2015 by courier), the Player sent another letter to the Club, also by courier and through the QFA, referring to the correspondence sent earlier and asking: (...) for the last time to clarify his actual situation within 72 hours from the date of this letter, (...) and in case [no answer was received, that he] **will consider the club's silence as an indubitable proof and recognition of the fact that he is not currently registered in the [QFA] by the Club and therefore not eligible to play any official match of the Qatar Stars League.**

Furthermore, the Player informed the club that due to the expiration of his visa, he and his family were legally authorized to stay in Qatar until 20 October 2015. He therefore asked the club to urgently address this issue and arrange my residence permit and my Family Residence Visa immediately.

On 15 October 2015, the Player asked the QFA to confirm whether he was registered.

On 19 October 2015 (received on 20 October 2015), the Player sent another letter to the Club, as well as through the QFA determining that in case no answer was received, he will consider the club's silence as an indubitable proof of the latter intention to terminate the employment relationship, that therefore, he will be obliged to terminate the contract with just cause.

On 20 October 2015, the Player and his family left Qatar and returned to Argentina.

Also on 20 October 2015, the Club sent an email to the Player, asking the Player's and his family's passport to finish and complete the procedure of residence for the player and his family.

Also on 20 October 2015, the Player's legal representative answered the Club's email of the same day, informing that the documents asked for (copies of Gaston Sangoy and his family's passports) have been already handed to the club; that the Club's silence regarding the Player's situation and the Club's failure to arrange Mr. Sangoy's residence permit and his family's Residence Visa will be considered as an indubitable proof of your intention to terminate the employment relationship between the Club and the Player.

Also on 20 October 2015, the Club answered the email of the Player's legal representative of the same day, mainly informing him that the Player *left Qatar today 20/10/2015 without the club knowledge and without any permission from the club administration in breach of FIFA and QFA regulation; so the club has right to take the legal procedure against the player.*

On 21 October 2015, the Player's legal representative answered the email of the Club, basically confirming the content of his previous emails.

On 31 March 2016, the Club filed a claim against the Player before the Civil Court of Qatar.

On 23 May 2016, the Player lodged a claim against the Club for a breach of the Employment Contract before the FIFA Dispute Resolution Chamber (the "FIFA DRC"), requesting payment of a total amount of USD 1,658,097, plus interest at a rate of 5% *p.a.* over the entire amount as from 13

November 2015. The Player also requested a transfer ban to be imposed on the Club.

The Club contested the competence of FIFA and "*highly in the alternative*" lodged a counterclaim against the Player, requesting payment of a total amount of USD 1,678,000, plus interest at a rate of 5% *p.a.* since 30 June 2016 or "*in the alternative*", an amount of USD 239,900, plus interest at a rate of 5% *p.a.* since 30 June 2016.

On 30 June 2017, the FIFA DRC rendered its decision (the "Appealed Decision") partially accepting the player's claim and condemning the club "*to pay to the [Player] **within 30 days** as from the date of notification of the present decision, outstanding remuneration in the amount of USD 49,000, plus 5% interest *p.a.* as from 1 November 2015 until the date of effective payment*".

On 29 May 2018, the Club filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the Appealed Decision, in accordance with Articles R47 and R48 of the 2017 edition of the CAS Code of Sports-related Arbitration (the "CAS Code").

On 4 June 2018, the Player filed a Statement of Appeal with CAS against the Appealed Decision, in accordance with Articles R47 and R48 CAS Code.

On 6 June 2018, the CAS Court Office acknowledged receipt of both appeals. The parties were invited to inform the CAS Court Office whether they agreed to consolidate the two proceedings (CAS 2018/A/5771 and CAS 2018/A/5772), in accordance with Article R52 CAS Code.

On 13 June 2018, the CAS Court Office informed the parties that the Deputy Division President had decided to consolidate the two arbitration proceedings and to submit such proceedings to a three-member Panel.

On 25 June 2018, the Club and the Player filed their Appeal Briefs, in accordance with Article R51 CAS Code. In its Appeal Brief, the Club, *inter alia*, argued that *“the CAS shall firstly suspend this procedure, considering that the same matter between the same parties is opened before Qatari Court, whose decision will be issued in due course and will be enforceable in Switzerland”*.

On 14 August 2018, following a number of extensions mutually agreed upon by the parties, the Player, the Club and FIFA filed their Answers to the respective Appeals, in accordance with Article R55 CAS Code.

On 28 August 2018, the CAS Court Office informed the parties that the Panel had decided to hold a hearing. The parties were also informed that the Panel, in light of a request to this effect from the Club, had decided not to suspend the proceedings and that the reasons for this decision would be set out in the final award. The parties were informed that such decision was without prejudice to the Panel’s decision on *“lis pendens”* or the competence of the Panel to deal with the merits of the Appealed Decision.

On 6, 7 and 13 September 2018 respectively, FIFA, the Club and the Player returned duly signed copies of the Order of Procedure to the CAS Court Office.

On 30 October 2018, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, all three parties confirmed not to have any objection as to the constitution and composition of the arbitral tribunal.

Before the hearing was concluded, all the parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their right to be heard had been respected.

Reasons

1. Applicable law

By submitting their dispute to CAS, even if the Club submits that the competence of CAS is limited to examining whether the FIFA DRC was competent, the parties have implicitly and indirectly chosen for the application of the conflict-of-law rule in Article R58 CAS Code, leading to the primary application of the regulations of FIFA.

In the matter at hand, the parties have, besides the above-mentioned implicit and indirect choice of law, however also made an explicit choice of law in Article 12 of the Employment Contract for the application of the law of the State of Qatar.

In accordance with the Haas-doctrine, Article R58 of the CAS Code serves to restrict the autonomy of the parties, since even where a choice of law has been made, the ‘applicable regulations’ are primarily applied, irrespective of the will of the parties. Hence any choice of law made by the parties does not prevail over Art. R58 of the CAS Code, but is to be considered only within the framework of Art. R58 of the CAS Code and consequently affects only the subsidiarily applicable law (HAAS, Applicable law in football-related disputes – The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law –, Bulletin TAS / CAS Bulletin, 2015/2, p. 11-12). Article 57(2) FIFA Statutes provides that Swiss law is applicable subsidiarily, should the need arise to fill a possible gap in the various regulations of FIFA. As to the relation between the parties’ explicit choice of law in the employment contract and the reference in Article 57(2) FIFA

Statutes to the subsidiary application of Swiss law, the Haas-doctrine clarifies that Article 57 (2) FIFA Statutes must be complied with by the panel. Where Article 57(2) FIFA Statutes “additionally” refers to Swiss law, such a reference only serves the purpose of making the RSTP more specific. In no way is the reference to Swiss law intended to mean that in the event of a conflict between the RSTP and Swiss law, priority must be given to the latter. Consequently the purpose of the reference to Swiss law in Article 57(2) FIFA Statutes is to ensure the uniform interpretation of the standards of the industry. Under Article 57(2) FIFA Statutes, however, issues that are not governed by the RSTP should not be subject to Swiss law. Accordingly, the various regulations of FIFA are to be applied primarily, in particular the FIFA RSTP, and, subsidiarily, Swiss law should the need arise to fill a possible gap in the various regulations of FIFA. The law chosen by the parties could theoretically be applied on a subsidiary basis, but only insofar as it would concern issues that are not regulated in the FIFA RSTP and if properly submitted.

2. Serious reasons needed for a stay of the proceedings

The Panel observes that the Club requests that the present appeal arbitration proceedings be suspended because it initiated proceedings against the Player before Qatari ordinary courts before the Player lodged a claim against the Club with the FIFA DRC, whereas the Player and FIFA submit that the proceedings should not be suspended.

Article 186 PILA determines as follows:

“1. The arbitral tribunal shall decide on its own jurisdiction.

1bis It shall decide on its jurisdiction without regard to an action having the same subject matter already pending between the same parties before a state court or another arbitral tribunal, unless serious reasons require to stay the proceedings.

2. Any objection to its jurisdiction must be raised prior to any defense on the merits.

3. The arbitral tribunal shall, in general, decide on its jurisdiction by a preliminary decision”.

The Panel finds that no suspension of the present appeal arbitration proceedings is to be pronounced based on Article 186 PILA.

Indeed, according to Article 186(1bis) PILA, an arbitration should only be stayed in case serious reasons require such a stay.

The legal doctrine is uniform in finding that an international arbitral tribunal having its seat in Switzerland is not obliged to stay the proceedings if an identical legal action has been initiated before a foreign state court first (BERGER, Article 186 PILS, in: ARROYO (Ed.), *Arbitration in Switzerland*, 1st Edition, p. 149-151)

The mere fact that an international arbitral tribunal with its seat in Switzerland is in principle not obliged to stay the proceedings, does not take away the fact that it should stay the proceedings in case serious reasons require it to do so.

In this respect, according to legal doctrine, the mere risk of contradictory decisions is not a serious reason (MAVROMATI/REEB, *The Code of the Court of Arbitration for Sport*, 2015, p. 491).

Legal doctrine also addresses what may be considered “serious reasons” to stay arbitral proceedings: “the requirement of “serious

reasons” stated in Art. 186(1bis) PILA should be applied in the same way as in any other situation where the arbitral tribunal has to decide whether a stay of its proceedings may be justified. These circumstances have been described by the Swiss Federal Supreme Court as if the arbitral tribunal “considers it appropriate in view of the interest of the parties”, bearing in mind that “in case of doubt, the principle of the swift conduct of the proceedings should prevail”. In view of these principles, the author considers that a stay of the arbitration based on Art. 186(1bis) PILS might be justified, for example, if it appears that the foreign proceedings were primarily initiated to “torpedo” the arbitration, or if the arbitration was only initiated when the proceedings in the foreign state court had already reached an advanced stage. The arbitral tribunal may also be willing to examine whether the decision of the foreign court is likely to be recognized and enforced in Switzerland”. (BERGER, Article 186 PILS, in: ARROYO (Ed.), Arbitration in Switzerland, 1st Edition, p. 149-150)

Having considered the legal doctrine set out above, and applying this legal framework to the matter at hand, the Panel finds that no “serious reasons” have been advanced by the Club that would require or legitimise a stay of the present arbitral proceedings.

3. No reason to stay the proceedings due to *lis pendens*

Insofar the Club submits that the Appealed Decision should be annulled because the FIFA DRC mistakenly did not stay the proceedings because of *lis pendens* on the basis of Article 9 PILA, the Panel finds that this argument must be dismissed as well.

There is insufficient proof that the Qatari proceedings will be concluded soon. In any event, the Panel finds that CAS is better equipped to render a decision on

this issue than the Qatari court. The main reason for this is that the “private enforcement mechanism” of FIFA, by means of which sanctions can be imposed on (in)direct members of FIFA that do not comply with final and binding decisions of the FIFA DRC and CAS awards rendered on appeal, is most likely more efficient than the possible enforcement of a Qatari court decision in (presumably) Argentina (i.e. the Player’s current country of residence) through domestic courts in Argentina.

Furthermore, CAS has claims of both the Club and the Player before it, whereas the Qatari court only has a claim of the Club before it. If the present proceedings would be stayed, this may have severe consequences for the Player.

Finally, since the Club argues that the Player breached the Employment Contract and that it is therefore entitled to be compensated for its damages by the Player, the Club could have invoked the joint liability of any new club of the Player on the basis of Article 17(2) FIFA RSTP. In the proceedings before the FIFA DRC, the Club could have requested the FIFA DRC to declare the Player’s new club jointly liable, which would objectively have increased the Club’s chances of obtaining such compensation because it would have two debtors that it could pursue, whereas such possibility is not available before domestic courts with the consequence that it could only attempt to enforce such decision against the Player alone.

4. Player’s just cause to terminate the Employment Contract: deregistration of the player

Article 14 FIFA RSTP determines as follows:

“A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause”.

Given that the Player terminated the Employment Contract, the burden of proof in establishing that such premature termination was justified lies with the Player.

The Panel observes that the Player basically invoked two separate arguments in justifying the unilateral termination of the Employment Contract: i) the deregistration of the Player; and ii) the Club’s failure to extend the Player’s visa, as well as the visa of his family members.

It remained undisputed between the parties that the Club deregistered the Player on 30 September 2015. The parties however have different views as to the nature of such deregistration. Whereas the Club submits that the deregistration was mutually agreed upon between the Club and the Player and that it was only of temporary nature, the Player maintains that he never consented to be deregistered and that it was not made clear to him whether the deregistration was of temporary or permanent nature.

Considering the circumstances of the case and the evidence – notably the exchange of emails and other correspondence between the parties-, insofar the Club submits that the Player was not permitted to leave the country and that such action resulted in a breach of the Player’s duties under the Employment Contract, the Panel finds that such argument must be dismissed. The Panel notes that it is established CAS jurisprudence that a club

is responsible to provide a player with the required extensions of residence and work permits (see *e.g.* CAS 2014/A/3706, para. 95 of the abstract published on the CAS website) although players have the duty to fully cooperate in the efforts aimed at obtaining the visa or the work permit (DE WEGER, *The Jurisprudence of the FIFA Dispute Resolution Chamber*, 2nd Edition, 2016, p. 125-126).

The Panel observes that the Club’s allegation that the Player was only temporarily deregistered was – even if this were true – at least not communicated to the Player. The Panel finds that the Club’s lack of communication in this respect, legitimately resulted in a lack of confidence of the Player in the Club.

Among a player’s fundamental rights under an employment contract, is not only his right to a timely payment of his remuneration, but also his right to be given the possibility to compete with his fellow team mates in the team’s official matches. By refusing to register or by de-registering a player, a club is effectively barring, in an absolute manner, the potential access of a player to competition and, as such, violating one of his fundamental rights as a football player. Not only the deregistration in itself already justifies a premature termination, but also the club’s silence after the player’s legitimate enquiries in this regard aggravate the situation to such an extent that the player had just cause to terminate the Employment Contract.

Furthermore, the club’s failure to ensure that the player had a valid residence permit to perform his duties under the Employment Contract reinforces the fact that it could no longer be reasonably expected from the player to continue the employment relationship.

Consequently, the Panel finds that the Player had just cause to terminate the Employment Contract on 13 November 2015.

5. Disproportionality of the liquidated damage clause

Although it was the Player who terminated the Employment Contract, the Club was at the origin of the termination by breaching its contractual obligations towards the Player and is thus liable to pay compensation for the damages incurred by the Player as a consequence of the early termination. This approach has also been applied in CAS jurisprudence (*e.g.* in CAS 2012/A/3033, para. 72 of the abstract published on the CAS website). Following the CAS jurisprudence on this issue, this practice is also constantly applied by the FIFA DRC.

By means of Article 9 Employment Contract, the parties contractually deviated from the default application of Article 17(1) FIFA RSTP.

As determined in CAS jurisprudence before, a contractually agreed liquidated damages clause does not necessarily have to be reciprocal in order to be valid. The validity is dependent on certain criteria. The appropriate test should be whether there has been any excessive commitment from any of the contractual parties in respect of the conclusion of the applicable clause. There is an excessive commitment from the player and a clause excessively favourable towards the club if in case of breach of the club, the player would only be entitled to two months of salary, whereas in case of breach by the player, the club would be entitled to the “*total amount of the contract*”. Besides, it is

particularly important that such liquidated damages clause puts the player entirely at the mercy of the club, because in practice it entitles the club to terminate the Employment Contract at any moment in time without any valid reasons having to be invoked for the relatively low amount of two monthly salaries. Such practice cannot be condoned, because the relevant clause is practically in violation of what is determined in Article 14 FIFA RSTP and the concept of contractual stability, as it permits a termination of contract even without just cause for a low amount of compensation.

6. Application of article 17 FIFA RSTP

In respect of the calculation of compensation in accordance with Article 17(1) FIFA RSTP and the application of the principle of “positive interest”, the Panel follows the framework as set out by a previous CAS panel (CAS 2008/A/1519-1520, at. para. 85 et seq.).

The purpose of Article 17(1) FIFA RSTP is basically nothing else than to reinforce contractual stability, i.e. to strengthen the principle of *pacta sunt servanda* in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches committed by a club or by a player. In respect of the calculation of compensation in accordance with Article 17(1) FIFA RSTP and the application of the principle of “positive interest”, the panel 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. The principle of positive interest (or “expectation interest”) aims at determining an amount which shall basically put the injured party in the

position that the same party would have had if the contract was performed properly, without such contractual violation to occur. The panel will proceed to assess the player's objective damages - the remaining value of the Employment Contract at the moment of termination by the Player was USD 1,193,000 gross - before applying its discretion in adjusting this total amount of objective damages to an appropriate amount, if deemed necessary. In this regard, the amounts earned by the player under a contract of employment with a new club mitigate his damages and are to be deducted from the damages incurred as a result of the premature termination of the employment contract i.e. from the amount the player would have had if the contract was performed properly – in this respect, the amount of EUR 2,728 (EUR 682 * 4) is to be deducted from the amount of compensation i.e. USD 1,193,000. Moreover, the fact that the player has mutually terminate his employment contract with a third club cannot come at the expenses of his former club and the entire value of the player's employment contract with the third club is to be deducted from the compensation to be paid to the player by the former club i.e. the entire value of the Player's employment contract with a third club in the amount of USD 230,000 is to be deducted from the compensation to be paid to the Player by the Club. As a result, the Player is entitled to be compensated for damages incurred in the amount of USD 959,830 gross (USD 1,193,000 -/- USD 3,170 -/- USD 230,000).

An additional amount of compensation under the “specificity of sport” should be justified only where the conduct of the club was severe (see CAS 2007/A/1358) which is not established in the case at hand.

Decision

The appeal filed on 29 May 2018 by Al Wakra Football Club Company against the decision issued on 30 June 2017 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is partially upheld.

The appeal filed on 4 June 2018 by Mr Gastón Maximiliano Sangoy against the decision issued on 30 June 2017 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is partially upheld.

The decision issued on 30 June 2017 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is confirmed, save for para. 4, which shall read as follows:

*Al Wakra Football Club Company has to pay to Mr Gastón Maximiliano Sangoy, **within 30 days** as from the date of notification of the present decision, compensation for breach of contract in the amount of USD 959,830 (nine hundred fifty nine thousand eight hundred thirty United States Dollars), plus 5% interest per annum as from 14 November 2015.*

*Al Wakra Football Club Company shall reimburse Mr Gastón Maximiliano Sangoy, **within 30 days** as from the date of notification of the present decision, with the amount of USD 545 for the costs incurred for the change of the flight tickets from Doha to Buenos Aires.*

CAS 2018/A/5853

Fédération Internationale de Football Association (FIFA) v. Tribunal Nacional Disciplinario Antidopaje (TNDA) & Damián Marcelo Musto

2 July 2019

Football; Dopage (hydrochlorothiazide & furosemide); Material scope of the FIFA Statutes' arbitration clause related to doping-related decisions; FIFA's right to appeal doping-related decisions directly to the CAS in the context of national-level players; Impact of the national anti-doping law on CAS jurisdiction; Discretion not to issue a preliminary award on jurisdiction; No fundamental breaches to the player's right of defence demanding that FIFA's appeal be dismissed; No breaches of the WADA Standard for Testing and Investigations (ISTI); Determination of the applicable period of ineligibility in the context of a negligent ADRV; Commencement of the period of ineligibility

Panel

Prof. Ulrich Haas (Germany), President

Prof. Massimo Coccia (Italy)

Mr Carlos Del Campo Colás (Spain)

Facts

The Fédération Internationale de Football Association (hereinafter "FIFA" or the "Appellant") is the world governing body of football, headquartered in Zurich, Switzerland.

The Tribunal Nacional Disciplinario Antidopaje (hereinafter "TNDA" or "First Respondent") is the adjudicating body of first instance for anti-doping rule violations (hereinafter "ADRV") in Argentina with its own legal identity.

Mr Damián Marcelo Musto (hereinafter the "Player" or "Second Respondent") is an Argentinean professional football player who currently plays for the Spanish football club SD Huesca in the Spanish first division.

On 20 June 2017, the Player submitted to an in-competition doping control organized by the Argentinian National Anti-Doping Organization (hereinafter the "NADO").

The analysis of the A-sample in the Madrid laboratory revealed the presence of two prohibited substances, namely "Hydrochlorothiazide" and "Furosemide". The analysis of the B-sample confirmed the result of the A-sample analysis. "Hydrochlorothiazide" and "Furosemide" are both listed in the WADA's 2017 Prohibited List under class S5, "Diuretics and Masking Agents". The substances are prohibited at all times (i.e. in- and out-of-competition).

In January 2018, the Player was notified by the NADO of the Adverse Analytical Finding (hereinafter the "AAF").

Based on the AAF, formal proceedings were initiated against the Player before the TNDA.

On 19 June 2018, the TNDA issued the Decision whereby a suspension (disqualification) from playing in competitions was ordered for a period of 7 (seven) months for the Player.

On 7 August 2018, FIFA filed its appeal before the Court of Arbitration for Sport (hereinafter the "CAS") against the Decision and submitted its Statement of Appeal according to Article R48 of the Code of Sports-related Arbitration (hereinafter the "Code"). The appeal is directed against the TNDA and the Player as Respondents.

On 24 August 2018, the First Respondent advised the CAS Court Office, that it will not take part in this procedure and that it will ratify any award issued by the CAS in this matter.

On 7 September 2018, the Appellant filed its Appeal Brief.

On 5 November 2018, the Second Respondent filed its Answer, raising an objection to the jurisdiction of the CAS and requesting that this issue be decided as a threshold matter.

The First Respondent failed to file its Answer.

On 5 April 2019, the Second Respondent returned a signed copy of the OoP including his objections.

At the closing of the hearing, the Parties expressly stated that they did not have any objections with regard to the procedure. The Parties further confirmed that they were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel and that their right to be heard had been respected.

Reasons

1. Material scope of the FIFA Statutes' arbitration clause related to doping-related decisions

The Appellant and the Second Respondent are in dispute whether or not CAS has jurisdiction to hear this case. The Second Respondent originally submitted that the FIFA regulations (including the FIFA ADR) were not applicable and that only the Argentinian Law on the *Régimen jurídico para la Prevención y el Control del Dopaje en el deporte* of 2013 (hereinafter referred to as "Law 26.912"), including its subsequent amendments, applied. In the hearing, the Second Respondent explained that the

Player – holding a football license from the AFA at the relevant time – was also submitted to the FIFA regulations, but that the provisions in the Law 26.912 would prevail over the FIFA regulations, since the Decision was issued by the TNDA under the auspices of the Law 26.912. According thereto, thus, the CAS would lack jurisdiction since FIFA failed to exhaust the internal remedies by not appealing to the *Tribunal Arbitral Antidopaje* ("the Appeal Tribunal") before appealing to the CAS.

It is undisputed between the Parties that the Player held a license from AFA at the relevant time. It is equally undisputed between the Parties that by holding such a license the Player has submitted – *inter alia* – to the FIFA Regulations. Consequently, the Player by virtue of holding a license has submitted to an arbitration clause by reference – valid under Swiss law - and is bound by FIFA arbitration clause included in Article 58 para. 5 FIFA Statutes related to appeals by FIFA against doping-related decisions (see CAS 2007/A/1370-1376, upheld by the Swiss Federal Tribunal in its judgment of 9 February 2009, 4A_400/2008). The Player does not dispute the formal validity of his submission to the FIFA Regulations (and the arbitration clause contained therein). Instead, the Player only submits that FIFA has failed to exhaust the internal remedies before filing its appeal to the CAS.

The Decision under appeal here was adopted by the TNDA, that is a distinct legal entity that is neither a confederation, nor a member of FIFA or a league as provided by Article 58 para. 5 FIFA Statutes. Nevertheless, the Panel holds that the doping-related decision in question here (the Decision) is covered by the material scope of the arbitration clause, since the list of decisions referred to in Article 58 para. 5

of the FIFA Statutes is not exhaustive (“in particular”) and the TNDA is part of an Anti-Doping Organisation to whom the interested national federation (AFA) delegated its disciplinary responsibilities and powers in doping matters. Indeed, the FIFA ADR expressly refer to decisions of Anti-Doping Organizations being appealable to the CAS (cf. e.g. Articles 80 para. 3, 81 FIFA ADR).

Consequently, the Panel is persuaded that there is no room to argue that the Decision is not covered by the arbitration clause contained in the FIFA Statutes *ratione materiae*.

2. FIFA’s right to appeal doping-related decisions directly to the CAS in the context of national-level players

The Parties are in dispute whether or not FIFA has exhausted the available internal means of recourse under the applicable provisions.

Article R47 of the CAS Code provides that an Appellant can only rely on the arbitration clause in favour of the CAS, if it has exhausted the legal remedies available to it prior to the appeal, in accordance with the applicable provisions. The FIFA ADR, in principle, differentiate in relation to the internal means of recourses between national-level players and international-level players. A decision may be appealed to a national-level appeal body before the appeal to CAS in cases involving national-level players whereas a final decision may be appealed exclusively to CAS in cases involving international-level players (article 75 para 2 and 3 of the FIFA ADR). However, article 81 of the FIFA ADR provides – in special circumstances – that FIFA has a right to appeal doping-related decisions in the context of national-level

players directly to the CAS, i.e. where no other party with a right to appeal has challenged the decision (before the national-level appeal body); therefore, the decision became legally “final” within the National Anti-Doping Organization’s (NADO’s) process.

It is undisputed between the Parties that no other party with a right to appeal has challenged the Decision (before the national-level appeal body, i.e. the Appeal Tribunal); therefore, the Decision became legally “final” within the NADO’s process. Consequently, by virtue of Article 81 FIFA ADR, FIFA may – even if the Player is qualified as a national-level player – appeal the Decision to the CAS without having to exhaust the other remedies within the Anti-Doping Organization’s process.

3. Impact of the national anti-doping law on CAS jurisdiction

The Panel notes that in the case at hand the Player is submitted to two different sets of rules, i.e. the FIFA ADR to which he submitted by entering into a license agreement with the AFA and the Law 26.912 being the statutory provisions governing the activities of the Argentinian NADO. Both sets of rules are not identical. The mere fact, however, that both sets of rules to which the player is submitted are not identical has no impact on the CAS jurisdiction. On the contrary, it suffices that the arbitration agreement is found in either one of the applicable sets of rules in order to establish the jurisdiction of the CAS. This is all the more true considering that the FIFA ADR make it clear that they want to be applicable to all players irrespective of any concurrent set of rules.

4. Discretion not to issue a preliminary award on jurisdiction

The Second Respondent requested the Panel to issue a preliminary award on jurisdiction.

The Panel notes that, according to Article R55 para. 5 of the CAS Code, it is at the discretion of the panel (“*may rule*”) whether to render a preliminary decision on its jurisdiction or to rule on its jurisdiction in the final award. When applying such discretion the panel – in principle – also takes account of the reasoning submitted by the party requesting a preliminary decision, in particular why a preliminary decision – according to the requesting party’s opinion – is necessary to safeguard its interests and to prevent it from possible harm or why a decision on jurisdiction, for some other reasons, is urgent or, otherwise, how and why the requesting party should legitimately benefit from a preliminary decision. Absent any compelling reason and urgent necessity for a preliminary decision on jurisdiction, a preliminary award on jurisdiction should not be rendered.

5. No fundamental breaches to the player’s right of defence demanding that FIFA’s appeal be dismissed

The Player submits that the delay in notification of the AAF and the denial of the TNDA to provide him with the Laboratory Documentation Package (“LDP”) deprived him of his right to a full and proper defense. The delay in notification placed the Player in a “difficult situation” to reconstruct the facts and to collect relevant evidence. By withholding the LDP before the TNDA, the Player claims that he was deprived of an invaluable source of evidence and information. This affected “*the whole case from the beginning in an irreparable manner*”.

In principle, breaches of a party’s procedural rights can be cured at a later stage in the proceeding, e.g. in a “second instance”. This is particular true, where a *de novo* hearing is provided on appeal as is the case before the CAS (Article R57 para. 1 of the Code). In exceptional circumstances it may be true that a *de novo* hearing may not fully cure the breaches that occurred. In such cases a remedy is warranted. The applicable rules – at least for some violations – provide for some kind of remedy. Thus – e.g. – the FIFA ADR regulate in Article 63 lit. e the player’s right to a timely decision. However, the fact that the player was only provided with the LDP at a late stage in the proceeding did not affect the case in an irreparable manner. The LDP is – for sure – an important source of information. The documents help to understand whether or not there have been deviations from the applicable International Standards. But the latter is a legal analysis that can be performed also at a later stage, i.e. before the appellate instance. Thus, the fact that the player was only provided with the LDP before CAS has not impaired the player’s right to a fair defence. With respect to the individual circumstances of the case, the delay made it more difficult for the player to reconstruct the facts of the case and to collect relevant evidence. However, these difficulties are not of a sufficient level to reject the appeal filed by FIFA from the outset. Instead, the difficulties encountered by the player must be addressed in a proportionate and appropriate manner where warranted e.g. where addressing the commencement of the period of ineligibility.

6. No breaches of the WADA Standard for Testing and Investigations (ISTI)

The Second Respondent submits that several rules of the WADA ISTI were

breached, in particular Articles 6.3.5, 8.3, 8.3.2, 8.3.3, 9.3.2. The violations result – according to the Second Respondent – from the fact that the Player’s samples were stored for two months at the CENARD, which is a laboratory that is not WADA-accredited. The Second Respondent submits that nothing is known about the circumstances in which the samples were stored. There is no documentation. Furthermore, the Second Respondent takes issue with the fact that his samples were only analysed nearly six (6) months after sample collection.

The Appellant submits that the above does not constitute a breach of the WADA ISTI and that the samples were handled professionally at all time, i.e. also while they were stored at the CENARD. They were kept under safe conditions at all times, which is implicitly confirmed by the fact that the Madrid laboratory did not notice any degradation or manipulation of the samples. However, such information would have been recorded in the LDP if that was the case. The Player’s samples were in proper condition when analysed by the Madrid laboratory.

According to Article 67 para. 2 lit. c FIFA ADR, a violation of the WADA Standard for Testing and Investigations (ISTI) does not *per se* invalidate the analytical results of the laboratory. Instead, a breach of the WADA ISTI may affect the Adverse Analytical Finding (AAF) only insofar as such a breach “*could have reasonably caused the anti-doping rule violation*”. Such breach is excluded where the integrity of the player’s samples has been acknowledged.

7. Determination of the applicable period of ineligibility in the context of a negligent ADRV

In order to claim a reduction of the sanction in the context of a negligent ADRV under Article 22 FIFA ADR, the player must show how the prohibited substances entered his system (cf. CAS 2012/A/2759, para. 49). The burden of proof is on him. The standard of proof according to Article 66 para. 2 of the FIFA ADR shall be by a balance of probability. The Panel is satisfied on a balance of probabilities that the presence of the prohibited substances in the Player’s samples is a result of the intake of caffeine pills. In coming to this conclusion, the Panel mainly took into account the following:

- i) The use of caffeine pills has been a widespread (bad) practice in South American football for many years (see e.g. CAS 2007/A/1370-1376).
- ii) It appears that, at around the time when the Player was tested, a considerable amount of AAF have been reported as result of the above practice.
- iii) The substances found in the Player’s bodily specimen appear to be typical for contaminated caffeine pills.
- iv) The Player’s submissions in this respect were credible and consistent.
- v) The finding of the Panel is not contradicted by the evidence of the expert Prof Martial Saugy.
- vi) Even though the Player did not list the caffeine pills on his doping control form – which would seem at first sight to contradict his version of facts – he credibly explained that the Doping Control Form had been filled out by the team doctor, Mr Marco Diaz, while he was passing the sample. The Player only signed the Doping Control Form after providing the sample.
- vii) The Player – due to the delays not attributable to him – was put in a

difficult situation with regard to his onus to identify and prove the route of ingestion.

When determining the appropriate sanction, under Article 22 para. 1 lit. a FIFA ADR the breadth of sanction is from a reprimand to 24 months ineligibility depending on the player's degree of fault. In exercising its discretion within this range, a difference is made between "normal degree of fault" ranging between 12-24 months and a "light degree of fault" ranging between a reprimand and 12 months. In order to determine into which category of fault a particular case might fall, it is according to CAS jurisprudence (CAS 2013/A/3227, para. 71) helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities. The Panel finds that this case is situated rather at the higher end of "light degree of fault". In coming to this conclusion, the Panel takes into account that:

- i) The substances found in the Player's system are prohibited in and out-of-competition;
- ii) It is the Player's responsibility to ensure that no prohibited substance enters his system;
- iii) The Player, at best, did some internet research, he did not contact the manufacturer of the supplements, let alone did he attempt to get them analysed before the intake;
- iv) The fact that, in general, food supplements often generate positive testing due to contamination and that,

specifically, in the past some South American football players had tested positive due to contaminated caffeine pills given by team doctors (see e.g. CAS 2007/A/1370-1376) should have induced the Player to take a much more diligent approach;

- v) The pills were given by the team doctor, Mr Marco Diaz, to the Player only minutes before the start of the match. The Player at this point in time had neither the possibility to check the label of the product, inquire about the origin of the caffeine pills or conduct an internet search on the product or manufacturer. In addition, the Player was told that the pills had been manufactured by a "reliable pharmacy";
- vi) The pills were given to several players before each match (in general, 5-6 starting players). They were distributed openly and not covertly by the team doctor. Consequently, this procedure appeared unsuspecting to the Player;
- vii) The Player did not suspect that the club failed to get the caffeine pills tested, as the team doctor, Mr Marco Diaz, advised the Player that the pills came from a reliable source.
- viii) The Player never heard of any of his teammates testing positive. Since he was not the only player taken the pills and considering that the players were regularly tested, the Player felt confident that he did not need to be concerned about the caffeine pills.

The Panel finds that a period of 11 months is proportionate in view of the Player's degree of fault and in light of the available jurisprudence.

8. Commencement of the period of ineligibility

It is undisputed that there were delays in the context of the analysis of the player's sample and, in particular, in the procedure before the anti-doping authority, that these delays were substantial and that they cannot be attributed to the player. Accordingly, there is room to backdate the player's sanction pursuant to Article 28 para. 1 FIFA ADR. This Article grants the panel discretion ("may decide") if and how far it wants to backdate the period of ineligibility. When making use of its discretion one must note that backdating a period of ineligibility in team sports effectively amounts to waiving part of the sanction, since – differently from individual sports – "*competitive results achieved during the period of ineligibility*" can – in principle – not be disqualified (the exception being when multiple players test positive at the same time). Thus, restraint must be shown when backdating the period of ineligibility in order not to undermine the FIFA ADR. The fact that the player was adversely affected by the sanction, because he could not participate in the team preparations for one season should be taken into account. In view of the above, it is considered fair that the commencement of the period of ineligibility shall start on the hearing date before the CAS.

Decision

The appeal filed by the Fédération Internationale de Football Association on 7 August 2018 against the decision issued by the Tribunal Nacional Disciplinario Antidopaje on 19 June 2018 is partially upheld. The decision of the Tribunal Nacional Disciplinario Antidopaje dated 19 June 2018 is set aside. Mr Damián Marcelo Musto is declared ineligible for a period of 11 months for having committed an anti-doping rule violation pursuant to Article 6 of the FIFA Anti-Doping Regulations.

CAS 2018/A/5864

Cruzeiro E.C. v. Fédération Internationale de Football Association (FIFA)

13 February 2019

Football; Violation by a club of Article 64 FIFA Disciplinary Code for failure to comply with a CAS decision; CAS power of review according to Article R57 of the CAS Code; No proof of exceptional circumstances justifying a more lenient sanction; No need for FIFA to define “well established practice”; Predictability of sanctions provided for by the FIFA Disciplinary Code (FDC); Proportionality of the sanction imposed on the club

Panel

Mr. Mark Hovell (United Kingdom), Sole Arbitrator

Facts

Cruzeiro E.C. (the “Club” or the “Appellant”) is a professional football club with its registered office in Belo Horizonte, Brazil. The Club is an affiliated member of the Confederação Brasileira de Futebol (the “CBF”), which in turn is affiliated to Fédération Internationale de Football Association.

Fédération Internationale de Football Association (“FIFA” or the “Respondent”) is the governing body of world football and has its registered office in Zurich, Switzerland.

On 22 November 2016, the Single Judge of the FIFA Players’ Status Committee (the “PSC”) decided on the dispute between the club Atlético Atenas (“Atenas”) and the Club as follows (the “FIFA PSC Decision”):

“1. The claim of [Atenas], is partially accepted.

*2. The [Club], has to pay to [Atenas], **within 30 days** as from the date of notification of this decision, the amount of USD 3,400,000 plus 5% interest p.a. on said amount as from 11 July 2015 until the date of effective payment.*

3. If the aforementioned sums, plus interest are not paid within the aforementioned deadline, the present matter shall be submitted, upon request, to FIFA’s Disciplinary Committee for consideration and a formal decision.

(...)”

On 13 February 2017, the Club filed an appeal at the Court of Arbitration for Sport (the “CAS”) against Atenas in relation to the FIFA PSC Decision.

On 11 July 2017, the CAS ruled as follows (the “CAS Award”):

“1. The appeal filed by [the Club] on 3 February 2016 against the [FIFA PSC Decision] is dismissed.

[The FIFA PSC Decision] is confirmed.

(...)”

On 31 August 2017, Atenas informed the FIFA PSC of the Club’s failure to comply with the CAS Award.

On 4 October 2017, Atenas requested the case be forwarded to the FIFA Disciplinary Committee (the “FIFA DC”) in view of the failure of the Club to fulfil its debt towards Atenas.

On 19 December 2017, the parties were informed by the FIFA PSC that the matter was being forwarded to the FIFA DC for consideration and a formal decision.

On the same day and on 8 March 2018, Atenas confirmed that the amount due was still outstanding.

On 26 April 2018, as the amounts due were not paid to Atenas nor to FIFA, the FIFA DC opened disciplinary proceedings against the Club due to its failure to respect the CAS Award. By means of that correspondence, the Club was urged to pay the amount due to Atenas by 10 May 2018 at the latest and was informed that the case would be submitted to a member of the FIFA DC once the time limit had expired.

On 6 June 2018, the FIFA DC passed a decision as follows (the “Appealed Decision”):

“1. The [Club] is found to have infringed art. 64 of the FIFA Disciplinary Code as it is guilty of failing to comply with the decision passed by the Court of Arbitration for Sport on 11 July 2017, which confirmed the decision issued by the Single Judge of the Players’ Status Committee on 22 November 2016, and according to which it was ordered to pay:

a. To [Atenas];

i. EUR 3,400,000 plus 5% interest p.a. on the said amount from 1 January 2016 until the date of effective payment;

ii. CHF 5,000 as costs of the proceedings;

iii. CHF 4,000 as contribution of the costs and legal fees incurred in connection with the arbitration proceedings;

b. To FIFA: CHF 15,000 as costs of the proceedings.

2. The [Club] is ordered to pay a fine to the amount of CHF 30,000. The fine is to be paid within 90 days of notification of the present decision. (...)

3. The [Club] is granted a final period of grace of 90 days as from notification of the present decision in which to settle its debt to [Atenas] and to FIFA.

4. If payment is not made to [Atenas] and proof of such a payment is not provided to the secretariat to the FIFA Disciplinary Committee and to the [CBF] by the abovementioned deadline, six (6) points will be deducted automatically by the [CBF]

without a further formal decision having to be taken nor any order to be issued by the FIFA Disciplinary Committee or its secretariat.

5. If the [Club] still fails to pay the amounts due to [Atenas] even after the deduction of points in accordance with point 4 above, the FIFA Disciplinary Committee, upon request of [Atenas], will decide on a possible relegation of the [Club’s] first team to the next lower division.

(...)”

On 13 August 2018, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the “CAS Code”), the Club filed a Statement of Appeal at the CAS against FIFA challenging the Appealed Decision.

On 28 August 2018, pursuant to Article R51 of the CAS Code, the Club submitted its Appeal Brief with the CAS Court Office.

On 24 September 2018, pursuant to Article R55 of the CAS Code, FIFA submitted its Answer to the CAS Court Office.

On 7 November 2018, on behalf of the Sole Arbitrator, the CAS Court Office informed the parties that pursuant to Article R57 of the CAS Code, the Sole Arbitrator had decided not to hold a hearing in this matter and that he would be issuing an award on the written submissions.

Reasons

1. CAS power of review according to Article R57 CAS Code

At the outset, the Sole Arbitrator wishes to point out that the wording in Article R57 of the CAS Code clearly states that:

“The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance”.

The Sole Arbitrator concludes that, contrary to the Club argument, there are no special circumstances in this case which warrant sending this matter back to the first instance decision maker. The Sole Arbitrator notes that to send this matter back to the FIFA DC would only delay proceedings further and ask the FIFA DC to perform the task that the Sole Arbitrator himself is entitled, fully able and willing to do. Thus, the Sole Arbitrator concludes that he will not send this matter back to the FIFA DC and he can, and will, deal with this matter *de novo* as Article R57 of the CAS Code clearly empowers him to do (See CAS 2008/A/1718-172 and CAS 2008/A/1700 & CAS 2008/A/1710).

2. No proof of exceptional circumstances justifying a more lenient sanction

The Club argued that there were exceptional circumstances in this case that the FIFA DC failed to take into account. The Club cited the economic and political crisis in Brazil as the primary reason for why it could not make the payment to Atenas. The Club also noted that the value of the Brazilian currency significantly dropped, which made the payment of the transfer fees to Atenas (which was denominated in USD) *“impossible and impractical”*. The Club acknowledged that a lack of financial means cannot be invoked as a justification for the non-compliance of financial obligations (CAS 2006/A/1110 and CAS 2014/A/3840), but argued that this did not mean that the FIFA DC could not take this into account. Further, the Club stated that *“as an incontestable demonstration of good faith”*, it did not use any form of *“subterfuge”* such as bankruptcy in order to deprive Atenas of its money, unlike other clubs might have done.

Conversely, FIFA rejected this argument and stated there were no exceptional circumstances. It noted that the situation in Brazil was not similar to that experienced by Greece / Argentina in the past (where financial restrictions imposed meant that payment was an impossibility) or Ukraine / Libya (where there were ongoing armed conflicts). Moreover, FIFA noted that no evidence was submitted to substantiate the alleged financial difficulties.

In summary, the Sole Arbitrator agrees with FIFA on this issue. Firstly, despite the broad allegations of *“financial turbulence”* and the like in Brazil, the Club failed to submit a single piece of evidence substantiating how this has placed the Club in severe financial difficulty. Pursuant to Article 8 of the CC, the Club had the burden of proof in establishing this assertion and the Sole Arbitrator considers that it failed to meet its burden. Secondly, the Sole Arbitrator fails to see how the fall in value of the Brazilian currency can either be a justification for non-payment, or how it amounts to *“exceptional circumstances”*. The fluctuations of foreign currency are a standard risk in business dealings and any entity dealing in foreign currency - as the Club were when dealing with Atenas - ought to be aware of the possibility of it and should plan its financial dealings accordingly. Pursuant to the principle of *pacta sunt servanda*, the Club should have been aware of its financial situation and *“cut its cloth accordingly”*, as FIFA put it. The Club’s failure to do so cannot be to the detriment of Atenas. Thirdly, despite the allegations by the Club that it was *“impossible”* to pay Atenas, the Club failed to submit any evidence that there were government imposed restrictions on making payments. In fact, FIFA submitted that in the period between the FIFA PSC Decision (November 2016) and the Appealed Decision (June 2018), the

Club had engaged 16 new players and released 26. In relation to the released players, the Club received more than EUR 4m and USD 11m in transfer fees. The devaluation of the Brazilian currency did not appear to prevent the Club from completing those transfers. Accordingly, based on the evidence available to the Sole Arbitrator, it appears that not only was it not “*impossible*” to pay Atenas as the Club alleged, but the failure to pay Atenas was a conscious choice made by the Club. Fourthly, as FIFA noted, Article 2 of the CC states that “*every person is bound to exercise his rights and fulfil his obligations according to the principle of good faith*”. The fact that the Club may have had financial difficulties, which may have been exacerbated by the devalued currency, did not exonerate it from meeting its financial obligations to its creditors. There is a clear line of CAS jurisprudence confirming that a lack of financial means does not justify failure to meet financial obligations (see *inter alia*, CAS 2013/A/3358 and CAS 2018/A/5622). Lastly, the Sole Arbitrator does not consider that the Club deserves any credit for not using any “*subterfuge*” such as entering into bankruptcy proceedings to avoid paying Atenas. The Club may not have entered into bankruptcy proceedings, but it has entered into a long, drawn out legal dispute through the CAS (twice) and FIFA (PSC and FIFA DC) which has resulted in a significant delay in paying the debt it undoubtedly owes to Atenas – a debt which was final and binding over 18 months ago when the CAS Award was issued.

3. No need for FIFA to define “*well established practice*”

The Club submitted that FIFA repeatedly referred to its “*well established practice*” in the Appealed Decision, but it failed to ever provide any explanation of what this

“*absolutely vague and confusing term*” was. The Club alleged that “*it was becoming the norm*” that FIFA would impose sanctions without justification or explanation and hide behind this term, making it “*next to impossible*” for aggrieved parties to challenge this.

Conversely, in very brief summary, FIFA argued that the Appealed Decision was in line with the FIFA DC’s longstanding practice which has been corroborated by the CAS on numerous occasions.

The Sole Arbitrator does not see the need for FIFA to define the term “*well established practice*”. The term is plainly a reference to FIFA Disciplinary Committee (FIFA DC) jurisprudence in similar cases. FIFA submitted a table of precedents in these appeal proceedings setting out the sanctions imposed in similar cases, and it confirmed the proportionality of the sanctions imposed in the Appealed Decision. It is, in that sense, akin to consistent CAS jurisprudence that CAS panels rely on. There is nothing controversial with that term, nor does the FIFA DC’s reliance on it automatically result in sanctions being disproportionate or challengeable. The sanctions are ultimately decided by the FIFA DC on a case by case basis, with reference to the outcomes in similar matters where debtors failed to pay a similar amount of debt. Parties have the right to appeal those decisions to the CAS. The CAS panel in the appeal proceedings then assesses the sanctions imposed by the FIFA DC to determine if they were disproportionate or not.

4. Predictability of sanctions provided for by the FIFA Disciplinary Code (FDC)

The Club argued that FIFA failed what has been established by CAS jurisprudence as the “*predictability test*”. The Club cited CAS

2007/A/1363, which stated that the principle of legality and predictability of sanctions requires “*a clear connection between the incriminated behaviour and the sanction and calls for a narrow interpretation of the respective provision*”. The Club alleged that FIFA failed to apply this test, and further, the wide parameters in Articles 15(2) and (3) of the FDC also failed the predictability test. Further, the Club argued that by not rendering a decision with the “*necessary grounds/explanation and within a predictable manner*” the Appealed Decision violated the “*mandatory rules set out in the FIFA Statutes and the FIFA Disciplinary Code, as well as principles of Swiss law, i.e. the equality of treatment and due process*”.

Conversely, FIFA argued that in order for disciplinary provisions and sports organisations to be compliant with the principle of *nulla poena sine lege* (i.e. one cannot be punished for doing something that is not prohibited by law), the stakeholders subject to such provisions and proceedings must know or be able to know that a certain conduct is wrong. FIFA argued that the FIFA Disciplinary Code (FDC), and the sanctions that could be imposed under the FDC, clearly satisfied the “*predictability test*”.

In order for disciplinary provisions and sports organisations to be compliant with the principle of *nulla poena sine lege* (i.e. one cannot be punished for doing something that is not prohibited by law), the stakeholders subject to such provisions and proceedings must know or be able to know that a certain conduct is wrong. In this respect, the FDC, and the sanctions that could be imposed under the FDC, clearly satisfied the “*predictability test*”. Firstly, the SFT has deemed the system of sanctions used by FIFA in the event of non-compliance with its decisions or those of

CAS as lawful (decision of the SFT dated 5 January 2007, X. S.A.D. v. FIFA and CAS, ATF 4P.240/2006). Secondly, according to CAS jurisprudence, however, it is not necessary for the principles of predictability and legality to be respected that one should know, in advance of his infringement, the exact rule he may infringe, as well as the measure and kind of sanction he is liable to incur because of the infringement (CAS 2014/A/3665, 3666 & 3667). Fundamental principles are satisfied whenever the disciplinary rules have been properly adopted, describe the infringement and provide, directly or by reference, for the relevant sanction. The fact that the competent body has the discretion to adjust the sanction applicable to the individual behaviour is not inconsistent with those principles (CAS 2014/A/3665, 3666 & 3667). It is clear that a club failure to pay its debt to its creditor is a breach of the FDC and that an appropriate sanction would be applied by the FIFA DC. Article 64 of the FDC clearly sets out what those potential sanctions could be (i.e. a fine, a final deadline, potential points deduction and/or relegation). The “predictability test” is not failed because the FDC does not explicitly set out the factors which the FIFA DC must consider in each individual case. The factors to take into account are clearly the specific circumstances of the case, as each case is determined on a case by case basis, and the sanctions to be imposed (as set out in Articles 15 and 64 of the FDC) must be proportionate to the offence committed and the circumstances of the case. Similarly, having a range of potential fines in Article 15 of the FDC (i.e. between CHF 300 and CHF 1m) does not violate the “predictability test”.

5. Proportionality of the sanction imposed on the club

The Club submitted that the Appealed Decision violated the principle of proportionality and would therefore be incompatible with Swiss public policy, which is one of the grounds for awards to be set aside under Article 190 of the PILA. The Club then claimed that the Appealed Decision violated three components of the proportionality principle, i.e. adequacy, necessity and proportionality. Conversely, FIFA maintained that the sanctions imposed in the Appealed Decision were proportionate.

At the outset, the Sole Arbitrator notes that there is an established line of CAS jurisprudence which states that the sanctions imposed by the FIFA DC can only be amended by a CAS panel if the sanction(s) concerned is (are) evidently and grossly disproportionate to the offence.

In summary, the Sole Arbitrator rejects the Clubs arguments in their entirety. The Club's submissions on this issue broadly contended that a more lenient approach would be as effective and more appropriate than the one undertaken by the FIFA DC in the Appealed Decision. However, whilst the Sole Arbitrator notes this argument, he considers that the Club's position is severely undermined by the fact that more than 2 years have elapsed since the FIFA PSC Decision and over 18 months have passed since the CAS Award was issued without any payment being made whatsoever. The Sole Arbitrator considers that the Club's failure to agree a payment plan or make any payment whatsoever to Atenas to date significantly weakens its position regarding proportionality.

Further, the Sole Arbitrator notes that it is the case with any disciplinary regime that a failure to comply with the sanctions imposed has to contain a mechanism for

increasing those sanctions to bring about compliance. This is built into the FIFA rules with greater sanctions only being engaged after failure to settle payment in the first instance. As noted previously, the legality and validity of the sanctions set out in Article 64 of the FDC have been considered and confirmed by the SFT (Decision of the SFT 4P.240/2006 dated 5 January 2007). Moreover, it has been applied by numerous CAS panels.

The threat of a potential imposition of a 6 point deduction, and relegation in the event of continued failure to comply does not amount to a violation of the principle of proportionality. The granting of a grace period of 90 days instead of a 150 day period, was not "*evidently and grossly disproportionate to the offence*". Similarly, the Sole Arbitrator does not consider a fine of CHF 30,000 amounting to less than 3% of the amount due to the creditor is disproportionate.

Decision

The Appeal filed on 13 August 2018 by Cruzeiro E.C. against the decision issued on 6 June 2018 by the FIFA Disciplinary Committee is dismissed. The decision issued on 6 June 2018 by the FIFA Disciplinary Committee is confirmed.

CAS 2018/A/5868

Pan-American Team Handball Federation (PATHF) v. International Handball Federation (IHF)

10 May 2019

Handball; Governance; Extent of the authority of *res judicata*; Review of a Division President's decision regarding CAS jurisdiction; Time limit to supplement or change requests for relief under Article R56 CAS Code; Consequences of revocation of delegated decision-making power; Reallocation by CAS of costs of previous instances

Panel

Prof. Martin Schimke (Germany), Sole Arbitrator

Facts

The Pan-American Team Handball Federation (the “Appellant” or the “PATHF”) is the continental confederation responsible for governing the sport of handball in Pan-America. It is affiliated to the International Handball Federation and has its registered office in Buenos Aires, Argentina.

The International Handball Federation (the “Respondent” or the “IHF”) with registered office in Basel, Switzerland, is the international sports federation governing the sport of handball worldwide.

The present proceedings relate to three separate, but related issues, all stemming from a series of decisions rendered by the IHF Council on 14 January 2018. First, they relate to the legality of a decision rendered by the IHF Council to divide the PATHF into two confederations, *i.e.* a “*North America and the Caribbean Handball Confederation*” and a “*South*

and Central America Handball Confederation”, following a decision by the IHF Congress to delegate such decision-making authority to the IHF Council, while the latter decision has been declared null and void by the Court of Arbitration for Sport (“CAS”) in the proceedings CAS 2018/A/5745 PATHF v. IHF (*i.e.* the “**Implementation Decision**”). Second, the proceedings relate to the IHF Council decision to suspend the PATHF (*i.e.* the “**Suspension Decision**”). Third, they relate to a claim by PATHF for compensation from the IHF for costs incurred by it related to the proceedings before the IHF Arbitration Commission (the “IHF AC”) and the IHF Arbitration Tribunal (the “IHF AT”) that had to be exhausted in order for the PATHF to commence the present appeal arbitration proceedings before CAS.

On 18 August 2017, during an IHF Council meeting in Tbilisi, Georgia the IHF President presented a motion to divide the PATHF into two confederations (the “Motion”).

On 7 October 2017, a PATHF Extraordinary Assembly was held in Bogotá, Colombia, to discuss the Motion. On 11 October 2017, the IHF was informed of the 7 October 2017 PATHF Extraordinary Assembly.

On 23 October 2017, the IHF President wrote to the PATHF alleging that by not inviting the IHF President the PATHF had not followed the stipulations in Article 10.2.3.1 IHF Statutes. He further requested that PATHF urgently provide complete information on the formal convocation procedures of the PATHF Extraordinary Congress, in order to file the case with the IHF AC. The IHF President also requested administrative and financial documents proving the correct spending of a sponsorship awarded by the IHF to the PATHF in 2014, in the amount of USD 1,000,000.

On 26 October 2017, the PATHF President replied to the letter of 23 October 2017, maintaining that the convocation procedure of the PATHF Extraordinary Assembly was correct. He further indicated that the accounting for the sponsorship money was made during the PATHF Congress held in Buenos Aires in July 2016, which financial statements were unanimously approved by the members present.

On 3 November 2017, the IHF President replied to the letter of 26 October 2017, reiterating that the PATHF Extraordinary Assembly was not convened in compliance with Article 10.2.3.1 IHF Statutes, and that the PATHF auditing report which was confirmed by the PATHF Extraordinary Assembly was not on the agenda, as a consequence of which the corresponding decision was not valid either.

On 9 November 2017, an IHF Council meeting took place. It was decided that PATHF's alleged violation of the IHF Statutes would be submitted to the IHF AC in order to obtain its recommendation for further treatment by the IHF Executive Committee and the IHF Council.

On 11 November 2017, an IHF Congress took place. The IHF Congress decided to *"delegate its authority to the IHF Council to discuss, evaluate and take a decision on the motion regarding the IHF Statutes related to the Pan-American continent and consequently on the relevant IHF Statutes changes"* (the "Congress Decision").

On 7 December 2017, the PATHF filed an appeal with the IHF AC, requesting that the Congress Decision be declared null and void.

On 14 January 2018, an IHF Council meeting was held in Zagreb, Croatia. Without any prior information being given to the PATHF, the IHF Managing Director read out the

recommendation received on the same day from the IHF AC regarding PATHF's alleged violation of the IHF Statutes. The following decisions were taken by the IHF Council (the **"Council Decision"**):

- Following a legal opinion issued by the IHF AC, according to which, in a nutshell, the IHF AC recommended to suspend the PATHF due to its failure to invite the IHF President to its Extraordinary Congress of 7 October 2017, and following a discussion, the IHF Council agreed (Votes in favour: 15; Votes against: 1; Abstentions: 0) to suspend the PATHF according to Article 10.2.3.2 IHF Statutes.
- Following a legal opinion issued by Dr François Carrard, concluding that *"[a]ll Council members without any limitation shall be authorized to vote on the issue of the so-called 'motion of the Pan-America' and that the Congress decision does not violate Swiss Law nor the IHF Statutes"* and following a discussion, the IHF Council agreed (Votes in favour: 15; Votes against: 1; Abstentions: 0) *"to divide the continent of Pan-America into two, specifically a 'North America and the Caribbean Handball Confederation ('North')' and a 'South and Central America Handball Confederation ('South')'".* It was further clarified that the IHF only recognises six confederations, including the *"North America and the Caribbean Handball Confederation"* and the *"South and Central America Handball Confederation"*, but not PATHF.

On 17 January 2018, the IHF President informed the PATHF of the Council Decision.

On 13 February 2018, the minutes of the Zagreb IHF Council Meeting were provided to the PATHF.

On 14 February 2018, the IHF AC rejected the appeal by the PATHF against the Congress Decision.

On 6 March 2018, the PATHF appealed the 14 February 2018 IHF AC decision to the IHF AT.

On 14 March 2018, the PATHF filed a new appeal with the IHF AC, this time against the Council Decision of 14 January 2018. It essentially requested that the decision implementing the decision taken on 11 November 2017 at the IHF Ordinary Congress is declared null and respectively annulled.

On 17 April 2018, the PATHF lodged an appeal with CAS, alleging denial of justice by the IHF in respect of the proceedings pending before the IHF AT regarding the Congress Decision. The proceedings were initiated as *CAS 2018/A/5685 Pan-American Team Handball Federation (PATHF) v. International Handball Federation (IHF)*. The PATHF ultimately withdrew this appeal.

On 1 May 2018, the IHF AT rendered its decision regarding the Congress Decision. It dismissed the appeal filed by the PATHF on 6 March 2018 against the 14 February 2018 decision of the IHF AC.

On 4 May 2018, the grounds of the 1 May 2018 IHF AT decision were communicated to the PATHF.

On 14 May 2018, the IHF AC rejected the PATHF appeal against the Council Decision.

On 15 May 2018, the PATHF filed an appeal with CAS against the decision issued by the IHF AT on 1 May 2018 related to the Congress Decision (*CAS 2018/A/5745 PATHF v. IHF*).

On 13 June 2018, the PATHF filed an appeal with the IHF AT against the decision by the IHF AC dismissing the PATHF's appeal against the Council Decision. The PATHF

requested that the decision issued on 14 January 2018 by the IHF Council in Zagreb, Croatia, implementing the Challenged Decision taken on 11 November 2017 at the IHF Ordinary Congress, is null, respectively annulled.

On 13 August 2018, the IHF AT rendered its decision (the "Appealed Decision") regarding the Council Decision, dismissing the PATHF appeal against the decision of the IHF AC of 14 May 2018.

On 17 August 2018, the PATHF lodged an appeal with CAS against the Appealed Decision, pursuant to Articles R47 *et seq.* of the CAS Code of Sports-related Arbitration (edition 2017) (the "Code"), with the IHF as sole respondent. The PATHF designated its Statement of Appeal as its Appeal Brief.

On 13 September 2018, the operative part of the award in the proceedings *CAS 2018/A/5745 PATHF v. IHF* related to the Congress Decision was issued, partially upholding the appeal filed by the PATHF against the IHF AT decision of 1 May 2018. Precisely, CAS annulled the IHF AT decision and declared null and void the 11 November 2017 decision of the IHF Congress "*to delegate its authority to the Council of the International Handball Federation to discuss, evaluate and take a decision on the motion regarding the IHF Statutes related to the Pan-American continent and consequently on the relevant IHF Statutes changes*".

On 14 September 2018, the IHF issued a press release reading, *inter alia*, as follows "[t]he project of a recognition of two separate Continental Confederations by the next IHF Congress remains absolutely in force and will be implemented forthwith in the best interest of handball worldwide".

On 26 September 2018, the PATHF filed a "supplementary Appeal Brief", amended prayers for relief as well as an application for

provisional measures. In its amended prayers for relief PATHF, for the first time, requested annulment of the 14 January 2018 IHF Council decision suspending the PATHF.

On 1 October 2018, the IHF objected to the admissibility of the “supplementary Appeal Brief” as well as to the amended prayers for relief. On 22 October 2018, the IHF filed its comments on the PATHF’s application for provisional measures, objecting thereto.

On 26 October 2018, the grounds of the arbitral award in the CAS proceedings *CAS 2018/A/5745 PATHF v. IHF* related to the Congress Decision were communicated to the parties.

On 14 November 2018, the President of the CAS Appeals Arbitration Division, based on Article R37 of the Code, issued an Order on Provisional Measures, with, in a nutshell the following operative part:

1. *CAS has no jurisdiction to deal with the appeal against the decision rendered by the IHF Council on 14 January 2018 suspending PATHF.*
2. *The application for provisional measures filed by PATHF on 25 September 2018 in the matter CAS 2018/A/5868 PATHF v. IHF is granted in respect of the decision rendered by the IHF Council on 14 January 2018 to divide the Pan-American continent.*
3. *The decision issued on 14 January 2018 by the IHF Council in Zagreb, Croatia, implementing the decision taken on 11 November 2017 at the XXXVI IHF Ordinary Congress to divide the Pan-American continent, is provisionally stayed pending a final award on the merits.*
4. *The IHF is ordered to refrain from taking any measure tending to implement the division of the Pan-American continent pending a final award on the merits.*

On 6 March 2019, a hearing was held in Lausanne, Switzerland.

Reasons

1. Extent of the authority of *res judicata*

Having affirmed its jurisdiction to adjudicate the present dispute, the Sole Arbitrator addressed the IHF’s objection to the jurisdiction of CAS in respect of the Suspension Decision. Specifically, IHF argued that insofar as the President of the CAS Appeals Arbitration Division had decided in her Order on Provisional Measures that CAS had no jurisdiction to review the validity of the Suspension Decision, this issue had already been decided and was therefore no longer before the Sole Arbitrator. The PATHF maintained that given that the Zagreb Council Meeting was not called in accordance with the IHF Statutes, the Council Decision, including the Suspension Decision, was rendered by an invalidly-constituted body and is therefore null and void. Such nullity can be ruled upon by a tribunal at any time, irrespective of any deadlines to appeal it, and CAS may therefore proclaim such nullity within the present proceedings.

To start with the Sole Arbitrator held that while in principle, the authority of *res judicata* is attached only to the operative part of an award, in order to properly understand the scope of the principle and the effect of the award’s operative part, one needs to also look at the reasoning leading to the findings. Further no reasons existed which led to the conclusion that such reasoning would only apply to arbitral awards, and not to orders by means of which proceedings are terminated in a final and binding way, be it entirely or partially. Furthermore, the Sole Arbitrator underlined that in light of Article

R37 of the Code, the President of the CAS Appeals Arbitration Division has the authority to terminate an arbitration procedure in a definite manner, *i.e.* to terminate an arbitration procedure without any possible review of such decision by the arbitral tribunal. In her Order on Provisional Measures of 14 November 2018, the President of the CAS Appeals Arbitration Division had indeed ruled that CAS had no jurisdiction to deal with the appeal against the IHF Council decision of 14 January 2018, *i.e.* the decision by which the PATHF was suspended under Article 10.2.3.2 IHF Statutes.

It was however questionable whether the procedure was partially terminated in respect of the Suspension Decision in a definite manner, or whether this was only a *prima facie* decision that was subject to the Sole Arbitrator's review. The Sole Arbitrator noted that while the Order on Provisional Measures does not specifically state that the arbitration procedure was terminated insofar as the Suspension Decision is concerned, the operative part of that order does not indicate either that such decision was only made on a *prima facie* basis; also, the reasoning of the Order on Provisional Measures further determines that "*the CAS does not, even on a prima facie basis, have jurisdiction to hear this appeal insofar as it is directed against the IHF Council decision to suspend the PATHF*". The Sole Arbitrator found the operative part of the Order on Provisional Measures to be sufficiently clear in ruling that CAS has no jurisdiction to adjudicate on the Council Decision insofar as the Suspension Decision is concerned.

2. Review of a Division President's decision regarding CAS jurisdiction

Always in the context of the Order on Provisional Measures the Sole Arbitrator

clarified that while a *prima facie* ruling by the Division President that CAS has jurisdiction is subject to review by the arbitral tribunal, in principle a ruling by the Division President that *CAS has clearly no jurisdiction* is not subject to the review by an arbitral tribunal (and is hence final and binding, terminating the arbitration procedure, entirely or partially), because an arbitral tribunal is not an appeal instance of the Division President. The Sole Arbitrator therefore found himself prevented from reviewing the Division President's decision that CAS is not competent to adjudicate and decide on the Suspension Decision, this issue having become final and binding by means of the Order on Provisional Measures. Consequently, the Sole Arbitrator does not have jurisdiction regarding the Council Decision insofar as the Suspension Decision is concerned.

3. Time limit to supplement or change requests for relief under Article R56 CAS Code

As regards the question of the admissibility of the "supplementary Appeal Brief" filed by the PATHF on 1 October 2018 together with amended prayers for relief, to which the IHF – relying on Article R56 of the Code – objected, the Sole Arbitrator noted that the PATHF, in the letter accompanying its combined Statement of Appeal/Appeal Brief, had stated that its Statement of Appeal is also to be considered as the Appeal Brief; the PATHF had thereby made clear that this document was intended to serve as a combined Statement of Appeal and Appeal Brief.

The Sole Arbitrator further developed that the consequences of filing an Appeal Brief are clearly set out in Article R56 of the Code, a provision which is to be interpreted in the sense that an appellant can, in principle, not supplement or change its

requests for relief after the filing of the Appeal Brief. In the opinion of the Sole Arbitrator, to find otherwise *i.e.* that the requests for relief can still be amended until the respondent filed its Answer or until the expiration of the time limit within which an appellant could have filed its Appeal Brief, would unjustifiably favour an appellant over a respondent; the respondent, once the Appeal Brief is filed, should know against which requests for relief it should defend itself. The Sole Arbitrator further determined that whereas under Article R56 of the Code, there are two grounds to permit an alteration of the requests for relief after the filing of the Appeal Brief, *i.e.* i) permission from the other parties and ii) exceptional circumstances, none of these grounds were fulfilled in the present case: the IHF clearly did not agree with the alteration of PATHF's requests for relief, and no exceptional circumstances warranted an alteration in this case.

Specifically, and addressing PATHF's argument that given the IHF's refusal to agree to the consolidation of the present procedure with CAS 2018/A/5745 PATHF v. IHF and to the expedited proceedings, the PATHF did not in advance waive its right to complete its Appeal Brief within the time-limit provided by Article R51 of the Code, the Sole Arbitrator found that PATHF could have (but did not) indicated in its combined Statement of Appeal/Appeal Brief that, in case of dismissal of its procedural requests (consolidation of the proceedings; implementation of an expedited procedure), it would seek leave to file a supplementary Appeal Brief. Also after the communication of the award in CAS 2018/A/5745, PATHF did not ask for an additional round of written submissions or to be allowed to amend its requests for relief. In those circumstances the PATHF cannot withdraw its previous declaration that its

Statement of Appeal was to be considered its Appeal Brief and the IHF could rely on the requests for relief outlined in the combined Statement of Appeal/Appeal Brief.

The Sole Arbitrator further held that PATHF's argument that given the suspension of the present proceedings from 23 August 2018 until 13 September 2018, in order to await the outcome of the already pending proceedings in CAS 2018/A/5745 PATHF v. IHF, the deadline to file the Appeal Brief did not expire until 5 October 2018, *i.e.* 22 days after the original 13 September 2018 deadline to file the Appeal Brief, did not alter the above finding. Accordingly, the PATHF failed to prove why it could legitimately not already have included the additional requests for relief in its original Statement of Appeal/Appeal Brief and that in the absence of this, no exceptional circumstances are established.

4. Consequences of revocation of delegated decision-making power

Thereupon the Sole Arbitrator turned to the question as to whether the Implementation Decision – *i.e.* the decision by the IHF Council to divide the PATHF into two confederations - should be annulled or declared null and void, as requested by PATHF in its prayers for relief.

To start with the Sole Arbitrator noted that the IHF did not dispute that, as a consequence of the fact that the Congress Decision – *i.e.* the decision by the IHF Congress to “*delegate its authority to the IHF Council to discuss, evaluate and take a decision on the motion regarding the IHF Statutes related to the Pan-American continent and consequently on the relevant IHF Statutes changes*” - was declared null and void by means of the CAS award in CAS 2018/A/5745, the Council Decision was inexistent, including insofar as

the Implementation Decision is concerned. That further, given that it was not in dispute between the parties that in principle, the Implementation Decision was to be declared null and void, the only issue was whether - as argued by the IHF - the present appeal arbitration procedure became moot (with the consequence that the costs of adjudicating this request for relief should be borne by the PATHF), or whether - as argued by PATHF - at the time of the present proceedings, the Council Decision is still valid and must be annulled, respectively declared null and void (with IHF to bear the costs).

The Sole Arbitrator found that the Implementation Decision was not, as a consequence of the fact that the Congress Decision had been declared null and void, automatically inexistent. Rather, it had to be declared null and void by a court or formally revoked by the IHF, neither of which had occurred. As regards the IHF position regarding the Implementation Decision, the Sole Arbitrator noted that while in the present proceedings, the IHF might have declared that the Council Decision is inexistent, in its press release of 14 September 2018, the IHF had not conveyed this impression to the general public. Therefore the PATHF had legitimate doubts that the Implementation Decision would be enforced by the IHF, regardless of the fact that the Congress Decision was declared null and void. Consequently, the PATHF had an interest in having CAS annul the Implementation Decision, and the appeal in respect of the Implementation Decision was not moot.

5. Reallocation by CAS of costs of previous instances

Lastly the Sole Arbitrator, with regards to the PATHF request to be reimbursed by the

IHF for the costs of the proceedings before the IHF AC and the IHF AT, held that in principle, it is not for the CAS to reallocate the costs of the proceedings before the previous instances. Furthermore, in the absence of any relevant rule and regulation providing otherwise, the PATHF is not to be reimbursed by the IHF for the costs of the proceedings before the IHF AC and the IHF AT.

Decision

Therefore the Sole Arbitrator partially upheld the appeal filed by the PATHF against the decision issued on 13 August 2018 by the IHF AT. He further annulled 13 August 2018 decision by the IHF AT and declared null and void the IHF Council decision of 14 January 2018 *“to divide the continent of Pan-America into two”*.

Football; Admissibility; Interpretation of the operative part of an award; *Res judicata* effect; Standing to be sued; Final and binding decisions

Panel

Mr Hendrik Willem Kesler (the Netherlands),
President
Mr Siarhei Ilyich (Belarus)
Prof. Ulrich Haas (Germany)

Facts

Football Club “Irtys” (the “Appellant” or the “Club”) is a professional football club with its registered office in the City of Pavlodar, Republic of Kazakhstan. The Club is registered with the Football Federation of Kazakhstan (the “FFK”), which in turn is affiliated to the *Fédération Internationale de Football Association* (“FIFA”).

Mr Bukari Sadat (the “Respondent” or the “Player”) is a football player of Ghanaian nationality.

On 16 January 2016, the Player and the Club concluded a document entitled “*labor contract*” (the “Employment Contract”), valid as from the date of signing until 30 November 2016. On 22 July 2016, the Player lodged a claim before the Dispute Resolution Chamber of FIFA (the “FIFA DRC”) against the Club, claiming outstanding salary, compensation for breach of contract and sporting sanctions to be imposed on the Club.

The Club contested the Player’s claims and requested them to be dismissed.

On 21 September 2017, the FIFA DRC rendered its decision (the “Appealed Decision”) [and partially accepted the Player’s claim]. On 27 September 2017, the operative part of the Appealed Decision was notified to the parties. On 11 October 2017, the Club requested the grounds of the Appealed Decision. On 23 October 2017, FIFA [rejected the Club’s request]. On 27 October 2017, the Club again requested the grounds of the Appealed Decision. On 13 November 2017, FIFA [once more] informed the Club as *inter alia* follows:

“we kindly ask you to take due note that in accordance with art. 15 par. 1 of the Rules Governing the Procedures of the [PSC] and the [DRC] as well as the note relating to the findings of the decision concerned, the motivated decision will be communicated to the parties, if a request for the grounds of the decision is received by the FIFA general secretariat in writing within ten days as from receipt of the findings of the decision. Failure to do so will result in the decision becoming final and binding and the parties being deemed to have waived their rights to file an appeal. In view of the above, we would like to emphasize that the findings of the relevant decision passed on 21 September 2017 have been duly notified to [the Club] on 3 October 2016 [sic], yet the request for the grounds of said decision was received by FIFA on 19 October 2017 only, i.e. 16 days after the notification of the findings of the decision. As a result (...) we regret having to inform you that we are not in a position to provide you with the motivated decision” (emphasis in original).

On 15 December 2017, the Club filed an appeal against the Player with the CAS. On 7 August 2018, CAS issued an arbitral award in the proceedings that were registered as *CAS 2017/A/5524 FC Irtys Pavlodar v. Sadat Bukari*, with *inter alia* the following operative part:

“1. The Court of Arbitration for Sport has jurisdiction to hear the appeal filed by Football

Club Irtysb Pavlodar on 15 December 2017 with respect to the decision taken by the [DRC of the FIFA] on 21 September 2017.

2. *The appeal filed by Football Club Irtysb Pavlodar on 15 December 2017 with respect to the decision taken by the [DRC of the FIFA] on 21 September 2017 is admissible.*
3. *The appeal filed by Football Club Irtysb Pavlodar on 15 December 2017 with respect to the decision taken by the [DRC of the FIFA] on 21 September 2017 is dismissed.*

On 9 August 2018, the Club sent a letter to FIFA with the following content:

"07 august 2018 was made decision by CAS for the CAS 2018/A/5524 (...) which Irtysb football club received on the 7th of august 2018 via email. From the content of the CAS decision, paragraph 118 indicated by court – the sole arbitrator considers that FIFA's refusal to provide the grounds for the decision was unjustified. Taking into account the conclusion of the court (...) and in accordance with the rules and regulations of FIFA which establish a 10-day deadline for filing a respective application to FIFA for the full (...) decision (...), we ask you to provide the full text of the decision FIFA [DRC] of 21st of September 2018".

On 31 August 2018, FIFA provided the Club with the motivated Appealed Decision and informed it as follows:

"Please find attached, as requested by [the Club] (...), the grounds of the decision passed in the aforementioned matter by the [DRC]".

On 8 September 2018, the Club filed a Statement of Appeal with CAS against the Appealed Decision in accordance with Articles R47 and R48 of the 2017 edition of the CAS Code of Sports-related Arbitration (the "CAS Code"). On 28 September 2018, the Club filed its Appeal Brief, in accordance with Article R51 CAS Code.

On 6 November 2018, the Player raised an objection of *res judicata*, challenged the jurisdiction of CAS to hear this matter and requested that the proceedings be bifurcated so that the Panel would decide the issue of jurisdiction and/or *res judicata* as a threshold matter. On 13 November 2018, the Club filed its comments on the issues of jurisdiction and *res judicata* and on the Player's request to bifurcate the proceedings. On 7 December 2018, the CAS Court Office informed the parties that the Panel had decided to bifurcate the proceedings and to decide on the Respondent's request to "*declare the appeal inadmissible on jurisdictional grounds*" as a threshold matter in a preliminary award. Before the hearing was concluded, both parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their right to be heard had been respected.

Reasons

1. Interpretation of the operative part of an award

The Panel observes that on 13 November 2017, following repeated requests of the Club to be provided with the grounds of the Appealed Decision, FIFA informed the Club, *inter alia*, as follows:

"As a result, (...) particularly that the request for the grounds of the decision has not been received within the stipulated ten days time limit, we regret having to inform you that we are not in a position to provide you with the motivated decision".

On 7 August 2018, following an appeal filed by the Club against the Appealed Decision, CAS issued an arbitral award ruling, *inter alia*, that the appeal filed by the Club was dismissed. The Panel notes that

the sole arbitrator reasoned at para. 118 of the award that:

“[T]he Sole Arbitrator finds that FIFA’s denial to issue the grounds of the Decision was not justified”.

As to the Player’s reliance on the principle of *res judicata* in arguing that CAS does not have jurisdiction to deal with the Club’s appeal, the Panel finds that one needs to interpret the operative part of an arbitral award in light of the underlying reasoning. It is true that authority of *res judicata* is, in principle, attached only to the operative part of the award. However, in order to properly understand the scope of the principle and the effect of the award’s operative part, one needs also to look to the reasoning leading to the findings (NOTH/HAAS, Article R46 CAS Code, in: ARROYO M., *Arbitration in Switzerland – The Practitioner’s Guide*, 2018, p. 1567).

2. Res judicata effect

Although the sole arbitrator in *CAS 2018/A/5524* dismissed the Club’s appeal, it becomes apparent from the reasoning of the award that the sole arbitrator did not address the merits of the Appealed Decision. In fact, the sole arbitrator considered the Club’s request for relief to be inadmissible because i) it was filed late; ii) because the Player did not agree to allow the Club to amend its requests for relief; and iii) because no exceptional circumstances were present that would justify a late amendment of the requests for relief. Indeed, the sole arbitrator clarified that the *“appeal against the Decision was expressly and unequivocally limited to the fact that FIFA had not issued the grounds supporting it, even though timely requested”*. Consequently, the sole arbitrator in the case *CAS 2018/A/5524* did not “dismiss” the appeal against the Appealed Decision, but

instead rejected the claim directed against the Appealed Decision on procedural grounds.

The Panel finds that, under such circumstances, the award issued in *CAS 2018/A/5524* did not acquire a *res judicata* effect as to the merits of the contractual dispute, as the Sole Arbitrator concluded that this part of the Club’s appeal was inadmissible. The Panel is comforted in this view by the jurisprudence of the Swiss Federal Tribunal (“SFT”). The latter repeatedly held that only decisions deciding on the merits of the dispute are vested with the *res judicata* effect (SFT 5A_82/2009, E. 2.1; SFT 4P.6/2005, E. 1: “Nichteintretensentscheid erwächst nicht in materieller Rechtskraft”). Accordingly, no situation of *res judicata* arises in the matter at hand. Consequently, the Panel finds that it is competent to look at the Club’s renewed appeal regarding the merits of the contractual dispute decided upon in the Appealed Decision.

3. Standing to be sued

Turning its attention to the admissibility of the Club’s renewed appeal, while the sole arbitrator in *CAS 2018/A/5524* could indeed argue that FIFA’s decision not to issue the grounds of the Appealed Decision was not justified, he was however prevented from ruling in the operative part of the arbitral award that FIFA should issue the grounds of the Appealed Decision, because the Club failed to name FIFA as a respondent. This point was also specifically raised by FIFA when it was asked whether it wanted to intervene in the arbitration *CAS 2018/A/5524*. FIFA indicated the following:

“[D]espite renouncing to intervene in the present matter, we hereby would like to clarify that [the Club] did not designate FIFA as a Respondent in the present procedure, and only indicated [the Player] as a Respondent, whereas one of the [Recte. Club’s] main contentions is related to its request to be provided by FIFA with the motivation of the [Appealed Decision]. In this respect, any question related to the [Recte. Club’s] request to oblige FIFA to provide it with the motivation of the aforementioned decision, may not be taken into consideration by the CAS and the specific Panel, as a different interpretation would per se constitute a violation of FIFA’s right to be heard” (CAS 2018/A/5524, para. 52).

The sole arbitrator in CAS 2018/A/5524 also clarified in para. 126 of his award:

“With respect to such petition the Respondent has no standing. In fact, the Player has no role in the issuance of the grounds of a decision rendered by a body of FIFA: in other words it is not personally obliged by the “disputed right” at stake, i.e. by the Club’s right to obtain, and FIFA’s obligation to issue, the grounds of the Decision”.

Accordingly, the Panel finds that the sole arbitrator’s remark in para. 118 of the award in CAS 2018/A/5524 cannot be taken out of its context and cannot be considered as an order to FIFA to issue the grounds of the Appealed Decision. Indeed, FIFA was not ordered to issue the grounds. FIFA is not even bound by the CAS award in CAS 2018/A/5524 because it was not a party to the proceedings. As a result, FIFA’s decision of 23 October 2017 not to issue the grounds of the Appealed Decision remained fully in force and became final and binding upon the parties and FIFA.

4. Final and binding decisions

This should have been the end of the matter. The situation was however

complicated because FIFA considered it necessary, upon the Club’s application, to notify the grounds of the Appealed Decision to the parties on 31 August 2018 and to revive the 21-day deadline to challenge the Appealed Decision. The Panel finds that FIFA was wrong to do so and that the Club’s request dated 9 August 2018 to be provided with the grounds was unjustified, because, as indicated above, FIFA’s decision of 23 October 2017 not to notify the grounds of the Appealed Decision became final and binding upon FIFA and the parties involved in CAS 2018/A/5524. The situation would have been different if the Club had lodged an appeal with CAS against the Appealed Decision, requesting CAS to order FIFA (thus calling FIFA as a respondent) to notify the grounds of the Appealed Decision and if CAS would indeed have ordered FIFA to notify the grounds. This was however not the case.

The Panel notes that there are no other legal grounds for FIFA that would justify a reconsideration of its decision not to issue the grounds of the Appealed Decision and to issue such grounds more than 11 months after its adoption. Moreover, taking into account the principle universally applied in arbitration proceedings that parties exercise their rights independently, the Panel notes that the Club, due to its own decisions (not calling FIFA as a respondent in the appeal proceedings against FIFA’s decision not to issue the grounds of the Appealed Decision), is responsible for the situation as it is under the Panel’s review.

For the reasons above, the Panel finds that FIFA could not revive the 21-day time limit to lodge an appeal against the Appealed Decision. Allowing FIFA to revive the time limit to appeal a decision

without good reason would endanger the legal certainty pursued with a statutory time limit to appeal and would, thus, go against the very purpose of deadlines for appeal. Such time limit to appeal is there in the interest of all stakeholders and is not at the free disposal of FIFA. The latter has no autonomy to alter or change the deadlines for appeal to the detriment of other stakeholders. Indeed, in the matter at hand, the Player would be particularly unjustly prejudiced, because he was of the legitimate understanding that FIFA's decision of 23 October 2017 not to notify the grounds of the Appealed Decision became final and binding. Article 15(1) and (2) of the FIFA Rules Governing the Procedures of the Players' Status Committee (PSC) and the Dispute Resolution Chamber (DRC) (the "FIFA Procedural Rules") determine as follows:

- "1. The [PSC], the DRC, the single judge and the DRC judge may decide not to communicate the grounds of a decision and instead communicate only the findings of the decision. At the same time, the parties shall be informed that they have ten days from receipt of the findings of the decision to request, in writing, the grounds of the decision, and that failure to do so will result in the decision becoming final and binding and the parties being deemed to have waived their rights to file an appeal.*
- 2. If a party requests the grounds of a decision, the motivated decision will be communicated to the parties in full, written form. The time limit to lodge an appeal begins upon receipt of this motivated decision".*

Because the Club's appeal with CAS to obtain the grounds of the Appealed Decision was dismissed (because the Club failed to name FIFA as a respondent), FIFA's decision to deny the Club's request to issue the grounds of the Appealed

Decision became final and binding. Accordingly, the Club failed to lawfully obtain the grounds of the Appealed Decision, as a result of which, according to Article 15(1) FIFA Procedural Rules, the Appealed Decision became final and binding and the parties are being deemed to have waived their rights to file an appeal. Consequently, the Panel finds that the Club's appeal is inadmissible and that this puts an end to the present appeal arbitration proceedings.

Decision

The appeal filed on 8 September 2018 by Football Club "Irtys", against the decision issued on 21 September 2017 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is inadmissible.

CAS 2018/A/5977

FC Rubin Kazan v. Union des Associations Européennes de Football (UEFA)

29 May 2019

Football; Financial Fair-Play; Applicable versions of the regulations in case of a settlement agreement; Application of the *lex mitior*; Related party and significant influence; Media releases issued by a club; Powers of a CAS panel as regards a sanction imposed by an association; Proportionality of the sanction

Panel

Mr Manfred Nan (The Netherlands), President
The Hon. Michael Beloff QC (United Kingdom)

Prof. Luigi Fumagalli (Italy)

Facts

FC Rubin Kazan LLC (the “Club”) is a professional football club with its registered office in Kazan, Russia. The Club is registered with the Football Union of Russia (the “FUR”), which in turn is affiliated to the *Union des Associations Européennes de Football* (“UEFA”).

On 8 May 2014, the Club entered into a settlement agreement (the “Settlement Agreement”) with UEFA, following the Club’s acknowledgement that it had failed to fulfil the break-even requirements set out in Articles 58 to 64 and 68 of the UEFA’s Club Licensing and Financial Fair Play Regulations (the “UEFA CL&FFPR”, 2012 edition), because it had an aggregate break-even deficit for the monitoring period 2013/2014 which exceeded the acceptable deviation by EUR 66,000,000. The objective of the Settlement Agreement, which was to cover the three sporting seasons

2014/15, 2015/16 and 2016/17 and the reporting periods ending in 2015 and 2016, respectively (clause 1.1), was to achieve for the Club to be break-even compliant at the latest in the monitoring period 2017/18; i.e. the aggregate break-even result for the reporting periods 2015, 2016 and 2017 was to be a surplus or a deficit within the acceptable deviation in accordance with Art. 63 UEFA CL&FFPR (clause 1.2). The Settlement Agreement also provided, *inter alia*, that the Club undertook to reach a maximum break-even deficit of EUR 30 million for the reporting period ending in 2015 (clause 3.1) and a minimum break-even result of EUR 0 million for the reporting period ending in 2016 (clause 3.2).

On 15 March 2016, the Club submitted to the UEFA Administration the break-even information for the reporting period ending in 2015, in accordance with Article 54(2)(d) UEFA CL&FFPR. According to the declared break-even information, the Club indicated a break-even deficit of EUR 4,000,000 for the reporting period ending in 2015.

On 14 June 2016, following an assessment of the operational measures set for the reporting period ending in 2015, the Investigatory Chamber of UEFA’s Club Financial Control Body (the “Investigatory Chamber”) determined that the donations from the main donator, i.e. Non-commercial Organization “Fund for Promotion of Physical Culture and Sport” (“NKO Fund”), for a total of EUR 28,000,000 had to be reported as donations from related parties, and thus had to be fully excluded from the break-even calculation. Consequently, the Club’s break-even information for the reporting period ending in 2015 was adjusted accordingly (i.e. the break-even deficit for the reporting period ending in 2015 amounted to EUR 32,000,000).

The Investigatory Chamber considered that the Club was in line with the break-even target of a maximum deficit of EUR 30,000,000 for the reporting period ending in 2015 as set out in the Settlement Agreement. When assessing the Club's break-even position, the Investigatory Chamber considered the applicable mitigating factors defined in Annex XI UEFA CL&FFPR, more specifically the factor "Operating in a structurally inefficient market".

On 15 March 2017, the Club submitted to the UEFA Administration the break-even information for the reporting period ending in 2016. Contrary to the decision of the Investigatory Chamber taken on 14 June 2016 with regard to the related party involvement, the Club did not disclose, on the basis of changes in the Club's structure in late 2015, any more donations from NKO Fund as donations from a related party for the reporting period ending in 2016.

On 21 May 2017, the Club played its last official match in the 2016/2017 sporting season. The Club submits that, in accordance with Clause 1.1 of the Settlement Agreement, the Settlement Regime therefore ended on this date.

On 23 May 2017, following the assessment of the operational measures set for the reporting period ending in 2016, the UEFA Administration informed the Club that the Investigatory Chamber concluded that the assessment could be finalised only upon the submission of an independent third party assessor report on the fair (market) value of sponsorship income from three entities within TAIF Group considered as related parties, i.e. TAIF, Kazanorgsintez and Nizhnekamskneftekhim ("TAIF Group"). The total revenue from these entities amounted to EUR 44,000,000 in the reporting period ending in 2016. Furthermore, the Investigatory

Chamber was of the opinion that a comprehensive assessment procedure with regard to donations received from NKO Fund and the joint stock company Tatenergo ("Tatenergo") for the reporting period ending in 2016 (amounting to EUR 14,000,000) would be continued during the 2017/2018 season in order to verify whether the Club and these donors should be considered as "related parties".

On 29 August 2017, the Club provided a Sponsorship Evaluation report issued by Nielsen Sports for the reporting period ending in 2016 (the "Nielsen Report 2016"). According to the Nielsen Report 2016, the maximum fair value for TAIF Group sponsorship was equivalent to EUR 26,000,000. Based on the Nielsen Report 2016, the Club was requested to amend its break-even calculation for the reporting period ending in 2016 and reflect the sponsorship revenue at fair value in its next submission of the break-even information.

On 1 March 2018, the football activities were transferred from the legal entity "Municipal Autonomous Institution FC Rubin Kazan" ("MAI Rubin") to the new legal entity "Football Club Rubin Kazan Limited Liability Company" ("FC Rubin Kazan LLC"). The new legal entity took over all rights and obligations of the old legal entity, including the obligations under the Settlement Agreement, and received a license from the FUR.

On 7 March 2018, the Club provided a second Sponsorship Evaluation report issued by Nielsen Sports for the reporting period ending in 2017 (the "Nielsen Report 2017"). According to the Nielsen Report 2017, the maximum fair value for TAIF Group sponsorship was equivalent to EUR 33,000,000.

On 28 March 2018, the UEFA Administration forwarded to the Club a separate report issued by Nielsen Sports (the “Nielsen Report 2018”). This report included a standardized discounting of “maximum fair value” to reflect the return on sponsorship investment as per standard market practices. According to Nielsen Sports, the discounted amount would represent the fair value. Following this analysis, maximum fair values are to be discounted between 40% (on the basis on non-top 5 league clubs) and 66% (average on the basis of all European clubs).

On 11 April 2018, the Club submitted to the UEFA Administration the break-even information for the reporting periods ending in 2016 and 2017. On the basis of the Nielsen Reports 2016 and 2017, the Club reflected the sponsorship income from TAIF Group at its fair value. According to this submission, the Club declared break-even deficits of EUR 19,000,000 for the reporting period ending in 2016 and EUR 20,000,000 for the reporting period ending in 2017.

On 19 April 2018, the Investigatory Chamber decided to engage independent auditors to confirm the completeness, validity and accuracy of the Club’s submission.

On 27 April 2018, the Club was notified that the Investigatory Chamber requested a compliance audit to be performed at the Club’s premises. Deloitte LLP (“Deloitte”) was asked to perform the compliance assessment of the Club. On 6 June 2018, further to the submission of observations by the Club, Deloitte issued its final compliance report (the “Deloitte Report”), which, *inter alia*, included the following key findings: NKO Fund and Tatenergo were related to the Club based on the related parties definition included in the UEFA CL&FFPR. As a result, the transactions (in particular, donations) with NKO Fund and Tatenergo should be adjusted in order to

reflect their fair value. Thus, according to Deloitte, the break-even result should be decreased in the reporting periods ending in 2016 and 2017 by EUR 18,000,000 and EUR 23,000,000 accordingly.

Also on 6 June 2018, the Club acknowledged some of the findings of the Deloitte Report and amended its break-even calculation accordingly. With regard to the fair value of transactions with the entities NKO Fund and Tatenergo, the Club did not acknowledge the findings of the Deloitte Report and did not amend its break-even calculation. The Club in particular (i) argued that the funds donated by NKO Fund and Tatenergo were not from “related parties” and were used by the Club for its operational activities; and (ii) as a mitigating factor, stated that it was not receiving the donations from the second quarter of the reporting period ending in 2017 and, thus, revenues of the Club were deriving mainly from sponsorship deals. The Club declared an aggregate break-even deficit of EUR 87,563,000 for the reporting periods ending in 2015, 2016 and 2017.

On 7 June 2018, the UEFA CFCB Chief Investigator decided (the “Referral Decision”) that the Club had not complied with the terms of the Settlement Agreement, and decided to refer the case to the UEFA CFCB Adjudicatory Chamber. In particular, the aggregate break-even deficit as calculated by the UEFA CFCB Chief Investigator was EUR 128,146,000. In reaching his final conclusions, the UEFA CFCB Chief Investigator also took into account the mitigating factor “*operating in a structurally inefficient market*” as defined in Annex XI(g) UEFA CL&FFPR, which amounted to approximately EUR 52,000,000 in total, resulting in an aggregate break-even deficit of EUR 75,953,000. Therefore, after deducting the total acceptable deviation of EUR 30,000,000 the Club had a final break-even deficit of EUR 45,953,000. For the reporting

period ending in 2016 in particular, the break-even deficit was EUR 36,404,000 minus a mitigating factor “*operating in a structurally inefficient market*” of EUR 17,291,000 in total, resulting in an aggregate break-even deficit of EUR 19,113,000.

On 6 August 2018, the Club filed its observations to the Adjudicatory Chamber, inter alia, denying the existence of a Board of Trustees within the structure of its administration and asserting that its influence over the operating performance of the Club cannot therefore be assessed as significant, with the consequence that the donations of NKO Fund and Tatenergo should not be considered as donations from related parties.

On 19 September 2018, the Adjudicatory Chamber issued its decision (the “Appealed Decision”). In the grounds of the Appealed Decision, the Adjudicatory Chamber essentially concluded that it agreed with the position of the Investigatory Chamber that NKO Fund and Tatenergo had to be considered as related parties and that the break-even result submitted by the Club had to be adjusted accordingly. In short, the Adjudicatory Chamber determined that the Club had failed to comply with the terms of the Settlement Agreement since it had an aggregate break-even deficit which exceeded the relevant acceptable deviation by an amount of EUR 45,953,000 for the reporting periods ending in 2015, 2016 and 2017. For the disciplinary measures to be imposed, the Adjudicatory Chamber considered an exclusion from one UEFA club competition for which the Club would otherwise qualify in the next two seasons (i.e. the 2019/2020 and 2020/2021 seasons) to be an appropriate measure.

On 29 October 2018, the Club filed a Statement of Appeal with CAS against the Appealed Decision. On 28 March 2019, a hearing was held in Lausanne, Switzerland.

Reasons

1. Applicable versions of the regulations in case of a settlement agreement

As to the applicable version of the UEFA’s Club Licensing and Financial Fair Play Regulations, and in accordance with the general principle of *tempus regit actum*, the Club was submitting that the 2012 edition of the UEFA CL&FFPR was applicable as to the substance of the contractual dispute as this was the version in force when the parties had signed the Settlement Agreement, whilst the 2015 edition of the UEFA CL&FFP Procedural Rules should govern the procedural aspects of the case.

As to the relevant editions of the UEFA CL&FFPR and the UEFA CL&FFP Procedural Rules, the Panel found that the Settlement Agreement as such was governed by the 2012 edition of the UEFA CL&FFPR. However, the Panel found that it was to be inferred from the reference in Clause 1.2 of the Settlement Agreement that the Club had to comply with future versions of the UEFA CL&FFPR. In the Panel’s view, it would be unacceptable if the 2012 edition of the UEFA CL&FFPR would be applied on the Club, whereas other clubs, not falling under any settlement regime would have to comply with the 2015 edition of the UEFA CL&FFPR. The reference in the Settlement Agreement to break-even requirements was to be understood as a dynamic reference to future editions of the UEFA CL&FFPR.

2. Application of the *lex mitior*

On the basis of the application of the principle of *lex mitior*, the Panel also found that the most favourable set of rules was to be applied to the Club, but that this

principle did not permit one to pick and choose between the most favourable individual provisions from different sets of rules, as such would offend against the principle of legality. Rather, the most favourable set of rules was to be applied as a whole. In the matter at hand, the Panel found the application of the 2015 edition of the UEFA CL&FFPR more favourable to the Club than the application of the 2012 edition of the UEFA CL&FFPR.

3. Related party and significant influence;
Media releases issued by a club

For the Panel, the core issue underlying the present dispute was that the Club was of the view that the donations received from NKO Fund and Tatenergo were not to be considered as donations from related parties, whereas UEFA was submitting that they were. In so doing, UEFA was relying on Annex X(F)(3)(b) of the 2015 edition of the UEFA CL&FFPR which provided that an entity was related to a reporting entity (i.e., the Club) if, *inter alia*, both were controlled, jointly controlled or significantly influenced by the same government.

The Panel found that, since the 2015 edition of the UEFA CL&FFPR defined the concept of “significant influence” as *“the power to participate in the financial and operating policy decisions of an entity, but (...) not control over those policies”*, it was not about being in a position to take decision, but about the power to participate in the decision-making process. Based on these considerations, there was sufficient evidence on file to conclude that the Board of Trustees indeed had the authority to take decisions and that the Republic of Tatarstan had significant influence in the Board of Trustees. Indeed, it was not disputed that Mr Minnikhanov was i) President of the Republic of Tatarstan; ii) Chairman of SIN-X (a

company solely owned by the Republic of Tatarstan, which in turn owns 100% of the shares of NKO Fund and Tatenergo); and iii) Chairman of the Board of Trustees of the Club. It was also not in dispute between the parties that the Republic of Tatarstan had at least a significant influence in NKO Fund and Tatenergo, through the mother company SIN-X.

The remaining question was therefore whether the Republic of Tatarstan also had at least a significant influence in the Club. In the Panel’s view, should this question be answered affirmatively, the consequence was that NKO Fund and Tatenergo were to be considered related parties. Following a detailed analysis of the regulatory framework and the positions of both parties, the Panel held that to qualify an entity as related in accordance with the UEFA CL&FFPR, regardless of whether the 2012 or 2015 edition was applied, required some sort of direct influence. The clearest example of such direct influence was the competence of taking decisions, be it in a personal capacity or in the framework of a committee. If it was by means of a committee, the individual member or members had to have a certain influence on the decision-making process. It was only natural to conclude that a single person had a larger influence in a committee comprised of five members, than in a committee comprised of fifteen members.

In casu, UEFA maintained that the Board of Trustees played an important role and took important decisions for the Club, while the Club maintained that it did not, and formally did not even exist according to the Statutes of the Club. Insofar the Club contended that the Board of Trustees did not exist, the Panel found that such argument had to be dismissed. Indeed, the Club itself had admitted the existence in its

letter to UEFA dated 6 June 2018: “[...] *FC Rubin board of trustees has only representative capacities and such body is a not a managerial body and cannot make any decisions to influence the club’s operation. [...]*”. Turning to the evidence on record, the Panel then observed that it transpired from a letter on file from NKO Fund to the Club dated 13 May 2016 that the Board of Trustees apparently had the authority, not only in 2017, but already in 2016, to take decisions and determine the Club’s policy going forward on the basis of which contracts like the one referred to in this letter could be concluded. The authority of the Board of Trustees to take decisions affecting the Club was further corroborated by a media communication published on the Club’s website on 22 February 2017 which showed that the Board of Trustees was not only an important organ in determining the policy of the Club, but that it was indeed competent to take important decisions such as the appointment of the Club’s Sporting Director. Although the Panel agreed with the Club that media releases could not simply be accepted as conclusive evidence, it found that these media releases, published by the Club itself on its website, allowed a *prima facie* presumption that such information was correct. The Club was however perfectly entitled to prove that the information provided in such media releases was not correct, but *in casu*, it had not satisfied its burden of proof in this respect. For the Panel, another evidence was that the Board of Trustees consisted of five members and that three out of those five members had a position with the Republic of Tatarstan or with companies fully controlled by the Republic of Tatarstan. In addition, the Panel recalled that not much attention had been given to the fact that a donation of approximately EUR 28,000,000 from NKO Fund in 2015 had been qualified by the Investigatory

Chamber as a donation from a related party on 14 June 2016. The Club had not objected to this qualification and the break-even calculation for the reporting period ending in 2015 had been adjusted accordingly. For the Panel, an inference could be drawn that because the Club had not objected to qualifying NKO Fund as related parties during the reporting period ending in 2015, and in the absence of any proof to the contrary, this entity was still to be considered as a related party during the reporting periods ending in 2016 and 2017. Since there was no material difference between NKO Fund and Tatenergo in the sense that both were ultimately fully controlled by the Republic of Tatarstan, the Panel found that also Tatenergo was to be qualified as a related party.

On the basis of all these arguments, the Panel found that NKO Fund and Tatenergo were indeed to be considered as related parties to the Club, with the consequence that the donations received from these entities had to be excluded from the break-even results for the reporting periods ending in 2016 and 2017.

4. Powers of a CAS panel as regards a sanction imposed by an association; Proportionality of the sanction

After having found that the deficit of EUR 19,113,000 of the reporting period ending in 2016 was a violation of clause 3.2 of the Settlement Agreement and the aggregate deficit of EUR 45,953,000 over the reporting periods ending in 2015, 2016 and 2017, after deduction of an acceptable deviation of EUR 30,000,000, was a violation of clause 1.2 of such Settlement Agreement, the Panel turned to the question of the proportionality of the sanction imposed on the Club by the Adjudicatory Chamber. The Club was

contending that the exclusion from future competitions imposed on the Club was grossly disproportionate.

The Panel started with recalling that there was well-recognized CAS jurisprudence to the effect that whenever an association used its discretion to impose a sanction, CAS would have regard to that association's expertise but, if having done so, the CAS panel considered nonetheless that the sanction was disproportionate, it had to, given its *de novo* powers of review, be free to say so and apply the appropriate sanction.

Ultimately, the Panel did not have to make use of its *de novo* powers, as it found the pronouncement of an exclusion from participation in future competitions to be an appropriate sanction for violating the terms of a settlement agreement. Indeed, the Settlement Agreement had been concluded as a consequence of the fact that the Club had already violated the UEFA CL&FFPR before and had therefore been afforded a second chance by means of the Settlement Agreement. Considering the fact that the Club had failed to comply with the terms of this second chance, the Panel found that a serious sanction was warranted and that an exclusion from participation in the next UEFA club competition for which the Club would otherwise qualify in the next two seasons (i.e. the 2019/2020 and 2020/2021 seasons) was not disproportionate.

Decision

As a result, the Panel dismissed the appeal of the Club and confirmed the decision issued on 19 September 2018 by the Adjudicatory Chamber of the UEFA Club Financial Control Body.

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

4A_494/2018

25 juin 2019

X. c. Confederacion Sudamericana de Futbol (CONMEBOL)

Recours en matière civile contre la sentence rendue le 13 juin 2018 par le Tribunal Arbitral du Sport (TAS 2016/0/4763).

Extrait des faits

X. est une société britannique spécialisée dans le consulting sportif.

Confederacion Sudamericana de Futbol - CONMEBOL (ci-après: CONMEBOL) est une association de droit privé ayant son siège à... au Paraguay. Elle regroupe les fédérations nationales de football sud-américaines. Elle organise des compétitions et tournois internationaux de football, dont la *Copa Sudamericana*, une compétition annuelle ouverte aux clubs de football professionnels du continent sud-américain.

Le 12 mai 2011, la CONMEBOL et X. ont conclu un contrat par lequel la première a cédé à la seconde les droits d'exploitation commerciale de la publicité statique lors des éditions 2011 à 2014 de la *Copa Sudamericana*.

La CONMEBOL a en outre octroyé à X. un droit de priorité pour l'obtention de tels droits lors des futures éditions de cette compétition.

A la suite de l'exercice dudit droit, X. et la CONMEBOL ont conclu un accord daté du 10 novembre 2014. Cet accord, ratifié judiciairement, conférait à X., pour une durée de 60 jours, le droit exclusif de conclure un nouveau contrat portant sur la cession des droits de commercialisation de la publicité statique lors des éditions 2015, 2016 et 2017 de la *Copa Sudamericana*. Le 18 décembre 2014, X. a exercé son droit d'option.

Au cours du mois de mai 2015, plusieurs actions menées en Suisse, aux Etats-Unis et dans d'autres pays, à l'encontre des autorités de la CONMEBOL, sur la base de soupçons d'actes de corruption commis au sein de cette organisation, incluant des accusations en matière pénale et des arrestations de hauts responsables de la CONMEBOL, ont été rendues publiques.

En date des 24 juin et 20 juillet 2015, X. et la CONMEBOL ont signé un nouveau contrat (*Acuerdo de Cesión de los Derechos de Comercialización de la publicidad estática y de patrocinio del evento de la Copa Sudamericana*), soumis au droit paraguayen, en vertu duquel la première s'est vu céder les droits d'exploitation commerciale de la publicité statique lors des éditions 2015 à 2017 de la *Copa Sudamericana* moyennant le versement d'un montant total de 30,000,000 USD, soit 10,000,000 USD par compétition. L'art. 7 dudit contrat prévoit notamment ce qui suit:

"7. FIN DU CONTRAT

Le présent contrat prend fin:

7.3 Par résiliation pour les motifs prévus dans le présent contrat.

(...)"

L'art. 12 du contrat conclu par les parties est libellé comme suit:

"12. CLAUSE ADDITIONNELLE

Les parties formaliseront par un avenant à considérer comme faisant partie intégrante du présent contrat, les obligations anti-pots-de-vin et anti-corruption, sur la base des clauses types approuvées

par la Chambre de Commerce Internationale en la matière”.

Cet avenant n’a jamais été conclu par les parties.

Le 19 mai 2016, X. a informé la CONMEBOL de sa volonté de résoudre le contrat, en précisant notamment ce qui suit:

“(…) Comme vous le savez, les événements récents ont porté atteinte directement et très sérieusement à l’image publique et à la réputation de la CONMEBOL et de certains événements qu’elle organise.

Nous nous référons en particulier aux procédures pénales menées aux USA et en Uruguay ainsi qu’aux procédures disciplinaires et éthiques menées par la FIFA, impliquant un nombre considérable de dirigeants de cette Confédération (Présidents, y compris le signataire du contrat de référence, Vice-Présidents et autres hauts dirigeants de celle-ci), et liées à l’encaissement, par le biais d’une structure criminelle organisée et hiérarchisée, de pots-de-vin et d’avantages occultes par lesdits dirigeants et offerts par des responsables de marketing sportif dans le cadre de la commercialisation des droits audiovisuels et des droits de marketing associés à divers matchs et compétitions de football (...).

De tels faits (...) ont porté une grave atteinte à la réputation et à l’image de la CONMEBOL, notamment en ce qui concerne l’exploitation des droits de marketing et de sponsoring des championnats organisés par cette Confédération et, partant, impliquent une altération substantielle et imprévisible des circonstances prises en compte lors de la conclusion du contrat de référence, et qui rendent l’exécution dudit contrat dans ses propres termes extraordinairement onéreuse pour X., en plus de contrevenir aux obligations anti-pots-de-vin et anti-corruption que les deux parties sont convenues de considérer comme faisant partie intégrante de leur accord”.

Le 26 mai 2016, la CONMEBOL a contesté la validité de la résolution unilatérale du contrat.

Le 4 juillet 2016, la CONMEBOL a adressé à X. une facture d’un montant de 3,300,000 USD, correspondant à la première tranche de la somme due pour l’édition 2016 de la *Copa Sudamericana*.

Le lendemain, X. a répondu qu’elle avait résolu le contrat le 19 mai 2016 et qu’elle n’effectuerait dès lors aucun paiement supplémentaire.

Le 18 août 2016, la CONMEBOL, se fondant sur la clause arbitrale insérée dans le contrat conclu par les parties, a déposé une requête d’arbitrage au Tribunal Arbitral du Sport (TAS), dirigée contre X., en vue d’obtenir le paiement de 10,000,000 USD, avec intérêts moratoires à 0,046% par jour dès le 6 juillet 2016 et de 3,300,000 USD, avec intérêts moratoires à 0,046% par jour à compter du 27 mai 2016.

Le 4 novembre 2016, X. a conclu au rejet des conclusions prises par la demanderesse; reconventionnellement, elle a réclamé le paiement de 10, 000, 000 USD et, subsidiairement, de 7,909,778 USD au titre de gain manqué et de 10,395,280 USD pour la perte éprouvée.

Le 16 décembre 2016, la demanderesse a adressé au TAS un mémoire de demande et de réponse à la demande reconventionnelle dans lequel elle a conclu au rejet des conclusions prises par la défenderesse. Cette dernière a déposé un contre-mémoire en date du 18 janvier 2017.

Après avoir ordonné un nouvel échange d’écritures, la Formation a tenu audience à Buenos Aires le 19 octobre 2017. Statuant le 13 juin 2018, le TAS, admettant partiellement

la demande principale et rejetant la demande reconventionnelle, a condamné X. à payer à la demanderesse la somme de 10,000,000 USD avec intérêts à 5% l'an dès le 6 juillet 2016.

En bref, il a considéré que la demanderesse n'avait pas violé ses obligations contractuelles. La défenderesse ne pouvait ainsi pas fonder sa résiliation sur l'art. 7 du contrat. Par ailleurs, les conditions d'application de la théorie de l'imprévision (art. 672 du code civil paraguayen) n'étaient en l'occurrence pas réalisées. Partant, la Formation a estimé que la défenderesse n'avait pas respecté ses engagements contractuels et devait dès lors s'acquitter du montant de 10,000,000 USD, conformément à la clause 3.1 b) du contrat. Pour le surplus, elle a rejeté les autres prétentions de la demanderesse, afin d'éviter une sur indemnisation de celle-ci.

Le 14 septembre 2018 X. (ci-après: la recourante) a formé un recours en matière civile au Tribunal fédéral aux fins d'obtenir l'annulation de la sentence rendue par le TAS.

Dans sa réponse du 8 avril 2019, l'intimée a conclu à l'irrecevabilité du recours et, subsidiairement, à son rejet dans la mesure de sa recevabilité.

La recourante, dans sa réplique du 29 avril 2019, et l'intimée, dans sa duplique du 15 mai 2019, ont maintenu leurs conclusions respectives.

Extrait des considérants

Dans un premier moyen, la recourante, invoquant l'art. 190 al. 2 let. d LDIP, dénonce une violation de son droit d'être entendue. Elle fait grief au TAS de n'avoir pas pris en compte un moyen qu'elle avait soulevé dans ses écritures.

Le droit d'être entendu, tel qu'il est garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, n'exige pas qu'une sentence arbitrale internationale soit motivée. Toutefois, la jurisprudence en a déduit un devoir minimum pour le tribunal arbitral d'examiner et de traiter les problèmes pertinents. Ce devoir est violé lorsque, par inadvertance ou malentendu, le tribunal arbitral ne prend pas en considération des allégués, arguments, preuves et offres de preuve présentés par l'une des parties et importants pour la sentence à rendre. Il incombe à la partie soi-disant lésée de démontrer, dans son recours dirigé contre la sentence, en quoi une inadvertance des arbitres l'a empêchée de se faire entendre sur un point important (**ATF 142 III 360** consid. 4.1.1 et 4.1.3).

C'est le lieu de rappeler que toute inadvertance manifeste ne constitue pas nécessairement une violation du droit d'être entendu. En effet, une constatation fautive, voire arbitraire, ne suffit pas en elle-même à entraîner l'annulation d'une sentence arbitrale internationale. Si la sentence passe totalement sous silence des éléments apparemment importants pour la solution du litige, c'est aux arbitres ou à la partie intimée qu'il appartient de justifier semblable omission dans leurs observations sur le recours. Il leur incombe de démontrer que, contrairement aux affirmations du recourant, les éléments omis n'étaient pas pertinents pour résoudre le cas concret ou, s'ils l'étaient, qu'ils ont été réfutés implicitement par le tribunal arbitral. Cependant, les arbitres n'ont pas l'obligation de discuter tous les arguments invoqués par les parties, de sorte qu'il ne peut leur être reproché, au titre de la violation du droit d'être entendu en procédure contradictoire, de n'avoir pas réfuté, même implicitement, un moyen objectivement dénué de toute pertinence (**ATF 133 III 235** consid. 5.2; arrêt 4A_692/2016, précité, consid. 5.2). Au demeurant, le grief tiré de la violation du droit d'être entendu ne doit pas

servir, pour la partie qui se plaint de vices affectant la motivation de la sentence, à provoquer par ce biais un examen de l'application du droit de fond (**ATF 142 III 360** consid. 4.1.2).

Dans son mémoire de recours, l'intéressée fait grief au TAS de n'avoir pas examiné l'argument selon lequel les faits pertinents pour l'application de la théorie de l'imprévision (*clausula rebus sic stantibus*) n'étaient pas ceux connus en mai 2015, mais les faits de corruption survenus entre octobre et décembre 2015. Elle soutient que les événements qui se sont produits entre les mois d'octobre et de décembre 2015 - en particulier l'extension des poursuites pénales menées par les autorités américaines à l'encontre de nombreux membres de l'intimée et l'arrestation de plusieurs hauts dirigeants de celle-ci, dont son président - auraient été totalement passés sous silence par la Formation. Selon la recourante, ces éléments qu'elle avait allégués et détaillés dans son mémoire de réponse puis dans sa duplique déposés au TAS, étaient susceptibles d'influencer le litige, raison pour laquelle la Formation aurait dû les prendre en considération au moment d'examiner si les conditions de la *clausula rebus sic stantibus* étaient réalisées.

Dans sa réponse, l'intimée insiste, en premier lieu, sur le caractère appellatoire des critiques formulées par la recourante. A cet égard, elle reproche à cette dernière de confondre le Tribunal fédéral avec une cour d'appel et de chercher uniquement à obtenir un réexamen de l'application du droit de fond. Elle s'emploie ensuite à démontrer que la Formation a bel et bien pris en compte les événements survenus entre octobre et décembre 2015. L'intéressée relève que le TAS a minutieusement résumé la position de la recourante sous n. 64 à 87 et 95 à 100 de la sentence attaquée. Elle met notamment en

évidence le passage suivant, qui figure sous le n. 68 de la sentence:

“L'intimée [CONMEBOL] cherche ensuite à démontrer que la Formation, au moment d'examiner si la théorie de l'imprévision pouvait s'appliquer en l'espèce, a pris en considération non seulement les événements de mai 2015 mais aussi ceux survenus entre les mois d'octobre et de décembre de la même année. Pour ce faire, elle s'appuie essentiellement sur les considérations suivantes émises par la Formation sous n. 142 et 143 de la sentence:

Selon l'intimée, la Formation a ainsi non seulement tenu compte des arguments de la recourante mais a aussi refusé, à juste titre, d'appliquer la théorie de l'imprévision, puisque les événements qui se sont produits entre octobre et décembre 2015 n'étaient pas imprévisibles au moment de la conclusion du contrat”.

Dans sa réplique, la recourante conteste l'interprétation - à ses yeux trop extensive - des différents passages de la sentence cités par l'intimée. Elle persiste à soutenir que la Formation a fait totalement abstraction des événements qui se sont déroulés entre les mois d'octobre et de décembre 2015. S'agissant du sens à donner aux termes “*événements ultérieurs*” auxquels se réfère le TAS sous n. 142 de la sentence attaquée, l'intéressée prétend que ceux-ci visent uniquement les conséquences économiques des actes de corruption survenus en mai 2015, et non pas les nouveaux faits révélés entre octobre et décembre 2015.

Quant à l'intimée, elle répète, dans sa duplique, que la Formation a fondé son raisonnement sur tous les éléments de fait juridiquement pertinents que les parties lui avaient soumis. Elle réaffirme que les événements qui se sont déroulés entre octobre et décembre 2015 ont été pris en compte par le TAS, ce dernier considérant, ne serait-ce qu'implicitement, qu'ils ne revêtaient pas un caractère imprévisible permettant à la recourante de se départir du contrat.

Considéré à la lumière de ce qui précède, le grief, tel qu'il est présenté, ne saurait prospérer.

Dans la sentence attaquée, la Formation a résumé le contenu de chaque écriture déposée par les parties. Sous n. 68, 80 et 97 de la sentence, elle a notamment fait référence aux actes de corruption et aux arrestations de divers dirigeants détaillés par la recourante dans ses écritures. En outre, elle a cité, sous n. 72 de la sentence, un passage de la réponse de la recourante à la requête d'arbitrage mentionnant expressément l'arrestation et la démission de l'ancien président de l'intimée en date du 3 décembre 2015. Que le TAS n'ait pas décrit précisément toutes les affaires de corruption et les procédures engagées contre les membres de l'intimée ne signifie nullement qu'il aurait omis de prendre en considération les événements qui se sont produits entre octobre et décembre 2015. Les critiques formulées sur ce point par la recourante - au demeurant largement appellatoires - ne permettent pas d'aboutir à une conclusion différente. Lorsqu'elle a été amenée à se prononcer sur l'application éventuelle de la théorie de l'imprévision, la Formation a considéré que le moment déterminant pour juger du caractère imprévisible d'un événement était celui de la conclusion du contrat (sentence, n. 138). Elle a estimé que la recourante connaissait les affaires de corruption touchant différents membres de l'intimée lors de la signature du contrat et que les événements ultérieurs n'ont été que la concrétisation de risques prévisibles (sentence, n. 142: "*Los hechos posteriores no fueron sino la materializaci On de los riesgos previsibles a la fecha del Acuerdo*"). En faisant référence, sous n. 142 de la sentence attaquée, aux "*événements ultérieurs*" ("*los hechos*"), le TAS visait nécessairement les faits postérieurs à la conclusion du contrat, et donc également les événements qui se sont déroulés entre les

mois d'octobre et de décembre 2015. La thèse soutenue par la recourante selon laquelle les "*événements ultérieurs*" se rapporteraient exclusivement aux conséquences économiques découlant des actes de corruption de mai 2015 est par trop réductrice et n'apparaît nullement convaincante. Force est ainsi de constater que la Formation a considéré - à tout le moins de façon implicite - que les événements qui se sont produits entre octobre et décembre 2015 ne présentaient pas un caractère imprévisible au moment de la signature du contrat conclu par les parties.

On relèvera enfin que, sous le couvert d'une prétendue violation de son droit d'être entendue, la recourante critique en réalité l'appréciation des faits juridiquement pertinents, telle qu'elle a été faite par la Formation, et cherche à provoquer par ce biais un examen de l'application du droit de fond, ce qui n'est pas admissible dans un recours en matière d'arbitrage international.

Il s'ensuit le rejet, dans la mesure de sa recevabilité, du grief tiré de la violation du droit d'être entendu.

Dans un second moyen, la recourante soutient que la sentence attaquée est incompatible avec l'ordre public matériel, motif pris que la Formation aurait gravement violé la *clausula rebus sic stantibus*.

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). Elle 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. S'il n'est pas aisé de définir positivement l'ordre public matériel, de cerner ses contours avec précision, il est plus facile, en revanche, d'en exclure tel ou tel élément. Cette exclusion touche, en particulier, l'ensemble du processus d'interprétation d'un contrat et les conséquences qui en sont logiquement tirées en droit. De même, pour qu'il y ait incompatibilité avec l'ordre public, notion plus restrictive que celle d'arbitraire, il ne suffit pas que les preuves aient été mal appréciées, qu'une constatation de fait soit manifestement fausse ou encore qu'une règle de droit ait été clairement violée (arrêts 4A_312/2017 du 27 novembre 2017 consid. 3.1; 4A_304/2013 du 3 mars 2014 consid. 5.1.1).

Au demeurant, qu'un motif retenu par le tribunal arbitral heurte l'ordre public n'est pas suffisant; c'est le résultat auquel la sentence aboutit qui doit être 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).

Se prévalant de l'avis de droit établi par le Professeur A., produit à l'appui de son mémoire de recours, l'intéressée fait valoir que la théorie de l'imprévision est un concept largement reconnu, qui fait partie des principes transnationaux. Elle souligne que la *clausula rebus sic stantibus* est rattachée aux principes de la bonne foi et de l'interdiction de l'abus de droit, qui relèvent de l'ordre public matériel. Elle en déduit que la théorie de l'imprévision entre également dans le champ d'application de l'ordre public.

L'intimée conteste cette affirmation qu'elle qualifie de péremptoire. Se fondant notamment sur l'avis de droit rédigé par le Professeur B., elle soutient qu'il n'est pas exclu que la théorie de l'imprévision puisse faire partie de l'ordre public, mais à des

conditions très strictes non réalisées en l'espèce.

Dans la mesure où la *clausula rebus sic stantibus* constitue une exception au principe de la fidélité contractuelle, il n'est pas inutile de rappeler que la portée dudit principe est très restreinte sous l'angle de l'ordre public matériel. En effet, le principe *pacta sunt servanda*, au sens restrictif que lui donne la jurisprudence relative à l'art. 190 al. 2 let. e LDIP, n'est violé que si le tribunal arbitral refuse d'appliquer une clause contractuelle tout en admettant qu'elle lie les parties ou, à l'inverse, s'il leur impose le respect d'une clause dont il considère qu'elle ne les lie pas. En d'autres termes, le tribunal arbitral doit avoir appliqué ou refusé d'appliquer une disposition contractuelle en se mettant en contradiction avec le résultat de son interprétation à propos de l'existence ou du contenu de l'acte juridique litigieux. En revanche, le processus d'interprétation lui-même et les conséquences juridiques qui en sont logiquement tirées ne sont pas régis par le principe de la fidélité contractuelle, de sorte qu'ils ne sauraient prêter le flanc au grief de violation de l'ordre public. Le Tribunal fédéral a souligné à maintes reprises que la quasi-totalité du contentieux dérivé de la violation du contrat est exclue du champ de protection du principe *pacta sunt servanda* (arrêts 4A_404/2017 du 26 juillet 2018 consid. 4.1; 4A_56/2017 du 11 janvier 2018 consid. 4.1; 4A_370/2007 du 21 février 2008 consid. 5.5).

L'intimée, suivant en cela l'avis exprimé par le Professeur B., soutient qu'une violation de l'ordre public matériel en lien avec la théorie de l'imprévision serait seulement envisageable dans l'hypothèse où un tribunal arbitral refuserait d'appliquer le concept de l'imprévision ou d'examiner si les éléments constitutifs en sont remplis, tout en admettant que la *clausula rebus sic*

stantibus est applicable. Tel serait également le cas si un tribunal arbitral appliquait la notion d'imprévision tout en estimant que celle-ci n'est pas pertinente ou sans vérifier préalablement la réalisation des conditions nécessaires à sa mise en œuvre. Point n'est toutefois besoin de pousser plus avant l'examen de cette question dès lors que, dans le cas concret, le moyen invoqué doit être rejeté pour les motifs exposés ci-dessous.

En l'espèce, la recourante prétend que la Formation aurait gravement méconnu la théorie de l'imprévision en ignorant purement et simplement les faits de corruption survenus entre octobre et décembre 2015. L'argumentation de l'intéressée revient ainsi à critiquer l'appréciation des faits juridiquement pertinents et à discuter les conditions de la *clausula rebus sic stantibus* dans le cas d'espèce, ce qui n'est pas possible dans un recours fondé sur l'art. 190 al. 2 let. e LDIP, parce que cela conduirait le Tribunal fédéral à revoir les faits et le droit comme s'il était une juridiction d'appel (arrêt 4P.277/1998 du 22 février 1999 consid. 2d). Sous le couvert d'une prétendue violation de l'ordre public, la recourante cherche en réalité à provoquer, par ce biais, un examen de l'application du droit de fond, ce qui n'est pas admissible.

En tout état de cause, la conclusion à laquelle est parvenue la Formation, soit que les événements postérieurs à la conclusion de l'accord n'étaient pas imprévisibles et ne permettaient dès lors pas à la recourante de se départir du contrat, n'apparaît nullement incompatible avec l'ordre public.

Le moyen tiré d'une violation de l'ordre public se révèle ainsi infondé, si tant est qu'il soit recevable.

Sur le vu de ce qui précède, le recours doit être rejeté dans la mesure de sa recevabilité

Décision

4A_540/2018

7 May 2019

Jérôme Valcke v. The Fédération Internationale de Football Associations (FIFA)

*Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 27 July 2018**

Extract of the facts

The Fédération Internationale de Football Associations (FIFA), an association under Swiss law, is the governing body of football at international level. It has disciplinary power over the national federations it groups, players or officials who do not respect its rules, in particular its Code of Ethics (hereinafter: CEF).

Jérôme Valcke (hereinafter, the Appellant) is the former Secretary General of FIFA. Appointed to this position by the FIFA Executive Committee on 27 June 2007, he was suspended from office on 17 September 2015. On 11 January 2016, his employment contract was terminated with immediate effect.

The present case concerns various breaches of the CEF alleged by FIFA that gave rise to disciplinary proceedings against the Appellant. These allegations concern several distinct themes, the main factual elements of which are summarized here.

Between 2009 and 2010, A., an officer of B. AG (hereinafter: B.), threatened to sue FIFA for several million US dollars, claiming to have knowledge of irregularities related to the organization of the 2006 FIFA World Cup. In exchange for his silence, he demanded that FIFA agree to enter into a contract with B.

to sell thousands of tickets to B. for several editions of the World Cup.

On 29 June 2009, FIFA and B. concluded a contract under which FIFA undertook to sell B. several thousand category 1 tickets for different editions of the World Cup at their nominal value.

This contract was signed, on behalf of FIFA, by the Appellant as well as by the association's Deputy Secretary-General, C. According to the contract, B. would have to comply with the "Guidelines for the General Ticket Terms and Conditions" as well as with FIFA Sales Regulations and all applicable national and international regulations. It was intended that B. would be in direct and exclusive contact with the office of the FIFA Secretary General.

In anticipation of the 2014 World Cup in Brazil, the Brazilian Parliament enacted a law providing, among other things, for civil and criminal penalties in the event of the sale of tickets for sporting events at a price higher than the nominal value.

On February 27, 2013, and March 5, 2013, A. sent emails to the Appellant concerning the resale of tickets for the 2013 Confederations Cup, a competition organized by FIFA for which B. had also obtained tickets, as well as for the 2014 World Cup, asking him to give his authorization to

* The original decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch

For the full English translations & introductory notes on the Federal Tribunal judgments in both sports- and

commercial arbitration cases, you can visit the website www.swissarbitrationdecisions.com (operated jointly by Dr. Charles Poncet and Dr. Despina Mavromati) as a service to the international arbitration community.

formalize the sale of tickets for these competitions. The Appellant replied in the affirmative to these emails, either by indicating that he would do what was necessary or by directly authorizing B. to resell the tickets in question.

On April 2, 2013, the Appellant sent an email to D., member of the Board of Directors of B. confirming the amendment of the contract to include all matches of the Brazilian team up to the semi-final, i.e. 1,200 category 1 tickets, as well as 200 category 1 tickets for the final of the competition. In return, the Appellant allegedly negotiated for himself a participation of 50% of the proceeds from the sale of tickets for 12 matches as well as for any other tickets that B. might obtain from him. If the latter acknowledges having received such an offer from A., he denies having accepted it.

On April 3, 2013, A. and the Appellant exchanged emails about a meeting in Zurich on the same day, referring to the transmission of “documents” by the former to the latter. In particular, the Appellant wrote in the context of this exchange that these “documents” constituted his pension.

According to A. and D., the terms “document” or “documents” referred to a sum of money in cash corresponding to an advance on the payment of the bribe agreed with the Appellant. The total amount of the bribe was estimated at around CHF 2 million, depending on the proceeds from the sale of the above-mentioned tickets. According to the Appellant, the term “document” referred to the particularly sensitive information concerning irregularities in connection with the 2006 World Cup used by A. to blackmail FIFA.

On November 26, 2013, E. AG (hereinafter, E.), FIFA’s exclusive partner for the promotion of hospitality packages, sent a letter to FIFA complaining that A. was selling tickets without FIFA’s authorization, stating that the resale of tickets at a price higher than their

nominal value was in breach of FIFA rules and Brazilian law and that the sale of such tickets as part of hospitality packages would amount to a breach of the exclusive agreement between FIFA and E. In that letter, E. considered that the only viable option was to designate B. as its sales agent.

Subsequently, steps were taken to restructure the business relationship between FIFA and B. to this end, which involved the termination of the contract between B. and FIFA and the conclusion of a new agency agreement between B. and E.

On December 20, 2013, B. and FIFA terminated their contract and B. concluded a non-exclusive agency agreement with E. The latter contract provided that B. would act in the future as E.’s agent, providing its customers with “hospitality packages” in accordance with FIFA’s ticketing policy and E.’s pricing structure. On the same day, E.’s CEO, F., acting on its own behalf, signed a side letter to the contract in which it undertook to pay B. USD 8.3 million. According to an internal memorandum dated September 22, 2014, FIFA had given an oral undertaking to reimburse this amount to F.

On December 23, 2013, A. expressed in a new email to the Appellant his dissatisfaction, considering in particular the new structure much less favorable than the old one for B. He regretted that he was no longer able to sell certain premium tickets, citing a shortfall of USD 7 to 8 million.

According to an audit carried out by the audit firm G., the Appellant has, on four occasions, breached FIFA’s internal travel rules by using private jets for no legitimate reason and by being accompanied by his family at FIFA’s expense resulting in additional costs for FIFA of approximately CHF 135, 609 that were never reimbursed or deducted from his salary.

On October 11, 2013, the then FIFA Chief Financial Officer, C., sent the Appellant a memorandum and an overview of the costs associated with the use of private jets by the Appellant between January 2011 and September 2013, of USD 11.7 million. C. encouraged the Appellant to use less expensive alternatives where possible and appropriate.

On July 8, 2013, the Appellant had a business meeting with his son H. and I. then FIFA's Marketing Director, at the offices of J. Inc. (hereinafter, J.) in Manchester. H. was working at the time with J., a company specializing in virtual reality, but was not an employee of it. J. had developed a technology that could potentially be used during the 2014 World Cup. After this first meeting, the FIFA marketing team began negotiations with J.

During the aforementioned negotiations, the Appellant and his son exchanged several emails in which the former provided the latter with advice on how to conduct himself and negotiate with J. On January 16, 2014, FIFA and J. concluded a services agreement, signed on behalf of FIFA by I. and C.

After initiating a disciplinary investigation against the Appellant, the Investigatory Chamber of the Independent Ethics Committee of the FIFA (hereinafter, the Investigatory Chamber) has repeatedly reminded the Appellant of his duty to cooperate in accordance with Art. 41 CEF. The Appellant expressed his willingness to cooperate, provided, however, that he was granted prior access to the file, and in particular expressed concern that his cooperation in FIFA's disciplinary proceedings might be prejudicial to him in view of the criminal investigations carried out by the Swiss and American authorities. He expressed concern that documents produced during the disciplinary proceedings might reach the Swiss or American criminal authorities.

The FIFA Adjudicatory Chamber issued its final award on February 10, 2016. Finding that

the Appellant had violated Articles 13, 15, 19, 20 and 41 CEF, it prohibited him from engaging in any activity related to football at a national and international level for a period of 12 years from October 8, 2015, and additionally imposed a fine of CHF 100,000.

By decision of June 24, 2016, the FIFA Appeal Committee (hereinafter, the Appeal Committee) partially confirmed the decision of the Adjudicatory Chamber. Confirming the breach by the Appellant of Articles 13, 15, 16, 18, 19, 20 and 41 CEF, it nevertheless reduced the duration of the prohibition imposed on him from 12 to 10 years, while ratifying the amount of the fine.

On February 23, 2017, the Appellant appealed to the Court of Arbitration for Sport (hereinafter, CAS) for the annulment, in the alternative, the reduction, of the sanctions imposed on him.

By decision of July 27, 2018, the CAS Panel rejected the Appellant's appeal against the decision of the Appeal Committee of June 24, 2016.

The Appellant submitted a Civil law appeal to the Federal Tribunal with a view to obtaining the annulment of the award of July 27, 2018. Considering that the arbitration is internal in nature, he mainly gives reasons for his grievances under Art. (393) CPC. First, he infers from the absence of a decision by the CAS Panel on the international or domestic nature of the arbitration a breach of his right to be heard. He then argues that the Panel made an arbitrary award in so far as it disregarded mandatory provisions of Swiss labor law applicable in the present case and manifestly violated Art. 10 of the 2009 version of the CEF. In his view, the award would also constitute a clear breach of Art. 6 (1) ECHR and 14 of the International Covenant on Civil and Political Rights (ICCPR) which entered into force for Switzerland on June 18, 1992, (UN Covenant II; SR 0.103.2) and is therefore incompatible with procedural public policy. Finally, he considers that the excessive

nature of the sanction imposed on him would constitute a breach of both the principle of preventing arbitrary procedures and substantive public policy.

At the end of his reply of November 28, 2018, the Respondent argued that the action was inadmissible and, in the alternative, that it should be dismissed. The Appellant, in his reply of December 14, 2018, and the Respondent, in its reply of January 11, 2019, maintained their respective submissions. The CAS waived its right to submit comments.

Extract of the legal considerations

In accordance with Art. 77 (1) LTF, Civil appeals are admissible against the decisions of arbitral tribunals: (a) for international arbitration, under the conditions provided for in Art 190 to 192 of the Federal Private International Law (SR 291); and (b) for domestic arbitration, under the conditions provided for in Articles 389 to 395 CPC.

The question of the domestic or international character of the arbitration is of great importance, as the grounds for admissible appeals against an award made in the context of international arbitration are considerably more limited than those admissible against a domestic arbitral award. In particular, Art. 190 (2) PILA, which is exhaustive, does not establish arbitrariness as a ground for appeal against an international arbitral award.

The CAS recognized the importance of the question of the international or domestic nature of the arbitration for a possible Civil appeal to the Federal Tribunal. Nevertheless, considering that it was essentially insignificant for the proceedings before it and that the parties were not requesting a decision, it did not consider it necessary to decide. The Appellant, who also considers that this lack of a position on the issue amounts to breaching his right to be heard, is of the opinion that this is a domestic arbitration and that the grounds for appeal under Art. 393 CPC can therefore be

relied upon before the Federal Court. The Respondent considers that it is dealing with an international arbitration in which only the grievances enumerated in Art. 190 (2) PILA are admissible in the proceedings.

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, at the time of the conclusion of the arbitration agreement (see judgment 4A_600/2016 of June 29, 2017, at 1.1.1), neither domiciled nor had its habitual residence in Switzerland. When the seat of the arbitral tribunal is in Switzerland and the provisions of Chapter 12 of the PILA are not applicable, the arbitration is domestic and governed by Art. 353 et seq. CPC (Art. 353. (1) CPC).

The CAS considered, in the light of these criteria and subject to a declaration by the parties in accordance with the requirements of Art. 353 (2) CPC, to be in the presence of an arbitration of a domestic nature. As the parties agree on this point, there is no need to return to it. The only issue in dispute is whether the parties have validly agreed on a choice of law under Chapter 12 of the PILA.

According to Art. 353 (2) CPC, the parties can, by an express declaration in the arbitration agreement or in a subsequent agreement, opt out of Part III of the CPC and agree that the provisions of Chapter 12 of the PILA are applicable. Art. 176 (2) PILA gives the parties, when the arbitration is of an international nature, the opposite possibility, namely to opt for the provisions relating to arbitration of the CPC, excluding those of the PILA.

According to the case law of the Federal Tribunal relating to Art. 176 (2) PILA, a choice of law must satisfy the three conditions set by law in order to be valid. Under the authority of the Concordat on Arbitration of March 27, 1969, it was laid down that such choice of law should, first, expressly exclude the application of federal law, second, provide for the exclusive

application of cantonal rules on arbitration and, third, take the written form. The Federal Tribunal held that there were no serious grounds for departing from the clear text of the law according to which an exclusion agreement required not only an agreement as to the exclusive application of the Concordat but also the express exclusion of the federal law on international arbitration (**ATF 116 II 721** at 4; **115 III 393** at 2b/bb; judgments 4P.140/2000 of November 10, 2000, at 2a.; 4P.243/2000 of January 8, 2001, at 2b; 4P.304/2006 of February 27, 2007 at 22.4; 4A_254/2013 of November 19, 2013 at 1.2.3). The entry into force of the CPC did not bring any significant changes to these conditions. According to the current version of Art. 176 (2) PILA, the parties can, by an express declaration in the arbitration agreement or in a subsequent agreement, opt out of the provisions of Chapter 12 of the PILA and agree to the application of Part III of the CPC.

There is nothing to prevent the case law relating to Art. 176 (2) PILA from being applied *mutatis mutandis* to the opting out in accordance with Art. 353 (2) CPC (AMBAUEN, 3. Teil ZPO versus 12. Kapitel IPRG, Eine Gegenüberstellung im Kontext der Opting-out-Möglichkeiten, 2016, no.198; BERGER/KELLERHALS, International and domestic arbitration in Switzerland, 3rd ed. 2015, no.112; DASSER, in Kurzkommentar ZPO, 2nd ed. 2013, No. 11 on art. 354; PFISTERERER, in Berner Kommentar, Schweizerische Zivilprozessordnung, 2012, no. 32 to Art. 353 CPC). According to the clear text of this provision, an opting out is valid if, first, the application of Part III of the CPC is expressly excluded, second, the exclusive application of the provisions of Chapter 12 of the PILA is agreed, and third, the express declaration of the parties is in written form. Thus, an agreement by the parties to apply the rules of international arbitration exclusively is not sufficient on its own. It is imperative that the parties expressly exclude the application of the provisions of the CPC relating to domestic arbitration.

In a recent award, the Federal Tribunal indicated as an *obiter dictum* that an opting out under Art. 353 (2) CPC cannot be validly agreed in order to avoid the restriction on the arbitrability of disputes concerning claims arising from a purely Swiss employment relationship which the worker cannot waive (Art. 354 CPC with Art. 341 (1) CO⁶) (**AIF 144 III 235** at 2.3.3). If this is not strictly speaking a supplementary condition in addition to those of Art. 353 (2) CPC, it must be noted that, even in the event of an opting out, the arbitrability of a domestic dispute within the meaning of the aforementioned provisions is determined in accordance with Art. 354 CCP and Art. 177 PILA.

The procedural order, transmitted by the CAS to the parties on July 26, 2017, and signed without reservation by them in the following days, contained the following provision:

“In accordance with the terms of the present Order of Procedure, the parties agree to refer the present dispute to the Court of Arbitration for Sport (CAS) subject to the Code of Sports-related Arbitration (2017 edition) (the “Code”). Furthermore, the provisions of Chapter 12 of the Swiss Private International Law Statute (PILS) shall apply, to the exclusion of any other procedural law”.

The Appellant considers that the parties have not validly agreed on an opt-out.

His argument is divided into three points.

Firstly, he considers that the clause in question would not comply with the condition of validity of a choice of law under Art. 353 (2) CPC that the clause should expressly exclude the application of Part III of the CPC. Since the procedural order signed by the parties merely excludes “*any other procedural right*”, it would not meet the requirements of the case law.

Secondly, the Appellant considers that he is not bound by this clause because he is unwilling to submit the dispute to the rules on international arbitration. If he does not dispute that he signed the procedural order in question, the Appellant considers that the inclusion of an

opting out clause would correspond to a clerical error of the CAS Court Office that went unnoticed at the time of signing the procedural order. According to him, procedural orders are ostensibly standard documents distributed “almost mechanically” by the CAS in all proceedings and “signed [by the parties] in the same way”. Since the Appellant expressly requested the application of Part III of the CPC in its Appeal Brief and the Respondent did not object to it in its reply, the Arbitral Tribunal cannot, in the Appellant’s opinion, reclassify the arbitration as international arbitration on its own initiative without drawing its attention to this point, for example by highlighting the clause in question or referring to it in the letter accompanying the procedural order. In his view, this was not the case in this instance, since the disputed provision was formulated as an introductory remark placed in the preamble, outside the operative part of the order. Even if it were not an error on the part of the CAS, but rather a desire “to impose an opting-out on the parties”, this conduct of the Arbitral Tribunal would be contrary to the principle of good faith (Art. 2 CC).

Thirdly, the Appellant doubts that the parties can validly agree on a choice of law after the opening of the arbitration proceedings, let alone after submitting appeal briefs that do not contest the domestic nature of the arbitration.

The Respondent, however, considers that the parties have validly agreed on an opting out under Art. 353 (2) CPC. In particular, it points out that the disputed provision differs from the choice of law clauses under Art. 176 (2) PILA on which the Federal Tribunal has had to rule. The PILA does not contain - unlike the CPC - any procedural provisions that could be chosen by the parties within the meaning of Art. 373 (1) CPC; the phrase “*exclusion from any other procedural law*” cannot be interpreted otherwise than as an exclusion from Art. 353 et seq. CPC. It also rejects the thesis of a clerical error put forward by the Appellant as well as his allegations concerning a breach of Art. 2 CC by the CAS.

With respect to the time at which the agreement was entered into, the Respondent considers that legal opinion infers from Art. 353 (2) CPC that such an agreement is possible until the award is made.

It appears from the outset that the Appellant cannot be followed when he claims that the opting out is not valid because of his unwillingness to submit the dispute to the rules on international arbitration. The Appellant, whose argument is based essentially on the hypothesis of a clerical error by the CAS that went unnoticed at the time the procedural order was signed, would ultimately like his agreement to the choice of law not to be enforceable against him. As the Panel rightly points out, his reasoning is problematic. A party, in particular when assisted by counsel, cannot sign a procedural order containing a choice of law clause and, subsequently, argue that it is not bound by it. To admit otherwise would be to violate the principle of contractual fidelity (*pacta sunt servanda*). The Appellant does not demonstrate how the agreement would be vitiated by being tainted with lack of consent within the meaning of Art. 23 et seq. of the Swiss Code of Obligations, in particular how the strict conditions of a fundamental mistake would be met in this case. It should also be noted that, although a choice of law under Chapter 12 of the LDIP is not currently favorable to the Appellant, since he did not prevail before the previous court and has an interest in the admissibility of the broader grounds for appeal that may be invoked against domestic arbitration, it was not necessarily unfavorable to him at the time the procedural order was signed. Indeed, if the CAS had followed his findings and annulled the sanctions imposed on him, it would have been to the Appellant’s advantage if this award could only be challenged under the more restrictive conditions of Art 190 et seq. PILA.

The Appellant wrongly considers that it was the responsibility of the CAS to clearly highlight the opting out clause because of its unusual nature in this case. He seems to refer to the “*unusualness rule*” (*Ungewöhnlichkeitsregel*), the rule according to which unusual clauses, to the existence of which the

contracting partner's attention has not been specifically drawn, are excluded from the supposedly overall adherence to general conditions (see ATF 138 III 411 at 3; judgment 4A_499/2018 of December 10, 2009, at 3.3, intended for publication). He disregards the fact that this rule based on the principle of trust is intended to protect the party who consents to the general conditions governing a contractual relationship. It is not clear how it should apply to a procedural order signed by two experienced parties assisted by counsel in an arbitration. The use by an arbitral tribunal of templates or standard documents does not change this and does not in any way exempt the parties from carefully reading the provisions which the tribunal suggests should govern the procedure. Thus, and without having to rule on whether or not the clause in question is unusual, the Appellant cannot be followed on this point. The same is true of its reasons - which are difficult to understand - regarding the principle of good faith and the prohibition against abuse of rights. Contrary to what he seems to argue, the CAS in no way "imposed" on the parties an international arbitration but simply suggested a procedural order containing an opting-out clause that the parties accepted without reservation. The Appellant's lack of diligence cannot be attributed to the CAS as nothing indicates that it breached Art. 2 CC.

In the context of the examination of the validity of the choice of law, two specific legal questions arise. The first is to ask whether the disputed clause of the procedural order satisfies the condition of validity of an opting out according to which the application of the third part of the CPC must be expressly excluded. The second is whether an opting out could still be concluded in the procedural order signed by the parties at the end of July 2017.

In the disputed clause of the procedural order, the parties not only agreed to the exclusive application of Chapter 12 of the PILA but also specified that this choice of law should be "*to the exclusion of any other procedural law*", a phrase on whose meaning in French ("*à l'exclusion de toute autre loi de procédure*") the parties agree. Thus, this

provision differs from the opting out clauses on which the Federal Tribunal had to decide in the context of its case-law relating to Art. 176 2 PILA. In the latter, the parties had completely failed to mention either the standards to be applied or those to be excluded, which is why one of the conditions of the opting out was not met.

In order to implement the requirements relating to opting out, it is useful to draw inspiration from the case law on the waiver of appeal against arbitral awards under Art. 192 PILA, which also requires an "*express declaration*" by the parties (CASEY-OBRIST, *Individualarbeitsrechtliche Streitigkeiten im Schiedsverfahren*, p. 157). In particular, Art. 192 (1) PILA states that:

"[I]f the two parties have neither domicile, habitual residence nor a place of business in Switzerland, they may, by explicit declaration in the arbitration agreement or a subsequent written agreement, waive the right of appeal against the awards of the arbitral tribunal; they may also waive the right of appeal only for one or other of the reasons listed in Art. 190 (2) PILA".

According to case-law, a direct waiver does not have to include the reference to Art. 190 PILA and/or Art. 192 PILA. It is sufficient for the express declaration of the parties to show clearly and unequivocally their shared desire to waive their right to any appeal **ATF 143 III 589** at 2.2.1, **143 III 55** at 3.1; **134 III 260** at 3.1; **131 III 173** at 4.2.31). The Federal Tribunal considered that making the valid waiver subject to the use of the express mention, in the arbitration clause, of these articles of the PILA would be tantamount to a formalism that was not appropriate. This would imply ignoring, for a purely formal reason, the willingness of the parties to waive any appeal against an arbitral award. Such an exclusion would also exclude any waiver made before the coming into force of the PILA. Thus, for example, the Federal Tribunal held that the following clause constituted a valid exclusion within the meaning of Art. 192 LDIP: "*All and any awards or other decisions of the Arbitral Tribunal [...] shall be final and binding on the parties who exclude all and any rights of appeal from all and any awards insofar as such exclusion can validly be made*" (**ATF 131 III 173** at 4.2.3.1 and 4.2.3.2). The consequences of waiver of appeal under Art. 192 LDIP are farther-

reaching than those of an opting out according to Art. 353 2 CPC in view of the parties' potential to challenge the arbitral award. While the choice of law under Chapter 12 of the PILA has the effect of replacing the grounds of appeal in Art. 393 CPC by the more restricted ones of Art. 190 PILA (see above), the waiver according to Art. 192 PILA deprives the Appellant of all grounds of appeal. This waiver applies to all the grounds listed in Art. 190 (2) PILA, unless the parties have excluded the appeal only for one or the other of those grounds (**ATF 143 III 589** at 2.1.1; **III 55** at 3.1 and the judgments cited). Nor is it justified to adopt stricter requirements for an opting-out agreement than for a waiver of appeal (ATF 116 II 639 at 2; **BUCHER**, in *Commentaire romand*, *Loi sur le droit international privé*, *Convention de Lugano*, 2011, no.36 to Art. 176 PILA).

If the Federal Tribunal has not been asked to decide on the degree of precision with which the exclusion of the third part of the CPC (or, in the case of an opting-out under Art. 176 (2) PILA, Chapter 12 of the PILA) must be formulated, it nevertheless specified that the use of a standard form could not be imposed on the parties and that the shared desire to exclude the provisions in question could be clarified by interpretation. According to the case law, however, legal certainty requires that this desire be clear from the terms used by the parties (ATF 115 II 390 at 2b/bb; judgments 4P.243/2000 of January 8, 2001, at 2b; 4A_25412013 of November 19, 2013 at 1.2.3).

It is not necessary, in order to establish such a desire, for the parties to have cited the provisions whose application is excluded. Where the terms used by the parties clearly indicate their shared desire to submit the dispute to the provisions of Chapter 12 of the PILA instead of the third part of the CPC, making an explicit reference to these provisions a *sine qua non* condition for opting out would be tantamount to ignoring this desire for formal reasons. As in the case of waiver of appeal against an international arbitral award, such formalism is not justified. If the law requires that an opting out agreement satisfy the three conditions of Art. 353 (2) CPC, it does not require the parties to cite certain provisions or

use certain expressions. For obvious reasons of clarity, however, it can only be recommended that they - and institutions formulating opting-out clauses for them - refer expressly to the aforementioned provisions.

In view of the above, a valid opting out according to Art. 353 (2) CPC and 176 (2) PILA does not require an express reference to Part III of the CPC or, respectively, Chapter 12 of the PILA, in the arbitration agreement or in a subsequent agreement. If such a reference is advisable in order to avoid any discussion, the validity of a choice of law does not depend on it. As the Federal Tribunal has stated in its case law on Art. 176 (2) PILA, it is sufficient that the shared desire of the parties to exclude the application of these provisions is clear from the terms used.

The disputed clause in the procedural order, according to which the provisions of Chapter 12 of the PILA must apply to the exclusion of any other procedural law, does not raise any problem of interpretation. The parties agreed on the application of the CAS Sports Arbitration Code as it stands in 2017 and the provisions of Chapter 12 of the PILA, the latter to be applied to the exclusion of any other procedural law. If it would have been desirable for the parties to explicitly mention the CPC and its third part, the categorical wording of this clause ("*any*") leaves no reasonable doubt that these provisions should not apply to the dispute in question. Moreover, in view of Switzerland's dual arbitration system, it is clear that a clause providing for the application of Chapter 12 of the PILA as a *lex arbitri* instead of any other procedural law is intended in the first instance to exclude alternative provisions of the CPC governing domestic arbitration, which should be particularly clear for two parties having their seat or domicile in Switzerland and being assisted by counsel at the time of signing the procedural order. As the express mention of the provisions of the CPC is not a condition for the validity of an opting out within the meaning of Art. 353 2 CPC, the absence of such a reference in the disputed clause shall not invalidate it.

In the present case, the parties' desire to exclude the application of the CPC's provisions on domestic arbitration is clear from the terms used in the procedural order. Regardless of what the Appellant may say, the disputed clause constitutes from this point of view a valid opting out within the meaning of Art. 353 (2) CPC.

With regard to the time of conclusion of the exclusion agreement, Art. 353 (2) CPC provides that an opting out may be concluded "*in the arbitration agreement or in a subsequent agreement*". In almost the same way, Art. 176 (2) PILA stipulates that the parties may provide for a choice of law under the third party of the CPC "*in the arbitration agreement or in a subsequent agreement*". In a decision issued before the revision of Art. 176 2 PILA, the Federal Tribunal left open the question of whether such an agreement could be concluded at any time (**AIF 115 II 390** at 2b/cc).

The majority of legal opinion considers that an opting-out agreement may be concluded at any time, even during arbitration (OETIKER, in *Zürcher Kommentar zum IPRG*, 3rd ed. 2018, no.104 to Art. 176 PILA; DUTOIT, *Droit international privé suisse, Commentary on the Federal Law of 18 December 1987*, 5th ed. 2016, no.6 to Art. 176 PILA; BERGER/KELLERHALS, op. cit., no.108; PFIFFNER/HOCHSTRASSER, in *Basler Kommentar, Internationales Privatrecht*, 3rd ed. 2013, No. 47 to Art. 176 PILA; DASSER, op. cit., no. 13 to Art. 353 CPC; PFISTERER, op. cit., no. 35 to Art. 353 CPC; LALIVE/POUDRET/REYMOND, *Le droit de l'arbitrage interne et international en Suisse*, 1989, No. 18 to Art. 176 LDIP), some commentators specifying that such a change of system may take place until the arbitral award is made (STACHER, in *Schweizerische Zivilprozessordnung (ZPO), Kommentar*, 2nd ed. 2016, No. 25 to Art. 353 LDIP; IMBAUEN, op. cit., op. cit., No. 89 if.; KAUFMANN-KOHLER/RIGOZZI, *International Arbitration, Law and Practice in Switzerland*, 2015, no. 2.44; BERGER/KELLERHALS, op. cit., —nos. 108 and 112; CORBOZ, in *Commentary on the LTF*, 2009, no. 30 to Art. 77 LTF).

However, some of these authors provide clarifications that put their position into perspective. For KAUFMANN-KOHLER/RIGOZZI, it seems reasonable to exercise the option of a system change before or at the beginning of the arbitration in order to avoid potential difficulties. According to them, where the arbitral panel has already been constituted, the agreement of the court is required, as the arbitrators have agreed to operate under another *lex arbitri* (KAUFMANN-KOHLER/RIGOZZI, op. cit., no.2.44). According to OETIKER, the agreement of the arbitral tribunal is necessary when decisive stages of the proceedings ("*entscheidende Prozessschritte*") have been reached (OETIKER, op. cit., no.104 to Art. 176 PILA; see also ORELLI, in *Arbitration in Switzerland - The Practitioner's Guide*, Arroyo [ed.], 2nd edition. 2018, no.31 to Art. 176 PILA). DUTOIT specifies that an exclusion agreement is possible "*provided that the procedure has not already reached such an advanced stage that a change in the applicable law is no longer possible*" (DUTOIT, op. cit., no.16 to Art. 176 PILA). According to IMBAUEN, an opting out is no longer possible once the arbitral tribunal has decided in a partial or interlocutory decision on a contentious issue relating to a mandatory provision, citing the example of a partial decision of the tribunal on its jurisdiction. According to this author, "[...] *it must be assessed in the specific case whether the arbitral tribunal has already carried out acts which are based on mandatory provisions of a lex arbitri and may no longer be repeated*". (IMBAUEN, op. cit., no. 90 f.). Finally, referring to the possibility for the parties to return to the PILA system after having concluded an exclusion agreement within the meaning of Art. 176 (2) PILA, lalive/poudret/reymond advise against a change of system during arbitration in view of the difficulties that such a change could raise (LALIVE/POUDRET/REYMOND, op. cit., no.18 to Art. 176 PILA, citing as an example a provision of the Concordat).

Other authors believe that the parties cannot agree on a change of system at all times. This is the case of WEBER-STECHER, according to which a choice of law is only possible until the first organizational session ("*Organisationsbesprechung*")

or “organizational hearing”). For this author, it is decisive that the change of system does not cause a significant slowdown in the procedure (WEBER-STECHER, in Basler Kommentar, Schweizerische Zivilprozessordnung, 3rd ed. 2017, no 11 to Art. 353 CCP). GÖKSU considers it appropriate to allow the possibility of opting out until the end of the organizational sessions or until the decision to set up the arbitral tribunal (“*until the conclusion of the organizational meetings or the constitutional resolution*”) (GÖKSU, Schiedsgerichtsbarkeit, 2014, no. 236). According to BUCHER, a “*subsequent agreement*” within the meaning of the aforementioned provisions may be concluded until one of the parties takes steps to set up the arbitral tribunal, thereby creating *lis pendens*. According to this author, the more flexible solutions suggested by the legal commentary could lead to serious difficulties of application. As the parties entered into a legal relationship with the arbitrators governed by Chapter 12 of the PILA from the moment the arbitral tribunal was constituted, they could no longer change the rules of the game without the agreement of the latter (BUCHER, op. cit., no.2 to Art. 176 PILA).

All the authors cited above, either commenting on Art. 353 2 CCP or on Art. 176 (2) PILA, or on these two provisions, do not distinguish between them. Only DASSER justifies the possibility of an opting out according to Art. 353 (2) CPC at each stage of the procedure, in particular by the fact that such a choice of law would correspond to a transition to a more liberal system, without however coming to a decision on the time until which the opposite transition is possible (DASSER, op. cit., no. 13 to Art. 353 CPC; see also on this point LALIVE/POUDRET/REYMOND, op. cit., no.18 to Art.176 PILA).

It must be noted that the practical importance of the issue is limited. In view of the small differences between the third part of the CPC and Chapter 12 of the PILA (see, for a detailed comparison, AMBAUEN, op.cit., no.158 if., in particular no.567; DASSER, op.cit., no.13 to Art. 353 CPC), a change of system - even during arbitration - should generally not have any

consequences for the proceedings before the arbitral tribunal. The present case provides a clear example of this, since the CAS noted that the question of the validity of the choice of law clause was of no importance for the proceedings before it and would only become relevant at the time of a possible appeal to the Federal Tribunal.

It should also be remembered that opting out is by nature consensual. Any inconveniences that a change of system during the arbitration process may cause for the parties, such as slowing down the proceedings, are therefore only the consequences of their own choice. Thus, even if such inconveniences might justify advising the parties not to agree on a change of system during the arbitration, they do not require it to be prohibited. As KAUFMANN-KOHLER/RIGOZZI and BUCHER point out, the real problem of the time limit of an opting out lies in the relationship between the parties and the arbitrators. To allow the possibility of a change of system at all stages of the arbitration without the agreement of the latter would amount to forcing them to arbitrate a dispute according to the rules of a *lex arbitri* other than that which governed the procedure at the time the tribunal was constituted.

The question of the last moment at which the parties may agree on an opt-out without the agreement of the arbitrators does not have to be decided in this case. Indeed, as the Appellant himself acknowledges, it was the CAS that suggested the disputed clause to the parties. Thus, there can be no question of a choice of law without the agreement of the arbitral tribunal. There is nothing to prevent an opting out in such a situation until the arbitral award is made.

In view of the above, the parties’ agreement to submit their dispute to the rules of Chapter 12 of the PILA is in accordance with the requirements of Art. 353 (2) CPC. Therefore, only the grounds for appeal in Art. 190 (2) PILA are admissible against the arbitral award of July 27, 2018. As Art. 190 (2) PILA does not establish arbitrariness as an admissible ground of appeal, the Appellant’s claims relating to the alleged

arbitrary violation of the mandatory rules of Swiss labor law and of Art. 10 of the 2009 version of the CEF must be declared inadmissible.

As for the rest of the appeal, there is no obstacle to the commencement of the proceedings. As the Appellant took part in the proceedings before the CAS (Art. 76 (1) LTF), he is entitled to appeal. His appeal, which is admissible by reason of the matter (Art. 72 (1) LTF), is directed against a final award (Art. 90 LTF) and has been submitted in the form provided for by law (Art. 42 LTF) and in due time (Art. 100 al. (1) LTF).

The Appellant infers from the absence of a decision on the international or domestic nature of the arbitration a breach of his right to be heard.

Contrary to the Appellant's claim, the question whether the arbitration was governed by the provisions of Part III of the CPC or Chapter 12 of the PILA was irrelevant to the proceedings before the arbitral tribunal, which the CAS expressly specified in the award issued. In no case shall it be inferred from the right to be heard that such a question, irrelevant to the outcome of the dispute, should be decided. Nor can the Appellant be followed when he alleges that, by not ruling on the question at issue, the CAS deprived him of the opportunity to learn what arguments were available to him against the award, thereby placing him in an "extremely uncomfortable" position. He ignores the fact that an arbitral tribunal, unlike a cantonal authority whose decision may be appealed in the Federal Tribunal (see Art. 238(f) CPC; Art. 112(d) PILA), is not required to indicate in its award the legal remedies against the award (see KLETT/LEEMANN, in Basler Kommentar, Bundesgerichtsgesetz, 3rd ed. 2018, no.7). For the rest, it should be noted that the Federal Tribunal examines its jurisdiction on its own motion. The fact that the Panel ruled on the question of the international or domestic nature of the arbitration would not have prevented this Court from overturning the position of the Arbitral Tribunal.

The Appellant claims that there was a violation of Art. 6 (1) ECHR and 14 of the UN Covenant II, the purpose of which, in his view, is to provide guarantees forming part of procedural public policy. He considers that the disciplinary action imposed on him because of his alleged failure to cooperate, while criminal proceedings relating to the same facts were ongoing, constitutes a violation of the right to a fair trial conferred by the aforementioned provisions. In his view, forcing him to cooperate with the FIFA authorities when the results of FIFA's internal investigation were likely to be forwarded to the criminal authorities would be tantamount to rendering meaningless the principle that no one is required to accuse himself. In the Appellant's opinion, the award issued is ostensibly incompatible with his right to a fair trial, which he considers to be part of procedural public policy.

It is true that the Appellant's grievance raises particularly interesting questions relating to the application and scope of the principle *nemo tenetur se ipsum accusare* in a disciplinary procedure within a private law association while criminal proceedings relating to the same facts are pending or contemplated. However, in order for this Court to examine them, the existence or imminence of such criminal proceedings should be shown. In the present case, the CAS did not elaborate on the possible application of the aforementioned principle, finding that the Appellant had not substantiated his allegations about possible criminal investigations by the Swiss and US regarding FIFA and its directors when the Investigatory Chamber requested him to cooperate. According to the CAS, the object of these investigations is not established. This is a finding of fact which binds the Federal Tribunal, as it conducts its legal reasoning on the basis of the facts found in the award under appeal (Art. 105 (1) LTF). In so far as it refers to criminal proceedings against him concerning the same facts as those alleged against him in the context of the disciplinary proceedings, the Appellant relies on a factual situation which was not retained by the Panel. His grievance is not admissible.

In a final argument, the Appellant argues against the disciplinary action imposed on him, a penalty which he considers to be excessive. He alleges in particular a breach of substantive public policy, since in his opinion the disciplinary action excessively undermines his personality rights.

The Appellant is prohibited from carrying out any activity related to football at a national and international level for a period of 10 years and received a fine of CHF 100,000. It is not up to the Federal Tribunal to judge whether this disciplinary action is adequate or not. Be that as it may, this is by no means incompatible with substantive public policy. In fact, sanctioning serious acts of a senior officer of a sports association with a heavy penalty does not in itself amount to disregarding the essential and widely recognized values which, according to the prevailing conceptions in Switzerland, should constitute the foundation of any legal order (**AIF 132 III 389** at 2.2.3). If the disciplinary action inflicted is likely to significantly affect the end of the Appellant's career, the latter's personality rights are not so constrained that it becomes a question of an award that is incompatible with public policy. In particular, the disciplinary action in question cannot be compared to that imposed on the Brazilian football player Francelino da Silva Matuzalem, namely the threat of an unlimited prohibition to practice his profession in the event that he does not pay an indemnity of more than 11 million euros at short notice (**AIF 128 III 322**). The age of the Appellant and the duration of his career in the world of sport and especially football do not change anything. The Appellant's grievance is not well-founded.

Decision

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

Informations diverses

Miscellaneous



Publications récentes relatives au TAS/Recent publications related to CAS

- Boss P. V., Manipulation de compétitions sportives (match fixing): aspects pénaux de la nouvelle Loi fédérale sur les jeux d'argent, *Forumpoenale* 1/2019 p. 52
- Greene P., Kaiser M., How athletes' rights can be better protected when it comes to retroactive Therapeutic Exemptions, *The International Sports Law Journal*, Volume 19, Numbers 1-2, September 2019, p. 29
- Laskowski J., Solidarity compensation framework in football revisited, *The International Sports Law Journal*, Volume 18, Numbers 3-4, March 2019, p. 150
- Latty F., Les politiques des Etats à l'égard des tribunaux arbitraux: le cas du Tribunal arbitral du sport, in Florian COUVEINHES, Raphaëlle NOLLEZ-GOLDBACH, *Les Etats face aux juridictions internationales - Une analyse des politiques étatiques relatives aux juges internationaux*, Actes de la 2^e Journée de droit international de l'ENS, Paris, Pedone, 2019, 239-256.
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- Nuriev A., Non-intentional anti-doping rule violations: Does a new trend in evidence provision suffice ? *The International Sports Law Journal*, Volume 19, Numbers 3-4, November 2019, p. 222
- Pielke R., Tucker R., Boye E., Scientific integrity and the IAAF testosterone regulations, *The International Sports Law Journal*, Volume 19, Number 1-2, September 2019, p.18
- Radke H., Basketball Arbitral Tribunal (BAT) as a 'lawmaker': the creation of global standards of basketball contracts through consistent arbitral decision-making, *The International Sports Law Journal*, Volume 19, Number 1-2, September 2019, p.59
- West D., Revitalising a phantom regime: the adjudication of human rights complaints in sport, *The International Sports Law Journal*, Volume 19, Number 1-2, September 2019, p. 2
- 4A_490/2017 vom 2. Februar 2018 [Jurisdiction rationae temporis – Prior disciplinary proceedings not a prerequisite for CAS jurisdiction], *ASA Bulletin*, Volume 37, No.2, 2019, p. 408
- 4A_556/2018 du 5 mars 2019 [Challenge admissible against termination order of vice president of CAS Appellate Chamber], *ASA Bulletin*, Volume 37, No.2, 2019, p.451
- 4A_54/2019 vom 11. April 2019 [CAS termination order upheld – Failure to timely file appeal by courier results in termination], *ASA Bulletin*, Volume 37, No. 3, 2019, p. 732
- Rechtsprechung, Internationales, CAS: Wirksamkeit der DSD-Regelungen des IAAF für Athletinnen – Fall Semenya, *Spurt* 5/2019, p. 211

- Rechtsprechung, Internationales, CAS:
Kein lebenslanger Ausschluss eines
Sportministers von den Olympischen
Spielen – Fall Mutku, Spurt 5/2019, p. 220