Bulletin TAS
CAS Bulletin

2023/01

TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT

Table des matières/Table of Contents/Indice de Contenidos

Editorial

For the current four-year term 2023-2026, the ICAS members have been appointed in accordance with the new Article S4 of the Code of Sports-related Arbitration, adopted earlier this year and providing for the appointment of 22 members instead of 20. The extension of ICAS to 22 members was decided in order to allow a larger representation of football stakeholders, considering that football is by far the sport generating the most cases at CAS. All ICAS members are jurists, and includes five Olympians. With one position still to be filled by the IOC, the ICAS is currently made up of 12 men and 9 women The full list can be found on the CAS website https://www.tas-cas.org/en/general-information/news-detail/article/the-international-council-of-arbitration-for-sport-icas-composition-for-the-term-2023-2026/

On 31 May 2023, the ICAS members elected for the 2023-2026 term voted unanimously to elect the following members to the following positions for the relevant cycle:

President: Mr John Coates AC (Australia), re-elected.

Vice-Presidents: Mr Michael Lenard OLY (USA), re-elected; Dr Elisabeth Steiner (Austria), re-elected; Mr Antonio Arimany (Spain), new.

At the ICAS meeting of 2 December 2022, the ICAS members voted to amend Article S6.2 of the Code of Sports related Arbitration so that for the 2023-2026 cycle onwards, ICAS will be composed of three, rather than two, Vice-Presidents. Mr Antonio Arimany, Secretary General of World Triathlon, was elected for the first time to the third Vice-President position. Mr Arimany was appointed to ICAS by the Association of Summer Olympic International Federations (ASOIF).

Appeal Division: Ms Corinne Schmidhauser OLY (President) (Switzerland), re-elected; Dr Elisabeth Steiner (Deputy President), re-elected.

Ordinary Division: Ms Carole Malinvaud (President) (France), re-elected; Prof. Giulio Napolitano (Deputy President) (Italy), re-elected.

Anti-Doping Division: Mr Ivo Eusebio (President) (Switzerland), re-elected; Mr David W. Rivkin (Deputy President) (USA), re-elected.

ICAS Board
Pursuant to Article S7 of the CAS Statutes, the ICAS Board is now composed of the President, three Vice Presidents, the President of the Ordinary Arbitration Division and the President of the Appeals Arbitration Division. This means that for the 2023-2026 term it will be composed of John Coates, Michael Lenard, Elisabeth Steiner, Antonio Arimany, Corinne Schmidhauser, Carole Malinvaud.

Furthermore, the composition of the ICAS commissions was also decided during the same meeting:
- Challenge Commission chaired by Justice Ellen Gracie Northfleet (Brazil) and composed of the three Division Presidents and the three Deputy Presidents (excluding the President and Deputy of the Division concerned by the specific procedure for challenge). The Challenge Commission shall handle the petitions for challenge raised against CAS arbitrators.
- Membership Commission chaired by Ivo Eusebio (replacing former ICAS member Judge Monique Jametti, Switzerland) and composed of Ms Tricia Smith OLY (Canada), and the three Division Presidents. The Membership Commission shall review the lists

of CAS arbitrators and mediators, as well as the candidatures of potential new CAS members.
- Athletes' Commission (formerly Legal Aid Commission) chaired by Michael Lenard, composed of Mr Louis Everard (Netherlands), Ms Silja Kanerva OLY (Finland), and Ms Tricia Smith. The purpose of the Athlete's Commission is to determine requests for legal aid and safeguards the interests of athletes within ICAS.

The new guidelines on legal aid established by the ICAS are published on the CAS website and are applicable to any CAS arbitration procedure initiated from 1 February 2023. Accordingly, a new specific legal aid fund for football-related disputes exclusively financed by FIFA was created i.e. the Football Legal Aid fund (FLAF). The FLAF will be available to natural persons, including agents with a FIFA license, without sufficient financial means to otherwise proceed at the CAS. The FLAF may be also exceptionally granted to football clubs which are in a difficult financial situation, under specific conditions. The general ICAS legal aid will continue to be financed by the Olympic Movement as a whole to assist natural persons from Olympic sports other than football.

We are pleased to publish in this issue three articles in English, namely, "A synthesis on COVID 19" co-written by Mark Hovell, CAS arbitrator, and Rustam Sethna, respectively partner and associate for Mills & Reeve, an Overview of the Appeal Procedure before the CAS written by Dr. Despina Mavromati, CAS arbitrator, and, "A Systematic Review of CAS Decisions in Football Matters in 2020-2021" co-written by Dr. Vladimir Novak, CAS arbitrator, Alice Roux and Margo De Bondt, respectively associates and stagiaire for Cleary Gottlieb Steen & Hamilton LLP, Brussels.

This new issue of the Bulletin includes eight football cases among the thirteen "leading cases" selected. The non-related football jurisprudence selected relates to doping, corruption and governance.

Finally, summaries of the most recent judgements rendered by the Swiss Federal Tribunal (SFT) in connection with CAS decisions have been enclosed in this Bulletin. Of particular interest is the decision 4A_420/2022 translated into English which addresses the limits in the FIFA PSC jurisdiction to hear set-off claims for damages against contractual claims in football rransfer disputes. This judgment is the subject of a short commentary by Dr. Despina Mavromati. Likewise, interestingly, the SFT judgement 4A_246/2022 rendered in French affirms the compatibility of football rules on sports succession with public policy. Lastly, in the French SFT judgement 4A_434_2022, the question arises as to whether an award of agreement between the parties can be the subject of an ordinary appeal to the Federal Court.

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

Matthieu Reeb
CAS Director General

Articles et commentaires
Articles and Commentaries
Artículos y comentarios

The CAS' Covid-19 Jurisprudence in Football

Mark Hovell and Rustam Sethna*

I. Introduction

The passage of time since the start of the Covid-19 pandemic, coupled with the fact that the CAS is the appellate body for international football contractual disputes from the FIFA Football Tribunal, has seen the emergence of a distinct body of jurisprudence from the pandemic.

Briefly, this 'Covid jurisprudence' addresses situations where debtors (mainly football clubs) seek to rely upon the unpredictable and unprecedented pandemic to relieve themselves from their legal or contractual obligations towards creditors (mainly players, coaches and other clubs). Principally, arguments have featured the doctrines of *force majeure* and *clausula rebus sic stantibus*, but also, the application of FIFA's Covid-19 Guidelines, known as the Covid-19: Football Regulatory Issues (the "FIFA CFRI").

Whilst these doctrines and the FIFA CFRI exist to assist clubs whose ability to fulfil obligations towards creditors were genuinely and directly impacted by Covid, their practical application seemed to be at odds with the well-established *pacta sunt servanda,* a principle that recognises the sanctity of a contract, and one which has underpinned CAS jurisprudence for decades.

As a result, we have seen a body of Covid jurisprudence that overwhelmingly favours creditors. This is not to suggest that the law is set up to unduly favour creditors. In fact, many clubs were able to defer, reduce or otherwise settle payments with creditors out of court or via a collective bargaining process, as the FIFA CFRI recommended. However, those clubs that sought to rely on Covid-19 at the CAS (whether at the ordinary or appeals division) were rarely successful.

This article seeks to explore common themes that have emerged from a cross-section of published 'Covid jurisprudence'[1]. In doing so, it will explore why debtor clubs are generally unsuccessful and the areas in which various Panels and Sole Arbitrators have typically found the evidence to be lacking.

II. Force majeure and *clausula rebus sic stantibus,* generally

* Mark Hovell is partner, Mills & Reeve LLP & CAS Arbitrator; Rustam Sethna is Associate, Mills & Reeve LLP

[1] As made available by FIFA or the CAS.

Under Swiss law – given its significance in international football disputes at the CAS[2] – there is no statutory definition of *force majeure*. However, the substance of the principle is captured at Article 119 of the Swiss Code of Obligations (the "SCO"), which provides that:

"1. An obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor.

2. In a bilateral contract, the obligor thus released is liable for the consideration already received pursuant to the provisions on unjust enrichment and loses his counter-claim to the extent it has not yet been satisfied.

3. This does not apply to cases in which, by law or contractual agreement, the risk passes to the obligee prior to performance".

Similarly, the doctrine of *clausula rebus sic stantibus* was developed in Swiss jurisprudence to enable a judge to amend a contract when the circumstances under which that contract was concluded have changed so much that the continuation of the contract in its present form cannot be expected. The doctrine has its roots in general principles of fairness and good faith, based on Article 2 of the Swiss Civil Code[3]. Therefore, a party will successfully invoke the doctrine of *clausula rebus sic stantibus* where[4]:

1. The change in the contractual relationship is caused by new, unforeseeable and inevitable circumstances; and
2. The performance is so excessively burdensome for one party that it cannot be demanded in good faith.

At the start of the pandemic, there was limited jurisprudence on the application of these principles in the sporting context. Analogies were made with cases relating to the 2013 Egyptian civil war[5] and the 2014 Ebola epidemic[6] amongst others, and opinions[7] were shared on how these might apply in the Covid context.

However, the CAS has yet to see a debtor that has successfully invoked *force majeure* or *clausula rebus sic stantibus*.

III. Key elements of the CAS' Covid Jurisprudence

A. *Force majeure* provision in contract

In CAS 2021/A/7673 & 7699[8], the Sole Arbitrator noted that *"[i]n the absence of a force majeure clause in the [relevant contract], Swiss statutory law applies".*

When a party invokes a defence of "impossibility" to perform a contract, the legal consequences of non-performance will depend on whether such impossibility or hinderance is temporary or permanent and whether one of the contractual parties is at fault.

The respective Sole Arbitrators in CAS 2021/A/7673 & 7699[9] and CAS 2021/A/8277[10] summarised the position under

[2] Article R45 and R58 of the CAS Code for Ordinary and Appeal Arbitrations, respectively, and Article 57 of the FIFA Statutes.
[3] Article 2 of the Swiss Civil Code states that: *"Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations".*
[4] CAS 2021/A/7673 Club Olimpia de Paraguay v. FC Dynamo Kyiv; CAS 2021/A/7699 FC Dynamo Kyiv v. Club Olimpia de Paraguay, awards of 12 October 2021.
[5] CAS 2014/A/3463 & 3464 Alexandria Union Club v. Juan José Sánchez Maqueda & Antonio Cazorla Reche, award of 26 August 2014
[6] TAS 2015/A/3920 Fédération Royale Marocaine de Football c. Confédération Africaine de Football, award of 17 November 2015.
[7] See, for example, N. De Marco (2020), *"Covid-19: Sport and the Law of Frustration and Force Majeure",* LawInSport. Available online: https://www.lawinsport.com/topics/item/coronavirus-sport-the-law-of-frustration-and-force-majeure
[8] Op cit., note 6.
[9] Op cit., note 6.
[10] CAS 2021/A/8277 Yeni Malatyaspor FK v. A., award of 27 April 2022.

Swiss law, where an impediment to perform a contract is only temporary. In this scenario, a creditor has the option to either:

a. Set an appropriate time limit for subsequent performance or ask the court to set such time limit (Article 107 SCO); or

b. Insist on performance without delay, under certain circumstances (Article 108 SCO); or

c. Waive performance and claim damages (Article 107(2) SCO); or

d. Terminate the agreement and demand return of any performance already made.

Notably, Article 97 SCO presumes that the debtor was at fault and the extent of a debtor's liability will depend in particular upon how much (or little) the debtor stands to gain from the transaction.

CAS 2021/A/7673 & 7699 concerned the transfer of a player from FC Dynamo Kyiv to Club Olimpia de Paraguay for USD 5,000,000, pursuant to a transfer agreement between the two clubs.

Here, the debtor club pleaded impossibility of performance due to Covid-19, but accepted that its *"impossibility to perform its side of the contract [was] only limited in time"*. This was not a *force majeure* argument *per se,* but rather the Sole Arbitrator noted that for the debtor to be successful, it needed to cumulatively establish that *"a) it was objectively impossible for it to perform its contractual obligations in a timely manner, b) because of the Pandemic, c) there is a causal link between the Pandemic and its failure to fulfil its side of the Transfer Agreement and d) it is not at fault"*.

In CAS 2021/A/8277[11] the Sole Arbitrator highlighted that if the impossibility was permanent, Article 119 of the SCO (reproduced above) would apply.

Notably, the FIFA DRC has, given effect to a mutually agreed upon force majeure clause in an employment contract[12]. Specifically, the decision found the following:

"[…] In this regard, the DRC Judge held that the parties mutually agreed in the contract on a salary equivalent to 25% "of the contract value per year divided for 12 months" in case of force majeure.

[…] Therefore, the DRC judge concluded that the COVID-19 pandemic triggered the application of […] the contract to the employment relationship between the Claimant and the Respondent.

[…] As a result the DRC judge decided that the Claimant should receive 25% of his salary for the months of April, May and June 2020".

On the other hand, debtors were not granted immunity from performance merely because the relevant contract contained a *force majeure* clause. This was demonstrated in CAS 2021/A/8079[13].

Here, the employment contract between an Indian club and Portuguese player contained a clear definition of *'Force Majeure'*. This included *"any act, event or circumstance beyond the reasonable control […] which effects the performance of its obligations […] including but not limited to fire, flood, explosion, war, riots, acts of Government Authorities […] or any events or circumstances analogous to the foregoing"*.

The employment contract further stated that in the event of *force majeure, "the Party whose performance is affected […] shall promptly notify the other Parties of the existence and cessation of such event.*

[11] Op cit., note 12.

[12] Paulo Sergio Moreira Goncalves (Portugal) v. Bali United (Indonesia), decision of the DRC Judge, passed on 29 September 2020.

[13] CAS 2021/A/8079 SC East Bengal v Jaime Santos Colado, award of 31 August 2022.

The Parties shall take all reasonable steps within their power to recommence performance of the Agreement following an event of Force Majeure after it expires or is no longer in effect".

However, one of the reasons why that club's appeal failed, was because this contractual provision only sought to address the 'temporarily impossible' situations referred to above. It did not entitle the club to terminate the contract.

Thus, distinguishing CAS 2021/A/8079[14], a party seeking to rely upon a *force majeure* clause in a contract ought to prove (amongst other things):

a. That Covid-19 (or the relevant event) was included within the meaning of *force majeure* for the purposes of that contract; and

b. That the contract enabled the club to immediately terminate and cease paying the creditor, rather than simply 'pausing' its obligations whilst the *force majeure* event continued.

B. Financial evidence and club expenditure

Perhaps the most common but least successful argument run by debtor clubs looking to avoid liability under their respective agreements was the disproportionate impact that Covid-19 had on its finances. This in turn, as further argued, made it impossible for debtor clubs to perform their obligations under a relevant contract.

In principle, this argument has stood up to judicial scrutiny in the past. For example, the Swiss Federal Tribunal has found that performance would be excessively burdensome in cases where a party was able to prove a 52.33% loss of revenue due to war (in a context unrelated to Covid)[15].

However, clubs raising these arguments at the CAS in the Covid context, have always failed to substantiate the losses they claim to have suffered, thereby failing to discharge their burden of proof.

a. In CAS 2021/A/7673 & 7699[16], Club Olimpia de Paraguay argued that *"the abrupt suspension of the sportive season in Paraguay had a negative impact to all football clubs. Like in many other places in the world, clubs faced cuts in sponsors payments and TV rights, as well as no income for ticketing match day revenue, merchandising, etc. Olimpia suffered a 60% reduction in its annual incomes in 2020 as the economic report shows".* However, the Sole Arbitrator found this to be a *"mere declaration, not supported by any documentary evidence".*

b. In CAS 2020/A/7346, 7347 & 7348[17], Neimenggu Zhongyou FC of China sought to argue that it was *"suffering financial difficulties which were exacerbated by the impact of [Covid-19], which is affecting its ability to pay the outstanding amounts and the transfer ban may lead to the Club's bankruptcy because it may mean a proposed takeover of ownership may not take place".* Again, the Sole Arbitrator held that the club had *"failed to adduce any supporting evidence, instead just simply states its position without any independent corroboration"* and that *"financial problems referred to by [the club] cannot excuse its failure to comply".*

c. Similarly, Turkish club Yeni Malatyaspor FK[18] in CAS 2021/A/7727 simply asserted that it lacked financial resources because its revenues sharply declined during the 2019-

[14] Ibid.
[15] ATF 48 II 249.
[16] Op cit., note 6.
[17] CAS 2020/A/7346 Neimenggu Zhongyou Football Club v. FIFA; CAS 2020/A/7347 Neimenggu Zhongyou Football Club v. FIFA; and CAS 2020/A/7347 Neimenggu Zhongyou Football Club v. FIFA, award of 22 October 2021.
[18] CAS 2021/A/7727 Yeni Malatyaspor FK v. Issiar Dia, award of 8 November 2021.

20 season due to the pandemic. The Sole Arbitrator found that this had no connection with the club's failure to fully perform the relevant agreement. In CAS 2021/A/7799[19], involving the same club, the Sole Arbitrator noted that it *"did not submit any evidence to prove that the financial effect of COVID-19 pandemic on the EURO/TL Exchange rate and the temporary suspension of sports activities caused serious financial difficulties to the [club], and, furthermore, the [club] did not prove that there has been a 30% decrease in seasonal revenues which consequently affected its ability to make the payments."*

d. The Sole Arbitrator in 2021/A/7888[20] expressly stated that that *"external economic factors"* did not justify non-compliance of financial obligations assumed by a contracting party and that the appellant club *"did not submit any evidence to prove that the financial effect of Covid-19 [and] the temporary suspension of sports activities caused serious financial difficulties to the [club] that effected its possibility to make payments"*.

e. In CAS 2021/A/8014[21] the Sole Arbitrator did not consider a Chinese club's arguments about the economic effect of the pandemic as they were *"entirely unsubstantiated by any evidence"*.

Therefore, the general conclusion drawn is that whilst the Covid surely impacted all clubs' finances, parties generally struggled to justify how (relatively) short-term drops in revenue had derailed a club's financial planning to such an extent that the performance of a contract as originally envisaged was no longer possible. In other words, clubs were required to show real financial disruption and a total lack of financial resources that made it impossible to fulfil its payment obligations towards a creditor. This needed to be more than a general economic difficulty in abstract terms.

The seemingly obvious but key takeaway from this jurisprudence is that without concrete evidence of actual and specific financial loss suffered, parties attempting to absolve themselves of a financial obligation would struggle to fulfil their burden of proof to the requisite standard.

C. FIFA CFRI and salary reductions

Equally common were arguments relating to the application of the FIFA CFRI, where clubs sought to vary the terms under an agreement, on the basis that it was allegedly done in accordance with the FIFA CFRI.

In summary, the FIFA CFRI encouraged clubs to collaboratively find a solution with players/coaches for any period where the competition was suspended due to Covid-19. Unilateral decisions to vary contracts were therefore required to be in "good faith, reasonable and proportionate" or alternatively, permissible if member association/league regulations allowing for this were permitted by national law and collectively agreed among social partners (e.g. a players' union, coaches association)[22].
Factors to be considered when determining the reasonableness of a unilateral variation under the FIFA CFRI were:

"a) the economic situation of the club;

b) the proportionality of any salary amendment;

c) the net income of the employee after salary amendment;

d) whether the decision applied to the entire squad or only specific employees; and

[19] CAS 2021/A/7799 Yeni Malatyaspor v. Mitchell Glenn Donald, award of 1 February 2022
[20] CAS 2021/A/7888 Yeni Malatyaspor FK v. Fabian Ceddy Farnolle, award of 1 February 2022.
[21] CAS 2021/A/8014 Shanghai Shenhua FC v. FIFA, award of 14 January 2022.
[22] See: CFRI FAQs, page 7. Available online: www.legal.fifa.com.

e) whether the club in good faith had attempted to reach a mutual agreement with its employee(s)."

FIFA separately went on to clarify that these principles were *"listed in the preferred order in which FIFA believes clubs and employees should address variations to an employment agreement during any period when a competition is suspended"*.

However, in CAS 2021/A/7680[23], the Sole Arbitrator noted that the list of criteria set out in the CFRI is "not exhaustive", and in that case, found that other criteria did not *"speak in favour of the [club]"*. In this case, the club sought to unilateral reduce the player's salary, retroactively. This, it was observed, was *"not in light of a due care process which is to be expected from a club dealing with such delicate matters"*.

That being said, in cases that reached the CAS, a majority of clubs either failed to act collaboratively or proportionately (or both) and failed to satisfy the conditions set out above.

In CAS 2021/A/7878 & 7916[24] the CAS Panel observed that for players to know whether a unilateral 50% reduction was justified, the club should have produced a financial report at the time of varying the contract. This report could have highlighted the effects of the pandemic and reasons why the club sought to reduce the player's salary by 50% rather than a more modest sum.

This theme of information sharing and transparency was also echoed by the Panel in another case, which noted the need for rationale behind any unilateral reduction of salaries, and the need to explain and justify the reduction to the player(s) concerned.

It appears that clubs sought to rely on the FIFA CFRI as their 'silver bullet' whereas in reality, the conditions set out by it place the burden on clubs to provide evidence that is more cogent.

D. Timing

Another factor in determining whether a debt was the result of Covid-19, is timing. Looking at the specific facts and circumstances of each case, Panels and Sole Arbitrators have considered when an obligation to pay arose and how that fitted within the trajectory of the pandemic.

For instance, CAS 2021/A/8014[25] concerned an appeal by a Chinese Club against a decision of the FIFA Disciplinary Committee which sought to enforce a previous CAS decision against the club. Whilst FIFA's enforcement decision was issued in March 2021, the underlying decision requiring the club to pay the player in the first instance, related to a debt from 2019 – well before the pandemic. The Sole Arbitrator observed that *"almost two years [had] elapsed without [the club] having paid any sum to the creditor and it appear[ed] that [the club] was trying by all means to delay the payment"*. Similarly, the Sole Arbitrator in CAS 2021/A/7680[26] also observed the fact that the salaries had been outstanding to the player long before the pandemic broke out.

Panels and Sole Arbitrators have also looked unfavourably upon clubs who on one hand, claim to have been 'financially brought to their knees by Covid', whilst continuing to pay large sums in transfer fees to recruit new players, at the expense of cherry picking those already on its books. Clearly, there was an element of clubs conveniently falling back on the pandemic when it suited them, for example, when a player or coach was surplus to

[23] CAS 2021/A/7680 Ittihad FC v Aleksander Prijovic, award of 11 April 2022.
[24] CAS 2021/A/7878 Naim Sliti v. Al Ettifaq Club & CAS 2021/A/7916 Al Ettifaq Club v. Naim Sliti.

[25] Op cit., note 23.
[26] Op cit., note 25.

requirements from a tactical perspective. It is of course established jurisprudence at the CAS that termination of contracts on these grounds is unlawful and therefore without just cause.

Panels and Sole Arbitrators have seen through these arguments, particularly when made at a time when society was recovering from the pandemic, fans were back in stadiums thereby generating matchday revenue often at pre-pandemic levels, thereby aiding budget and cash flow issues and as a result, increasing spending to near pre-pandemic levels.

On 5 May 2023, the World Health Organisation declared that Covid-19 was no longer a 'Public Health Emergency of International Concern'. Whether debtor clubs continue to use the pandemic to excuse themselves from fulfilling a contractual obligation remains to be seen, but it is certain that the further we are from the lockdowns and suspensions of leagues etc, the more unlikely that such arguments would be successful.

IV. Conclusion

As the CAS does not operate on the doctrine of precedent, the jurisprudence reviewed above is only of persuasive value. However, the consistency in these decisions cannot be ignored, and it is clear that the CAS' Covid jurisprudence has set a high bar for debtors seeking to justify their failure to comply with contractual obligations. Ultimately, the CAS will usually respect a commercial agreement between parties, in accordance with the principle of *pacta sunt servanda.*

An Overview of the Appeal Procedure before the CAS

Despina Mavromati*

Abstract

The Court of Arbitration for Sport (CAS) was created in 1984 and has evolved into an independent arbitral tribunal and the "supreme court" of sports-related disputes at the international level, administering several hundred of cases every year. The CAS functions predominantly as an appellate tribunal, reviewing decisions rendered by the internal tribunal of sports federations. The appeal mechanism of the CAS differs from commercial arbitration in many aspects. This article presents an overview of the procedural particularities of the CAS appeal procedure following the amendment of the CAS Code in November 2022, from the outset of the arbitration through the issuance of the final award and beyond.

I. Introduction

The Court of Arbitration for Sport (CAS) is an international arbitral institution specialized in sports disputes and seated in Lausanne. It administers several hundred of sports-related disputes every year.[1] Created by the IOC President Juan Antonio Samaranch in 1984, the CAS has gone through several procedural and institutional amendments and reforms to improve its dispute resolution mechanism, adapt to the needs of its users and guarantee its institutional independence from its various stakeholders.[2]

* Dr. iur, LL.M., M.B.A., FCIArb. Attorney-at-law, of Counsel, BianchiSchwald LLC; UEFA Appeals Body Member; Arbitrator, Court of Arbitration for Sport. This article has been first published in the ASA Bulletin 1/2023.

[1] The CAS registered a record 996 procedures in 2021, see the ICAS 2021 Annual Report and Financial Statements, p. 17 (www.tas-cas.org). From the total of procedures, 796 were appeal procedures, 147 ordinary procedures, 15 ad hoc procedures, 29 decided by the CAS Anti-Doping Division and 9 mediation procedures.

[2] https://www.tas-cas.org/en/general-information/history-of-the-cas.html

Since the "Paris Reform" in 1994,[3] the CAS is overseen by the International Council of Arbitration for Sport (ICAS), which is tasked with safeguarding the independence of the CAS and the rights of the parties.[4] The year 1994 also marked the creation of two arbitration divisions within the CAS, namely, the Ordinary Arbitration Division and the Appeals Arbitration Division; the former deals with disputes of sole instance very similar to the ones dealt in commercial arbitration, while the latter is in charge of disputes arising from decisions rendered by sports federations and is the focus of this article. In addition to these two divisions, the CAS is also composed of the Anti-Doping Division (since 2020),[5] operates the CAS Ad hoc Divisions during the Olympic Games as well as other major events, and has a Mediation Division.[6] The main set of rules for CAS appeal proceedings is the CAS Code of Sports-Related Arbitration (the CAS Code), which was last updated in November 2022.

The appeals proceedings of the CAS have some important differences compared to commercial arbitration. Since in most cases the arbitration clause is inserted in the rules of the sports federation as a statutory clause, it may be that in some instances (e.g., in disciplinary cases and especially in doping-related matters under the World Anti-Doping-WADA Code) the arbitration agreement is not based on the consent of both parties but is rather imposed on the athletes and other individuals. This very issue was at the heart of the *Pechstein* saga[7] that went before the European Court of Human Rights (ECtHR)[8] and the German courts.[9] In essence, the ECtHR held that the arbitration clause in such *forced arbitration* is valid so long as it complies in full with the principles of Art. 6 of the European Convention on Human Rights (the Convention), which requires among others the independence of the hearing authority.[10] In the same judgment, the ECtHR confirmed that the CAS complies with the requirements of structural and personal independence and is thus a sufficiently independent arbitral tribunal in the light of Art. 6 of the Convention.[11]

---

[3] The Paris Reform was triggered by the well-known *Gundel* judgment of the Swiss Federal Supreme Court (SFT) in 1993 (119 II 271), in which the SFT drew the attention of the CAS to the numerous institutional and financial links that existed between the IOC and the CAS.

[4] Art. S2 and S6 CAS Code.

[5] The CAS ADD acts as the substitute of the internal instance of the international federations and is therefore not a "true arbitral tribunal", see SFT 4A_232_2022 of 22 December 2022, at 5.3.

[6] Art. S1, S2 and S3, S14 and S20. The CAS mediation procedure is governed by a separate set of rules (CAS Mediation Rules, last version of 2016).

[7] The Pechstein saga includes several arbitral – and court proceedings: two CAS awards (one before the CAS Appeals Division in Lausanne -CAS 2009/A/1912, *Claudia Pechstein v. ISU & CAS 2009/A/1913 DESG v. ISU*, award of 25 November 2009- and one before the CAS Ad Hoc Division in Vancouver -*OG 10/004, Claudia Pechstein v. DOSB & IOC*, award of 18 February 2010; two SFT judgments (SFT 4A_612/2009 of 10 February 2010 and Request for revision SFT 4A_144/2010 of 28 September 2010); before the German courts (LG München of 26 February 2014, 37 O 28331/12; before the OLG München, partial decision of 15 January 2015, U 1110/14 Kart; before the Bundesgerichtshof of 7 June 2016, KZR 6/15; and before the German Federal Constitutional Court (BVerfG), Judgment of 3 June 2022, 1 BvR 2103/16); and before the ECtHR (Judgment of 2 October 2018, Mutu and Pechstein v Switzerland (Applications 40575/10 and 67474/10) (the Pechstein ECtHR Judgment).

[8] On the various ECtHR judgments and other decisions related to the CAS see Despina Mavromati, *CAS through the lens of the European Court of Human Rights and other tribunals*, in James Nafziger/ Thomas Stoel (eds.), Handbook on International Sports Law, Elgar Publishers, 2nd ed. 2022, pp. 196-241. On the ECtHR Pechstein Judgment Antonio Rigozzi, *Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond*, in Ch. Müller/S. Besson/A. Rigozzi (Eds), *New Developments in International Commercial Arbitration 2020*, Stämpfli 2020, pp. 77-130.

[9] The BVerfG remanded the case to the OLG München, albeit only with respect to the denial to grant a public hearing. See Rüdiger Morbach, *The Pechstein Saga Continues: The German Federal Constitutional Court Grants Another Round on the Rink*, in Kluwer Arbitration Blog, 27 July 2022.

[10] The complex issue of the CAS jurisdiction in appeal proceedings falls outside the scope of this article.

[11] See the Pechstein ECtHR Judgment, paras 138 ff. The findings of the Pechstein judgment regarding the jurisdiction of the CAS and the public hearing were partially reproduced in the BVerfG Judgment. The SFT has repeatedly confirmed the structural independence of

In the following pages, we will navigate through some specific issues related to the appeal proceedings, from the filing of the statement of appeal until the issuance of the final award and beyond, focusing on procedural particularities that counsel without previous experience in sports arbitration should be mindful of when involved in CAS appeal proceedings.

II. General Issues in the Appeal Proceedings

A. Tasks and Role of the CAS Appeals Division President

Each CAS Division has its own Division President and a Deputy President appointed by the ICAS from among its 22 members.[12] The President of the Appeals Division (the AD President) has several duties and powers, including, but not limited to the issuance of any procedural orders before the constitution of the panel (e.g., orders on language,[13] orders on joinder and intervention,[14] orders on the consolidation of the proceedings, orders on the request for interpretation[15] and termination orders[16]). Most importantly, the AD President decides on the request for provisional measures (incidentally also on the CAS jurisdiction on a *prima facie* basis) if the panel has not yet been constituted; this happens in most cases, since the request must be filed along with the introductory submission of the statement of appeal.[17] Another very important task of the AD President is to appoint the panel chair or the sole arbitrator, but also of the respondent's arbitrator (if the latter fails to do so) and the confirmation of the constitution of the panel.[18]

Furthermore, the AD President decides on requests for expedited proceedings, on the confidentiality of the proceedings and may (theoretically) suggest conciliation to the parties.[19] In other words, the AD President ensures the overall smooth coordination of the proceedings until the constitution of the panel. Thereafter, the AD President may grant an extension for the issuance of the award upon request by the panel chair (Art. R59), however, most of the AB President's powers are transferred to the panel chair / sole arbitrator who issues appropriate directions for the conduct of the hearing and subsequent orders.[20]

B. Notifications and E-filing platform

CAS arbitration is institutional arbitration. As such, all notifications and communications should go through the CAS Court Office in Lausanne.[21] The rule is that all formal submissions, including the statement of appeal, appeal brief, the answer, arbitral awards and various orders, must be notified by registered mail or in a form permitting proof or receipt.[22] If filed by registered mail, the exhibits to the various submissions can be sent by email, which is also the standard way of communication for the

---

the CAS since 2003, SFT 4P.267/2002 of 27 May 2003 (129 III 445, *Lazutina / Danilova*) and SFT 4A_260/2017 of 20 February 2018 (144 III 120, *Seraing*). See also the more recent SFT 4A_644/2020 of 23 August 2021, SFT 4A_10/2022 of 17 May 2022 and 4A_232_2022 of 22 December 2022, at 6.6.2 and 6.7. The latter judgment equally confirmed the sufficient independence of the two CAS Divisions (i.e. the CAS ADD and the CAS Appeals Division) from each other, not least through the separate lists of arbitrators.

12. Art. S6 (2) CAS Code. ICAS was composed of 20 members up until the last amendment CAS Code.

13. Art. R29 CAS Code. CAS 2020/A/6753, *Wydad Athletic Club v. S. Diarra & Ujpest 1885 Futbal Kft*, award of 14 May 2021, para. 45.

14 Art. R41.2 CAS Code.

15 Art. R63 CAS Code.

16 Art. R64.1, R65.2. A termination order may be challenged as an award before the SFT, ATF 4A_582/2009 of 13 April 2010, X. SA (Bulletin ASA 2010, p. 598), at 3.3.

17 Art. R37 and Art. R48 CAS Code.

18 Art. R54 CAS Code.

19 Art. R52, R43 and R42 CAS Code, respectively.

20 See among others Art. R57 CAS Code.

21 Art. R31 CAS Code.

22 See e.g. SFT 4A_556/2018 of 5 March 2019, at 4.5.2 and 6. However, the parties can send all exhibits to their various submissions via e-mail, see R31 CAS Code.

remaining correspondence between the CAS and the parties.[23]

However, and particularly since the outbreak of the Covid-19 pandemic, parties have been increasingly using the CAS e-filing platform since the CAS no longer requires the consent of both parties for its use.[24] It is important to note that the e-filing platform can only be activated after the filing of the introductory submission to the CAS, i.e. after acquiring the case number for the arbitration proceeding in question. The e-filing is therefore more useful for the secondary stages of the proceedings, specifically, from the filing of the appeal brief and beyond.

C. Choice of the Language of the Proceedings

The CAS official languages are French, English and (since 2021) Spanish.[25] While the majority of proceedings is conducted in English, there has been a steady increase of proceedings conducted in Spanish, mostly in football-related matters. The main criterion for the choice of the procedural language is the language in which the decision appealed against was drafted.[26] If the parties cannot agree on a common language, the President of the Panel or the AD President will issue an order determining such language. Notwithstanding the choice of language, it is more and more common to opt for hybrid solutions, i.e. the choice of one language for the proceedings while the filing of submissions and exhibits is in another language without the need to translate them, as long as all parties agree and the arbitrators understand such language.[27] It is also possible (even though rare in practice) to opt for non-official language.[28] Finally, the parties can express themselves in any other language during the hearing so long as they bear the interpretation costs.

The choice of the language is a technical albeit important issue that can have a wider impact on the cost and duration of the proceedings (for example, if translations and interpreters are needed in complex cases) but also on the choice of the arbitrator: since a large majority of arbitrators are English-speaking, the choice of a non-English language may significantly decrease the pool of available arbitrators.[29]

D. Choice of the Arbitrators and Challenge Proceedings

Similar to commercial arbitration, the choice of the arbitrators and the appointment of the panel is a crucial procedural step in CAS proceedings. The particularity of CAS is that it operates through a mandatory list of arbitrators compiled by the ICAS Membership Commission.[30] There is a "general list" of CAS arbitrators who can serve on both ordinary and appeal proceedings and other special

---

[23] E.g. requests for extension, other procedural requests and logistical matters.

[24] See the CAS Emergency Guidelines – Art. R31 para. 4 CAS Code. See also the Guidelines for the CAS e-filing platform available on the CAS website.

[25] Art. R29 CAS Code.

[26] Provided that the decision was drafted in a CAS official language. Generally, procedural orders are not published. CAS 2019/A/6483, *Wydad Athletic Club v. CAF & Espérance Sportive de Tunis*, order of 18 October 2019, p. 3. See Despina Mavromati / Matthieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials,* Wolters Kluwer (2015), pp. 75 ff.

[27] Art. R29 CAS Code in fine. CAS 2018/A/5796, *A. Abdelhak v. IHF*, award of 27 December 2018, para. 16. See also CAS 2018/A/5751, *New Stars de Douala v. Deportivo Niefang, FEGUIFUT & CAF*, award of 11 January 2019, para. 39. See TAS 2006/A/1095, *FC Zurich c. SFL & FC Sion*, sentence du 9 mai 2007, para. 15.

[28] See the ICAS 2021 Report and Financial Statements (English amounted to a 80.5%, Spanish 9.4% and French 9.3%). Another language was used only to a 0.8% of the CAS procedures.

[29] See the CAS list https://www.tas-cas.org/en/arbitration/liste-des-arbitres-liste-generale.html. See also CAS 2018/A/6040, *Club Atlético Boca Juniors v. CONMEBOL & Club Atlético River Plate*, award of 4 February 2020, para. 42.

[30] Art. S6 para. 4 CAS Code. See also the ICAS 2021 Report and Financial Statements.

lists.[31] Once on the general list, arbitrators cannot act as either counsel or experts before the CAS.[32] There has been criticism but also praise on the mandatory list of the CAS, which aims at ensuring expertise in sports-related matters and increasing costs and time efficiency.[33]

Another specific list that exists as part of the CAS general list is the "football list", comprising individuals with expertise in football-related matters, which amount to the large majority of CAS appeal proceedings.[34] The CAS Code provides that in football-related matters, the AD President appoints an arbitrator from such list, unless the parties agree otherwise or there are exceptional circumstances.

In any event, parties to an appeal procedure can only appoint an arbitrator from the general list of arbitrators. It is also possible for the parties to agree on a sole arbitrator, or the AD President may subsequently decide this for the parties, if the parties fail to agree on the panel composition, and after taking into account the circumstances of the case.[35] The choice of the arbitrator is a crucial element to be filed along with the statement of appeal or within the time limit set by the AD President, failing which the appeal is deemed withdrawn.[36]

Reasons that speak in favor of a sole arbitrator mostly relate to the limitation of the budget and the lack of factual and legal complexity of the case. In all other cases, it is advisable to opt for a panel of three arbitrators. In accordance with the CAS Code, each party appoints one arbitrator (along with the statement of appeal for the appellant ten days after receipt of the statement of appeal by the respondent)[37] and the panel chair is appointed by the AD President.

The choice of a party-appointed arbitrator is not an easy task for counsel; apart from the due diligence check and the initial filter depending on the language of the proceedings, it is advisable to look for previous experience and CAS awards and explore the types of cases in which the arbitrator-to-be-appointed was involved, but also the parties that appointed her/him. *Ex parte* communication prior to the arbitrator's appointment (e.g., for discussion on conflicts, or on whether such arbitrator could feel well placed to deal with the particular case) should not be allowed. However, such conduct is not explicitly prohibited, either. In all cases, upon their appointment by the parties, arbitrators must fill out the *"Arbitrator's Declaration of Independence and Impartiality"* form, in which they must fully disclose any reasons likely to put any doubts on their independence / impartiality; they must equally confirm that they have the qualifications and availability to expeditiously deal with the case.[38]

The appointment of the arbitrator by the opposing party is an even more sensitive matter. Counsel must conduct a full due diligence check as soon as the name of the arbitrator becomes known and in any event upon the full disclosure by such arbitrator

[31] There is a subcategory of the general list called "football list", see https://www.tas-cas.org/en/arbitration/list-of-arbitrators-football-list.html

[32] See the "double-hat" prohibition in Art. S18 CAS Code. Arbitrators on the CAS Anti-Doping list cannot sit as arbitrators in CAS Appeals procedures.

[33] Antonio Rigozzi /William McAuliffe, *Sports Arbitration*, The European, Middle Eastern and African Arbitration Review 2013, p. 16.

[34] Out of the 996 procedures registered in 2021, 796 were in appeal proceedings, see the ICAS 2021 Annual Report and Financial Statements, p. 17.

[35] Art. R50 CAS Code. Such circumstances relate mostly the disputed value and the complexity of the case. See Despina Mavromati / Matthieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials,* Wolters Kluwer (2015), pp. 442 ff.

[36] Art. R48 and Art. R50 CAS Code. The consequence of the non-appointment of an arbitrator by the respondent is that the AD President may decide in lieu of such party, see Art. R53 CAS Code.

[37] Art. R53 CAS Code.

[38] Art. R33 CAS Code. Lack of availability or lack of a good command of the language of arbitration may theoretically lead to the removal of the arbitrator from the case as per Art. R35, even though this provision is rarely used in practice.

through the arbitrator's declaration of independence form. This "*devoir de curiosité*" lies with the parties' counsel, as repeatedly held by the SFT.[39] Another important element is the time limit for filing potential objections to the appointment of the opposing party's arbitrator. This limit remains seven days after the ground for challenge has become known, notwithstanding the respective amendment in the general legal framework established by the Swiss Private International Law Act (PILA).[40] The SFT considers that the starting point for the "knowledge" of the grounds likely to raise doubts as to the arbitrator's independence starts to run from the moment the party / its counsel obtained that knowledge, assimilating therefore knowledge of the party's counsel to the knowledge of the party.[41]

The ICAS Challenge Commission decides on the petition for challenge after consulting with the parties and the arbitrators.[42] The reasoned decision is not open to an immediate challenge but can be challenged before the SFT along with the award.[43]

Notwithstanding the ongoing duty of disclosure, the SFT has held that failure to disclose ongoing new appointments does not equal lack of independence unless the opposing party can establish deliberate concealment, which may be quite difficult in practical terms.[44]

Another interesting issue arising in CAS appeal proceedings is the repeated appointments of certain arbitrators by international sports federations, for example, FIFA that is very often involved in appeal proceedings as co-respondent. This is especially true in appeals against decisions rendered by its dispute-resolution bodies.[45] In most cases, FIFA is a "passive" respondent, and is not actively involved in the case since it is only named as co-respondent (i.e. the body that issued the decision appealed against). The SFT has held that, in terms of counting of the previous appointments of arbitrators as per the IBA Guidelines, only direct appointments should count (consolidated proceedings should not be considered as multiple appointments). At the same time one should distinguish between appointments as panel chair by the AD President from the appointments by the parties.[46]

All the above considerations in terms of conflicts check and due diligence equally apply to both parties for the appointment of the panel chair that is made by the AD President. If the parties accept such appointment or fail to file a petition for challenge within the given time limits, the AD President will proceed to the confirmation of the panel. Only from this moment is the constitution of the panel deemed to be complete.[47] Since its last modification in November 2021, the CAS Code explicitly added certain criteria for selection of a panel chair or sole arbitrator (expertise, diversity, equality and turnover of arbitrators).[48]

E. Filing Fee, Procedural Costs and Legal Aid

[39] 4A_234/2010 of 29 October 2010, at 3.4.2; see 4A_110/2012, of 9 October 2012, at 2.2.2 (31 ASA Bull 174, 2013); see however the limits of the duty of diligence in SFT 4A_318/2020 of 22 December 2020 (Request for revision of the award CAS 2019/A/6148, Sun Yang), at 6.5.

[40] See the new Art. 180a para. 1 PILA (applicable since 2021) which provides for 30 days "*unless the parties have agreed otherwise (…)*". Art. R34 CAS Code is applied as *lex specialis*.

[41] SFT 4A_520/2021 of March 4, 2022, A v. FIFA, at 5.4.2.

[42] Art. S7 para. c and Art. R34 CAS Code. The Challenge Commission is composed on the Chair (ICAS Member independent of the international federations or the IOC) and the three Division President (except for the one who is in charge of the matter). Approx. 10% of the challenges are accepted, see the ICAS 2021 Report and Financial Statements, p. 19.

[43] SFT 4A_520/2021 of March 4, 2022, at 5.3.

[44] SFT 4A_520/2021 of March 4, 2022, at 5.5.

[45] Football-related proceedings amount to almost 80% of the appeal procedures before the CAS, see the ICAS 2021 Annual Report and Financial Statements, p. 19.

[46] SFT 4A_520/2021 of March 4, 2022, at 5.5.

[47] Art. 54 para. 5 CAS Code. See 4A_282/2013, of 13 November 2013, at 5.1.1, 5.3.3 and 5.3.4.

[48] Art. R54 CAS Code.

Along with the filing of the statement of appeal, the appellant must pay a non-refundable Court Office fee of CHF 1,000. This amount is considered for the final amount of costs.[49]

Apart from the filing fee, the CAS Court Office fixes the advance of costs at an early stage of the proceedings. Both parties (or by the appellant paying for both parties) will have to pay the full amount for the proceedings to continue.[50] Since some appeals may be of purely dilatory nature and in order to avoid engaging into unnecessary legal fees, counsel for the respondent may request a time limit for the filing of the answer after the payment of the advance of costs by the appellant.[51] It bears noting that the CAS arbitrators do not normally receive an advance of costs by the CAS but they are paid after the finalization of the CAS proceedings and the issuance of the arbitral award. This difference from commercial arbitration may be explained by the fact that the CAS appeal proceedings are generally much quicker than commercial arbitration proceedings.

A particularity of the CAS appeal proceedings is some types of cases are free of charge, namely appeals against decisions rendered by international federations in proceedings of "exclusively" disciplinary nature.[52] According to the CAS Code, "free of charge" means that the parties will not have to pay the fees and costs of the CAS arbitrators (who are paid according to the CAS fee scale available online) and the various administrative costs of the CAS. The parties still need to pay the CAS Court Office fee of CHF 1,000 and the costs of the parties' counsel, witnesses, experts and interpreters, if applicable.[53]

Along with the award, the panel may decide to order a contribution to legal fees and other expenses at its discretion and even without specific request from the parties. However, it will take into consideration the conduct of the parties, the complexity of the proceedings, and other factors.[54]

Apart from the procedure under the conditions listed in the CAS Code, it is possible for natural persons lacking the financial means to request financial aid from the Legal Aid Fund which is financed by the Olympic Movement. Such fund operates according to the Legal Aid Guidelines[55] and is administered by a dedicated ICAS Commission known as the Legal Aid Commission.[56] Legal aid is possible for all types of procedures (ordinary, appeal and anti-doping) for natural persons who lack sufficient means to cover the procedural costs.[57] They cover the procedural costs, the advance of costs, a counsel from the CAS pro bono list,[58] possible travel and accommodations costs for the party concerned,

---

[49] Art. R64.1 CAS Code.

[50] Art. R64.2 CAS Code. The consequence of not paying the advance of costs is the withdrawal of the appeal procedure. This seems harsher than in commercial arbitration (e.g. Art. 37 (6) ICC Rules 2021) where the claimant gets a new deadline to pay the advance of costs. In any event, the SFT has held that Art. R64.2 CAS Code and its consequences do not violate the prohibition of excessive formalismo (cf. SFT 4A_692/2016 of 20 April 2017, at 5.2).

[51] Art. R55 para. 3 CAS Code.

[52] Art. R65.1 CAS Code. The decisions that are "exclusively" of disciplinary nature do not include decisions related to sanctions as a consequence of a dispute of an economic nature, e.g. the numerous appeals to the CAS from clubs sanctioned for the non-payment of their dues / not respecting CAS decisions, see CAS 2019/A/6129, *US Città di Palermo v. FIFA*, award of 30 October 2019.

[53] Art. R65.2 and R65.3 CAS Code.

[54] Art. R65.4 CAS Code. Cf. the SFT 4A_600/2010 of 17 March 2011, at 4.2: this judgment was rendered before the amendment CAS Code which gave the discretion to the panel to order a contribution to legal fees and other expenses even without the request by the parties.

[55] See the Guidelines on Legal Aid before the Court of Arbitration for Sport as from 1 November 2020.

[56] See Art. S7 para. 2 (b) CAS Code. The Legal Aid Commission is chaired by the ICAS President (currently Mr. John Coates) and four ICAS Members. Approx. 70% of the requests for legal aid are accepted, see the ICAS 2021 Report and Financial Statements, p. 19.

[57] Art. 5 of the Guidelines.

[58] Art. 5 para. 2 of the Legal Aid Guidelines and Art. S18 CAS Code.

and any witnesses, experts, interpreters or pro bono counsel.

Since the last modification of the CAS Code in November 2022, the CAS Code also provides for a separate legal aid fund financed by football stakeholders specifically for football-related disputes.[59] The CAS legal aid system has been challenged by some individuals as not being sufficient to cover the proper representation of the parties in disciplinary proceedings and particularly as a means to invalidate the arbitration agreement. On at least two occasions, the SFT has confirmed that legal aid falls outside the scope of domestic (and international) arbitration. In a judgment post-Pechstein, the SFT has held that the CAS legal aid mechanism complies with the right of access to justice.[60]

III. Main stages of the CAS Appeal Proceedings

A. Filing of the Statement of Appeal and Time Limits

It is important to note that the general time limit to file an appeal against a decision of an international federation is twenty-one (21) days from the receipt of the challenged decision.[61] However, this being a general time limit, counsel is advised to look into the specific rules of the federation for a confirmation, since the latter constitutes a *lex specialis* provision compared to the time limit set out in the CAS Code. Almost all sports federations have adopted the same time limit.[62]

While all other time limits can be extended upon request and prior to their expiry,[63] the time limit to file the statement of appeal cannot be extended for reasons of legal certainty. Counsels are therefore advised to opt for a very short statement of appeal so as not to miss the deadline and then file a request for extension for the filing of the appeal brief if there are reasons for such request (e.g., preparation of additional expert reports, need to translate an important volume of documents, health reasons or other). As a rule, a first request for extension for up to ten days can be decided – and will usually be granted – by the CAS Director General without consulting with the other party.[64]

Other requirements for the appeal include the exhaustion of internal remedies, the qualification of the decision as an "appealable decision" (as opposed to a simple letter of information)[65] and the existence of an arbitration clause providing for such appeal.[66] The statement of appeal is the introductory document notifying the CAS

[59] Art. S6 para. 9 CAS Code

[60] SFT 4A_166/2021 of 22 September 2021, at 5.5.2 ff. The SFT held that it is not necessary to provide for the same legal aid guarantees to a state court to guarantee the right of access to justice. Prior to the ECtHR Pechstein Judgment, the SFT had already dismissed a similar claim by an athlete in disciplinary proceedings who supported that the arbitration agreement should be invalidated for lack of financial means, see SFT 4A_178/2014 of 11 June 2014.

[61] Art. R49 CAS Code. To the extent that the appeal to the CAS replaces the challenge procedure of the associations' decisions under Art. 75 CC (which provides for one month), the time limit of 21 days has been criticized as being too short and thus invalid, see Scherrer/ Bräger, ad Art. 75 ZGB, para. 23, in Geiser / Fountoulakis (eds.), Basler Kommentar Zivilgesetzbuch I, 7th ed., 2022, Helbing Lichtenhahn.

[62] Art. 51 para. 1 of the FIFA Statutes (2022); see Art. 8.3 of the ITF Independent Tribunal Procedural Rules.

[63] Art. R32 and cf. to Art. R49 CAS Code. Time limits begin from the day after the notification by the CAS is received (with non-working days and holidays included in the calculation). Time limits end if the communication is sent before midnight (time zone of the party sending the notification or the primary legal counsel in case of representation). On the communications see also "Notifications and E-Filing Platform" above.

[64] Art. R32 CAS Code. This rule was adopted shortly after the outbreak of the Covid-19 pandemic (through the CAS Covid-19 Emergency Guidelines) and was incorporated in the CAS Code shortly afterwards.

[65] The CAS follows Swiss case law for the qualification of the appealable decision, while the denomination of such document by its drafter is not decisive, see CAS 2020/A/7590, *HCF v. ICF, CAS 2020/A/7591 RCF v. ICF,* award of 23 December 2021, paras 71-75.

[66] Art. R47 CAS Code. See Despina Mavromati / Matthieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials,* Wolters Kluwer (2015), pp. 379 ff.

Secretariat and the other party/ies of the CAS appeal proceedings. It is however important to comply with all requirements and add all elements listed in the CAS Code and duly pay the CAS Court Office filing fee.[67] If the statement of appeal is incomplete, the CAS Court Office will only grant one short time extension (generally three days) to complete the statement of appeal, failing which the CAS will not open the case.[68]

It is also important to clearly depict the respondent(s) in the appeal proceedings: in football disputes, there is a difference between the so-called "horizontal" disputes (disputes between two parties – players or clubs – in which the FIFA dispute resolution bodies merely act as the tribunal and have no stake at the outcome of the case)[69] and the "vertical" disputes,[70] (most often disciplinary or ethics-related decisions rendered by FIFA where the appeal should be addressed directly against it).[71] In case of doubt, FIFA / another sports federation whose dispute resolution body issued the decision appealed against should be named as respondent even though it may eventually not participate in the proceedings. The same applies to parties who are affected by the outcome of the decision appealed against, particularly in disciplinary decisions.[72]

B. Request for Provisional Measures

Of relevance in appeal proceedings is the possibility to request – and be granted – interim relief, to the extent that the appeal to the CAS does not have a suspensive effect.[73] The decision on provisional measures will be rendered by the AD President or by the panel, if it has already been constituted. In very urgent cases, the AD President will decide without consulting the other party/ies. In any event, the AD President performs a *prima facie* control of the CAS jurisdiction, which is not binding on the panel. The three conditions that must be met are the same as in the SFT / civil proceedings and include the risk of irreparable harm, the likelihood of success on the merits, and the balance of interests between the parties.[74] If filing a request for provisional measures along with the statement of appeal, it is recommended to elaborate the facts and legal arguments at this stage so as to allow the AD President to assess the likelihood of success of the appeal.

C. Filing of the Appeal Brief and the Answer

Most often, the appeal procedure includes only one round of submissions, namely the filing of the appeal brief and the answer brief. The importance of this filing lies in the fact that, after this stage, the parties are no longer authorized to amend or supplement their arguments and requests for relief unless all parties agree or the panel chair so decides

[67] Art. R48 and R64.1 / R65.1 CAS Code. The power of attorney for the parties which are represented, even though necessary, is not one of the elements of Art. R48 CAS Code, see CAS 2015/A/3959, *CD Univ Católica & Cruzados SADP v. Genoa Cricket & FC*, award of 27 November 2015, para. 132 f.

[68] The case will not be opened, meaning that there will not be a docket number nor the need for a termination order. The time limit to complete the statement of appeal is granted to avoid excessive formalism. The requirements are however strict and the SFT has confirmed the legality of the consequences of their non-respect, see SFT 4A_600/2008 of 20 February 2009 (for the failure to pay the advance of costs in time). See SFT 4A_324/2021 of 3 August 2021 and SFT 4A_416/2020 of 4 November 2020.

[69] CAS 2016/A/4837, *S. N. Barquero v. FC Rubin Kazan*, award of 19 December 2017, para. 119 with references to CAS 2014/A/3489 & 3490, *S.E. Palmeiras v. D. Filho & Panathinaikos FC*, Award of 10 November 2014, para. 175.

[70] CAS 2017/A/5359, *Persepolis Football Club v. Rizespor Futbol Yatirimlari*, award of 29 May 2018, para. 66 f. and para. 72 f. See also CAS 2016/A/4836, *R. G. Riancho v. FC Rubin Kazan*, award of 19 December 2017, para. 124 f.

[71] On the distinction between horizontal and vertical disputes in terms of consensual and forced arbitration see also SFT 4A_600/2020, of January 27, 2021.

[72] CAS 2020/A/6713, *N. H. da Silva v. FIFA*; award of 26 May 2021, para. 57.

[73] This is in line with the rules of most federations, Art. 57 para. 4 FIFA Statutes (2022).

[74] Art. R37 CAS Code. CAS 2022/A/8709, *Football Union of Russia (FUR) v. UEFA et al.*, order on provisional measures of 8 April 2022.

on the basis of exceptional circumstances.[75] The SFT has repeatedly confirmed the wide power of the panel to accept or refuse new evidence based on the CAS Code so that it is very difficult to successfully challenge the panel's refusal to submit new evidence before the SFT.[76] In view of the importance of these submissions and the limited time set to file the appeal brief (10 days) or the answer (generally 20 days)[77] it is not unusual to request an extension.[78] It is noteworthy that counterclaims are not authorized in appeal proceedings but only in ordinary proceedings.[79]

The appeal brief and the answer brief must both contain all facts and legal arguments upon which they build their case along with the final requests for relief. The answer brief is also the last stage in which the respondent may file its objections to CAS jurisdiction.[80] Importantly, any witnesses that the parties wish to call to a potential hearing must be clearly listed, along with a summary (3-4 lines) of their expected testimony. Such summary aims at informing the panel and counter party of the respective testimony and must organize the hearing and the examination / cross-examination of witnesses. The panel can also evaluate the pertinence of such witnesses' potential testimony and either request additional information or refuse the hearing of a witness for irrelevance.[81]

D. Evidentiary Procedure and Hearing

After the filing of the answer and unless the parties have agreed on a second round of submissions, the panel asks the parties whether they wish to have a case management conference. This used to happen on a case-by-case basis but is now codified in the CAS Code.[82] This is a welcome development. Similar to commercial arbitration, the case management conference aims at filtering down the issues at stake and dealing with procedural issues or the scheduling of the hearing.

Another important stage of the proceedings is the issuance of the order of procedure, which summarizes the major elements of the arbitration procedure and must be signed by all parties.[83] Since this document systematically deals with important issues such as the jurisdiction of the CAS, the panel's power of review,[84] the constitution of the panel / the number of arbitrators,[85] the determination of the arbitration proceedings as international (falling under the PILA) or domestic (falling under the Swiss Code on Civil Procedure, CCP), the parties must carefully read the terms and add any reservations / raise any objections as needed.[86]

---

[75] Art. R51, Art. R55 and R56 CAS Code. The latter provision is limited to "new arguments" and new requests for relief and does not include the reaction to the respondent's answer or the response to any procedural objection (e.g. jurisdiction or admissibility) raised with the answer.

[76] SFT 4A_478/2017 of 2 May 2018, at 3.3.1; see also SFT 4A_274/2013 of 5 August 2013, at 3.2.

[77] Art. R51 and Art. R55 CAS Code, respectively.

[78] Art. R32 CAS Code.

[79] Art. R39 CAS Code. A party can however issue a cross-appeal provided that it acts within the time limit specified in the CAS Code (Art. R49 CAS Code and the relevant provision of the federation's rules).

[80] Art. R55 para. 5 CAS Code; thereafter, the *Einlassungsdoktrin* applies and it is no longer possible to raise jurisdictional objections. It must be noted that the submission on a possible request for provisional measures does not equal acceptance of jurisdiction, see SFT 4A_564/2020 of 7 June 2021, at 6.3.2.

[81] This does not happen often and is subject to the risk of violating the parties' right to be heard under Art. 182 para. 3 and Art. 190 para. 2 (d) PILA.

[82] Art. R56 CAS Code. This is also a general practice in other sports case management organizations, e.g. Sport Resolutions in London, England and is a standard practice in commercial arbitration e.g. the ICC.

[83] There is however no specific consequence in case of the non-signing of such order of procedure.

[84] SFT Judgment 4A_102/2016 of 27 September 2016, at 3.3 (*Essendon*).

[85] SFT 4A_282/2013, of 13 November 2013, at 5.1 and 5.3.3. The parties had agreed on a three-member panel (pursuant to the arbitration agreement) but subsequently signed the order of procedure (indicating a sole arbitrator) without reservations.

[86] SFT 4A_540/2018 of 7 May 2019 (*Valcke*), at 4.1 and 4.5. Even though proceedings should have been domestic under the CCP (since both parties – Mr. Valcke and FIFA were in Switzerland), the parties subsequently signed an

The oral hearing is optional, but a panel will most likely accept to hold a hearing upon request by one of the parties.[87] The directions and a tentative hearing schedule are usually set shortly before the hearing upon consultation with the parties. While hearings are generally not public, the CAS Code was amended after the judgment in the Pechstein case to allow a hearing without the consent of both parties upon certain conditions.[88]

As per the CAS Code and the PILA, the panel has a wide margin of discretion regarding the administration and assessment of the evidence, subject to Art. 182 para. 3 PILA. This has led to the development of a unique mixture of common law and civil law traditions when it comes to evidentiary issues before the CAS. This is also attributed to the fact that the CAS arbitrators, appointed on an ad hoc basis by the parties and the CAS, stem from different countries and continents with different legal cultures.

In this respect, the panel may request additional evidence from the parties at any time or appoint experts. The use of a Redfern Schedule or other similar methods to filter requests for the production of documents happens in certain factually complex cases.[89] While the CAS has no such power as to force the other party to produce information,[90] it may logically draw adverse inferences from the denial of such party to do so. Also, while the PILA allows the assistance of a state court for the taking of evidence, this is rarely used in practice.[91]

Experts and Witness Statements in CAS Arbitration

Similar to international arbitration proceedings, experts are frequently used in CAS proceedings as part of the evidentiary procedure, particularly in doping-related disputes or match-fixing cases.[92] The range of issues largely depends on the nature of the proceedings (i.e., contractual, disciplinary and, more specifically doping-related disputes). It included specific areas of a foreign "national" law[93] but also forensic expertise (including graphology),[94] or medical and laboratory expertise.[95] In CAS arbitrations there is a predominant use of party-appointed experts. The examination of experts falls largely within the panel's discretion, which however consults with the parties and their counsel and may involve hot tubbing or traditional expert examination.[96]

order of procedure indicating the application of the 12th chapter of the PILA without reservations to this effect. The SFT held that the opting-out was valid and pointed out the lack of diligence of the applicant.

87 Art. R57 CAS Code.

88 Art. R57 CAS Code: the provision requires a request by a physical person (i.e. not a club), a matter of disciplinary nature subject to several exceptions (e.g. morals, public order, national security, minors, or if the proceedings relate to legal or technical questions), cf. SFT 4A_486/2019 of 17 August 2020, at 4.3. The conditions are analogous to the ones of the ECtHR, see ECtHR, *Guide on Article 6 of the European Convention on Human Rights*, 31 August 2022, p. 61. Before the modification CAS Code, the public hearing required the consent of both parties.

89 CAS 2019/A/6274, *I. Henriques et al. v. IOC*, award of 3 February 2020, para. 28.

90 Art. R44.3 CAS Code.

91 CAS 2019/A/6148, *WADA v. S. Yang & FINA*, award of 28 February 2020 (annulled and replaced by the CAS 2019/A/6148 of 22 June 2021, paras. 70, 72 and 103.

92 CAS 2020/O/6689, *WADA v. Russian Anti-Doping Agency*, award of 17 December 2020, e.g. para. 531. Experts are frequently used in "typical" procedures involving an anti-doping rule violation under the WADA Code, CAS 2014/A/3488, *WADA v. J. Lallukka*, award of 20 November 2014; in match-fixing cases, see CAS 2018/A/6075, *I. Labuts v. Football Association of Ireland (FAI)*, award of 17 July 2020.

93 CAS 2009/A/1801, *Aris Thessaloniki FC v. D. Bajevic*, award of 17 March 2009.

94 CAS 2020/A/6899 & 6930, *Cádiz FC & M. Mbaye v. FIFA & Watford FC*, award of 1 July 2021, para. 66.

95 CAS 2018/O/5822, *IAAF v. RUSAF & M. Ponomareva,* award of 11 April 2019, para. 9.

96 CAS 2018/O/5794 & 5797, *C. Semenya v. IAAF*, award of 30 April 2019, para. 466; see also Doriane Coleman / Jonathan Taylor, *Experts in the Hot Tub at the Court of Arbitration for Sport*, Vol 104, No 2, pp. 40-45.

If the panel intends to appoint an expert, it shall consult the parties with respect to the appointment and terms of reference of any expert. Such expert must, prior to an appointment, immediately disclose any circumstances likely to affect her / his independence with respect to any of the parties.[97]

Issues related to the Burden and the Standard of Proof

Generally, parties must adduce the evidence to establish the issues that they rely on in accordance with the general rule of Article 8 Swiss Civil Code (CC).[98] The burden of proof pertains to the merits of the dispute so that the general provision of Article 8 CC applies in all cases where Swiss law is applied to the merits.[99] In fact, several rules of international sports federations have transposed the general provision of Article 8 CC into their own rules / specify who bears the burden of proof.[100] In disciplinary proceedings, the federation / prosecuting authority acting on behalf of the federation bears the burden to establish the violation.[101] The same rules also include presumptions – refutable or irrefutable – that aim at facilitating the discharge of the burden of proof.[102]

The standard of proof largely depends on the specific issue at stake, with the regulations of international federations and WADA providing for specific standards. Generally, the two typical standards applicable in CAS cases are the "balance of probabilities" (that a matter is more likely to have occurred than not) and the standard of "comfortable satisfaction" (a standard lower than the criminal standard of "beyond reasonable doubt" but higher than the one of balance of probabilities).[103] The standard of comfortable satisfaction has been explicitly added as the applicable standard of proof in numerous provisions, including the FIFA Code of Ethics, the WADA Code and other regulations and it is accepted that it is a "variable standard", bearing in mind the seriousness of the offence.[104] The same standard has been applied in match-fixing proceedings even though it was not explicitly provided for in the applicable rules.[105]

To the extent that specific issues regarding evidence are not further regulated in the CAS Code or the PILA, Art. 168 CCP applies by analogy. The latter provides that, generally in civil procedures, the admissible means of

---

[97] Even though all experts must be independent by the parties, the SFT has acknowledged that the evidentiary power of panel-appointed experts compared to party-appointed experts, see SFT 4A_274/2012 of 19 September 2012, para. 3.2.1

[98] CAS 2020/A/7175, *Al-Arabi Sporting Club v. J. I. Martínez*, award of 29 January 2021, para. 37 with references.

[99] Antonio Rigozzi / Brianna Quinn, *Evidentiary Issues before CAS, in International Sports Law and Jurisprudence of the CAS*, 4th CAS & SAV/ FSA Conference Lausanne 2012, Berne 2014, p. 15.

[100] Art. 49 FIFA Code of Ethics (2020), whereby the burden of proof regarding breaches of provisions rests on the Ethics Committee; see also Article 3.1 WADA Code (2021), which provides for the comfortable satisfaction of the hearing authority that an anti-doping rule violation occurred *"bearing in mind the seriousness of the offence"*.

[101] E.g. Art. 18 of the FIG Code of Discipline, which also provides for the (lower) standard of the "balance of probabilities".

[102] See Antonio Rigozzi, / Brianna Quinn, op. cit. p. 15.

[103] FIFA used to include in the FIFA Code of Ethics the standard of « personal conviction" which seemed similar to the one of comfortable satisfaction, see CAS 2011/A/2426, *A. Adamu v. FIFA*, award of 24 February 2012, para. 88; see also CAS 2017/A/5086, *M. J. Chung v. FIFA*, award of 9 February 2018, para. 136 and references. Article 48 of the FIFA Code of Ethics in its 2020 version has abandoned the concept of "personal conviction" and explicitly provides for the "comfortable satisfaction" standard of the Ethics Committee.

[104] CAS 2017/A/5379, *A. Legkov v. IOC*, award of 23 April 2018, para. 702 ff.

[105] CAS 2010/A/2172, *O. Oriekhov v. UEFA*, award of 18 January 2011, para. 53; CAS 2009/A/1920, *FK Pobeda et al. v. UEFA*, award of 15 April 2010, para. 85. Other federations have however adopted the standard of the balance of probabilities as the general standard, Art. 5.1 of the ITF Independent Tribunal Procedural Rules (2019).

evidence include testimony, physical records, inspection, expert opinions, written (witness) statements and the questioning of the parties during the evidentiary hearing. In practice, the evidence typically brought before the CAS includes witness statements, expert opinions (depending on the procedure) and the examination of witnesses / parties during the hearing. Some regulations may also include specific provisions as to the evidentiary measures and their admissibility.[106] However, CAS panels generally have wide discretion regarding the appreciation of the evidence. In all cases, this discretion is limited by the principle of public policy.[107]

CAS panels have also dealt with the issue of inadmissible evidence under Swiss law (e.g., polygraph evidence), which may still be admissible under circumstances.[108] Some federations' rules on evidence explicitly foresee that the disciplinary authority is not bound by a rule of law related to admissibility of evidence before a court of law or statutory tribunal.[109] Any unlawfully obtained evidence has also been discussed and its admissibility depends on a number of factors, including the legitimate interests at stake and the nature of the infringement.[110] Accordingly, using as evidence recordings / filming without consent was found to infringe personality rights but they may still be admissible if justified through a predominant public or private interest.[111] The SFT has confirmed the admissibility of such evidence when it pursues a legitimate objective (e.g. the fight against match-fixing).[112] It is further possible to hear anonymous or protected witnesses under specific circumstances.[113] Finally, some situations may require a lower degree of evidence when a party has difficulties in discharging its burden of proof.[114]

E. The Scope of the Panel's Review

A milestone principle of the CAS appeal procedure is the full power of review of the hearing panel.[115] This extends to the facts and the law of the case and has a dual practical consequence: the panel may "cure" procedural deficiencies occurred in the previous instance (so that a party cannot invoke such irregularities as a sole argument to reverse the appealed decision) and has various possibilities to decide: it can annul the previous decision and issue a new decision, or refer the case back to the previous instance. In contrast, the SFT has held that there is no right to a dual degree of jurisdiction.[116]

Another element of the appeal procedure is that the parties may bring new evidence and amend their requests for relief, which however – and logically –

106 Art. 2.1, 3.2 and 6.1 of the WADA Code (2021) according to which the anti-doping rule violation is established through an adverse analytical finding found in a WADA-accredited laboratory. However, the WADA Code is quite general for other facts related to anti-doping rule violations which may be established by "all reliable means" (Article 3.2 WADA Code 2021).

107 Cf. Art. 184 PILA, Art. 190 (2) (b) and (e) PILA.

108 CAS 2011/A/2384 & 2386, *UCI v. A. Contador Velasco & RFEC* and CAS 2011/A/2386, award of 6 February 2012, para. 240-242, para. 240.

109 Art. 18 (in fine) of the FIG Code of Discipline (2021). It is evident, however, that notwithstanding this provision, evidence cannot be admitted if it infringes public policy.

110 CAS 2011/A/2425, *A. Fusimalohi v. FIFA* ; SFT 4A_362/2013 of 27 March 2014, at 3.2.2.

111 CAS 2011/A/2425, *A. Fusimalohi v. FIFA*, award of 8 March 2012, para. 80 ; see CAS 2011/A/2426, *A. Adamu v. FIFA,* award of 24 February 2012, para. 75.

112 SFT 4A_362/2013 of 27 March 2014, at 3.2.2.

113 CAS 2019/A/6388, *K. Keramuddin v. FIFA*, award of 14 July 2020, para. 125. The FIFA rules have also explicit rules on the admissibility of anonymous or protected witnesses, see Articles 44-46 FIFA Code of Ethics (2020) and Articles 38-39 of the FIFA Disciplinary Code (2019).

114 This is mostly in cases of match-fixing where it it very difficult for the prosecuting authority to discharge its burden, see CAS 2018/A/5734, *KS Skënderbeu v. UEFA*, award of 12 July 2019, para. 180, with references to CAS 2009/A/1920, *FK Pobeda et al. v. UEFA*, award of 15 April 2010.

115 See generally See Despina Mavromati / Matthieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials,* Wolters Kluwer (2015), pp. 503 ff.

116 SFT 4A_200/2021 of 21 July 2021, at 5.2.

cannot go beyond the scope of the decision appealed against.[117] Another limitation (albeit not frequently used in practice) is the discretion of the panel to exclude new evidence if it was available to them or could have been discovered by them before the challenged decision was rendered.[118] The CAS Code explicitly provides for this possibility. Therefore, if the panel considers that the conditions of Art. R57 para. 3 CAS Code have been met and refuses such additional evidence, this refusal should arguably escape the subsequent control by the SFT (unless it falls within Art. 190 para. 2 (e) PILA)

F. The Notification of the Arbitral Award, Recognition and Enforcement

As in most arbitration proceedings, the award is rendered by a majority decision, failing which by the president only. The award is signed, written and contains brief reasons. Prior to its notification to the parties, it is proofread by the CAS Director General, a process that has been challenged before the SFT, the German *Bundesgerichtshof*[119] and the ECtHR[120] but found to be considered as non-problematic in terms of due process – and analogous to the practice in commercial arbitration.

The award (whose operative part may be notified to the parties before the grounds in urgent cases) can only be challenged before the SFT based on Art. 190 para. 2 PILA. Notwithstanding the wording of the CAS Code allowing for the exclusion of challenge before the SFT (pursuant to the analogous provision in the PILA), the SFT has held that such rule is not enforceable in cases where the exclusion clause is found in the rules of the federation and is therefore imposed on the athlete.[121]

The grounds for challenge are logically identical in both commercial – and sports arbitration. However, the SFT has issued judgments of principle in which it somehow adapted its judgments to the particularities of sports arbitration, in particular with respect to the *"bienveillance"* in the interpretation of the arbitration agreement by reference.[122] It has also dealt with some specific scenarios such as the challenge before the SFT of the jurisdiction of the previous instance (rather than the CAS).[123] Moreover, it has acknowledged the specificities of repeated appointments in sports arbitration.[124] It has however refused to create a notion of public policy specifically tailored to sports arbitration.[125] Furthermore, the ECtHR has held that the limited control of CAS awards by the SFT is justified, also in view of the de novo review by the CAS.[126] Through the years, the SFT has helped the CAS shape and amend some of its procedural provisions and has also rendered some leading judgments in international arbitration more generally.[127] Generally, the success rates of the setting aside proceedings remain very low.

While there is a time limit for the finalization of the award (three months from the transfer file to the panel), the duration will eventually depend on the case complexity and the conduct of parties' counsel. The rules allow for an extension of *"a maximum of*

---

[117] CAS 2010/A/2090, *NF & A. v. IF*, award of 7 February 2011, para. 7.22

[118] Art. R57 para. 3 CAS Code.

[119] See the Judgment of the German Swiss Supreme Court (*Bundesgerichtshof*) of 7 June 2016, KZR 6/15.

[120] See the Pechstein ECtHR Judgment, para. 158. The ECtHR endorsed the position of the SFT 4A_612/2009 of 10 February 2010, at 3.3.

[121] Cf. Art. R59 CAS Code and Art. 192 PILA. See the *Cañas* judgment of the SFT 4P.172/2006 of 22 March 2007, at 4.1.1.

[122] SFT 4A_460/2008 of 9 January 2009 and SFT 4P.172/2006 of 22 March 2007 at 4.3.2.3.

[123] The SFT held that such challenge cannot fall within the jurisdictional challenge of Art. 190 para. 2 (b) PILA but only within the (limited) review of Art. 190 para. 2 (e) PILA. See also SFT 4A_232/2022 of 22 December 2022.

[124] SFT 4A_520/2021 of March 4, 2022, at 5.5.

[125] SFT 4A_312/2017 of 27 November 2017 at 3.3.2 and references.

[126] Judgment of 3 September 2019, Erwin Bakker v Switzerland (Application 7198/07) at 47.

[127] SFT 4A_558/2011 of 27 March 2012 (substantive public policy), SFT 4A_490/2010 of 13 April 2010 (procedural public policy), SFT 4A_318/2020 of 22 December 2020 (constitution of the arbitral tribunal).

four months after the closing of the evidentiary proceedings…".[128]

CAS awards in appeal proceedings are public unless both parties agree to keep them confidential, which is practically difficult. This has led to an important volume of CAS awards being published on the CAS database available online.[129] All other elements of the case file remain confidential and the arbitrators are not allowed to disclose details of the file pending and after the case.[130]

Most of CAS appeal proceedings are international arbitration proceedings, i.e., governed by the 12th Chapter of PILA, however in some cases the Swiss Code on Civil Procedure (CCP) may apply.[131] In any event, the Order of Procedure signed between the parties will be decisive on this point, determining the level of review by the SFT.[132]

Generally, CAS awards are recognized and executed abroad as per the New York Convention (NYC58). Another – albeit indirect – way of ensuring execution of the CAS award in Switzerland is through the freezing of funds in Switzerland, particularly for cases where FIFA or UEFA distribute funds to a debtor club. The major particularity of sports arbitration lies however in the fact that sports federations have a very efficient self-enforcing mechanism, imposing disciplinary sanctions for non-compliance with a CAS award.[133]

IV. Concluding Remarks

The CAS is an international arbitral institution specialized in sports disputes, administering several hundred cases every year. Originally created by the IOC in 1984, it has become independent from the IOC and other stakeholders through several institutional reforms and procedural amendments. The SFT, state court judgments as well as the ECtHR have recognized this independence.

As an arbitral institution seated in Lausanne, the CAS falls within the general scope of the 12th Chapter of the Swiss PILA and its procedures are governed by the CAS Code. The CAS predominantly deals with disputes as an appeals instance against decisions rendered by the internal tribunals of sports federations. CAS appeal procedures demonstrate numerous particularities compared to commercial arbitration that include – but are not limited to – the arbitration clause included in the rules of a sports federation (which, particularly in doping-related matters has been qualified as forced arbitration), to a mandatory list of arbitrators, its free disciplinary proceedings and its legal aid fund. While its evidentiary system is a unique mixture of civil law and common law practices, CAS panels regularly follow soft law tools common in commercial arbitration, such as the IBA Guidelines. A further particularity of the CAS procedures relates to the efficient self-enforcement mechanism established by the rules of sports federations.

On the basis of CAS awards, the SFT has rendered several important judgments that have an impact not only on sports arbitration but on international arbitration more generally. However, and even though the SFT has accepted the particularities of sports arbitration with respect to the arbitration

---

[128] Art. R59 CAS Code.

[129] See https://jurisprudence.tas-cas.org/Help/Home.aspx Similarly, several international federations or organizations (e.g. FIFA, WADA, etc.) systematically publish the awards in appeal proceedings in which they were parties.

[130] Art. R59 CAS Code. See also See Despina Mavromati / Matthieu Reeb, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials,* Wolters Kluwer (2015), pp. 559 ff.

[131] SFT 4A_600/2016 of 29 June 2017 (*Platini*), at C.b.a.

[132] SFT 4A_540/2018 of 7 May 2019, at 4.1 and 4.5.

[133] Art. 15 of the FIFA Disciplinary Code (2019) and Art. 58 para. 1 of the FIFA Statutes (2021). The world of sports is strongly self-regulated and provides for self-enforcement mechanisms. In this context, FIFA has recently launched the FIFA Clearing House which acts as *"an intermediary for the payment of training rewards in the football transfer system that fall due pursuant to the RSTP and performs all required Compliance Assessments in their execution",* see Art. 1.3 of the FIFA Clearing House Regulations (2022).

clause by reference, it does not seem willing to adopt a specific notion of public policy or adapt the other grounds of annulment to the particularities of sports arbitration.

A Systematic Review of CAS Decisions in Football Matters in 2020-2021

Vladimir Novak, Alice Roux, Margo De Bondt*

I. Introduction

There has been a proliferation of football matters before the Court of Arbitration for Sport (the "CAS") in recent years, "*proportionally more* […] *than any other sport*".[1] Indeed, based on the published CAS jurisprudence database, football cases accounted for c. 70% of the CAS published decisions in 2020-2021[2] compared to c. 55% in 2018-2019.[3]

The authors undertook a systematic review of the published decisions in the 2020-2021 period contained in the CAS jurisprudence database[4] to draw up statistical decision-making trends presented in Section II and notable substantive and procedural findings presented in Section III. Section IV concludes.

II. Decision-Making Trends

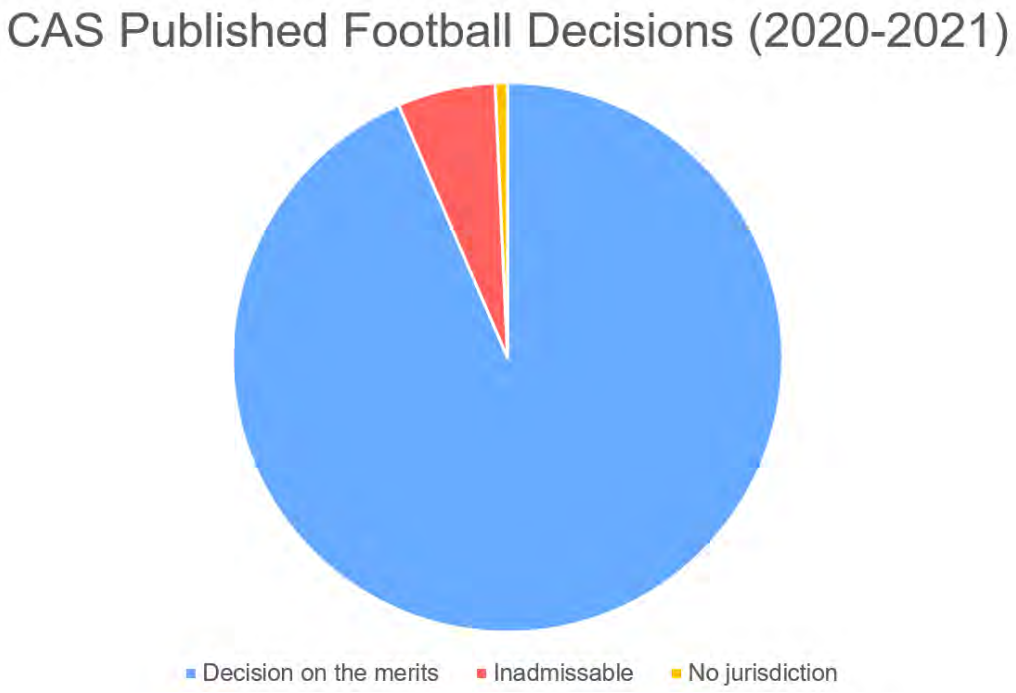
A systematic review of the *published* football matters in the 2020-2021 period shows the following decision-making trends:

Almost all appeals led to a decision on the merits. The CAS proceeded to rule on the merits in c. 94% (130 out of 139) of the published decisions. The CAS declined jurisdiction in one case and found eight matters inadmissible, in particular due to missed deadlines. It cannot be excluded that there were additional decisions declining jurisdiction that were not included in the CAS jurisprudence database, though it is unlikely

* Dr. Vladimir Novak is an arbitrator at the Court of Arbitration for Sport and an associate at Cleary Gottlieb Steen & Hamilton LLP, Brussels. Alice Roux is an associate at Cleary Gottlieb Steen & Hamilton LLP, Brussels. Margo De Bondt is a stagiaire at Cleary Gottlieb Steen & Hamilton LLP, Brussels. The views expressed are the authors' own, and they bear sole responsibility for any error or omission.

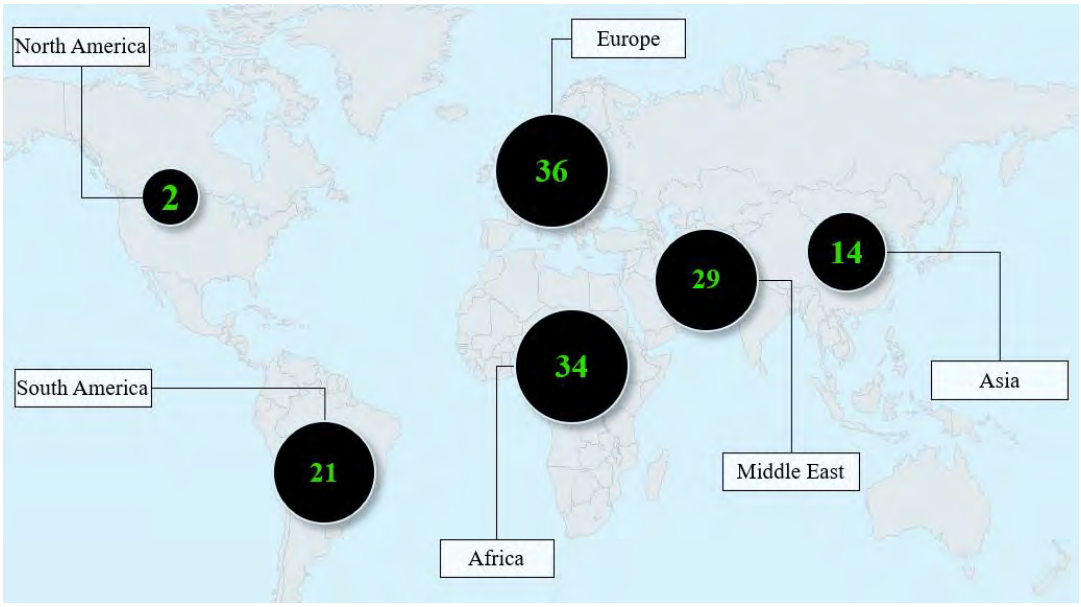
[1] *See* ICAS 2021 Annual Report and Financial Statements (https://www.tas-cas.org/fileadmin/user_upload/ICAS_Annual_Report_Financial_Statements_2021.pdf).
[2] 139 out of 195 published decisions.
[3] 180 out of 320 published decisions.
[4] 139 decisions based on the adoption date.

that any such matters would materially alter a clear trend of ruling on the merits in the vast majority of cases before the CAS.



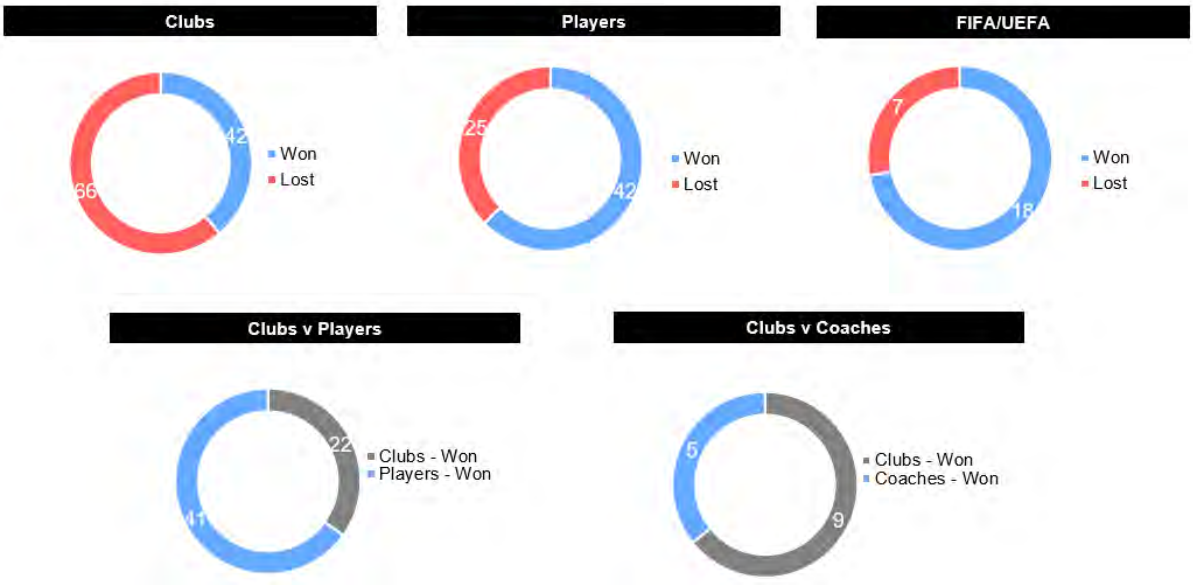
Two-thirds of the matters were brought by appellants from Europe, Africa, and the Middle East.[164] Europe accounted for c. 25% (36 out of 139) of the appeals, closely followed by Africa and the Middle East with c. 24% (34 out of 139) and c. 20% (29 out of 139) of the appeals respectively. South America accounted for c. 15% (21 out of 139) and Asia for c. 10% of the appeals. North American appellants were almost absent before the CAS with just 1% of the appeals (2 out of 139).

[164] In three matters, the identity of the appellant was redacted in the published version of the decision. The regional designation was based on principal appellant.



Clubs were involved in eight out of every ten matters. 108 out of 139 cases involved clubs, in particular in disputes with players/coaches (other parties included FIFA/UEFA, national federations/associations/leagues, and referees). The following outcome trends are notable:[165]

- FIFA/UEFA prevailed in c. 72% of their matters.
- Players prevailed in c. 63% of their matters.
- Clubs prevailed in c. 39% of their matters.



III. Notable Findings

The 139 published football decisions in the 2020-2021 period concerned a variety of

[165] Partially upheld appeal was counted as a 'win' in the statistics.

contractual and regulatory matters. The authors conducted a systematic review of these cases and identified and summarized the following notable findings, organized into topics of: (a) termination/compensation; (b) personality rights; (c) contractual exchanges/negotiation; (d) sanctions; (e) regulatory matters; (f) legal principles; and (g) procedure.

A. Termination/compensation

- A player has *just cause* to terminate a contract due to non-payment of wages for at least two months, provided the club received a notice of default with a time period to fulfil the financial obligations (CAS 2021/A/7959; CAS 2021/A/7958; CAS 2021/A/7793; CAS 2020/A/7292). However, the outstanding amount may not be "insubstantial" (CAS 2019/A/6533).

- "Good cause" to terminate exists when the fundamental terms and conditions which formed the basis of the contractual arrangement are no longer respected. The same does not apply in relation to "auxiliary" terms and conditions (CAS 2019/A/6452).

- If a player terminates a contract for non-payment of wages and then signs a new contract, the value of the new contract for the period corresponding to the remaining term of the prematurely terminated contract shall be deducted from its residual value (CAS 2021/A/7793; CAS 2020/A/6954; *see also* CAS 2020/A/6798). However, the reduction is not automatic in case a player received a higher remuneration under their former contract than under their new contract (CAS 2019/A/6578).

- If a player adopted a pattern of unprofessional behaviour that is not of such gravity as to constitute *just cause* for termination, it can nevertheless be taken into account by the CAS as a mitigating factor when deciding on the extent of compensation due to the player for the unjustified termination (CAS 2019/A/6452).

- "Intention" in failure to pay termination-related compensation is irrelevant (CAS 2020/A/7012).

- Liquidated damages clauses that disproportionately favour one party are generally invalid (CAS 2020/A/7187; CAS 2020/A/7011; *see also* CAS 2020/A/7007 and CAS 2019/A/6514), though a mere disparity between the amounts of damages set out in a liquidated damages clause does not necessarily lead to the invalidity of the clause (CAS 2019/A/6246). There is no excessive commitment when a player contractually agrees to a liquidated damages clause entitling him to receive the remaining salaries of the employment contract in case of termination (CAS 2019/A/6533).

- Where no bonus scheme was set up and there was no indication of the conditional nature of the bonus, a player is entitled to the payment of the whole bonus sum even if he was unable to play for most of the season (CAS 2020/A/6959).

- Unless *poor results* of the team are specifically agreed between a club and a coach as "just cause" for termination, such circumstances do not reach the level of gravity required to justify the early termination of the agreement. Even if agreed, the "poor results" threshold will need to be clearly defined to trigger just cause for termination (CAS 2020/A/6798).

- A player cannot waive all entitlements deriving from work already performed and work to be performed under an employment contract (CAS 2020/A/6961; CAS 2020/A/6727).

- A club that makes the issuance of the

International Transfer Certificate conditional upon the conclusion of a settlement agreement under which the player waives their entitlement to claim outstanding remuneration and compensation for breach of contract is exploiting the player's straitened circumstances, which is not permitted (CAS 2020/A/6727).

- Obligations deriving from a "pre-contract" are not as strict as in a definite employment contract; the damages incurred in case of a breach of a "pre-contract" are therefore generally lower because it remains possible that a definite agreement will not be reached (CAS 2020/A/6748).

B. Personality rights

- Access to training and ability to compete with fellow teammates in the team's official matches is a fundamental right under an employment contract, the violation of which may provide just cause for termination (CAS 2020/A/7370).

- Just cause for early termination may also arise if the club does not place the player in a position to perform the agreed work, by not registering him with the national federation and thus preventing him from being qualified to play matches (CAS 2020/A/6954; CAS 2020/A/6770; CAS 2020/A/6950).

- The employer's duty to protect the employee's "personality" rights includes an obligation not to employ a coach in a different/less interesting position (CAS 2020/A/7175).

C. Contractual exchanges/negotiation

- The player can communicate with the club via the club's e-mail address registered on the Transfer Matching System. It is the exclusive responsibility of the clubs to ensure that the addresses are valid, up-to-date, and regularly consulted (CAS 2020/A/7292).

- WhatsApp messages sent by the player to the club to discuss the payment deadline amount to informal exchanges, which hold no clearly identifiable expressions of intentions to extend the payment deadline, and therefore do not have any legal effect on the club's payment obligations vis-à-vis the player (CAS 2020/A/6867).

- The alleged representation power must first be analysed from the point of view of the addressee to whom said representation powers would have been granted *i.e.*, from the agent's perspective acting on behalf of the principal. Only if no such representation power can be found at internal level can one analyse the alleged representation power by looking at the relationship between the agent and the third party to see whether the third party could in good faith rely on the representation power of the agent (CAS 2020/A/6962).

- Where a person without authority enters into a contract on behalf of a third party, rights and obligations do not accrue to the latter unless that party ratifies the contract (CAS 2019/A/6468).

D. Sanctions

- Sanctions must be proportionate and justified. Turning autonomy into arbitrariness is not acceptable (CAS 2020/A/6920).

- Whenever an association uses its discretion to impose a sanction, CAS shall demonstrate a certain degree of deference to the decision-making bodies of such association, especially in the determination of the appropriate sanction. It is only when the sanction is disproportionate that the CAS must be free to say so and apply the

appropriate sanction (CAS 2019/A/6665; CAS 2019/A/6344; CAS 2018/A/6072; CAS 2019/A/6239).

- Clubs are *strictly* liable "*for incidents of any kind*" based on the conduct of their supporters (CAS 2020/A/6920), though a club's specific conduct may be relevant in the assessment of the proportionality of the sanction (CAS 2018/A/6040).

- Sporting sanctions must be imposed on any club found to have induced a breach of contract during the protected period (CAS 2020/A/6796).

- A player does not have standing to request that sporting sanctions be imposed on a club; it is solely within FIFA's prerogative to determine so (CAS 2018/A/6044; see also CAS 2018/A/6002).

- The imposition of sporting sanctions is warranted when the only plausible reason explaining the player's decision to unilaterally terminate their employment contract with their previous club is to be able to immediately sign a more lucrative contract with a new club (CAS 2019/A/6337).

E. Regulatory matters

- Candidates for membership in FIFA Council are under no obligation to disclose sanctions that do not concern a violation of the FIFA Code of Ethics (CAS 2021/A/7685).

- Candidates for the president of a national association should be of irreproachable behaviour and in possession of a high spectrum of norms and values, including full integrity. The undisputed existence of a final decision by an ethics body of the national association, which reprimanded said person for inappropriate public remarks during a radio broadcast, establish a lack of the requisite integrity (CAS 2019/A/6517).

- International transfer of players is only permitted if the player is over the age of 18 unless exceptions have been established to accommodate certain reasonable circumstances that would not affect the minors, among others, in socio-economic, educational, cultural, family and psychological terms. This is decided based on the weight of the "football factor" within the whole range of reasons and the overall circumstances of the matter and the player's registration should only be refused if the "football factor" is the prevailing element in the decision to change countries (CAS 2020/A/7503).

- Clubs are prohibited from entering into contracts which enable other parties to acquire the ability to influence, in employment and transfer-related matters, the independence, policies or teams' performances of those clubs. This applies to both direct and indirect influence and requires consideration of the context wherein this influence takes place (CAS 2020/A/7008). However, the influence must be "material", which is to be assessed on a case-by-case basis (CAS 2020/A/7417).

- It is widely recognised that in cases where payments are accepted by an official without a legitimate reason, no further proof is required with regards to the occurrence of an improper influence on the decision-shaping and making – any kind of reward renders the relevant advantage unlawful or improper (CAS 2019/A/6665; CAS 2019/A/6344).

- Absence of the Video Assistant Referee (VAR) in a game does not constitute a violation of the principle of equality of chances as both teams are affected in the same way (CAS 2019/A/6483).

- A bridge transfer occurs when a club is used as an intermediary in the transfer of a player from one club to another *e.g.*, to circumvent the payment of training compensation and has three main characteristics: (1) it is made for no apparent sporting reason; (2) there are three clubs involved: (i) the club where the player was firstly registered, (ii) the "bridge club", usually a club of a lower level, (iii) the final club of destination; and (3) the player is engaged with the bridge club for a short period of time and often does not play any match for such club (CAS 2019/A/6639).

F. Legal principles

- The principle of *exceptio non adimpleti contractus* is generally not applicable within employment agreements as the Swiss Code of Obligations provides an exhaustive list of the grounds under which a party may withhold its contractual employment obligations due to the breach of the other party (CAS 2020/A/7400).

- The *ne bis in idem* principle does not prevent a judicial body from imposing multiple sanctions for the same violation within a single proceeding (CAS 2020/A/7369).

- In accordance with the *non ultra petita* principle, a CAS panel must adhere to the specific parameters of the party's request for relief and is unable to substitute an alternative relief irrespective of whether it would be correct based on the evidence (CAS 2020/A/6916; CAS 2020/A/6889; CAS 2020/A/6950).

- Financial damage is never considered as "*irreparable harm*" because such damage may be remedied by means of financial compensation (CAS 2020/A/6796).

- The principle of *venire contra factum propium* provides that when a conduct of one party has led to legitimate expectations of another party, the first party is barred from changing its course of action to the detriment of the second party (CAS 2020/A/6861).

- Discretion of a competent body to adjust the sanction mentioned in the applicable rules is not inconsistent with the general principle *nulla poena sine lege certa* (CAS 2019/A/6393).

- The estoppel principle protects the legitimate expectation of a person that places reliance upon a representation made by another person (CAS 2019/A/5824).

- The principle of *electa una via non datur recursus ad alteram* allows a party to opt for state court adjudication, though once such option is exercised, the possibility to refer the same case to sport adjudication bodies is precluded (CAS 2019/A/6626; see also CAS 2019/A/6569).

- The principle of *non reformatio in peius* serves to protect an appellant from receiving a higher sanction on appeal than at the lower instance, but does not preclude the imposition of a sanction on a party that was acquitted of liability by the lower instance body (CAS 2018/A/6040).

- Derogating from the prohibition of retroactive legislation is only possible if: (i) retroactivity is expressly provided for by law; (ii) it is reasonably limited in time; (iii) it does not lead to shocking inequalities; (iv) it is justified by relevant reasons (*i.e.*, it responds to a public interest more worthy of protection than the private interests at stake); and (iv) it respects acquired rights (CAS 2020/A/7444).

- The *res judicata* effect only goes as far as the panel that issued the decision in question wanted to decide on the matter in dispute. Issues that the first panel deliberately left undecided are not covered by the *res judicata*

effect (CAS 2019/A/6483). The types of decisions that enjoy *res judicata* effects are defined by law and not by the parties' autonomy; there is no provision in Swiss law that confers *res judicata* effects on decisions of association tribunals (CAS 2019/A/6483).

- The principle of *contra proferentem or contra stipulatorem* is an option of last resort *i.e.*, if the intention of the parties cannot be established by any other method of interpretation (CAS 2019/A/6337).

G. Procedure

- The standing to challenge a decision of an association may extend to "indirect" members in the case of "umbrella associations" provided such members have an interest in the action, which is to be interpreted broadly (CAS 2021/A/7637).

- A request that goes beyond a mere statement of defence and is directed at altering the operative part of an appealed decision, and which would have the effect of prejudicing the position of the appellant qualifies as a counterclaim/cross-appeal, which is not allowed before the CAS. If a potential respondent wishes to challenge a decision, it must file an independent appeal with the CAS within the applicable appeal time limit (CAS 2020/A/7605; CAS 2020/A/7397; CAS 2019/A/6626).

- Procedural defects at the lower instance proceedings can be cured, and are therefore moot, by virtue of the proceedings before the CAS (CAS 2020/A/7567; CAS 2020/A/7007; CAS 2019/A/6344; CAS 2019/A/6187).

- If an appellant has filed an amended Statement of Appeal with the sole purpose of including a respondent as a party in the proceedings, it cannot simply withdraw its appeal against that respondent once the latter has taken an interest in the case and in the meantime raised issues that need to be addressed by the CAS panel (CAS 2020/A/7252).

- After the submission of the Appeal Brief and of the Answer, the parties may submit further evidence if they so agree or if the President of the CAS panel consents on the basis of exceptional circumstances, such as if the new (untimely) evidence contains a fact which is a *real novum*. The fact that an appellant could not anticipate the submission by one of the respondents of a "legal expert report" does not constitute an exceptional circumstance that would justify a request for production of its "own" legal rebuttal opinion (CAS 2020/A/6994; CAS 2020/A/6993; CAS 2020/A/6992; CAS 2020/A/6991; CAS 2020/A/6990).

- It is not for the CAS to reallocate the costs of the proceedings before previous instances (CAS 2020/A/6994).

- The CAS Code does not grant CAS panels a power to review decisions taken by the President or Deputy President of the CAS Appeals Division (CAS 2020/A/7272).

- Where an appellant's prayers for relief expressly/directly seek against a third party that was not named as respondent in the appeal proceedings, or directly affect said third party in its legal position and interests, the latter should be brought as necessary respondent in the arbitration proceedings. By failing to do so, the appellant deprives said third party of its right to be heard (CAS 2020/A/6713).

- A CAS panel is not prevented from considering transcripts of examination of witnesses in a criminal proceeding abroad, even if the individuals concerned are not witnesses in the CAS proceedings (CAS 2019/A/6665; CAS 2019/A/6344).

- The fact that there is not only one anonymous witness statement on file but five separate, coherent, consistent and reliable witness statements from anonymous witnesses who were subject to cross-examination is relevant (CAS 2019/A/6388).

- If neither party is domiciled in the European Union (EU) and there is no close proximity between the matter at hand and EU law, then EU law is not applicable (CAS 2020/A/6393).

- CAS panels do not consider themselves bound by prior decisions of the FIFA DC or the CAS, as each matter requires a case-by-case assessment (CAS 2020/A/7092; CAS 2018/A/6072).

- A party that has filed submissions in time has validly filed its submissions, even if the package then takes weeks to arrive or even if it never arrives but is lost in transit (CAS 2018/A/5998).

- A party seeking the production of documents in the custody or under the control of the other party has the duty to demonstrate, with specificity, whether these documents are likely to exist and to be relevant. A request that is too generic, explorative in nature and not directly relevant for the specific case goes too far, within the meaning of being a "fishing expedition", and must be dismissed (CAS 2019/A/6533).

- If a relevant CAS award has been adopted (even if not yet published) and has come to the attention of a CAS panel in another pending procedure, that panel is bound to take it into account, provided the parties of the pending procedure are afforded the opportunity to submit their comments on the award (CAS 2019/A/6514).

- Requests for extensions may not be made, and therefore not granted, after the expiration of a deadline. However, a respondent's failure to submit an answer does not mean that the CAS panel must blindly accept the position of the appellant(s) (CAS 2019/A/6463).

- Allowing post-hearing video-recorded examination of the witnesses would violate the applicable rules of the proceeding, in particular Article R51 of the CAS Code (CAS 2019/A/6388).

IV. Conclusion

Given the exponential growth of football and recent changes in the regulatory landscape, football cases will likely continue to feature prominently in the CAS workload for the foreseeable future. It remains to be seen whether clubs— appearing in >80% of the CAS football matters in 2020-2021 but prevailing in less than 40% of the cases—will materially improve their success rate in the coming years. It likewise remains to be seen whether appellants from North America and Asia will increase their participation rate before the CAS, which was far below appellants from the other continents.

The CAS proceedings are legally not subject to a *stare decisis* doctrine. Findings in previous cases do, however, form a *persuasive* precedent, which is often followed in similar circumstances. Indeed, many of the findings in Section III are not necessarily football-specific and could guide future CAS panels in resolving various contractual and regulatory issues.

Jurisprudence majeure*
Leading Cases
Casos importantes

* 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.
Llamamos su atención sobre el hecho de que la siguiente jurisprudencia ha sido seleccionada y resumida por la Secretaría del TAS con el fin de poner de relieve las recientes cuestiones jurídicas que han surgido y que contribuyen al desarrollo de la jurisprudencia del TAS.

CAS 2019/A/6669
Sayed Ali Reza Aghazada v. FIFA
28 April 2022

Football; Disciplinary sanctions for failing to report sex crimes and to protect physical and mental integrity of players; Lex mitior and tempus regit actum; Hearing in person and translation during a hearing; Duty of good faith of a party to the arbitration; Testimony of anonymous witnesses; Conditions for the use of protected witnesses; Burden of proof and Beweisnotstand; Standard of proof; CAS power of review

Panel
Prof. Ulrich Haas (Germany), President
Mr Donald Rukare (Uganda)
The Hon. Michael Beloff QC (United Kingdom)

Facts

The dispute in these proceedings revolves around the decision rendered by the Adjudicatory Chamber of the FIFA Ethics Committee ("AC"). The decision of 8 October 2019 ("the Decision") concerns alleged ethical misconduct of the Appellant, Mr Sayed Ali Reza Aghazada, who was the Secretary General of the Afghanistan Football Federation ("AFF") from 2012 until 2019, related to sexual harassment, sexual abuse and rape committed by AFF officials. Among these officials was – *inter alia* – Mr Keramuddin Karim, the former President of the AFF. The AC imposed a ban on the Appellant prohibiting him from taking part in any kind of football-related activity at a national, regional and international level for a period of 5 years for failing to report the above said crimes and for failing to protect the physical and mental integrity of players. It further imposed a fine on the Appellant in the amount of CHF 10,000.

On 23 November 2018, the representative of the Afghanistan Women's National Football Team ("AWNFT") sent an email to the general email address of the AFF (info@aff.org.af) and – addressed in CC – to Mr Aghazada ([…]@gmail.com). The email reads – in its pertinent parts – as follows: *"Dear Mr. President Kramudin Karim, (…) You might remember that on 05th-Feb-2018 we informed you about mental abuse, sexual affairs and bad behaviour of two male representatives of Afghanistan Football Federation who were sent by you to our Jordan Football training camp. Our complaint and case were on the representatives Abdul Saboor Walizadeh who was introduced as an official delegate and representative of AFF and head of Women's Football Committee, and Nader Alme who was sent as an assistant coach. We clearly remember you promised us that you will punish them and you will take strong actions against them. (…) After our investigations, we found out that Abdul Saboor Walizada got promotion as a head of the judicial and Nader Alme became the coach of U17 Men's National Team. (…) Is this the way you want to protect our rights and our safety, by hiring the abuser?"*.

On 29 November 2018, the sports brand Hummel terminated its sponsorship agreement with the AFF after becoming aware of the allegations of mental, physical and sexual abuse within the AFF. On 30 November 2018, a widespread media coverage reported *"severe mental, physical and equal right-abuse of the female players by male AFF officials"*. The reports also mentioned that the AFF released a statement in which it *"vigorously rejects the false accusations made with regard to the AFF's women's national team"*.

On the same date, the FIFA Investigatory Chamber of the FIFA Ethics Committee ("IC") commenced investigations into the allegations of

mental and physical abuse of members of the AWNFT. The IC informed Mr Aghazada of the investigations and requested him to furnish all relevant information in the possession of the AFF in relation to the investigated matter to the IC by 7 December 2018.

On 2 December 2018, Mr Aghazada replied to the IC's letter of 30 November 2018 by stating that *"the AFF takes this matter extremely seriously and it does everything to prevent (and investigate) such extremely discturbing [sic] incidents and allegations"*.

On 5 December 2018, the Appellant in his capacity as Secretary General of the AFF sent the following letter in English and Dari language to Mr Walizada as well as to Mr Aleme, both accused of abuses of AFF female players: *"You may be aware that in the last days, the media have reported about sexual abuse and other mistreatment occurring within the AFF national teams. It was suggested that you may have been affected and the victim of such actions. Please find attached the relevant media reports and requests. As am [sic] employer, we want to do everything to support and protect you. If you would like to report anything in relation to these media reports, or if you have any knowledge of such incidents, please inform us immediately. If you do not feel comfortable to inform us, you may also provide such information to FIFA directly (legal@fifa.org). (…)"*.

On 9 December 2018, the then Attorney General of the Islamic Republic of Afghanistan ("Attorney General") provisionally suspended five officials of the AFF, including Mr Karim and Mr Aghazada. The Attorney General further imposed travel bans on all of the suspended officials.

On 12 December 2018, Mr Aghazada sent an email to the Secretary General of FIFA, Ms Fatma Samoura, informing her about the internal investigations initiated by the AFF and of the provisional suspension imposed on him by the Attorney General. He further indicated that the suspension should be considered an act of unlawful governmental interference contrary to the FIFA Statutes. On the same date, the IC provisionally suspended Mr Karim for a period of 90 days.

On 17 December 2018, Mr Aghazada sent an email to the IC and Ms Samoura explaining that the internal investigations could not be conducted properly due to the suspensions imposed by the Attorney General. Accordingly, Mr Aghazada requested that the internal investigations of the AFF *"be stayed, until the situation with the government is clarified and at least, the General Secretary and the Vice-President are able to return to daily duties"*.

On 17 January 2019, after the deadline to provide the requested information had been extended by IC's email dated 24 December 2018, the AFF submitted its position on the alleged mental and physical abuse of female football players based on its internal investigations, in which it denied all such allegations.

On 8 June 2019, the AC sanctioned Mr Karim with a life ban on taking part in any football-related activity for the abuse of his position and the sexual abuse of various female players. The AC also imposed a fine of CHF 1,000,000 on him.

On 4 July 2019, the IC notified Mr Aghazada that formal investigations were being initiated against him for possible breaches of Articles 13, 15, 17, 23 and 25 of the 2018 edition of the FIFA Code of Ethics ("FCE"). The IC further requested Mr Aghazada to provide *"a written statement in relation to your awareness with respect to Mr*

Karim's conduct, in particular, if you were aware of the same please refer to any actions you may have taken in that respect" by 17 July 2019.

On 16 July 2019, Mr Aghazada denied all alleged violations of the 2018 FCE stating, *inter alia*, that he *"has never been involved in such activity* [sexual abuse or assault of women] *directly or indirectly, and confirms that he has not been complicit in any such activity where it is alleged against Mr Karim, or any other person at the AFF"*.

On 22 August 2019, the IC submitted its final report to the AC. The report *"finds Mr Aghazada guilty of having breached article 23 par 1 and 17 of the FCE 2018"*.

On 23 August 2019, the AC informed Mr Aghazada that formal proceedings were being initiated against him before the AC based on the findings of the final report of the IC. On 8 October 2018 the AC issued its Decision whereby Mr Sayed Aghazada was (i) found guilty of an infringement of art. 17 (Duty to report) and art. 23 (Protection of physical and mental integrity) of the FIFA Code of Ethics, in relation to his awareness of and failure to report and prevent the sexual abuse committed by Mr Keramuudin Karim, former President of the Afghanistan Football Federation (AFF), against several female players in the period 2013 – 2018; (ii) banned from taking part in any kind of football-related activity at national and international level (administrative, sport or any other) for a period of 5 years, as of notification of the present decision, in accordance with article 7 lit. j) of the FIFA Code of Ethics in conjunction with art. 6 par. 2 lit. c) of the FIFA Disciplinary Code; and (iii) fined in the amount of CHF 10,000.

On 10 December 2019, the Decision with grounds was notified to Mr Aghazada. On 22 December 2019, the Appellant filed an appeal before the CAS against the Decision.

On 17 and 18 June 2021, after several postponements due to COVID-19 related travel restrictions, a hearing was held in this matter. The President of the Panel, the CAS counsel in charge of the case and the clerk attended the hearing in person whereas the other Members of the Panel, the parties and their representatives, as well as the witnesses attended the hearing by video-conference.

The Panel heard evidence from three witnesses (i.e. Player C, Player D and Player A), who were called by the Respondent and heard by the Panel in a way so as to protect their identity. This was done via a translator/interpreter. The Parties and the Panel then had the opportunity to examine and cross-examine the witnesses. The testimony of the witnesses can be summarized - in essence - as follows: Player C played for the Afghan women national football team at the time of the relevant facts. In the year 2017, she was sexually harassed, hit in the face and elsewhere on her body and raped by the President of the AFF. The abuses took place on the premises of the AFF, i.e. in a secret room that could only be accessed through the office of the President of the AFF by fingerprint. Thereafter, the President of the AFF gave Player C 300 or 400 US dollars and advised her not to tell anybody about what had happened or about the secret room. Player C refused to take the money and was kicked out of the secret room through a side door that connected the secret room with the private parking space of the President of the AFF. She had blood, bruises and black spots on her face, neck and other parts of her body. She walked through to the main gate of the AFF compound and bumped into the Secretary General of the

AFF, the Appellant. Player C turned to him for help and tried to explain what had happened to her, but instead of helping her, he was rough, and showed her no concern at all. He *"pulled his* [business] *card out of his pocket"* and told her: *"you can make money out of that and you can go wherever you want but I don't want to see you ever again in the federation"*. According to Player C, the Appellant clearly knew what had happened to her, as he could see the state in which she was upon exiting the secret room where she had been sexually abused and beaten by the President of the AFF, Mr Karim. In addition, the Appellant's office and Mr Karim's office were very close in the old offices, where the abuse took place; finally, Mr Karim and the Appellant have a *"close relationship"*. According to Player C, *"everybody at the AFF including the Appellant"* knew about the widespread abuses committed on the female players of the AFF.

At the time of the relevant facts, Player D was a player of the Afghan women national football team. She was sexually assaulted twice by the President of the AFF, Mr Karim. Each time, the abuses took place in the old offices of the President of the AFF. Each time, she left the office of the President of the AFF in very bad conditions, i.e. shocked and crying, and many people could see her at that moment. In addition, according to Player D, it was impossible for the Appellant not to know about such abuses as his office in the old building was next to the President's office. Moreover, the Appellant and Mr Karim had a close relationship. Together with other players, Player D intended to make an official complaint in writing about these abuses. In order to do so they had to go through the Appellant. The Appellant however blocked the complaint, as was reported by the person in charge for filing the complaint. These events occurred between 2014 and 2016.

At the time of the relevant facts, i.e. while the Appellant was Secretary General of the AFF, Player A was a member of the Afghan women national football team. Player A reported that she was sexually harassed by the President of the AFF. Such abuse took place in the leisure room which is located on the upper floor of the new building of the AFF, above the new office of the President of the AFF. According to Player A, all women at the AFF knew about sexual abuses by AFF officials; it was impossible for the Appellant not to know about them. Player A also stated that she did not feel comfortable to report this fact earlier since she was under great stress until the President of the AFF was sentenced; today she had more strength to enable her to testify about the Appellant.

The Panel also heard the testimony of the Appellant, whom both the Parties and the Panel had the opportunity to examine and cross-examine. The testimony of the Appellant can be summarized - essentially - as follows: He was Secretary General of the AFF from 2012 until 2019. He was elected to the position of Secretary General by the Executive Committee of the AFF upon proposal of the same Committee. At the time of his appointment as Secretary General, he was 22 years old. As Secretary General, he was in charge of international relations of the AFF as well as all financial matters and day to day business and administrative issues of the AFF. He was constantly liaising with the President of the AFF. For many issues he needed to ask for authorisation from the President of the AFF prior to taking action. From 2010 to 2015, he was working in the old offices of the AFF together with the other AFF employees. As from 2015, he moved to the new building of the AFF which is located in the same compound. He claims that the relationship with the President of the AFF,

Mr Karim, was friendly and strictly professional. He was not aware of the abuses that were committed by the President of the AFF. He stated that he became aware of the alleged abuses against members of the National Women Football Team on 30 November 2018. While being on business trip, he read an email that had been sent on 23 November 2018 to his private email account from the Afghan Women National football team. At the same time, he also received a letter from the AFF sponsor, Hummel, cancelling the sponsorship contract with the AFF due to severe allegations of sexual harassments by AFF employees. Upon arrival in Kabul, he immediately started an internal investigation into these allegations. He also held a press conference shortly after the incidents became public through media articles. At the press conference the Appellant dismissed the allegations of sexual abuses and explained that the women's team unleashed the media scandal after the AFF had decided to dismiss members from the AFF National Women Football Team who refused to wear the hijab in accordance with Islamic laws. He confirmed that he signed the letters from the AFF to Mr Abdul Saboor Walizada and Mr Mohammad Nader Aleme dated 5 December 2018, which were drafted according to his direction. Shortly thereafter, he was himself provisionally suspended.

Finally, the Panel also decided to hear Ms Andrea Sherpa-Zimmermann, CAS Counsel, who was present with the witnesses at a secret location. Ms Andrea Sherpa-Zimmermann was heard by the Panel *ex officio*. She reported that she was present throughout the testimony of the protected witnesses. She said that she was unable to comment on the quality of the translation provided by the translator, since she does not speak the relevant language. However, having assisted to the examination and cross-examination of the three witnesses in presence of the Interpreter, she confirmed that it was her firm impression that the Interpreter did not unduly interfere with the testimony of the protected witnesses. Furthermore, it was her firm impression that everything the witnesses said was translated into the microphone. There were no side discussions between the Interpreter and the witnesses. She further stated that she did not have the impression that there were language issues between the witnesses and the Interpreter. Everything ran very smoothly and professionally. She also explained that she had assisted to the examination of the same witnesses in the context of another CAS proceeding in which the same Interpreter was used. She did not feel that the Interpreter acted any differently in the present proceedings as compared with the previous proceedings.

Reasons

1. *Lex mitior* and *tempus regit actum*

The Parties were in dispute whether, in the light of the *lex mitior* principle, the Appeal had to be governed by the 2012 FCE or the 2018 FCE edition with respect to its substantive aspects. The Appellant submitted that the 2012 edition of the FCE, i.e. Article 18 (Duty of disclosure, cooperation and reporting) and Article 24 (Protection of physical and mental integrity), was to apply, because neither provision contained a minimum sanction which was more favourable to the Appellant. In addition, the wording of Article 24(1) of the 2012 FCE edition required a closer contact between the offender and offended than was evidenced by the facts of this case. The Respondent, submitted on the contrary, that the scope of liability had to be considered in order to determine the applicable edition of the FCE. A specific maximum

sanction for a breach of the "Duty to report" (Article 17 of the 2018 FCE) and the "Protection of physical and mental integrity" (Article 23 of the 2018 FCE) was only provided for in the 2018 FCE edition. Furthermore, by reason of Article 11 of the 2018 FCE, it was more favourable for a person in the Appellant's position who had committed more than one offence, than the version in force at the time of such commission.

The Panel recalled that the principle of *lex mitior*, a concept originally deriving from criminal law, applied when a federation, associations or sports-related bodies amends its rules and regulations between the time of the asserted sports rule violation and the time of the decision taken by the relevant sports body in respect thereof. The principle of *tempus regit actum* was then softened by the *lex mitior* principle in a case where the new rules were more favourable to the accused. In such circumstances the less severe "penalties" and "sanctions" would be applied retroactively. The principle of *lex mitior* served the purpose of sanctioning the person who had committed a violation reflecting the current opinion of the sports body that a milder sanction should apply to such violation than the one applicable at the time of its commission.

The Panel then held that the principle of *lex mitior* applied to the case at hand. The "sanctions" which could be imposed under the 2012 and 2018 edition in respect to the violations of the FCE allegedly committed by the Appellant differred inasmuch as only the 2018 edition of the FCE provided for a maximum ban on taking part in any football-related activity in case of a violation of the Duty to report under Article 17 of the 2018 FCE (two years) and in case of a violation of the Protection of physical and mental integrity under Article 23 of the 2018 FCE (five years). An Article which provided a cap for a sanction was automatically more favourable than one which did not. In addition, Article 11 of the 2018 FCE also limited for the first time the length of a sanction in case of multiple violations of the FCE, which was likewise equally in favour of the Appellant. The Panel also rejects the Appellant's submissions regarding the application of Article 24(1) of the 2012 edition of the FCE. It recalled that the substance of the offence was to be assessed according to the law in force at the time it had been committed. In the eyes of the Panel, the Appellant was misconstruing the principle of *lex mitior* which applied only to the sanction for and not the substance of the offence. Therefore, the Panel found that the 2018 edition of the FCE was more favourable to the Appellant than the 2012 Edition and was thus applicable to the merits in this matter.

2. Hearing in person and translation during the hearing

The Appellant had requested the postponement of the hearing scheduled to take place on 17 and 18 June 2021, since, as a result of visa and travel restrictions in the context of the COVID pandemic, neither the Appellant nor his legal team would likely have been able to travel to Lausanne in Switzerland in time for the scheduled *in persona* hearing. The Panel however recalled that there was no right to an in person hearing (as distinct from one by video conference) either under Swiss law, the CAS Code or general principles of law.

The Appellant had also raised several issues relating to the Interpreter and his/her translation services during the examination and cross-examination of the protected witnesses. *Inter alia*, the Appellant had provided a series of examples of alleged mistranslations. The Panel noted that

the purpose of a translation was not per se to translate each and every word that is pronounced by the witness, but rather to convey the meaning of what was said by such witness. In this particular case, the Interpreter had extensive qualifications and experience, and as a result was fit for purpose. Moreover, having reviewed the examples provided by the Appellant, the Panel found that the Interpreter had effectively conveyed the meaning of what had been said by the witnesses as required. The examples listed by the Appellant – in the view of the Panel – provided no grounds for any suspicion about the accuracy of the translation by the Interpreter.

3. Duty of good faith of a party to the arbitration

The Appellant was also contending that during the examination of Player C, a question was put to that witness in the absence of the Appellant's legal team and that, as a result, the Appellant's right to be heard in a safe and balanced manner had been compromised. The Panel first noted that it was unsure whether or not any of the members of the Appellant's legal team (who were logged on to the video platform at all times) were indeed absent from the virtual Hearing room when the question was put to Player C. But even if it had been the case that none of the three members of the Appellant's legal team were present, the President of the Panel had repeated the question to Player C when the Appellant and his legal team were certainly in the virtual Hearing room. The Panel further observed that the Appellant had not raised any complaint promptly but only after the hearing. It recalled that, if a party to an arbitration feels that its procedural rights have been infringed, it must, in exercise of its duty of good faith, act immediately to make an objection, *a fortiori* if such party is represented by several counsels. In acting against the principle of *venire contra factum proprium* the Appellant was barred from raising this complaint.

4. Testimony of anonymous witnesses

The Panel also had to deal with the question of whether a tribunal can rely on the testimony of an anonymous witness. It held that this issue was linked to the right to a fair trial guaranteed under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (ECHR), notably the right for a person to examine or have examined witnesses testifying against him or her (Article 6 (3) ECHR) which as provided under Article 6 (1) ECHR applies not only to criminal procedures but also to civil procedures. The Panel was of the view that even though it was not bound directly by the provisions of the ECHR (cf. Art 1 ECHR), it should nevertheless take account of their content within the framework of procedural public policy. In addition, it was noteworthy that also Article 29 (2) of the Swiss Constitution guaranteed the same rights, in order to enable a person to check and, if need be, challenge facts alleged against him by a witness.

The Panel recalled that admitting anonymous testimony potentially infringed both, the right to be heard and the right to a fair trial, since the personal data and record of a witness were important elements of information to have at hand to test a witnesses' credibility. Furthermore, it was a right of each party to participate in the adducing of evidence and to be able to ask the witness questions. However, not all encroachments on the right to be heard and to the right to a fair trial amounted to a violation of those principles or of procedural public policy. The Panel referred to a decision (ATF 133 I 33) of the Swiss Federal Tribunal ("SFT") in which the latter had decided (in the context of

criminal proceedings) that the admission of anonymous witness statements did not necessarily violate the right to a fair trial provided under Article 6 ECHR. According to the SFT, if the applicable procedural code provided for the possibility to prove facts by witness statements, it would have jeopardized the court's power to assess the witness statements if a party had been prevented, in principle, from ever relying upon such witness statements if anonymous. The SFT had stressed that the ECHR case law recognised the right of a party to use anonymous witness statements and to prevent the other party from cross-examining such witness if *"la sauvergarde d'intérêts dignes de protection"*, notably the personal safety of the witness, required it. The Panel considered that this nuanced approach applied also to civil, including disciplinary, proceedings.

In the eyes of the Panel, the personality rights as well as the personal safety of a witness formed part of his/her interests worthy of protection. In the case at hand the Panel had no doubt that the danger for the witnesses and their relatives was not merely theoretical but actual. Furthermore, the Panel had equally no doubt that the measures ordered by it were adequate and proportionate in relation to all interests concerned.

5. Conditions for the use of protected witnesses

The SFT had also held that the use of protected witnesses, although available, had to be subject to strict conditions. In particular the right to a fair trial had to be ensured through other means, namely a cross-examination through *"audiovisual protection"* and an in-depth verification of the identity and the reputation of the anonymous witness by the court. Pursuant to its own and the Strasbourg jurisprudence, the decision was not to be *"solely or to a decisive extent"* based on an anonymous witness statement.

The Panel was of the opinion that it had observed all of these precautions in these proceedings and, therefore, that the evidence of these protected witnesses was admissible. Furthermore, the Panel noted that also the Panel in CAS 2019/A/6388 had accorded the status of protected witnesses to the players in question in the proceedings against the former President of the AFF Mr Karim.

6. Burden of proof and Beweisnotstand

Turning to the question of the burden of proof, the Panel recalled that in a case, where a Tribunal has not reached the requisite degree of personal conviction that an alleged fact occurred the principle of burden of proof defines which party has to bear the consequences of such a state of non-conviction. Except where the arbitral agreement determines otherwise, the arbitral tribunal shall allocate the burden of proof in accordance with the rules of law governing the merits of the dispute, i.e. the *lex causae*. The *lex causae* in the matter at hand had been previously found to be primarily the various regulations of FIFA, most notably the FCE, and subsidiarily Swiss law.

In application of the *lex causae*, the Panel held that pursuant to Article 49 of the FCE, *"the burden of proof regarding breaches of provisions of the Code rests on the Ethics Committee"*. However, it also recalled that, in accordance with Swiss law, each party had to bear the burden of proving the specific facts and allegations on which it relied. In a situation, where difficulties of proof arised (*Beweisnotstand*), a number of tools were at disposal in order to ease the – sometimes difficult – burden put on a party to prove certain facts. These tools ranged from a duty of the other party to cooperate in the process of fact

finding, to a shifting of the burden of proof or to a reduction of the applicable standard of proof. The latter was the case, if – from an objective standpoint – a party had no access to direct evidence (but only to circumstantial evidence) in order to prove a specific fact. Hence, while the burden of proof remained on FIFA, the Appellant had in the circumstances of this case a duty to cooperate in the process of fact finding by the Panel, by bringing forward facts and evidence in support of his line of defence.

7. Standard of proof

The Panel then had to address the issue of the standard of proof. It recalled that the standard of proof was defined as the level of conviction that is necessary for a deciding body to conclude that a certain fact occurred. For the Panel, what law determines the standard of proof was debatable. However, given that the standard of proof was regulated for state court proceedings by Article 157 Swiss Code of Civil Procedure and was a matter closely related to the evaluation of the evidence, the better view was that the standard of proof should be classified as a question of procedure.

While the CAS Code itself did not specify a particular standard of proof, Article 48 of the FCE – to which the Parties had submitted – provided that *"[t]he members of the Ethics Committee shall judge and decide on the basis of their comfortable satisfaction"*. Consequently, the Panel found that the standard of proof in the present matter was comfortable satisfaction, i.e. lower than the standard of *"beyond a reasonable doubt"* but higher than the standard of *"balance of probabilities"*, while bearing in mind the seriousness of the allegations made.

8. CAS power of review

The Panel held that whether or not the Appellant knew about the infringements within the meaning of Article 17 of the FCE providing that *"Persons bound by this Code who become aware of any infringements of this Code shall inform, in writing, the secretariat and/or chairperson of the investigatory chamber of the Ethics Committee directly"*, was a fact that could not be established by direct evidence (to which only he was privy), but only by indirect or circumstantial evidence.

After having carefully reviewed the circumstantial evidence on file, the Panel found that 1) as is usually the case between the President and the Secreatry general of an association, the working relationship between the President of the AFF and the Appellant was very close; 2) from a personal perspective, the Appellant and Mr Karim had a very intimate private relationship, and that the Appellant was part of Mr Karim's inner personal entourage creating a bond of trust between them; 3) the Appellant held a leading management position within the AFF and that it was hard to imagine that given his position in such a small and hierarchical unit, he could have remained ignorant of any significant information pertinent to the organization and of happenings within it, therefore being particularly difficult for the President's crimes to have been committed without others, and certainly the Appellant, knowing of them; 4) the offices of the President and the Appellant were right next to each other, making it especially hard to believe that the crimes could have been committed by the President virtually on the Secretary General's doorstep without the latter becoming aware of them; 5) the abuses committed on female football players were not isolated and individual incidents but rather, as had emerged from the

testimony of the protected witnesses, occurred over a long period of time and were of a systemic nature, with the result that the Panel could not accept that the Appellant as the Secretary General of the AFF was not aware at all of this culture of abuse of female players taking place of such a period and in such proximity to him.

For the Panel, even if some of the above points looked at individually may have been insufficient to conclude with comfortable satisfaction that the Appellant knew of the sexual abuses committed against female players, collectively they constituted coherent pieces of a puzzle which came together to form a clear picture, namely that the Appellant knew what terrible circumstances were taking place within the AFF and who was responsible for them. Despite knowing about the atrocities suffered by the AFF female football players, the Appellant had not informed FIFA about these abuses nor taken any action as Secretary General to start an impartial investigation against Mr Karim and / or other AFF officials involved in these abuses. Accordingly, the Appellant had breached his duty to report as provided under Article 17 (1) of the FCE.

The Panel found that the Appellant had equally breached Article 23 of the FCE which provides that *"Persons bound by this Code shall protect, respect and safeguard the integrity and personal dignity of others"*. As previously stated, the Appellant knew about the crimes committed, he knew who the victims and who the perpetrators were. Despite this knowledge, the Appellant had failed to *"protect, respect and safeguard the integrity and personal dignity of others"*.

The Panel found the conduct of the Appellant particularly grave in relation to Player C. Instead of helping Player C, protecting her and investigating the matter the Appellant had roughly brushed her aside and had even further humiliated her by telling her that she could make money out of the incident. This was an expression of profound disregard for the needs of persons entrusted to his care, was deeply discriminatory and hurtful. Similarly, Player D had stated that a complaint had been presented to the Appellant by another player, with respect to Mr Karim's conduct and that the Appellant had prevented the complaint being filed. As a result, instead of protecting the alleged victims, the Appellant had chosen to protect the alleged perpetrator, thereby allowing Mr Karim to continue his abuses in secrecy. In the eyes of the Panel, such despicable attitude of the Appellant constituted a blunt violation of his obligation to protect, respect and safeguard the integrity of the AFF female football players embodied in Article 23 (1) of the FCE.

In assesssing the consequences of the Appellant's violation of Articles 17 (1) and 23 (1) of the FCE, the Panel started with recalling that in disciplinary matters appealed to CAS, a panel would – where appropriate – demonstrate a certain degree of deference vis-à-vis the decision-making bodies, especially in the determination of the appropriate sanction. However, when a CAS panel concluded that the sanction imposed was disproportionate, it had to be free to say so and apply the appropriate sanction. This notwithstanding, it was bound by the matter in dispute and the requests filed by the Parties.

In the present matter, the AC had decided to impose upon the Appellant a monetary fine in the amount of CHF 10,000 as well as a ban from taking part in any football-related activity for a period of five years. Assessed in light of the facts of this case, the Panel found this sanction clearly

to be too lenient. Based on Article 11 of the FCE, a harsher sanction could properly have been imposed, but as stated above, the Panel deemed itself bound by the matter in dispute and the requests filed by the Parties. Notably in this context the Respondent had not sought an increase in the sanction imposed by the AC.

Decision

In light of the foregoing, the Panel held that the appeal had to be dismissed and the decision rendered by the Adjudicatory Chamber of the FIFA Ethics Committee on 8 October 2019 confirmed.

CAS 2020/A/6922
Tiago Carpes de Bail v. FIFA
13 June 2022

Football; Disciplinary dispute; Scope of (appeal) proceedings; Concept of standing/*locus standi*; Conditions for the recognition of a right to appeal of a non-addressee of a first instance decision; Creditors' standing to appeal in relation to FIFA Disciplinary Committee's decisions on sporting successions of debtors; FIFA's (lack of) standing to be sued as sole respondent in appeal proceedings against decisions of its Disciplinary Committee (DC) related to sporting succession of clubs

Panel
Mr Jan Räker (Germany), Sole Arbitrator

Facts

This appeal is brought by Mr Tiago Carpes de Bail (the "Player" or "Appellant") against the decision of the FIFA Disciplinary Committee (the "FIFA DC") of the FIFA (the "Respondent" or "FIFA") dated 7 November 2019 (the "Appealed Decision") in the disciplinary proceeding against Southend Futsal Club, England ("Southend"), regarding the dismissal of disciplinary sanctions on said Club.

On 1 August 2015, the Player signed a "Work Contract Professional Player" with the English futsal club Baku United F.C. Thereafter, Baku United F.C. informed the Player that the club would be closing down due to financial difficulties, which lead to the termination of the contract by the club. On 22 April 2016, the Player filed a claim against Baku United F.C. with the FIFA Dispute Resolution Chamber (the "FIFA DRC") for termination of the contract without just cause. On 23 March 2017, the FIFA DRC rendered a decision (the "DRC Decision"), in which Baku United F.C. (London Baku United Futsal Club) was ordered to pay to the Player the amount of EUR 21,667 plus 5% *p.a.* interest as from 25 April 2016 and USD 5,000 as procedural costs. The DRC Decision remained unchallenged. As the amount awarded to the Player remained unpaid, the latter initiated disciplinary proceedings against Baku United F.C. at the FIFA DC, which rendered its decision on 7 November 2017.

On 11 January 2018, the Player informed FIFA that he had still not been paid and that the club was now named London City F.C.. Throughout the time between January 2018 and September 2019, the Player sent various communications to FIFA and made numerous phone calls to FIFA in order to obtain further information on the status of the matter. In such wake, the Player informed FIFA in March 2019 that the Club had changed its name again, this time to Southend Futsal Club. On 13 September 2019, FIFA informed the Player that it had initiated disciplinary proceedings against Southend as the prospective successor of Baku United F.C. for a potential failure to respect the DRC Decision. On 7 November 2019, the FIFA DC rendered the Appealed Decision, holding as follows:

"1. All charges against the club Southend Futsal Club are dismissed.

2. The disciplinary proceedings initiated against the club Southend Futsal Club are hereby closed".

The FIFA DC's considerations leading to the Appealed Decisions were expressed as follows:

23. […] *it cannot be established to his comfortable satisfaction that the new Club, Southend Futsal*

Club, is the legal and/or sporting successor of the original Debtor, Baku United FC (London Baku United Futsal Club).

24. […] *since the new Club cannot be regarded as the sporting successor of the original Debtor, all charges against the new Club must be dismissed, as the new Club cannot be considered as a non-compliant party within the meaning of art. 64 of the 2017 FDC* […]*".*

The grounds of the Appealed Decision were communicated to the Player on 18 March 2020. On 6 April 2020, the Player filed a Statement of Appeal with the CAS in accordance with Article 58 of the FIFA Statutes and Articles R47 and R48 of the Code of Sports-related Arbitration (2019 edition) (the "CAS Code"). The Appellant's submissions may be summarized as follows:

- The Appellant considers Southend Futsal Club to be the legal successor of Baku United FC. The Appellant submits that the club known as Baku United F.C. in the 2014/2015 season was known as London Baku United in the 2015/2016 season. In the 2016/2017 and 2017/2018 seasons, Baku United was replaced by London City Futsal Club. In the 2018/2019 season, London City Futsal Club's place taken by Southend Futsal Club. For the 2019/2020 season, Southend Futsal Club changed its name to London Baku United Futsal Club.
- The Appellant acknowledges that he bears the burden of proof, but requests to take into account the specificity of his situation which requires him to operate with limited information, given the at best semi-professional state of futsal. The Appellant also duly informed FIFA about the various name changes which subsequently occurred. On the other side, the Appellant asserts, FIFA acted with a complete lack of assistance and transparency. Additionally, the Appellant contends that the proceedings at FIFA lasted for an unreasonable amount of time, due to FIFA allowing the English FA unreasonable extensions for its feedback to FIFA.
- Even though the DRC Decision only gave 30 days to Baku United to pay the amount, FIFA failed to enforce its own decision for more than two years, which constitutes a gross transgression of the enforcement system of Article 64 of the 2017 edition of the FDC. FIFA should therefore be liable for the consequences of such failure.

The Respondent's submissions, in essence, may be summarised as follows:

- The Respondent contends that on 27 March 2018, following a request from the Respondent, the English FA informed the Respondent that it was not aware of any relationship between the original debtor and London City FC. Throughout the years 2018 and 2019, the Respondent sent various further requests regarding the status of London City FC and Southend FC to the English FA. On 24 April 2019, the English FA finally replied to the Respondent, stating that Southend was affiliated to the English FA already since 2002 and that it was not known under any other name between 2002 and 2019. The FIFA DC accordingly rendered the Appealed Decision, denying a legal succession between the original debtor and Southend.
- The Respondent further argues that the Appellant never became a party to the disciplinary proceedings against the original debtor or Southend. Therefore, the Appellant lacks standing to appeal the Appealed Decision. This applies regardless of his right

to file a complaint to FIFA or to be informed about the outcome of the proceedings. The Appellant does at most have an indirect interest in the outcome of the "enforcement proceedings", whose purpose is not to ensure the settlement of the creditor's claims, but to ensure compliance with a FIFA decision or CAS award. Furthermore, the result of such proceedings can at any time only be a sanction imposed on the debtor, but not the settlement of the creditor's claims.

- Even more importantly, the Appellant failed to include Southend as a respondent in the current proceedings, even though the Appellant requests an award which would directly affect the legal interests of Southend. Due to the according lack of a passive "*litis consortium*", FIFA also lacks standing to be sued in the Appeal. Furthermore, as Southend was not named as a Respondent in this matter and as Southend did not appeal the Appealed Decision by itself, the Appealed Decision has become final and binding in favour of Southend.
- The Respondent insists that FIFA acted diligently in favour of the Appellant, persistently trying to obtain the information required for the assessment of the Appellant's requests, by sending no less than 9 letters and reminders to the English FA between January 2018 and January 2019. The Respondent refuses any liability for the possibly tardy responses from the English FA and maintains that, on the basis of such responses, the Appealed Decision is correct.

Reasons

1. Scope of (appeal proceedings)

The Sole Arbitrator notes that the Appellant's request to be paid compensation was not a subject of the Appealed Decision. Rather, the Appellant bases his claim on the outcome of the Appealed Decision, for which he requests financial compensation from FIFA as the originator of such decision.

However, the nature of an appeal procedure against a decision is that the decision which is appealed is legally scrutinized by the appeal body, which then either confirms the appealed decision or upholds the appeal by either overturning it with a new decision or by referring it back to the original deciding body for a new decision. The Appellant however requests a third option, which is the payment of damages in place of the revocation of the Appealed Decision. The Sole Arbitrator further notes that, within the procedure leading to the Appealed Decision, the subject matter was not a claim of the Appellant, but the question whether or not disciplinary sanctions should be imposed on another party, Southend. Therefore, the Sole Arbitrator concludes, that no payment to the Appellant, be it from Southend or FIFA, could ever result as a direct consequence from such proceedings. This cannot change within appeal proceedings. A request for the payment of a certain amount of money, which was not the subject matter of the Appealed Decision, can not be made with an appeal arbitration procedure of disciplinary nature, but would only be admissible in ordinary procedure. The Sole Arbitrator holds that the Appellant's request to hold FIFA liable for his damages is outside the scope of the current appeal arbitration proceedings.

2. Concept of standing/*locus standi*

The concept of standing or *locus standi* describes the ability of a party to demonstrate to a court or

an arbitral tribunal that it has a sufficient connection to and harm from the challenged decision to support its participation in the case. The basic purpose of the concept of standing is to determine the group of persons who are entitled to, in the present case, appeal the decision of an association.

3. Conditions for the recognition of a right to appeal of a non-addressee of a first instance decision

Standing to appeal a decision cannot be recognized with respect to any person remotely affected by a decision. Legal security and the effectiveness of the appeal process against a decision command that there should be strict limits on the potential circle of persons who may be recognized to have standing to appeal, namely those persons having a special interest in the outcome of the case in a manner that clearly distinguishes them from other persons, including the general public.

4. Creditors' standing to appeal in relation to FIFA DC's decisions on sporting successions of debtors

The Sole Arbitrator notes that there is no provision in the FDC expressly stating that the victim of an alleged violation, like the creditor [of] a party failing to comply with a payment order issued by the DRC or CAS, would have the right to appeal a decision of the FIFA DC. Likewise, neither the FDC expressly offer such right to an entity who reports such failure to the FIFA DC and requests the initiation of disciplinary proceedings. The only mention of legal standing in the FDC is to be found in Article 58.1 of the 2019 edition of the FDC but the Sole Arbitrator notes that, in appeals against decisions of the FIFA DC which are brought to the Appeal Committee of FIFA, legal standing is restricted to parties to the proceedings before the FIFA DC. While this does constitute a guideline as to which level of proximity is regarded required by FIFA to constitute legal standing to appeal, the lack of an according provision in relation to appeals to CAS necessitates further scrutiny beyond the issue whether an Appellant was a party to the FIFA DC proceedings.

In CAS 2002/O/373, the CAS Panel held that a party must invoke a substantive right of its own or have an interest worthy of protection in order to be recognized standing to appeal. The concept of an *"interest worthy of protection"* was defined as encompassing the situation where *"the appellant is factually and directly affected by the litigious decision in a fashion that can be eliminated by its annulment and if the appellant did not have the opportunity to be heard in the first instance"*.

A narrow interpretation was also confirmed in CAS 2015/A/3874 in relation to Art. 62(2) of the UEFA Statutes, in which it was found that the appellant was not *"directly affected"* as the victim of racist and discriminatory chants during a match: *"the Appellant is also not directly affected as the "victim" of the racist and discriminatory chants, at least in the sense of the established case law. According to CAS 2008/A/1583 & 1584, this could only be envisaged if the UEFA rules provided a specific right for a victim to appeal, which they do not. Indeed Article 62 para. 2 of the UEFA Statutes links the "directly affected" requirement to the disciplinary decision and not to the conduct giving rise to the disciplinary proceedings"*.

With respect to the right to appeal of a non-addressee of a first instance decision, the CAS Panel held in CAS 2016/A/4903 that such a right must be admitted *"in very restricted cases. As a general rule, the appellant's interest must be concrete,*

legitimate, and personal. […] *the decision being challenged must affect the appellant directly, concretely, and with more intensity than others. Finally, the interest must exist not only at the time the appeal is filed but also at the time when the decision is issued. CAS jurisprudence found that in order to have standing to sue, the appellant must have an interest worthy of protection or a legitimate interest. This is found to exist if (i) the appellant is sufficiently affected by the appealed decision, and if (ii) a tangible interest of a financial or sporting nature is at stake.* […]. *Sufficient interest is a broad, flexible concept free from undesirable rigidity and includes whether the appellant can demonstrate a sporting and financial interest".*

The Sole Arbitrator understands that the Player has spent in vain numerous years trying to enforce the DRC Decision against Baku United F.C. and its alleged legal successors. In the case of the Player and Baku United F.C., this system proved to be insufficient for help, because Baku United F.C. was discontinued as a club and – possibly – succeeded by a variety of new clubs, continuing Baku United's legacy without being willing to take responsibility for Baku United's debt. Despite it being acknowledged by previous FIFA DC jurisdiction and stipulated in Art. 15.4 of the 2019 edition of the FDC that new clubs can be held liable for the debts of former clubs, if they are to be considered as their sporting successors, the FIFA DC held that this was not the case for Southend in relation to the Player's claim. It is that substance which causes the grief which lead to the Player's appeal.

Appeals lodged by creditors in relation to disciplinary proceedings against debtors who failed to respect according FIFA decisions were dealt with differently by various CAS panels in the recent past: Some panels dealt with such appeals on the merits without bringing up the issue of standing to sue at all (CAS 2020/A/6745). In some cases, the standing to sue was confirmed (CAS 2020/A/6873) and in some it was explicitly rejected (CAS 2019/A/6287). The Sole Arbitrator acknowledges that indeed, the Appellant's legal position was not immediately and directly affected by the Appealed Decision. The disciplinary system created in the FDC is a system which is aimed at ensuring compliance of all direct and indirect FIFA members with the laws and regulations of FIFA and the decisions of FIFA's bodies. This system exclusively works on the basis of sanctions against offenders, but offers no single tool which a creditor could use to directly enforce a payment claim against his debtor. Such enforcement tools are restricted to the public authorities of the respective states.

However, it must also be noted that the Appellant does in fact have an own interest in the outcome of the Appealed Decision which distinguishes him from the wider public which is excluded by the concept of *locus standi*. The Sole Arbitrator must therefore consider whether such distinction is severe enough to warrant a deviation from the general rule, that a direct interest must exist. The Sole Arbitrator agrees with the Panel in the case CAS 2016/A/4903 that, for such deviation to be justified and required, the Appellant must demonstrate to have a tangible interest of economic or sporting nature that sufficiently affects him.

As to the Appellant's interest which is affected by the Appealed Decision, the Appellant craves the payment of a salary amount which was promised to him, but never paid. The salary is the amount that employees rely on to be paid for the coverage of their living expenses and their entire livelihood. The settlement of the overdue amount is therefore of high personal importance to the Appellant.

While not having a direct effect, a different decision of the FIFA DC would have had a substantial indirect effect on the Appellant's situation. Had the FIFA DC imposed the usual disciplinary sanction on Southend, then the only means available to Southend in order to avoid or end a ban from registering players, a points deduction and/or a relegation would have been the payment of the overdue amount to the Appellant. Accordingly, an according decision by the FIFA DC would have been widely equivalent to a legal compulsion in favour of the Appellant. The Sole Arbitrator considers this to be a particularly strong indirect effect.

Finally, from a procedural point of view, the Appellant had only limited regular options to participate in the proceeding which led to the Appealed Decision. While the Respondent had to or chose to rely on the information received by one of its member associations, that showed little interest in a speedy solution of the matter, the Appellant was not formally part of the procedure and was therefore not formally able to provide evidence and arguments to the proceeding. If the Appellant did not have a standing to sue for an appeal, he could at no point defend or promote the aforementioned substantial interests by proving factual statements and proof that speaks in his favour. He would depend entirely on the ability and willingness of others to gain and provide the necessary information.

In light of the aforementioned, the Sole Arbitrator holds that the Appellant's legal interest in the Appealed Decision is sufficiently high and direct to grant him a standing to appeal against it.

5. FIFA's (lack of) standing to be sued as sole respondent in appeal proceedings against decisions of its FIFA related to sporting succession of clubs

The FDC do not give any advice regarding the standing to be sued. The question of the standing to be sued is a question of the merits which means that in case it is denied, an appeal has to be dismissed (see MAVROMATI/REEB, The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials, R48, no. 65; CAS 2008/A/1639, no. 26; CAS 2007/A/1329 & 1330).

In CAS 2007/A/1329 & 1330, the Panel stated that *"Under Swiss law,* […]*, the defending party has standing to be sued (legitimation passive) if it is personally obliged by the "disputed right" at stake (see CAS 2006/A/1206). In other words, a party has standing to be sued and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it (cf. CAS 2006/A/1189; CAS 2006/A/1192)".*

However, for the purpose of the present Appeal against the Appealed Decision, FIFA is not the only party from which something is sought. The Appellant's standing to sue derives from his personal and important interest to gain an amount of money from Southend. This interest is pursued by a request to FIFA to impose sanctions on Southend and FIFA rejected to impose such sanctions on Southend. Southend would therefore also be immediately affected if the Appealed Decision was set aside, even if the case was only referred back to the FDC, because it would lose the acquitting effect of the Appealed Decision and be subject to the risk of being sanctioned and being held liable again. Just like the Appellant has a legitimate interest in being able to present and argue his case in this forum, Southend would have had a legitimate

interest in defending its case. If the Sole Arbitrator decided to set aside the Appealed Decision, Southend would be directly affected, but without being granted a right to be heard and defend its position.

Accordingly, the Sole Arbitrator holds that for an appeal against a disciplinary decision of FIFA, with which the Appellant seeks to obtain a harsher sanction or to revert an acquittal, the Appellant must also name the party on which the sanction shall be imposed, as a Respondent in his appeal. In the present case therefore, the Sole Arbitrator holds that FIFA does not have standing to be sued as a sole Respondent. Consequently, the answer to the question whether or not Southend shall be considered the sporting successor of Baku United F.C. has become moot.

Decision

The appeal filed by Mr Tiago Carpes de Bail against the FIFA on 5 April 2020 with respect to the decision rendered by the FIFA Disciplinary Committee on 7 November 2019 is dismissed.

CAS 2020/A/7359
Football Club Noah v. Football Club Kairat
25 April 2022

Football; Training compensation; Entitlement to training compensation in case of transfer to a Category IV club; Discretion of the deciding body in the quantification of training compensation and duty to achieve a proportional result

Panel
Mrs Anna Bordiugova (Ukraine), Sole Arbitrator

Facts

On 18 April 2013, the football player X. (the "Player"), born [in] 1998, was registered as an amateur with the Football Academy of Football Club Kairat (the "Respondent" or "FC Kairat"), a professional football club with registered office in Almaty, Kazakhstan, competing in the Kazakh Premier League and affiliated to the Kazakhstan Football Federation ("KFF"). On 26 February 2016, during the season of his 18th birthday, the Player signed his first employment contract with the Respondent, valid until 1 March 2018. On 1 February 2017, the Respondent and the Player entered into a new employment contract, valid from the date of its signature until 30 November 2019, for a monthly salary of KZT […] (the "Employment Contract").

On 28 May 2018, the Player unilaterally terminated the Employment Contract with the Respondent, with effect from 30 June 2018, offering the payment of the compensation established by clause 6.7 of the Employment Contract, in the amount of KZT 1,190,000. On 29 May 2018, the Respondent sent a notification to the Player, stating that pursuant to clauses 6.7 and 10.8 of the Employment Contract, to terminate the agreement he had to pay the Respondent a compensation in the minimum amount of USD 5,000,000. On 27 June 2018, the Player sent a second notice to the Respondent, reiterating the termination notice and offering again the payment of a compensation in the same amount, i.e. KZT 1,190,000.

On 2 July 2018, the Moldovan football club FC Saxan requested the Respondent to issue the Player's non-TPO declaration, due to the signing of a contract with the Player. On 4 July 2018, the Respondent answered FC Saxan referring to the compensation clause included in clause 10.8 of the Employment Contract as well as to Article 17.4 of the FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP"). On the same date, the Respondent filed a claim before the KFF Dispute Resolution Chamber ("KFF DRC") requesting the imposition of sporting sanctions on the Player.

On 9 July 2018, the Respondent filed a claim before the FIFA Dispute Resolution Chamber ("FIFA DRC") against FC Saxan, requesting the imposition of sporting sanctions on the latter for the alleged inducement of the Player to terminate the Employment Contract. On the same date, FC Saxan informed the Respondent by email that it was not aware of the existence of a valid contract between the Respondent and the Player and hence that it was not holding any negotiation with him.

On 24 July 2018, the KFF DRC issued a decision admitting the Respondent's claim, imposing sporting sanctions on the Player.

On 27 August 2018, the Player entered into an employment agreement, valid until 1 June 2019,

with Football Club Noah (the "Appellant" or "FC Noah"), an Armenian professional football club founded on 15 May 2017 with headquarters in Yerevan, competing in the Armenian Premier League and affiliated to the Football Federation of Armenia ("FFA").

On 14 September 2018, the Single Judge of the FIFA PSC authorised the Appellant to provisionally register the Player.

On 17 January 2019, following some news published by the media regarding the transfer of the Player from the Appellant to the Russian football club FC Sochi, the Respondent sent a letter to the latter informing it about its intention to file legal actions against the Player and PFC Sochi due to an alleged bridge transfer of the Player, in order to claim a compensation of at least USD 5,000,000 in case no agreement was reached between them. PFC Sochi was requested to contact the Respondent within five days. This letter remained unanswered. On 23 February 2019, the Player was effectively transferred to PFC Sochi, where he was registered as a professional. On 29 April 2019, the Respondent sent a letter to PFC Sochi and to the Appellant requesting the payment of training compensation in the amount of EUR 864,538.34.

On 15 May 2019, the Respondent filed a claim before FIFA DRC against the Player, PFC Sochi and the Appellant, requesting the payment of a compensation in the amount of USD 5,000,000 plus 5% interest p.a., as from 1 July 2018 until the date of effective payment. The claim led to the opening of the FIFA file with Ref. nr. wit 19-01055 (the "Breach of Contract File"). On 12 February 2020, the FIFA DRC passed a decision in the Breach of Contract File partially accepting the claim of the Respondent and ordering the Player to pay the latter a compensation in the amount of KZT 1,260,000. On 15 April 2020, the FIFA DRC notified to the parties the grounds of the decision rendered in the Breach of Contract File.

On 6 June 2019, the Respondent filed a claim before the FIFA DRC against the Appellant and PFC Sochi, requesting the payment of the Player's training compensation in the amount of EUR 864,538.34. The claim was registered with Ref. nr. wit 19-01456 (the "Training Compensation File"). On 2 July 2020, the FIFA DRC rendered a decision partially accepting the claim of FC Kairat. FC Noah, was ordered to pay EUR 156,082 as training compensation plus 5% interest p.a. as from 15 October 2018 until the date of effective payment.

On 7 August 2020, the grounds of the decision were communicated by FIFA to the Parties and can be summarized as follows:

- Given that the Player was registered with FC Kairat before the end of the season of his 21st birthday (i.e. as an amateur from 18 April 2013 to 29 February 2016, and as a professional from 1 March 2016 to 30 June 2018) and that he was registered with FC Kairat as a professional before the end of the seasons of his 23rd birthday, FC Kairat should in principle be entitled to training compensation.

- Notwithstanding this, given that FC Noah was classified as a category IV club when registering the Player, in principle no training compensation was due to FC Kairat.

- In this regard, the FFA had classified FC Noah at the lowest category possible, despite it was competing in the highest professional division in Armenia. It would be against the spirit of Article 21 of the FIFA RSTP to allow a professional club that plays in the highest division of a

country where more than one training category is available to benefit from young talents trained by other clubs outside its country without having to reward the clubs which have invested in training those young players. In light of the above, the category of FC Noah in the TMS (i.e. category IV) could not be taken into consideration.

- There were two training categories in Armenia, and as per FIFA Circular 1249 *"All third-division clubs of member associations in category I and all second-division clubs in all other countries with professional football"* such as FC Noah, shall be classified as category III, not IV. As a result, FC Noah was a UEFA category III club (UEFA indicative amount of EUR 30,000 per year) in this particular case.

On 26 August 2020, the Appellant filed an appeal with the CAS against the decision of the FIFA DRC of 2 July 2020 (the "Appealed Decision"), directed against the Respondent.

On 16 March 2021, a hearing was held by videoconference.

Reasons

1. Entitlement to training compensation in case of transfer to a Category IV club

The Sole Arbitrator first addressed the question of whether training compensation was due in this particular case. As per FIFA Circular Letter no. 1627, of 9 May 2018, the FFA had been requested to allocate its affiliate clubs into two potential categories (III and IV). Considering the particularities of the Armenian professional football and considering the circumstances of the Appellant, the FFA had allocated the latter in Category IV. As a result, taking into account the Appellant's categorization established by FFA, pursuant to Article 2.2 (ii) of Annexe 4 of the FIFA RSTP, in principle the Respondent would not have been entitled to any training compensation due to the hiring of the Player by the Appellant. Nevertheless, the Respondent was contesting the categorisation of the Appellant established by FFA, as it considered that given that the club competed in the highest professional division of Armenia, participated in UEFA competitions (hence having youth teams and a youth development programme approved by UEFA) and had had a relevant sporting and economic growth, it should have been included in the highest possible Category (i.e. III).

The Sole Arbitrator did not share the Respondent's opinion and considered that, even if one could disagree with the decision of the FFA to allocate the Appellant in Category IV, such decision was not arbitrary or biased. In this regard, the Sole Arbitrator considered that (i) the fact that the Appellant had been incorporated a little more than a year before such categorization, (ii) before the 2018/19 season it was competing in the Armenian First Division (2nd tier) and not in the Top division, (iii) the reason why the club was promoted from the First League to the Top League during the 2018/19 season was because in the previous season there were only 6 clubs participating in the Top League of Armenia and, ultimately, (iv) the fact that currently five of the nine clubs competing in the Top League are in category III and four in category IV, dispelled any concern regarding the reasons for such categorisation.

However, the Sole Arbitrator recalled that, in accordance with Article 5.4 of Annexe 4 of the FIFA RSTP, the categorisation that national federations made of its affiliated clubs was not binding for the FIFA DRC. In the present case, in the exercise of this discretion, the FIFA DRC

had concluded that it would have been against the spirit of Article 21 of the FIFA RSTP to allow a professional club that played in the highest division of a country where more than one training category were available to benefit from young talents trained by other clubs outside of Armenia without having to reward the clubs which had invested in training those young players.

The Sole Arbitrator agreed with the FIFA DRC and considered that this situation would not have been fair for the Respondent. Hence, fairness demanded that the Appellant paid to the latter a training compensation, despite being a Category IV club. However, this decision could not result in the imposition of a compensation disproportionate or unjust for the Appellant, considering the particularities of the case. The Sole Arbitrator was of the opinion that this was indeed what had happened in the present case. While concurring with the FIFA DRC on the fact that it would not be fair for the Respondent not to receive a compensation for the time and money it had spent in the training and education of the Player, especially taking into account that the Appellant was one of the top clubs of Armenia, the Sole Arbitrator could not endorse the quantification that the FIFA DRC had done of the training compensation (i.e. EUR 156,082) which, in her view, entailed an unjust result, clearly disproportionate to the particularities of the case, in the terms envisaged by Article 5.4 of Annexe 4 of the FIFA RSTP.

2. Discretion of the deciding body in the quantification of training compensation and duty to achieve a proportional result

The Sole Arbitrator then assessed what would be the correct amount of training compensation to be paid to the Respondent.

For the Sole Arbitrator, considering that when the Player had been hired the Appellant had just set in motion its youth training program, it seemed reasonable to believe that the amount that the club had been investing at that time in training players had been significantly lower than the EUR 30,000 corresponding to a Category III club, especially taking into account the average cost of life in Armenia. In this regard, the Appellant was sustaining, and the Sole Arbitrator accepted, that while in the 2017/2018 it had had no youth team, in 2018/2019 it had started investing in training young players, at a total amount of EUR 3,500 per season (i.e. extremely lower than the EUR 30,000 per player). In line with this, considering the cost of life in Armenia and the average costs and expenses that a club had in this country, it seemed hard to believe that the Appellant would have had to spend EUR 156,082 in training the Player.

The Sole Arbitrator recalled that the assessment of the correct amount of training compensation also had to take into account that the Appellant had in good faith the legitimate expectation that the hiring of the Player would not trigger the payment of any training compensation, given that the Club was allocated in Category IV. In the eyes of the Sole Arbitrator, when the FIFA DRC, the Panel or the Sole Arbitrator exercised the discretionary power established by Article 5.4 of Annexe 4 of the FIFA RSTP, it had to balance the clubs' right to legal certainty and the consequences that a retroactive change in their categorization might have for them with the particularities and circumstances of the case at hand in order to assure that the amount of the training compensation was not only proportionate, but also fair for all the parties. For this purpose, the deciding body had to bear in mind that this discretionary power should be

only exercised and the amount of the training compensation only be adjusted for reasons of material justice, in case the result of the quantification was clearly disproportionate to the circumstances at hand, either because it was too high or too low.

In this very particular case, the Sole Arbitrator considered that, given that there was no clear information regarding the training costs borne by the Appellant and that, ultimately, such costs would not be significant, it would be appropriate to take into account the real expenditures of the Respondent in the training of the Player to establish the correct amount of the training compensation, from the day of his registration as an amateur (i.e. as of 18 April 2013) until the day of termination of the Employment Agreement with the Respondent (i.e. until 28 May 2018). This was precisely what the Appellant had proposed for the adjustment of the training compensation. For this purpose, the Sole Arbitrator took into account the uncontested financial data provided by the Respondent and only considered the direct costs incurred on running its Academy, not the indirect ones (i.e. an apportion of the costs corresponding to the secretariat, marketing department, gym area and its equipment, stadium, etc.), as she was of the opinion that such indirect costs existed regardless of the training of the young players and because it was impossible to estimate which part of these indirect expenses could be attributed to the training of young players.

As a result, the Sole Arbitrator found that the amount of the training compensation had to be adjusted to USD 44,569, plus the corresponding legal interest of 5% per annum as from 15 October 2018, which, taking into account that the average exchange rate between USD and EUR on that date (i.e. 15 October 2018) was 1 USD = 0.863483 EUR, corresponded to EUR 38,484.57.

Decision

The Sole Arbitrator partially upheld the appeal filed by Football Club Noah on 26 August 2020 against the decision of the FIFA Dispute Resolution chamber of 2 July 2020 and found that FC Noah had to pay EUR 38,484.57 as training compensation plus 5% interest p.a. as from 15 October 2018 until the date of effective payment.

CAS 2020/A/7523
Vladimir Leshonok v. Football Club Irtysh & Football Union of Russia (FUR)
16 May 2022

Football; Contractual dispute; Assessment of the validity of a buyout clause from the angle of its conformity to applicable regulations or norms; Assessment of the validity of a buyout clause from the angle of its conformity to the FUR's Regulations on the Status and Transfer of Players (FUR RSTP); Notion of excessive commitment of a party in the context of the contract at stake; Method of calculation of damages; Calculation of damages to be allocated to a player based on the parties' contract and the FUR RSTP

Panel
Mr Espen Auberg (Norway), Sole Arbitrator

Facts

Mr Vladimir Leshonok (the "Appellant" or the "Player") is a former professional football player of Russian nationality. Football Club Irtysh (the "First Respondent" or "the Club") is a professional football club, registered with the Football Union of Russia (the "FUR"), which in turn is affiliated with the Fédération Internationale de Football Association ("FIFA"). FUR (the "Second Respondent") is a nationwide governing football body in Russia, and is a FIFA member. The Appellant and the Respondents are hereinafter jointly referred to as the "Parties".

On 29 May 2020, the Parties signed [an] employment contract (hereinafter "the Employment Contract") concluded for the term from 1 February 2019 until 31 May 2021. Its termination is regulated in the Employment Contract Clause 8, which *inter alia* read:

8.3. Upon termination or early cancellation of the employment contract, all payments due for the Employee shall be granted by the Employer according to the requirements of the Labour Code of the RF and regulation norms of the FUR […]. […].

8.5. In the event of terminating the employment contract on the Employee's initiative (on his own volition) without just cause, the Employee shall be obliged to pay the Employer compensation in the amount of 20,000,000 (Twenty million) rubles. […].

8.7. The Employer [the Club] *is entitled to terminate the present Employment Contract early at its own initiative, notifying the Employee* [the Player] *about this fact in writing no later than 15 calendar days, however, the Employer is also obliged to make a payment in the amount of two fixed official salaries in favour the Employee on the day of dismissal, according to subclause 7.1 of clause 7 of this contract".*

Following the conclusion of the 2019/2020 season, the Club was promoted to the Russian Football National League, which is the second level of the Russian professional league. On 10 August 2020, the Club's president sent the Player a notification of early termination of the Employment Contract. The notification reads:

"With this termination notice of the employment contract, we inform You that the employment contract concluded with You dated February 1, 2019 No. 01/2019 will be terminated early within 15 calendar days from the date of signing this notice, based on the clause 8.7. of this employment contract. We also inform

You that payments in the amount of two salaries will be made on the day of dismissal".

On 11 August 2020, the Player sent a request to the Club where he informed the club that he considered the early unilateral termination of the Employment Contract to be [*inter alia*] unjustified. In the same request, the Player asked for [*inter alia*] an explanation with regards to the reasons and grounds for the early termination of the Employment Contract.

On 25 August 2020, fifteen days after the notification of the early termination of the Employment Contract, the Employment Contract was terminated. The same day, the Club paid the Player compensation in the amount of two fixed official monthly salaries, which amounted to RUB 250,000. Paragraph 1 of part 1 of Article 77 of the Labour Code of the Russian Federation *"agreement of the parties"* is specified in the order of dismissal as the basis for termination of the Employment Contract. No agreement on early termination of the Employment Contract was signed on the part of the Player who specified in the order of dismissal: *"I do not agree with the order, the dismissal was conducted unilaterally at the initiative of the employer, there is no agreement of the parties".*

On 28 August 2020, the Player sent a letter to the Club where he upheld that the Employment Contract was terminated by the Club unilaterally without valid reasons and in the absence of the agreement between the parties. The Player demanded the Club to pay him RUB 1,056,946.43 within 10 calendar days as compensation for early termination of the Employment Contract, and informed that if the Club did not comply, the Player would be forced to apply to the FUR Dispute Resolution Chamber with demand to pay compensation and apply sports sanctions to the Club.

On 10 September 2020, the Player filed a claim against the Club before the FUR's Dispute Resolution Chamber (the "FUR DRC") and argued that Clause 8.7 of the Employment Contract is illegal and invalid as it significantly violates the legal rights of the Player provided for by the Labour Code of the Russian Federation, as well as the core principle of stability of employment contracts stated by FIFA.

On 15 September 2020, the Club replied. The Club asked the FUR DRC to dismiss the claim, and sustained that Clause 8.7 of the Employment Contract is a valid buyout clause, which is in accordance with FUR RSTP, FIFA's Regulations on the Status and Transfer of Players (the "FIFA RSTP"), Russian law and established jurisprudence of the Court of Arbitration for Sport ("CAS").

On 16 September 2020 the FUR DRC rendered the operative part of the award, dismissing the Player's claim (the "Appealed Decision"). The operative part of the award reads:

"1. To dismiss the statement of the Professional Football player Leshonok Vladimir Olegovich in relation to the Alliance non-profit partnership 'Football Club 'Irtysh', Omsk on the recovery of compensation for early termination of the Employment Contract in full […]*".*

The grounds of the decision were communicated to the Parties on 28 October 2020. On 18 November 2020, the Player filed a Statement of Appeal with CAS, pursuant to Article R47 of the Code of Sports-related

Arbitration (2020 edition) (the "Code"), against the Appealed Decision.

Reasons

The Employment Contract between the Parties states that both are entitled to unilaterally terminate the contract, regardless of whether there is just cause for termination. In the event of such a unilateral termination on the Player's initiative, Clause 8.5 of the Employment Contract states that the Player shall be obliged to pay the Club a compensation in the amount of RUB 20,000,000. Similarly, if such a unilateral termination is initiated by the Club, Clause 8.7 of the Employment Contract states that the Club is obliged to pay the Player an amount corresponding to two fixed official monthly salaries, *i.e.* RUB 250,000. The Parties agree that the Employment Contract was terminated at the initiative of the Club, that the termination was not connected with any wrongful acts of the Player and that the Club invoked Clause 8.7 of the Employment Contract exclusively as grounds for its termination. The Parties disagree on whether the termination was lawful.

The termination clauses are often referred to as liquidated damages clauses, penalty clauses and buyout clauses. The Sole Arbitrator notes that Clause 8.7 of the Employment Contract is, in essence, a buyout clause which gives the Club the right to withdraw from the contract at any time subject to the payment of a predefined amount. The main issue to be resolved is whether the Club's termination, with reference to the buyout clause of Clause 8.7, is valid.

1. Assessment of the validity of a buyout clause from the angle of its conformity to applicable regulations or norms

As the parties did agree on the conditions in the Employment Contract, the Sole Arbitrator notes that a natural starting point in the consideration of the validity of the buyout clause is the principle of contractual freedom, *i.e.* that the parties are free to agree what they want. If conditions in the contract should be deemed void, such a decision must be based on restrictions in applicable regulations or norms with regards to the parties' autonomy.

2. Assessment of the validity of a buyout clause from the angle of its conformity to the FUR RSTP

The wording of the FUR RSTP and the FIFA RSTP suggest that the parties are free to agree on any amount of compensation in the employment contract. However, the principle of contractual freedom is not absolute. Validity of buyout clauses has been considered by CAS on numerous occasions, also in relation to the FUR RSTP. Based on the conclusions in the case CAS 2019/A/6514, it must be assumed that in order for a buyout clause to be valid and to comply with the FUR RSTP, three cumulative requirements must be met:

- The buyout clause shall be written in a clear and unequivocal manner.
- There shall be no evidence of coercion or duress in conclusion of the buyout clause.
- The buyout clause shall not demonstrate excessive commitment by one party that grants the other party undue control.

The Player claims that the buyout clause demonstrates excessive commitment from him as there is a gross imbalance between the amounts to be paid by the Parties when activating the buyout clauses that gives the

Club undue control over the Player. Whilst the Club is obliged to pay the Player an amount corresponding to two fixed official monthly salaries, *i.e.* RUB 250,000, if the Club terminates the Contract, the Player is obliged to pay the Club RUB 20,000,000, *i.e.* 80 times more, if the Player terminates the contract.

3. Notion of excessive commitment of a party in the context of the contract at stake

Although excessive commitment must be considered on a case-to-case basis, CAS jurisprudence gives some guidance with regards to how excessive a commitment from one of the parties must be before it should lead to the invalidity of a buyout clause or a liquidated damages clause. Based on CAS 2016/A/4826 and CAS 2015/A/3999 & 4000, it is clear that not any disparity between the amount of damages to which players and clubs are entitled according to the buyout clauses could lead to the invalidity of the clauses, and that a club's damages in case of a unilateral termination of an employment contract by a player could well be higher than the damage of a player in case of a unilateral termination by a club.

In CAS 2014/A/3707, the panel concluded that a buyout clause was invalid. Although the primary applicable law in that case was the FIFA RSTP, the main principles are applicable also for cases based on the FUR RSTP. The contract at issue entitled the club to terminate the contract subject to payment of remaining contractual amount for the season of termination, whilst the corresponding right for the player was subject to the player paying the club the remaining contract value in full. The CAS panel stated that such a regime *"leads to a system, which disproportionately favours the* [club]*, which, in practice, can establish a long-term employment relationship with the Player and rescind it after one year only. With this method, the* [club] *can therefore refuse to keep the Player if the latter does not progress as expected but may retain him, should he confirm his sporting qualities and value. Such a system is clearly contrary to the general principles of contractual stability as well as of labour law as it gives the* [club] *undue control over the Player, without rewarding him in exchange".*

In the case CAS 2019/A/6246, the CAS concluded that a liquidated damages clause was valid. In that case, the player was entitled to a compensation of RUB 225,000 and the corresponding compensation for the club in case of a termination by the player was RUB 2,500,000, *i.e.* about 11 times higher. The sole arbitrator in that case concluded that the difference between the amounts was not of such a level that it should lead to the invalidity of liquidated damages clause.

In the abovementioned case CAS 2019/A/6514, the sole arbitrator stated that *"intervening with the parties' free will enshrined in a buyout clause should be confined to exceptional cases. This would, in principle, apply in the case of excessive disproportionality i.e., when one party makes an excessive commitment that disproportionately favours the other party of the buyout clause".* Applying this principle to the case, the Sole Arbitrator concluded that a buyout clause which obliged the club to pay three monthly salaries was valid. The corresponding buyout clause for the player was three months salaries in addition to expenses.

The Sole Arbitrator thus notes that CAS' jurisprudence with regards to buyout and liquidated damages clauses based on the FUR RSTP to a large degree correspond to CAS jurisprudence based on the FIFA RSTP and Swiss law. CAS jurisprudence based on the

FUR RSTP seem to give the parties a large degree of autonomy and freedom to agree on the terms of buyout or liquidated damages clauses and acknowledge that there can be disparity with regards to the predetermined damages in these clauses. However, the clauses can be deemed void if they are, *inter alia*, excessively disproportionate.

In the case at hand, with respect to the consideration of whether the buyout clause is excessively disproportionate, the Sole Arbitrator notes that the clause that entitles the Club to unilaterally terminate the contract in practice obliges the Club in such a case to pay RUB 250,000, whilst the corresponding amount in case the Player unilaterally terminates the contract is RUB 20,000,000, an amount that is 80 times higher.

4. Method of calculation of damages

The Sole Arbitrator agrees with the Club that the amount of damages incurred by players and clubs in case of unilateral breach of contract can differ and that, in general, the damages suffered by clubs following players' unilateral termination of contracts could well be higher than the damages suffered by players following clubs' unilateral termination of contracts. Damages should be calculated based on the principle of positive interest, under which compensation for breach must be aimed at reinstating the injured party to the position it would have been in, had the contract been fulfilled properly and to its end. A club's damages in such a case could include, *inter alia*, a transfer fee and an agent fee related to signing a replacement player, as well as medical insurance.

The Sole Arbitrator notes that the Player was 36 years old and that no transfer fee was paid when the Player signed a contract with the Club. At the time the Employment Contract was signed, the Club played in the third level in the Russian league and was later promoted to the second level of the Russian league. The damages the Club would suffer in case of the Player's unilateral termination of the Employment Contract, based on the principle of positive interest, would be limited to transfer and agent fees, if any, of a player that has a similar quality and age of the Player, in addition to other feasible costs. It must be assumed that the potential damages the club would suffer in case of the Player's unilateral termination of the Employment Contract would be rather limited, and in any case nowhere near the amount stipulated in the buyout clause, *i.e.* RUB 20,000,000.

Furthermore, the Sole Arbitrator notes that whilst the buyout clause that allows the Club to unilaterally terminate the Employment Contract requires the Club to pay a relatively small fee, the buyout clause that allows the Player to unilaterally terminate the contract requires him to pay a fee that is so high compared to his wages that it would be practically impossible for him to unilaterally terminate the Employment Contract himself. Taken into consideration the Player's age, the level he plays football at and that no transfer fee was paid when he signed a contract with the Club, it is also highly unlikely that a new club would agree to pay the fee in connection with a transfer.

In view of the above, the Sole Arbitrator concludes that the Club's right to terminate the contract according to Clause 8.7 of the Employment Contract, seen in relation with

the Player's right to terminate the contract in accordance with the Clause 8.5 of the Employment Contract, is considered as excessively disproportionate as it demonstrates excessive commitment by the Player and grants the Club undue control. As a consequence, the Club's termination of the Employment Contract with reference to its Clause 8.7 is deemed void.

5. Calculation of damages to be allocated to a player based on the parties' contract and the FUR RSTP

As the Club's unilateral termination in accordance with Clause 8.7 of the Employment Contract is deemed void, the consequences of the Club's unilateral termination shall be established in accordance with Clause 8.3 of the Employment Contract, with further reference to the FUR regulations. FUR RSTP Article 9 paragraph 2 states that compensation should be determined based on:

"1) the remaining term of the employment contract with the former professional football club;

2) salaries and other payments due to a professional football player / coach under an employment contract with the old and new (if any) professional football clubs;

3) expenses incurred by a professional football player in transfer (movement) to the former and new (if any) professional football clubs;

4) whether there was a termination of the employment contract for a protected period (for a professional football player);

5) other objective criteria".

As the Player has not signed a contract with a new club following the termination of the Employment Contract with the Club, the compensation shall be calculated based in the remaining term of the Employment Contract. On the date of the termination, *i.e.* 25 August 2020, the remaining net value of the Player's Employment Contract was RUB 931,883, corresponding to monthly wages of RUB 143,750 (RUB 125,000 with added 15% regional coefficient surcharge) for nine months and four days, deducted of the RUB 250,000 already paid by the Club as well as 13% personal income tax of the remaining amount. Against this background, the Sole Arbitrator finds that the Club shall pay compensation for breach of contract in the amount of RUB 931,883 to the Player. As interest on outstanding payment is not regulated in FUR RSTP, calculation of interest should be based on Article 236 of the Labour Code of the Russian Federation.

Decision

The appeal filed on 24 January 2020 by Vladimir Leshonok against the decision issued on 16 September 2020 by the Dispute Resolution Chamber of the Football Union of Russia is partially upheld. The decision issued on 16 September 2020 by the Dispute Resolution Chamber of the Football Union of Russia is set aside. Football Club Irtysh shall pay compensation for breach of contract to Vladimir Leshonok in the amount of RUB 931,883 (nine hundred and thirty one thousand eight hundred and eighty three Russian Rubles), with interest as set out in Article 236 of the Labour Code of the Russian Federation. All other and further motions or requests for relief are dismissed.

CAS 2021/A/7636
SønderjyskE Fodbol A/S v. Fédération Internationale de Football Association (FIFA) & Dabo Babes Football Club
27 June 2022

Football; FIFA "proposal" regarding compensation for training (art. 13 FIFA Procedural Rules); CAS jurisdiction; Condition for a FIFA proposal to become final and binding and admissibility of the appeal; Applicable law; Scope of FIFA authority to issue a "proposal"; Notification of a decision; Consequences of FIFA's failure to issue a complete proposal

Panel
Mr Jacopo Tognon (Italy), President
Mr Mark Andrew Hovell (United Kingdom)
Mr Lars Hilliger (Denmark)

Facts

SønderjyskE Fodbold A/S (the "Appellant" or the "Club" or "SønderjyskE") is a Danish football club, affiliated to the Danish Football Federation, which in turn is affiliated to the *Féderation Internationale de Football Association* ("FIFA").

The *Fédération Internationale de Football Association* ("FIFA" or the "First Respondent") is the international governing body of football, based in Zurich, Switzerland.

Dabo Babes Football Club (the "Second Respondent" or "Dabo") is an amateur club from Nigeria, affiliated to the Nigerian Football Federation (the "NFF"), which in turn is affiliated to FIFA.

On 4 January 2019, the Appellant and the Second Respondent entered into a transfer agreement (the "Transfer Agreement") for the definitive transfer of the player Nazifi Yahaya, according to which the Appellant agreed to pay to the Second Respondent the amounts as follows:

"1. SE pays a total transfer fee including training compensation of EUR 7,000 gross (VAT to be paid in Nigeria) to Dabo to be paid by release of TMS.

(…)

The Appellant and the Player signed an employment agreement valid from 5 January until 31 December 2019 according to which the Player was entitled to receive a monthly salary of DKK 21.500 gross as a remuneration for his professional services rendered in favour of the Appellant, plus bonuses (the "Employment Agreement").

According to the Appellant, the Second Respondent was aware of the fact that the training compensation was included in the transfer fee.

However, the Second Respondent filed a claim before the FIFA Dispute Resolution Chamber (the "FIFA DRC") requesting the distribution of the training compensation in connection with the transfer and registration of the Player.

On 23 November 2020, Dabo lodged a claim before the FIFA DRC, claiming EUR 186,500 and 5% interest *p.a.* as outstanding training compensation.

On 2 December 2020, the FIFA DRC Secretariat issued the following proposal (the "Proposal") to SønderjyskE and Dabo:

"[…] in accordance with Article 13 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, i.e. the Procedural Rules, and the FIFA Circular 1689, please find enclosed the proposal made by the FIFA secretariat in accordance with the above mentioned provision.

In sum, the proposed amount due by the respondent to the claimant is as follows:

EUR 243'287.67 as training compensation, plus 5% interest p.a. as of the due date

In accordance with Article 13 of the Procedural Rules, it is informed that the parties have to either accept or reject the proposal ***within the 15 days following this notification via TMS, i.e. until 17 December 2020****. In this regard, the Claimant is limited only to accept or reject the proposal, excluding hereby any possibility to amend its original claim.*

In case a proposal is accepted by all parties or the parties fail to provide an answer to the FIFA Player Status' Department within stipulated deadline, the proposal will become binding.

In case of rejection by the respondent [i.e. SønderjyskE], the latter will have ***five additional days, i.e. until 11 January 2021*** *to provide its position to the claim. Should the respondent wish to extend its deadline to file its position, it must request said extension before the expiration of the above mentioned date, in which case the deadline is automatically extended for* ***ten (10) additional days , i.e. until 21 January 2021*** *in accordance with Article 16 par. 11 of the Procedural Rules.*

Please also be informed that in case of rejection of the proposal by one of the parties, a formal decision on this matter will be taken by the Single Judge of the sub-committee of Dispute Resolution Chamber in due course.

Equally, we wish to point out that the relevant proposal will always be without prejudice to any formal decision which could be passed by the competent deciding body in the matter at a later stage in case the proposal is rejected by one of the parties". (emphasis in original)

On 16 December 2020, Dabo informed the FIFA DRC Secretariat that it accepted the Proposal.

SønderjyskE did not reply to the Proposal within the time limit granted therein.

On 18 December 2020, FIFA informed Dabo and SønderjyskE as follows (the "Appealed Decision"):

(…)

[W]e would like to inform the parties involved that the proposal has become binding. Consequently, the Respondent, ***SønderjyskE****, has to pay to the Claimant,* ***Dabo Babes FC****, within 30 days as from the date of this notification, if not done yet, the amount of* ***EUR 243'287.67, plus 5% interest p.a. as of the due date*** *until the date of effective payment.*

In the event that the aforementioned sum is not paid by the Respondent [SønderjyskE] within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

The Claimant [Dabo] is directed to inform the Respondent [SønderjyskE] immediately and directly of the account number to which the remittance is to be made and to notify the FIFA Dispute Resolution Chamber of every payment received". (emphasis in original)

On 8 January 2021, SønderjyskE filed an appeal against the Appealed Decision by submitting a Statement of Appeal before the Court of Arbitration for Sport (the "CAS") in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code").

Reasons

1. CAS Jurisdiction

The Appellant relied on Articles 57 and 58 of the FIFA Statutes as conferring jurisdiction on the CAS.

The First Respondent did not contest the jurisdiction of the CAS, whilst the Second Respondent disputed that the CAS has jurisdiction to hear the matter at hand. In particular, the Second Respondent contested the jurisdiction of CAS because: (i) the Appealed Decision was not a decision of a federation (FIFA) but a decision of the parties and it was of a mere informative nature and, thus, it was not an appealable decision; (ii) the Appellant had not exhausted all legal remedies available at FIFA since it did not reject the Proposal.

In light of the fact that the appealed decision i.e. a FIFA letter confirming the proposal issued by the FIFA DRC regarding the amounts in dispute relating to training compensation, produced legal effects towards the parties involved, it had to be considered as an appealable decision, pursuant to Article 58 para. 1 of the FIFA Statutes. Considering that there were no further internal remedies available at FIFA since FIFA decided that the proposal became final and biding, CAS had jurisdiction to hear this case.

2. Condition for a FIFA proposal to become final and binding and admissibility of the appeal

The Appealed Decision was notified to the Appellant on 18 December 2020 and the Appellant filed its Statement of Appeal on 8 January 2021. Therefore, the 21-day deadline to file the appeal was met. However, the Respondents disputed the admissibility of the appeal arguing that in the absence of a clear objection made by the Appellant by the prescribed term, the Proposal submitted on 2 December 2020 had already entered into force and, thus, the Appealed Decision of 18 December 2020 could not be an appealable decision, being it of a merely informative nature. Therefore, in case SønderjyskE wanted to challenge the Proposal, it had to object to the Proposal within the granted time limit.

As a first step, it is important to note that the proposal regarding the amounts in dispute relating to training compensation issued by the FIFA DRC in accordance with Article 13 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, i.e. the Procedural Rules, and the FIFA Circular 1689 (the proposal), becomes final and binding only in case both parties accepted the proposal or if none of the parties objects it within the stipulated term. In any case, the parties to which a proposal is addressed do not know whether the other party accepted or objected such proposal until proper confirmation is given by FIFA. Therefore, a proposal shall not be considered a final and binding decision. In this respect, pursuant to Article 13(3) FIFA Procedural Rules (2021 edition), only a "confirmation letter" from FIFA is a decision that definitely produces legal effects towards the parties involved.

As a result, an appeal filed by the appellant club within the deadline provided for by article R49 CAS Code against the appealed decision issued by the FIFA confirming the FIFA proposal is admissible. Indeed, while a proposal is not binding until confirmed by FIFA, the appealed decision is not of a mere informative nature but is a final decision producing legal effects towards the parties involved. Indeed, the consent of both the Appellant and the Second Respondent –

even tacit – was required before the Proposal could become final; without this, a confirmation letter, such as the Appealed Decision, was required.

3. Applicable law

Pursuant to Article 26 of the FIFA RSTP (2020 edition), disputes regarding training compensation *"shall be assessed according to the regulations that were in force when the contract at the centre of the dispute was signed, or when the disputed facts arose"*. Disputes related to training compensation and solidarity mechanism are usually governed by Annex 6 of the FIFA RSTP. Pursuant to the principle of *lex specialis derogat legi generali* (CAS 2017/A/5003, CAS 2015/A/4229, 2013/A/3274), Annex 6 of the FIFA RSTP prevails being it a more specific provision compared to the rules set forth by the FIFA Procedural Rules.

4. Scope of FIFA authority to issue a "proposal"

As per the clear wording of Article 13 of the FIFA Procedural Rules and the FIFA Circular no. 1689, FIFA administration has in principle the authority to issue a proposal to the parties involved in disputes regarding training compensation with respect to the amounts owed, upon condition that (1) the dispute has no complex facts and legal issues or (2) in cases in which the FIFA DRC has a clear and established jurisprudence. The condition that the dispute concerns no complex factual or legal issues shall be ascertained on a *prima facie* basis. Furthermore, the FIFA administration shall establish, always on a *prima facie* basis, whether all the regulatory requirements for being entitled to receive training compensation are met. According to the mechanism of article 13 of the FIFA Procedural Rules, (i) FIFA has in principle the authority to issue proposals, if either of the pre-requisites (1) and (2) are met; (ii) FIFA has ample discretion in making that assessment (CAS 2020/A/7252 & CAS 2020/A/7516) but it should not act arbitrarily and should carry out proper due diligence; (iii) failure by a party to respond to a proposal qualifies as acceptance; (iv) notification of a proposal via TMS is valid and permitted (CAS 2004/A/574); (v) the parties have the duty to regularly check the "Claims" tab in TMS. The occurrence of all the above requisites has to be verified on a case-by-case basis.

In this specific case, the Panel held that FIFA administration went beyond its margin of ample discretion in determining the complexity of the case and it did not appear to conduct sufficient due diligence or sufficient investigation prior to determining to issue the Proposal. The Panel was therefore of the opinion that this case should not have been qualified as "simple" and that pre-requisite was not engaged. As such the FIFA administration should not have issued the Proposal but referred the case to the FIFA DRC.

In light of the above, the Panel finds that the FIFA administration, in this specific case, was not entitled to issue the Proposal notified to the Parties on 2 December 2020.

5. Notification of a decision

As a basic rule, a decision or other legally relevant statement is considered as being notified to the relevant person whenever that person has the opportunity to obtain knowledge of its content irrespective of whether that person has actually obtained knowledge. Thus, the relevant point in time is when a person receives the decision and not when it obtains actual knowledge of its content. In this respect, in case of failure of a party to respond to or reject a

FIFA proposal notified by TMS within 15 days, such proposal is considered accepted, and the party is considered having waived the right to request a formal decision. Thus, there are two requirements that have to be met for having a "receipt" of a communication, namely the communication must have entered into the "sphere of influence" of the addressee and one can expect under the circumstances that the addressee takes note of it. Thus, the relevant point in time is when a person receives the decision and not when it obtains actual knowledge of its content (CAS 2019/A/6253).

Thus, the Panel found that a failure of a party to reject a proposal constitutes a waiver of the right to request a formal decision. Furthermore, a club shall regularly check the "Claims" tab in TMS, failing which such club will bear the disadvantages deriving therefrom.

6. Consequences of FIFA's failure to issue a complete/correct Proposal

In consideration of all the foregoing, the Panel found that in the case at hand the FIFA administration had exceeded its ample discretion in the evaluation of the complexity of the dispute. This was simply not a matter that should have been sent down the fast-track route. Therefore, pursuant to Article R57 of the CAS Code, the Panel annulled the Appealed Decision and referred the case back to FIFA.

In this respect, the Panel noted that Article R57 of the CAS Code allows CAS panels to issue a new decision or to annul the decision and refer the case back to the previous instance. In circumstances where there was no decision taken on the merits at the first instance, the Panel determined that it should not render a decision on the merits of the case and substitute a FIFA decision which never considered the merits, rather it is more appropriate to return the case to FIFA (see *CAS 2012/A/2854; Mavromati/Reeb, op. cit., Article R57 N 20*). Indeed, the Panel found that he objectives of not depriving the parties of one level of adjudication and of allowing a unitary assessment of all the relevant aspects of the dispute should prevail over the advantages with respect to time and costs that a direct adjudication on the merits of the case by a CAS panel would imply.

Decision

In light of the foregoing, the Panel upheld the appeal filed by SønderjyskE Fodbold A/S on 8 January 2021 against the decision issued by FIFA on 18 December 2020 and referred back to FIFA for a formal decision on the merits said decision.

CAS 2021/A/7701
Joao Teixeira v. National Anti-Doping Agency of Ukraine
6 April 2022

Football; Doping (dorzolamide); General requirements of a prohibition and/or sanction provision in a federation's rules; Scope and purpose of the WADA prohibited list of substances; Legal basis for the WADA categories to impose disciplinary sanctions; Possibility to challenge a substance deemed to be "similar" to a prohibited substance in the prohibited list; Establishment of the presence of a prohibited substance in the athlete's sample; Sanction

Panel
Prof. Martin Schimke (Germany), Sole Arbitrator

Facts

Mr Joao Teixeira (hereinafter referred to as the "Player" or the "Appellant") is a professional football player from France. Since 30 August 2019 he is under contractual relationship with the Ukrainian Club Olexandria (the "Club").

The National Anti-Doping Centre of Ukraine (the "NADC" or the "Respondent") is the Ukrainian anti-doping agency approved by the World Anti-Doping Agency ("WADA") as a national anti-doping organization within the meaning of the WADA Code.

On 4 December 2019, the Appellant was subject to an anti-doping test performed by NADC. The analysis resulted in an Adverse Analytical Finding for the presence of dorzolamide.

On 30 January 2020, the Respondent notified the Appellant that dorzolamide had been found in his sample, so that he was guilty of violating article 2.1 of the NADC's anti-doping rules.

On 7 July 2020, NADC informed the Player of the concentration of dorzolamide found in the Player's sample (the concentration of dorzolamide was estimated at 5.1 ng/ml) and that the case was forwarded to the Disciplinary Anti-Doping Commission of the NADC ("NADC DAC").

On 18 January 2021, following the exchange of written submissions and an oral hearing on 12 January 2021, the NADC determined that the Player committed an anti-doping rule violation in accordance with Article 2.1 of the NADC Anti-Doping Rules ("NADC ADR") (the "Appealed Decision"), by stating the following:

*"**18.** DAC NADC finds to its comfortable satisfaction that the commission of the ADRV under Article 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample (Dorzolamide) has been proven.*

19.** DAC NADC concluded that the Article 10.2.2 of the NADC ADR is applicable in this matter, and period of ineligibility of **2 (two) years** should be applied to the Athlete, **starting from 04 December 2019 until 03 December 2021.

(…)".

On 4 February 2021, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") in accordance with Article R47 et seq. of the CAS Code of Sports-related Arbitration (the "CAS Code") against the Appealed Decision.

Reasons

It is undisputed by the Parties that a WADA-accredited laboratory analysed the Player's A-sample and detected the presence of dorzolamide in the amount of 5.1 ng/ml. The Player did not request the analysis of the B-sample.

The Respondent claimed that the Appellant committed a doping violation according to Article 2.1 of NADCU ADR, because dorzolamide is a prohibited substance according to S5 "Diuretics and Masking Agents" of the Prohibited List of the WADA-Code. Therefore, the Player should be sanctioned with a 2-year period of ineligibility. Conversely, the Player asserted that he did not commit an anti-doping violation, because the amount of the substance found was that small that it would not have any diuresis effect at all. Furthermore, he did not know how the substance entered his body, but he alleged that it was likely that it was a sabotage act committed against him by his Club.

In the Prohibited List (edition 2019) of the World-Anti Doping Code under "S5 DIURETICS AND MASKING AGENTS" the following is provided:

The following diuretics and masking agents are prohibited, as are other substances with a similar chemical structure or similar biological effect(s).

Including, but not limited to:

- *Desmopressin; probenecid; plasma expanders, e.g. intravenous administration of albumin, dextran, hydroxyethyl starch and mannitol.*
- *Acetazolamide; amiloride; bumetanide; canrenone; chlortalidone; etacrynic acid; furosemide; indapamide; metolazone; spironolactone; thiazides, e.g. bendroflumethiazide, chlorothiazide and hydrochlorothiazide; triameterene and vaptans, e.g. tolvaptan.*

Except:

- *Drospirenone; pamabrom; and ophthalmic use of carbonic anhydrase inhibitors (e.g. dorzolamide, brinzolamide);*
- *Local administration of felypressin in dental anaesthesia".*

1. General requirements of a prohibition and/or sanction provision in a federation's rules

At the outset, the Sole Arbitrator examined the general requirements of a prohibition and/or sanction provision. The Sole Arbitrator found comfort in CAS 2013/A/3324 & 3369 and CAS 2017/A/5006, where the Panel provided a useful summary of the relevant principles of interpretation established by the CAS case law. Thus, the different elements of the rules of a federation shall be clear and precise, in the event they are legally binding on athletes (CAS 2006/A/1164; CAS 2007/A/1377; CAS 2007/A/1437) whereas inconsistencies/ambiguities in the rules must be construed against the legislator as per the principle of *"contra proferentem"* (CAS OG 14/02; CAS 2017/A/5006; CAS 2013/A/3324 & 3369; CAS 94/129; CAS 2009/A/1752; CAS 2009/A/1753; CAS 2012/A/2747; CAS 2007/A/1437; CAS 2011/A/2612).

Furthermore, the Sole Arbitrator noted that when interpreting the rules, it is necessary to consider whether the spirit of the rule (in as much as it may differ from the strict letter) has been violated (CAS 2001/A/354 & 355; CAS 2007/A/1437; CAS OG 12/02). It follows that an athlete or an official or a club (or anyone bound by the rules), when reading the rules, must be able to clearly make the distinction between what is prohibited and what is not (CAS 2007/A/1437).

2. Legal basis for the WADA categories to impose disciplinary sanctions

As far as the above-mentioned concrete wording of S5 is concerned, the Sole Arbitrator recalled that the concept chosen there namely, in addition to a list of named substances to include a catch all-clause sweeping up *"other substances with a similar chemical structure or similar biological effect(s)"* to one or more of the substances listed by name, is not new and unique. Rather, this catch-all provision also appears in the Prohibited List in relation to anabolic androgenic steroids (category S1.1), peptide hormones, growth factors, related substances, and mimetics (category S2), and stimulants (category S6b). Therefore, CAS jurisprudence has already dealt with the said concept in detail. In this respect, the Sole Arbitrator confirmed that the Prohibited List was not a closed list and the purpose of the wording and concept of S5 was to create *"the capacity to identify and sanction the use of substances not expressly listed as prohibited substances but nevertheless related to a prohibited substance by its pharmacological actions or chemical structure. […]. If that were not so, an athlete would be able, without risk, to use a drug that was only slightly different in make-up or formulation from the drug that appeared in the WADA Prohibited List, and so escape sanction"*. (*A. Lewis/J. Taylor,* Sport: Law and Practice, 2021, Chapter C6 para. 6.56 to 6.60 with reference to CAS 2005/A/726).

3. Legal basis for the WADA categories to impose disciplinary sanctions

In light of the above considerations including the general requirements of a valid legal basis, the Sole Arbitrator found that the wording of S5 and the other categories of the Prohibited List (edition 2019) of the World-Anti Doping Code were clear and specific enough and did not contravene the doctrines of legal certainty and foreseeability. This applied all the more to S5 in the present case because dorzolamide did not go entirely unmentioned in it. Rather, S5 explicitly provides that (only) the ophthalmic use of the substance dorzolamide is permitted. According to the principle *argumentum e contrario*, one could at least conclude from this that (the non-ophthalmic use) should therefore be prohibited. The inclusion of an "exceptional" use of a substance would make no sense, if that substance were not generally prohibited. As a result, the Sole Arbitrator found that the Appealed Decision relied on a proper legal basis.

4. Possibility to challenge a substance deemed to be "similar" to a prohibited substance in the prohibited list

However, in the context of the above discussion on the wording and concept of S5 (and other categories), case law and literature also emphasise that similarity to a listed substance can be disputed by the athlete.

The Sole Arbitrator stressed that the inclusion of a substance on the List is made after a thorough evaluation by the so-called "List Committee", a group of specialists in the field of doping substances representing all stakeholders in the fight against doping. It is thus justified to exempt a decision to put a substance on the List from challenge by the athletes. On the other hand, the classification of a substance as "similar" to one of the listed substances is made by the WADA administration without the benefit of the input from experts from all interested groups. To exclude any challenge of such a decision would give too much responsibility to WADA alone. Thus, the Panel considered that in contrast to a decision to include a particular substance on the

Prohibited List, a WADA determination to treat a substance as "similar" to a listed substance can be challenged by athletes.

5. Establishment of the presence of a prohibited substance in the athlete's sample

After having established that dorzolamide is a prohibited substance according to the WADA Prohibited List, the Sole Arbitrator turned to the question of whether there was a doping violation on the part of Appellant. First, the exception of S5 is not applicable in the present case, because the Player did not assert that he used dorzolamide for an ophthalmic purpose. The Sole Arbitrator was not in a position to question or undermine the wording of the Prohibited List or WADA's Technical Letter that do not include a threshold value/reporting level, according to which a (small) quantity of dorzolamide in the urine sample would not cause an anti-doping rule violation regardless of the determinations of relevant experts as to whether or not this was likely to have had a diuretic effect, or any other effect related to doping or performance-enhancement (CAS 2018/A/5768). Thus, in the absence of proof that this was a topical ophthalmic administration, the Panel concluded that the presence of dorzolamide in the athlete's sample established an anti-doping violation as per Article 2.1 NADCU.

6. Sanction

The Sole Arbitrator noted that for the application of Article 10.5 or 10.6 NADC ADR (the elimination or reduction of the sanction respectively), the Player should establish, pursuant to Article 3.1. NADC ADR, that he bore no Fault or Negligence or no Significant Fault or Negligence. According to Article 3.1. NADC ADR the Player bears the burden by a balance of probability to persuade the Sole Arbitrator that the occurrence of a specified circumstance is more probable than its non-occurrence. Thus, the Player had to convince the Sole Arbitrator by the balance of probabilities establishing how the prohibited substance entered his body.

The only evidence submitted by the Player in this respect was his statement suspecting "the Club" of having committed a sabotage act against him. However, in the Sole Arbitrator's view, the general accusations against the Club were rather unsubstantiated assumptions and speculations. Even though, the Sole Arbitrator could not exclude in its entirety that a sabotage act occurred, the Appellant did not provide any corroborating evidence according to Art 3.1 NADC ADR on how this substance entered his body. Corroborating evidence would have been necessary to determine if there was No Fault or Negligence or No Significant Fault or Negligence.

As a result, the requirements of Articles 10.4 and 10.5 NADC ADR have not been fulfilled. In consequence, Article 10.2.2 NADC ADR has to be applied, meaning that a period of two (2) years Ineligibility shall be imposed on the Appellant.

Decision

In light of the above considerations, the Sole Arbitrator dismissed the Appeal in its entirety and the Appealed Decision was upheld.

CAS 2021/A/7858
Association Omnisport Centre Mbérie Sportif v. Union Sportive Tataouine
7 June 2022

Football; Training compensation when a player re-registers as a professional after having been reinstated as an amateur; Interpretation of Article 3 para. 2 RSTP; Club entitled to training compensation

Panel
Mr Patrick Lafranchi (Switzerland), Sole Arbitrator

Facts

Association Omnisport Centre Mbérie Sportif (the "Appellant") is a professional football club, affiliated to the Gabonese Football Federation ("FEGAFOOT"). The present dispute concerns a claim for training compensation for A. (the "Player"), born [in] 1996 in […], Gabon. The Player is a professional football player currently registered with the Saudi football club Al-Adalah FC and playing for the national team of Gabon. The Appellant bases its claim on a player passport of the Player dated 23 June 2020 and issued by FEGAFOOT as well as a statement issued by FEGAFOOT dated 23 June 2020, confirming that the Player had been registered with the Appellant from 11 November 2008 until 4 January 2017 without interruption.

Union Sportive Tataouine is a professional football club (the "Respondent"), affiliated to the Tunisian Football Federation ("FTF"). The Respondent argues that no training compensation is owed as there were four different player passports issued by the FEGAFOOT, containing contradictory information as to the registration of the Player with the Appellant.

On 4 August 2020, the Appellant lodged a claim against the Respondent before the FIFA Dispute Resolution Chamber (the "FIFA DRC"), claiming training compensation in the amount of EUR 51,700 plus 5% interest p.a. as of the due date. On 1 February 2021, the FIFA DRC rejected the Appellant's claim (the "Appealed Decision"). On 22 March 2021, the grounds of the Appealed Decision were communicated to the Parties.

In its decision, the FIFA DRC recalled that training compensation is payable by the new club of a player to the club(s) that have trained him between the age of 12 and 21 (unless it is evident that he has already terminated his training period before that) when the player is registered for the first time as professional and each time the player is transferred as professional between clubs affiliated to two different associations before the end of the season of his 23rd birthday (Article 20 FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP") in connection with Article 1 (1) and Article 2 (1) of Annexe 4 FIFA RSTP). With reference to Article 2 (2) Annexe 4 FIFA RSTP, the FIFA DRC held that no training compensation is due if a professional player reacquires amateur status on being transferred to a new club, but that training compensation is owed if a player is re-registered as a professional within 30 months of being reinstated as amateur (Article 3 (2) FIFA RSTP).

According to the FIFA DRC, it remained undisputed that the Player reacquired amateur status after having been registered with the Appellant as a professional and that he was re-registered with the Respondent as a professional.

Thus, according to the FIFA DRC, the Appellant would, in principle, be entitled to receive training compensation for the new registration of the Player as a professional with the Respondent before the end of his 23rd birthday season and within 30 months of the end of his previous professional contract.

However, the FIFA DRC pointed out that Article 20 FIFA RSTP foresees said training competition only (1) when a player is registered as a professional for the first time or (2) when a professional player is transferred between clubs affiliated to different associations. As none of those prerequisites set out above had been fulfilled in the present matter (neither was the Player registered for the first time as professional, nor was there a transfer between clubs affiliated to different associations when the Player registered with the Respondent), the claim of the Appellant was dismissed.

On 12 April 2021, the Appellant filed a Statement of Appeal with the CAS against the Appealed Decision. On 24 June 2021, the CAS Court Office informed the Parties that a Sole Arbitrator had been appointed to decide the case at hand. On 27 September 2021, the Parties were informed that the Sole Arbitrator deemed himself sufficiently well-informed to decide this case based solely on the Parties' written submissions, without the need to hold a hearing.

On 19 November 2021, the Lithuanian Football Federation sent a letter to the CAS Court Office confirming that the Player had amateur status when he was registered with FK Utenis from 9 August 2017 until 20 November 2017 and submitted the Player's football passport.

Reasons

1. Interpretation of Article 3 para. 2 RSTP

In the Appealed Decision, the FIFA DRC had stated that the Appellant would, in principle, have been entitled to training compensation as per Article 3 (2) FIFA RSTP. However, it had pointed out that the FIFA RSTP foresaw the payment of training compensations only in case that a Player was either registered for the first time as a professional or was a professional Player transferred between clubs affiliated to different associations. Upon his registration with the Appellant, none of those two options had held true for the Player which was why the FIFA DRC had considered that the prerequisites of Article 3 (2) FIFA RSTP in combination with Article 20 FIFA RSTP had not been fulfilled. The Appellant had a different approach and considered the reference to Article 20 as being to the whole text of Article 20 FIFA RSTP and the whole training compensation scheme and not to the two training compensation triggers mentioned therein.

The Sole Arbitrator held that, contrary to the principle that no training compensation is due if a player reacquires amateur status, training compensation was due, if a player re-registered as a professional within 30 months of being reinstated as an amateur. Although Article 3 para. 2 of the FIFA RSTP stated that training compensation should be paid *"in accordance with article 20"* FIFA RSTP, this reference could not be read as a requirement that one of the two standard situations triggering the training compensation mechanism set out in Article 20 FIFA RSTP (first registration as a professional or transfer of a professional until the end of the season of his 23rd birthday) applied, in addition to the situation that made Article 3 para. 2 FIFA RSTP applicable in the first place. It was rather to be understood as a reference to the other

issues addressed by Article 20 FIFA RSTP (payment is due whether the transfer takes place during or at the end of the player's contract, a further reference to other provisions regarding training compensation in Annexe 4 of the FIFA RSTP and that the principles of training compensation do not apply to women's football) and the training compensation system as such.

Yet, the Sole Arbitrator noted, it remained unclear what club was entitled to training compensation in this scenario.

The Sole Arbitrator recalled that Article 3 (2) FIFA RSTP, as an exception to the rule, was meant to apply in the scenario that a player re-registered as a professional within 30 months after being reinstated as an amateur. The club "benefitting" from this rule (thus, being entitled to training compensation) was the last club where the player had been registered as an amateur before being re-registered as a professional. This was comparable to a first registration as a professional as one of the scenarios set out in the ground rule of Article 20 FIFA RSTP, which – as per reference – should be observed when Article 3 (2) FIFA RSTP was applied. The club where the player had last been registered as a professional before reacquiring amateur status, on the other hand, was not entitled to training compensation. Except – and that seemed self-evident in light of the ratio of Article 3 (2) FIFA RSTP – if the club the player was transferred to reinstated the player as an amateur before re-registering the player as a professional, within the time limit of 30 months. In that scenario, and if all the other requirements were fulfilled, the club where the player had last been registered as a professional was obviously entitled to training compensation.

The Sole Arbitrator noted that this interpretation was in line with the intention and purpose of the training compensation system in general – that clubs that invested in training and educating young players were rewarded whenever a player that they trained became a professional (on being transferred). Also, potential abuse or attempts to circumvent the provisions regarding training compensation were prevented.

2. Club entitled to training compensation

Having set out all the above, the Sole Arbitrator then addressed the particularities of the case at hand.

He first noted that the Player had been registered as a professional with the Appellant for three seasons (season 2014/2015 to season 2016/2017), after having played for the latter as an amateur for six seasons. Notwithstanding the conflicting information in the different player's passports, it was undisputed that the Player – after having left the Appellant – had been reinstated as an amateur with Red Star FC on 5 January 2017. The Player had then signed a professional contract with the Respondent on 20 September 2018, in the season of his 22nd birthday. Thus, undisputedly, he had been re-registered as a professional within 30 months after being reinstated as an amateur.

It was further undisputed that the Appellant was not the last club where the Player had been registered as an amateur, as the Player had undisputedly been registered as a professional with the Appellant before he had left the latter. Rather, the Parties had agreed that the last amateur club the Player had been registered with (notwithstanding the conflicting information in the player's passports), had been Académie des Etoiles. From there, the Player had been

transferred to the Respondent, where he had been re-registered as a professional.

Furthermore, none of the (conflicting) player's passports on file had explicitly stated that the Player would have had reacquired his status as a professional by the latest in the calendar year of his 21st birthday: The player's passports did either not mention anything in this regard or stated the contrary. Much more so, the Parties agreed that the Player had re-registered with the Respondent as a professional on 20 September 2018, thus after the calendar year of his 21st birthday.

The Sole Arbitrator thus concluded that the prerequisites set out above were not fulfilled. The Sole Arbitrator therefore found that the Appellant could not claim training compensation from the Respondent, although for other reasons than suggested in the Appealed Decision.

Decision

As a consequence, the Sole Arbitrator dismissed the Appeal in its entirety and the Appealed Decision was upheld.

CAS 2021/A/7859
NK Zaprešić v. Serder Serderov & Fédération Internationale de Football Association (FIFA)
11 April 2022

Football; Termination of employment agreement without just cause by club; Scope of CAS jurisdiction in case of appeals against decisions issued by internal bodies of FIFA; Competence of DRC Judge to decide on its own jurisdiction despite arbitration clause in favor of NDRC; Jurisdiction of FIFA for employment-related disputes; Burden of proof regarding independence of NDRCs; Composition of NDRCs according to Article 3 para. 1 FIFA NDRC Standard Regulations; Right to an "independent and impartial tribunal' under FIFA Circular No. 1010; Procedural rights of party that does not proceed in first instance proceeding

Panel
Mr Nicolas Cottier (Switzerland), Sole Arbitrator

Facts

On 14 January 2019, the Croatian club NK Inter Zaprešić (the "Club" or the "Appellant") and the Russian football player Serder Serderov (the "Player" or the "First Respondent") signed an employment agreement (the "Agreement"), valid from that date until 15 June 2020. According to Article 9 of the Agreement, the Player's monthly salary was fixed at EUR 6,000.

The English version of Article 16 g) of the Parties' Agreement reads as follows:

"In case of dispute, the contractual parties establish the competence of the Croatian Football Federation's Court of Arbitration. The Club and the Player are obliged not to settle possible disputes arising hereof in front of regular courts. The Club and the Player are expressly obliged to completely adhere to all the provisions of the Croatian Football Federation's regulations which regulate the work of the Croatian Football Federation's Court of Arbitration, including the way of electing the arbiter or the arbitration council. The Club and the Player, pursuant to the provisions of the Law on Arbitration, have expressly agreed that the adjudication of the Croatian Football Federation's Court of Arbitration may be challenged in front of the international Court of Arbitration for Sport (CAS) in Lausanne, Switzerland. An eventual successful challenge of the adjudication of the Croatian Football Federation's Court of Arbitration does not affect the effectiveness of this adjudication".

As of 1 January 2020, the Club stopped paying any salary to the Player.

On 15 March 2020, the Croatian 1. HNL was suspended until 5 June 2020 due to the COVID-19 pandemic and, upon respective request by the Club, the Player went back to Russia for the period of suspension of the championship.

Following this suspension and the consecutive extension of the football season, on 22 May 2020, the Player and the Club signed an addendum to the Agreement, extending its duration until 5 August 2020.

On 10 July 2020, the Player sent a notice of default to the Club, granting it a deadline of fifteen days to pay alleged overdue payables of EUR 36,000, namely the equivalent of six months of salaries, for the period from 1 January 2020 until 30 June 2020. The Player reserved his right to terminate the contract with just cause in case of absence of payment.

In response, on 14 July 2020, the Club sent a letter to the Player, by means of which it formally invited him to *"immediately but no later than 10 (ten) days from the receipt of this letter to come in Zaprešić (Croatia) and continue to fulfil [his] contractual obligations"*. The Club indicated that in case of failure by the Player to comply it would unilaterally terminate the Agreement and sue the Player for damages.

On 22 July 2020, referring to his notice of default of 10 July 2020, the Player replied that the Club was responsible for the fact that he had not been able to travel to Croatia earlier.

As the Player did not join the Club within the set deadline, the latter terminated the Agreement on 25 July 2020.

The Player did not find any new employment before the expiration period of the Agreement, namely 5 August 2020.

On 14 September 2020, the Player lodged a claim against the Club before the Judge of the FIFA Dispute Resolution Chamber (the "DRC Judge"). The Club did not proceed in front of the DRC Judge although it had been requested to do so by said judge and although it was participating to similar procedures before the FIFA DRC during the same period of time. In particular, the Club did not raise any objection to the jurisdiction of the DRC Judge.

In its decision of 13 January 2021 (the "Decision"), the DRC Judge found that the Club had lost interest in the Player's services and had only summoned the Player to return to the Club after the Player had enquired about the payment of his salaries. In conclusion, the DRC Judge held that on 25 July 2020, the Club had terminated the Agreement without just cause and that it was undisputed that the Club itself was in breach of the Agreement at the time of termination, since the Player's remuneration had not been paid since January 2020.

Specifically, and based on the version of August 2020 of the FIFA Regulations on the Status and Transfer of Players (the "RSTP"), the DRC Judge decided to partially accept the claim and ordered the Club to pay the Player outstanding remuneration in the amount of EUR 36,000, payable in six instalments plus 5% interest *p.a.* until effective payment of the respective instalment as well as EUR 6,968 as compensation for breach of contract plus 5% interest *p.a.* as from 14 September 2020 and until effective payment.

On 25 March 2021, the grounds of the Decision were notified to the Player and the Club by the Fédération Internationale de Football Association ("FIFA" or the "Second Respondent").

On 13 April 2021, the Appellant lodged a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the Player and FIFA with respect to the Decision, pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (2020 edition) (the "Code"). Essentially, the Appellant argued that the DRC Judge had lacked jurisdiction to decide on the present case as the arbitration clause under Article 16 g) of the Agreement provides for the competence of the Court of Arbitration of the Croatian Football Federation (the "CFF Court of Arbitration" or the "CFF NDRC"), and that the latter fulfilled all requirements set by FIFA to qualify as independent National Dispute Resolution Chamber ("NDRC").

Reasons

1. Scope of CAS jurisdiction in case of appeals against decisions issued by internal bodies of FIFA

To start with, and in light of the Appellant's objection to the jurisdiction of the DRC Judge in the first instance proceedings, the Sole Arbitrator clarified that given that the present proceeding qualifies as CAS appeals arbitration proceeding - and specifically, appeals proceeding against a decision issued by an internal body of FIFA, namely the DRC Judge - unlike as in CAS ordinary arbitration proceedings, he does not only have to decide on the validity of the arbitration clause; that rather, he also has to determine whether indeed the DRC Judge, based on the applicable FIFA Regulations, had jurisdiction to issue the decision appealed against, notwithstanding the arbitration clause in the Parties' Agreement in favour of a national arbitration tribunal, specifically the CFF Court of Arbitration.

2. Competence of DRC Judge to decide on his own jurisdiction despite arbitration clause in favor of NDRC

Starting his analysis of jurisdiction for the first instance proceedings, the Sole Arbitrator clarified that while the Parties' Agreement contained a clear and specific arbitration clause in favour of a national arbitration tribunal (here: the CFF Court of Arbitration), the DRC Judge - as an internal body of a Swiss association - was not part of the Parties' Agreement and therefore not bound by it; that therefore, and in light of the fact that the Player, despite the arbitration clause in favour of the CFF Court of Arbitration, had filed his claim against the Club before the DRC Judge, it was for the DRC Judge to decide on his competence for the case in question.

That specifically, given that both the Player and the Club were bound by the FIFA Regulations on the Status and Transfer of Players (RSTP) – the Club through membership and the Player by means of his registration with the national association, the latter being itself a member of FIFA - the question of competence had to be decided based on the RSTP. That furthermore, and in particular, the DRC Judge had to examine, with regard to the national arbitration tribunal designated by the Parties in their Agreement, whether the requirements of the guarantee of fair proceedings and respect of the principle of equal representation of players and clubs are fulfilled; in the affirmative, the DRC Judge would decline his own jurisdiction and refer the Parties to the national decision-making body initially chosen by the Parties. If the relevant requirements have not been met, the DRC Judge would hold so and accept his own jurisdiction.

3. Jurisdiction of FIFA for employment-related disputes

Continuing his analysis of the jurisdiction of the DRC Judge, the Sole Arbitrator referred to Article 22 lit. b) of the RSTP, according to which FIFA is "automatically" competent to decide on employment-related disputes between a club and a player of an international dimension, unless the parties have opted in writing for the competence of an arbitration tribunal established at national level, and that arbitration tribunal is independent, guarantees fair proceedings and respects the principle of equal representations of players and clubs. Given that the Parties' Agreement was of employment-related nature and further given that it binds a Croatian Club to a Russian player and is therefore of international dimension, the Sole Arbitrator concluded that, in order to determine whether the DRC Judge had been competent to decide the present case at first instance, he had to examine whether the two cumulative conditions were met: a) the parties to the Agreement must have opted in writing for the competence of an arbitration tribunal established at national level and b) the chosen arbitration tribunal had to be independent, to

guarantee fair proceedings and to respect the principle of equal representation of players and clubs.

To start with, the Sole Arbitrator found that the first condition, namely the contractual choice in writing of an arbitration tribunal (internal or external to the federation) is fulfilled in the present case, namely by means of Article 16 g) of the Parties' Agreement. In this context the Sole Arbitrator rejected the submissions of FIFA and the Player on the alleged lack of clarity and specificity of the arbitration clause, underlining that in his view, the clause contained, in very clear wording, an arbitration clause in favor of the CFF Court of Arbitration.

The Sole Arbitrator further noted that neither the DRC Judge, at first instance, nor the Sole Arbitrator, at second instance, are bound by the option of national arbitral tribunal chosen by the Parties in the Agreement. That rather, given that the criterium of independence is a second and cumulative condition set by the RSTP in order to validly "opt out" of the jurisdiction of FIFA, both the DRC Judge and the Sole Arbitrator had to assess, based on the applicable FIFA Regulations and, if necessary, Swiss law (applicable as per Article 56 para. 2 of the 2021 FIFA Statutes), whether the independence condition is met.

4. Burden of proof regarding independence of NDRCs

Turning to the question of burden of proof that the national arbitration tribunal is independent as required by Article 22 lit. b) of the RSTP, the Sole Arbitrator held that according to CAS jurisprudence (CAS 2016/A/4846), and in accordance with Article 8 of the Swiss Civil Code, such burden rests on the party which claims such independence, in the present case the Appellant.

5. Composition of NDRCs according to Article 3 para. 1 FIFA NDRC Standard Regulations

Starting his analysis as to whether the CFF Court of Arbitration would qualify as independent national arbitral tribunal, the Sole Arbitrator underlined that the principles set under Article 22 lit. b) RSTP were further explained and outlined in FIFA Circular No. 1010 dated 20 December 2005 and the FIFA National Dispute Resolution Chamber (NDRC) Standard Regulations, the latter having entered into force on 1 January 2008 (the "FIFA NDRC Standard Regulations").

Specifically, FIFA Circular No. 1010 outlines that the terms *'independent'* and *'duly constituted'* under Article 60 para. 3 (c) of the FIFA Statutes require that an arbitration tribunal meets the minimum (international) procedural standards as laid down in several laws and rules of procedure for arbitration tribunals, comprising, in the here relevant part, the *"Principle of parity when constituting the arbitral tribunal"* and the *"Right to an independent and impartial tribunal"*.

The Sole Arbitrator further noted that according to Article 3 para. 1 of the FIFA NDRC Standard Regulations, the chairman and a deputy chairman of a NDRC must be appointed by consensus between the player and club representatives.

Turning to the Procedural Rules of the CFF Court of Arbitration (the "CFF Procedural Rules"), the Sole Arbitrator noted that according to Article 5 para. 2 of such rules *"the President and the vice president of the Court of Arbitration shall be appointed by the Executive Committee of the CFF among arbitrators that have been proposed by the clubs and players' representatives"*.

The Sole Arbitrator found that in light of the fact that essentially, it was the CFF Executive Committee which is in charge of the

appointment of the President and the vice-president of the CFF Court of Arbitration, having the final word in electing both candidates, and given that, as argued by the First Respondent, both candidates had been proposed by the Clubs' representatives, the President and the vice-president of the CFF Court of Arbitration are not *"chosen by consensus by the player and the club representatives"*. In this context the Sole Arbitrator further noted that out of the 17 members of the CFF Executive Committee, none represented the players, while six of them were senior officials of Croatian top clubs. In conclusion, the Sole Arbitrator found that there is no guarantee that the principle of equal representation of players and clubs, expressly required under Article 22 lit. b) of the RSTP, is respected.

Based on the above, and further also referring to the CAS final decisions in the cases CAS 2014/A/3690 and CAS 2016/A/4846, the Sole Arbitrator concluded that due to the lack of consensus between players and clubs for the appointment of the chairman and the vice-chairman and the structural inequality between the clubs and the players in the composition of the CFF Executive Committee, *i.e.* the body in charge of the appointment of the President and the vice president of the CFF Court of Arbitration, the CFF Court of Arbitration is not an independent tribunal in compliance with Article 22 lit. b) of the RSTP, FIFA Circular No. 1010 and Article 3 para. 1 of the FIFA NDRC Standard Regulations.

6. Right to an "independent and impartial tribunal' under FIFA Circular No. 1010

Continuing never-the-less his analysis as to whether the CFF Court of Arbitration would qualify as independent national arbitral tribunal, the Sole Arbitrator highlighted that according to FIFA Circular No. 1010, for a NDRC to meet the requirement of 'independence' and 'duly constituted', the arbitral tribunal has to meet certain minimum procedural standards, amongst others the 'Right to an independent and impartial tribunal'. That FIFA Circular No. 1010 provides that in order to observe this right, the procedural rules of the respective arbitral tribunal need to foresee the option to reject an arbitrator as well as *"that the ensuing rejection and replacement procedure be regulated by agreement, rules of arbitration or state rules of procedure"*. The Sole Arbitrator held in this respect that while Article 9 of the CFF Procedural Rules mentions the President's duty to decide on challenges, the CFF Procedural Rules do not mention as to how an arbitrator should be replaced. Accordingly, the Sole Arbitrator held that the lack in the CFF Procedural Rules of a clearly established challenge mechanism, be it expressly or by clear reference to other sets of rules, constitutes another ground to exclude that the CFF Court of Arbitration meets the criteria set under Article 22 lit. b) RSTP, Circular No. 1010 and the FIFA NDRC Standard Regulations.

In conclusion, the Sole Arbitrator decided that given that he had already found the CFF Court of Arbitration to be non-compliant based on two separate grounds, namely the lack of consensus in the appointment of its chairman and vice-chairman and the lack of a clearly established rejection mechanism, the other issues raised by the Respondents against the CFF Court of Arbitration could be left open. However, and in response to the First Respondent's criticism of the fee applied to the procedure before the CFF Court of Arbitration (Article 15 of the CFF Procedural Rules) – the Sole Arbitrator determined that this was in contradiction with the clear wording of Article 32 of the FIFA NDRC Standard Regulations, foreseeing the principle of gratuity of the proceedings.

In conclusion, the Sole Arbitrator found that the DRC Judge had been competent to decide, in the first instance, on the present employment-related dispute of international dimension.

7. Procedural rights of party that does not proceed in first instance proceeding

Finally, the Sole Arbitrator turned to the Second Respondent's argument according to which the Appellant's capacity to raise an objection to the jurisdiction of the FIFA DRC was restricted before CAS, given that the Appellant had failed to dispute FIFA's jurisdiction before the FIFA DRC. In this context the Second Respondent argued that the Appellant had been fully aware of the proceeding before the DRC Judge and that it had raised a jurisdiction objection in other, parallel proceedings which had taken place before the FIFA DRC. According to the Second Respondent, the Appellant, raising only at CAS level an objection to the jurisdiction of the DRC Judge related to the first instance proceedings, is acting in bad faith in the present proceedings.

The Sole Arbitrator, relying on jurisprudence of the Swiss Federal Tribunal (SFT) (ATF 120 II 155), held that a party which did not proceed during the first instance proceeding may still raise an objection to the jurisdiction of such instance in the context of appeal proceedings against the decision issued at first instance, unless the judge of first instance had issued an interim decision which had entered into force. At the same time the Sole Arbitrator however underlined that the right to contest the first instance's jurisdiction - while in principle also retained by the party which did not proceed before the first instance - is limited by the principle of good faith (ATF 120 II 155, p. 165). The Sole Arbitrator further determined that while the respective jurisprudence of the SFT refers to an "external" court of arbitration, it can also apply *mutatis mutandis* to the question of the possibility to raise an objection before CAS against the competence of an "internal" tribunal, such as the FIFA Tribunal, or, more specifically, the DRC Judge.

In order to support his finding that the limitations to raise an objection to the first instance judicial bodies apply to both "external" as well as "internal" tribunals, the Sole Arbitrator elaborated that the FIFA Regulations, notably the FIFA Statutes and the RSTP, set up a jurisdictional system with the purpose to solve disputes notably between clubs and players. The possibility to appeal to CAS ensures that such disputes be eventually adjudicated by an external arbitration court. The Sole Arbitrator further elaborated that given that this jurisdictional system directly binds the national federations, given that they are members of FIFA, but also indirectly binds local clubs and players by way of reference, it was correct, at least with regards to the possibility to raise an objection on jurisdiction, to impose on the parties to proceedings before the FIFA Tribunal the same limits as the ones applicable to parties to an arbitration proceeding before an external tribunal.

Turning to the case at hand the Sole Arbitrator noted that while indeed, the Appellant did not contest having been fully aware of the first instance proceeding before the DRC Judge, it did not at all proceed in such proceedings, while at the same time it was raising an objection of lack of jurisdiction of the DRC Judge in at least one parallel first instance FIFA Tribunal proceeding.

The Sole Arbitrator further underlined that the Appellant did not provide any reasons as to why in the present case, it did not raise an objection to the jurisdiction of the DRC Judge, while it did do so in the context of other first

instance FIFA Tribunal proceedings. The Sole Arbitrator concluded that given the absence of any legitimate explanation for such a contradictory procedural attitude, in view of the SFT jurisprudence, and of the particular circumstances of this case, the Appellant was not allowed to raise the objection to lack of DRC Judge jurisdiction before CAS.

Decision

The appeal filed by NK Inter Zaprešić on 13 April 2021 by NK Inter Zaprešić against Mr Serder Serderov and FIFA with respect to the decision issued on 13 January 2021 by the Dispute Resolution Chamber Judge of FIFA is rejected and said decision is confirmed.

CAS 2021/A/7983
Brianna McNeal v. World Athletics (WA)
and
CAS 2021/A/8059
WA v. Brianna McNeal
9 June 2022 (operative part of 2 July 2021)

Athletics (100 m hurdles); Doping (tampering with any part of the doping control); Applicable law and *lex mitior*; Assessment of the evidenc; Conduct to be considered tampering; Sanction for a tampering ADRV as a first offence and exceptional circumstances; Degree of fault; Applicable sanction to multiple violations; Application of the principle of proportionality

Panel
Mr Rui Botica Santos (Portugal), President
Ms Barbara Reeves (United States)
Prof. Ulrich Haas (Germany)

Facts

Brianna McNeal (the "Athlete") is a 29-year-old internationally renowned athlete from the United States of America ("USA") who competes in the 100 metres hurdles. The Athlete was in 2013 the World champion in the 100 meters hurdles and, among many other achievements, won the Olympic Gold medal at the 2016 Rio Olympic Games.

World Athletics (the "WA"), formerly known as the "International Association of Athletics Federations" (the "IAAF"), is the world governing body for track and field.

This case is essentially about a Tampering accusation made by WA against the Athlete which was decided, at first instance, by the WA Disciplinary Tribunal.

The Athlete failed to make herself available to be tested by a Doping Control Officer (DCO) on the morning of 12 January 2020, between 6:00 and 7:00 AM. When notified by the WA Athletics Integrity Unit (AIU) in order to provide an explanation for her Missed Test, the Athlete sent the "First Medical Note" to the AIU and alleged that she failed to wake up due to the unpredictable effects of the medication she took on the previous day for the first time, following a "surprise" medical procedure.

The AIU suspected that the First Medical Note had been altered and asked for further evidence from the Athlete, which she provided in the form of two additional medical notes (the Second and Third Medical Notes). Once again, the AIU did not deem such documents to be originals.

The Athlete then provided the Medical File when asked to do so by the AIU and, upon being called for an interview in August 2020, confessed that she had indeed changed the dates of the Medical Notes from 10 January 2020 (the real date) to 11 January 2020 (the false date).

On 13 January 2021, the AIU charged the Athlete with a Tampering violation under the provision of Article 2.5 2019 WA ADR/WADC and, on 21 April 2021, a decision was issued by the WA Disciplinary Tribunal imposing a 5-year period of Ineligibility on the Athlete due to a Tampering ADRV which was the Athlete's second violation of anti-doping rules.

The present procedure is a consequence of the Appeal lodged by the Athlete on 21 May 2021against the decision of the WA Disciplinary Tribunal and of the Cross-Appeal lodged by the WA also against that decision. Both appeals were consolidated into one single procedure and will be simultaneously decided due to the commonalty of issues at stake.

Reasons

1. Applicable law and *lex mitior*

In its fight against doping, WA follows the WA ADR and the rules applicable are those in effect at the time of the facts. Since the alleged anti-doping violation i.e. alteration of the dates of three Medical Notes occurred on 13 February 2020 and on 14 March 2020, the regulations which in principle govern the dispute are those that were in force from 1 November 2019 and during the date of the facts (the "2019 WA ADR").

In the meantime, a new edition of the WA ADR was approved and implemented – which came into force from 1 January 2021 (the "2021 WA ADR"). The 2021 WA ADR reflects the promulgation of the new 2021 edition of the World Anti-Doping Code (the "2021 WADA Code").

The Panel found that an exception to the principle of application of the law at the time of the facts can exist if the *lex mitior* doctrine applies. The principle of *lex mitior* occupies a central place in sports law. There is no discretion on the application of the *lex mitior* principle once it is found that the case appropriately falls within its scope (CAS 2015/A/4005 para. 115; and CAS 2020/A/6755 para. 51).

As the Athlete underlined during the proceedings before the WA Tribunal, the Panel concurred that the 2021 WA ADR rules were more favourable to the Athlete. In general, the *lex mitior* principle is relevant and applicable when and if the new rules - – as it was the case of these proceedings – (i) provide for a reduced sanction; and/or (ii) redefine the disciplinary offense. The 2021 WA ADR that enshrines the *lex mitior* principle offers more favourable terms to athletes with respect to the imposition of sanctions for violations of Tampering offences. Equally, the new rules afford considerably greater flexibility in connection with the consequences to be drawn from a finding of multiple anti-doping rule violations, which was the case, since the Athlete had already committed another ADRV in 2019 and, if the ADRV disputed under these procedures was confirmed, that would be the Athlete's second violation.
Therefore, it was the Panel's view that 2021 WA ADR was more favourable to the Athlete and that she should benefit from all its provisions.

2. Burden of proof, standard of proof, Assessment of the evidence

Considering the disciplinary nature of Anti-Doping Rule Violation (ADRV) cases, the Panel shall determine first the burden of proof, the applicable standard of proof and the evaluation of the evidence presented to it in order to be able to proceed with the analysis of the merits of the dispute.

The Panel recalled that the burden of proof shall be ascertained in accordance with Rule 3.1 2021 WA ADR, which states that: *"The Integrity Unit or other Anti-Doping Organisation will have the burden of establishing that an anti-doping rule violation has occurred"*. It was therefore for WA to

demonstrate, to the comfortable satisfaction of the Panel, that the Athlete did indeed engage and commit an ADRV of Tampering (Rule 2.5 2021 WA ADR), which includes objective and subjective factors. CAS Jurisprudence is well acquainted with the "comfortable satisfaction" of the Panel standard of proof and the formula used in Article 3.1 2021 WA ADR (*"greater than a mere balance of probability but less than proof beyond reasonable doubt"*) is similar to the jurisprudence's findings. In fact, it has been described as *"a kind of sliding scale, based on the allegations at stake: the more serious the allegation and its consequences, the higher certainty (level of proof) the Panel would require to be 'comfortable satisfied"* (CAS 2014/A/3625, para. 132).

Nonetheless, the Panel stressed that the burden of proving that the Athlete was suffering from psychological or mental health issues during the period when the Medical Note's dates were changed, which in turn affected her judgement and reason, lied with the Athlete.

In this context, the assessment of the evidence contributes significantly to the decision-making. The Panel needed to have strong evidence that certain facts occurred in a given manner and the evidence also had to satisfy the Panel in the same sense. The relevant circumstances of the case assessed individually and/or combined, commonly known as the context, are major elements to reach this conclusion. The "evaluation of the evidence" concept refers to the judicial process of weighing/assessing the evidence on the record (*appréciation des preuves*). Under Swiss arbitration law, the deciding body is free in its evaluation of the evidence (*libre appréciation des preuves*). This principle is expressly recalled by Article 9(1) of the IBA Rules of Evidence, according to which *"the Arbitral Tribunal shall determine the (…) relevance, materially and weigh of evidence"* (Berger/Kellerhals, International Arbitration in Switzerland, 2nd Ed., London, 2010, para 1328).

3. Conduct to be considered tampering

(…)

2.5 Tampering or Attempted Tampering with any part of Doping Control by an Athlete or other Person"

Although Rule 2.5 2021 WA ADR does not itself define the meaning of the term "Tampering", this issue is resolved in Annex I of that regulation, which reads as follows:

"Tampering: *Intentional conduct that subverts the Doping Control process but that would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, offering or accepting a bribe to perform or fail to perform an act, preventing the collection of a Sample, affecting or making impossible the analysis of a Sample, falsifying documents submitted to an Anti-Doping Organisation or TUE committee or hearing panel, procuring false testimony from witnesses, committing any other fraudulent act upon the Anti-Doping Organisation or hearing body to affect Results Management or the imposition of Consequences, and any other similar intentional interference or Attempted interference with any aspect of Doping Control.*

[Comment to Tampering: For example, this Rule would prohibit altering identification numbers on a Doping Control form during Testing, breaking the B bottle at the time of B Sample analysis, altering a Sample by the addition of a foreign substance, or intimidating or attempting to intimidate a potential witness or a witness who has provided testimony or information in the Doping Control process. Tampering includes misconduct that occurs during the Results Management process. See Rule 10.9.3(c). However, actions taken as part of a Person's

legitimate defence to an anti-doping rule violation charge shall not be considered Tampering. Offensive conduct towards a Doping Control official or other Person involved in Doping Control that does not otherwise constitute Tampering shall be addressed in the disciplinary rules of sport organisations.]"

The Panel recalled that it is not necessary for a Doping Control Process to be actually subverted, in order for a tampering offence to exist. It suffices, for that purpose, that the conduct in question could, in theory, subvert the said process. The commission of a tampering offence always requires satisfactory proof that the offender intended to subvert the investigation, even if the latter was unaware that s/he was violating an anti-doping provision (CAS 2017/A/4937). In the specific context of the rules, intent does not need to be direct in the sense that subverting the doping control process was the sole and only driving motive behind the athlete's actions. Rather, it is sufficient for there to be intent that the athlete recognises the consequences of his or her actions and accepts that such consequences have the potential to subvert the process. A violation of Rule 2.5 2021 WA ADR cannot be established merely by reference to the examples included in the rule. Therefore, a finding that the offence has actually been committed must include consideration of the subjective aspects of the case.

In this respect, the Panel found that the alteration of the dates of the Medical Notes could not only be considered to be falsification of a document, under Rules 2.5 and 5.7.9 2021 WA ADR, but also clearly amounted to conduct that tended to/was capable of subverting the Doping Control Process, as it was intended to favour and give added support to the explanation given by the Athlete for justifying her missed test. Furthermore, the Athlete had failed to prove the facts on which her defence was based, i.e. she had not comfortably convinced the Panel that the psychological effects of "the surprise" medical procedure namely, an abortion, had such an overwhelming effect on her that she was unable to comprehend the consequences of her acts, and is thus free of all liability in respect thereof.

4. Sanction for a tampering ADRV as a first offence and exceptional circumstances

"10.3.1 ***For violations of Rule 2.3 or Rule 2.5, the period of Ineligibility will be four (4) years except****: (i) in the case of failing to submit to Sample collection, if the Athlete can establish that the commission of the anti-doping rule violation was not intentional, the period of Ineligibility will be two (2) years; (ii)* ***in all other cases, if the Athlete or other Person can establish exceptional circumstances that justify a reduction of the period of Ineligibility, the period of Ineligibility will be in a range from two (2) years to four (4) years depending on the Athlete's or other Person's degree of Fault****; or (iii) in a case involving a Protected Person or Recreational Athlete, the period of Ineligibility will be in a range between a maximum of two (2) years and, at a minimum, a reprimand and no period of Ineligibility, depending on the Protected Person or Recreational Athlete's degree of Fault".*

The Panel reminded that under Rule 10.3.1 2021 WA ADR, a reduction of the 4 years period of ineligibility applicable for a first tampering offence in a range from 2 years to 4 years was possible if the athlete could establish exceptional circumstances depending on the athlete's degree of fault. The specific meaning of "exceptional circumstances" is not defined in said rule. However, some examples of what can be considered to be "exceptional circumstances"

are provided in the context of other rules. The Panel recalled that in principle, the interpretation of the expression "exceptional circumstances" must be restrictive so as only to include very unusual or abnormal situations.

In this respect, the Panel considered that the conduct of an athlete that without any doubt failed to prove that she did not intend to subvert the Doping Control Process, could nevertheless betray a certain level of psychological disturbance, which did not, however, alter the seriousness of her acts and the fact that she committed an ADRV. In this regard, psychological factors might amount to an abnormality that was "not within the bounds of normal conduct" and therefore to exceptional circumstances justifying that the penalty imposed on the athlete for the Tampering ADRV, when fixed on a first offence basis, vary according to the athlete's degree of fault.

The Panel therefore concluded that there were exceptional circumstances in this case justifying that the penalty imposed on the Athlete for the Tampering ADRV, when fixed on a first offence basis, varied according to her degree of fault, within a range of from two to four years of Ineligibility, in accordance with Rule 10.3.1 (ii) 2021 WA ADR.

5. Degree of fault

In order to determine, into which category of fault- significant, normal or light as established in CAS 2013/A/3335 - a particular case might fall, the Panel found that it was 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 her personal capacities. In this respect, the Panel considered that an athlete who acted, in objective terms, with a "significant degree of fault" could, due to the existence of exceptional circumstances closely linked to the subjective aspects of the case, have her degree of fault reduced from a "significant degree of fault" to a "normal degree of fault".

Under the circumstances of the case, the Panel concluded, notwithstanding the fact that it was unable to conclude that the Athlete had no intent to subvert the Doping Control Process, particularly because of her extreme lack of care, that it was nevertheless convinced that the traumatic experience through which the Athlete passed namely, an abortion, are exceptional circumstances that should be taken into consideration as a factor that shadowed her judgment, to a certain extent. The Panel accordingly also considered that the said exceptional circumstances were closely linked to the subjective aspects of the case, and that it was appropriate, because of the said aspects, to reduce the Athlete's degree of fault from a "significant degree of fault" to a "normal degree of fault".

6. Applicable sanction to multiple violations

The Panel already decided that the appropriate penalty for the Tampering ADRV committed by the Athlete, on a first offence basis, would be a 3-year Ineligibility period. Accordingly, and as the minimum level of the penalty to be imposed is the sum total of the period imposed for the Athlete's first ADRV (1 year) and the period of ineligibility that would be imposed on the Athlete for the second ADRV, on a first offence basis (3 years), the minimum period of Ineligibility that could be imposed is 4 years. The

maximum limit is twice the period of Ineligibility that would be imposed on the Athlete for the second ADRV, on a first offence basis (3 years), namely 6 years.

It follows therefore, according to Rule 10.9.1 (a) (ii) of the 2021 WA ADR, that the appropriate penalty would be a period of Ineligibility of from 4 to 6 years. The specific penalty applicable should be fixed within this range, by reference to all the circumstances and the Athlete's degree of fault with regard to the second offence.

For this reason, and according to the formula in 2021 WA ADR, and having already considered that the Athlete's degree of fault, taking all the circumstances of the case into consideration, was such that her penalty could be reduced by one year, the Panel confirmed the said conclusion, which shall be applied in the final penalty. The Panel therefore considered that the application of the rules to this case required the imposition, on the Athlete, of a period of ineligibility of 5 years, for this ADRV, and therefore upheld the decision of the WA Disciplinary Tribunal.

7. Application of the principle of proportionality

In light of the above, the Panel considered that the 5-year period of Ineligibility sanction to be imposed on the Athlete might not be further reduced under the principle of proportionality, since the elements of such principle had already been dully considered by the Panel and are a part of the 2021 WADC. When applying these regulations, only the most extreme and rare cases, where sanctions are clearly disproportionate and unfair, allow for an autonomous consideration of the principle of proportionality.

Decision

Therefore, the appeal filed by Ms Brianna McNeal was dismissed and the appeal filed by World Athletics against the decision of the World Athletics Disciplinary Tribunal was confirmed in full, with the following additional item:

"All competitive results obtained by Ms. Brianna McNeal between 13 February 2020 and 14 August 2020 shall be disqualified with all resulting consequences including forfeiture of any medals, titles, points, prize money and prizes".

CAS 2021/A/8075
Football Association of Albania & Nedim Bajrami v. FIFA & Swiss Football Association
13 June 2022 (operative part of 30 August 2021)

Panel
Mr Francesco Macrì (Italy), President
Mr Julien Fouret (France)
Mr Mark Hovell (United Kingdom)

Football; Nationality; Principle set forth in the FIFA New Eligibility Rules/ Regulations Governing the Application of the FIFA Statutes; Acquisition of Albanian citizenship under Albanian law; Cumulative prerequisites of art. 9 para. 2 of the FIFA New Eligibility Rules regarding requests to change associations

Facts

The Football Association of Albania (the "First Appellant" or the "FAA") is the football governing body in the Republic of Albania.

Nedim Bajrami (the "Second Appellant" or the "Player") is a professional football player of both Swiss and Albanian nationality.

Fédération Internationale de Football Association (the "First Respondent" or "FIFA") is the international governing body of football with its registered office in Zurich, Switzerland.

The Swiss Football Association (the "Second Respondent" or the "SFA") is the football governing body in Switzerland.

Nedim Bajrami is a professional football player born on 28 February 1999 in Zurich, Switzerland, from Albanian parents. As confirmed by the SFA, Mr Bajrami has appeared in 31 official matches for the Swiss national football team, none of which were at the so-called "A" level (*i.e.* with the senior Swiss national football team). Mr Bajrami played his first match for the Swiss U-15 national football team on 10 September 2013 and his last match for the Swiss U-21 national football team on 16 November 2020. He had never been called to represent the Albanian national football team in a friendly match or an official competition.

On 17 March 2021, the Ministry of Interior of Albania issued a declaratory statement under Articles 4(b) and 6 of Law 113/2020 of 29 July 2020 officially recognising Mr Bajrami's Albanian descendance, following which Mr Bajrami obtained an Albanian birth certificate on 19 March 2021 and an Albanian passport on 21 March 2021.

On 19 March 2021, the FAA submitted a (first) change of association request to the FIFA Players' Status Committee (the "FIFA PSC") concerning the Player (the "First Request"). On 23 March 2021, the first application was rejected by the Single Judge (the "SJ") of the FIFA PSC (the "First Decision").

On 21 May 2021, the FAA submitted a second change of association request to the FIFA PSC about Mr Bajrami (the "Second Request"), this time based on Article 9 para. 2 (a) of the FIFA New Eligibility Rules/ Regulations Governing the Application of the FIFA Statutes (the "Regulations", the "RGAS" or the "New Eligibility Rules"). On 27 May 2021, the SJ of the FIFA PSC rejected the request of FAA for a change of association of Mr Nedim Bajrami. The

grounds of this decision (the "Appealed Decision") were notified to FAA on 4 June 2021.

On 23 June 2021, the Appellants filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") in accordance with Article 58 of the FIFA Statutes and Articles R47 and R48 of the Code of Sports-related Arbitration (2020 edition) (the "CAS Code") against the Respondents with respect to the Appealed Decision.

In summary, the Appellants argue that the Player never played at "A" level for the Swiss National Football team and that he held the Albanian nationality from birth. These two cumulative requisites matched the provision of Article 9 para. 2 (a) of the RGAS and the request for a change of association is worthy of upholding. The SJ of the FIFA PSC erred in stating that the Player had to fulfil *"further administrative requirements"* as substantial preconditions to obtain the Albanian nationality.

In summary, the First Respondent, argues that the prerequisites under Article 8 para. 1 (dh) and (e) of the Albanian Law 113/2020 on Citizenship are substantive. The Player had to undertake both before obtaining the requested nationality, thus incurring the prohibition of Article 5 para. 2 (a) of the Regulations. Besides, contrary to what is claimed by the Appellants, the statement from the General Secretary of the Albanian Ministry of Interior is clear and undisputable as it reports that the Albanian citizenship was granted to the Player only on 17 March 2021 by descendance. The wording of the Albanian Law 113/2020 on Citizenship clearly states that Albanian nationality can be automatically acquired only by birth (as provided by Articles 4 and 5) and not by descendance, as this is the case of the Player. Consequently, the Player did not hold Albanian nationality at his first official match with Switzerland and did not meet the second requirement of Article 9 para. 2 of the RGAS.

Reasons

1. Principle set forth in the FIFA New Eligibility Rules/ Regulations Governing the Application of the FIFA Statutes

On 18 September 2020, FIFA modernized its Regulations Governing the Application of the FIFA Statutes (ed. 2020) (the "Regulations", the "RGAS" or the "New Eligibility Rules"). The reform stands on the following core principles, as reported in the Commentary:

"- 'no nationality, no eligibility'. Eligibility must be based on an objective measurement (i.e. the nationality held by the player);

- *equal treatment of all* [Member Associations]*;*
- *the existence of a genuine link between the player and the* [Member Association] *they (intend to) represent;*
- *avoiding cases of excessive severity or hardship;*
- *prevention of abuse (i.e. 'nationality shopping'); and*
- *protecting the sporting integrity of international competition".*

These principles contain three essential elements: nationality as a precondition to play for a representative football team; the existence of a genuine link between the player and the association, and the intention to avoid that such rules can frustrate the legitimate expectation of a player to joining the chosen association; to prevent any abuse and to protect the integrity of competitions.

Regarding the first topic, Article 5 para. 1 (Principles) of the Regulations reads as follows: "Any person holding a permanent nationality that is not dependent on residence in a certain country is eligible to play for the representative teams of the association of that country"; and Article 5 para. 2:

"there is a distinction between holding a nationality and being eligible to obtain a nationality. A player holds a nationality if, through the operation of a national law, they have: a) automatically received a nationality (e.g. from birth) without being required to undertake any further administrative requirements (e.g. abandoning a separate nationality); or b) acquired a nationality by undertaking a naturalisation process".

FIFA's Commentary explains as follows [in relation to the branch a) of Article 5 para. 2]:

"The first element requires that nationality be obtained 'automatically'. This will generally occur when a player is born, subject to the relevant national law, in line with the principle of jus solis (nationality is linked to the place of birth) or jus sanguinis (nationality is linked to the nationality held by one or both parents) or a combination of both.

The second element requires that the automatic grant of nationality does not oblige the player to 'undertake any further administrative requirements'".

The Commentary clarifies that FIFA acknowledges that nationality by *jus sanguinis* or *ius soli* is *"automatically"* obtained and that the formalities necessary to get it are not to be considered *"further administrative requirements"*.

To sum up, FIFA rules recognise the primary importance of the player's nationality to allow the applicant to play in the representative team of the relevant state. Such status will have to be in accordance with the rules of the relevant country to assess whether the applicant has already met this requirement (*"hold nationality"*) or has to go through a specific administrative procedure (*"being eligible to obtain nationality"*). Whether the player holds nationality due to childbirth, passports and other similar certificates to obtain citizenship must be considered formalities and cannot prevent the acquisition of sporting nationality.

2. Acquisition of Albanian citizenship under Albanian law

Law 113/2020 stresses the concept of citizenship as *"the stable legal bond"* that only can grant to an individual to exercise rights and the duty to comply with obligations in the Albanian State. Notably, the Panel observes that Law 113/2020 provides two significant events to obtain Albanian citizenship by parenthood or kinship:

- Article 5 – Acquisition of citizenship by birth:

  "Anyone born to at least one parent who is an Albanian citizen shall automatically acquire Albanian citizenship and shall be registered as an Albanian citizen. The entitlement to register as an Albanian citizen shall not expire after the person has reached 18 (eighteen) years of age".

- Article 6 - Acquisition of citizenship by descent:

  "1. A foreign citizen whose ancestors are of Albanian descent shall acquire Albanian citizenship, provided that a direct lineal kinship up to the third degree established between the applicant and their ancestor.

  2. In such case, the citizen shall submit an application to acquire Albanian citizenship by descent and shall fulfil the requirements under Article 8(1)(dh) and (ë) of this Law.

3. *The documentation required to establish Albanian descent shall be defined in an instruction by the Minister".*

It remains understood that the Law at stake recognises the idea of nationality as that personal link and cultural heritage originated from birth between an individual and the country of the parents, the primary requirement for obtaining *"automatically"* citizenship. Such *"national"* bound is so essential that it entitles the applicant to be registered as an Albanian citizen even after 18 years of age.

3. Cumulative prerequisites of art. 9 para. 2 of the FIFA New Eligibility Rules regarding requests to change associations

Rules about participation in official matches are provided to determine the different situations in which the player can represent the relevant national team. According to Article 9 para. 1 of the Regulations, *"a player may, only once, request to change the association for which he is eligible to play to the association of another country of which he holds the nationality"*. Pursuant to Article 9 para. 2 (a) of the Regulations, the granting of such a request requires a demonstration that:

i. The player has not been fielded at the "A" level for his current nationality; and

ii. At the time of being fielded for his first match in official competition at the non- "A" level for his current association, the player *"already held"* the nationality of the association which he wishes to represent.

As provided by FIFA's Regulations, these two prerequisites are cumulative.

The Panel turns now its attention to the FAA's request for change of association of the Player dated 21 May 2021 and the grounds of the Appealed Decision.

Both Parties confirm that Mr Bajrami has appeared in 31 official matches for the Swiss national football team, none of which were at the so-called "A" level (*i.e.*, with the senior Swiss national football team). Mr Bajrami played his first match for the Swiss U-15 national football team on 10 September 2013 and his last match for the Swiss U-21 national football team on 16 November 2020.

It is not contested that Nedim Bajrami is a professional football player born on 28 February 1999 in Switzerland by Albanian parents, as proved by the birth certificate of the Office of Civil Registry, issued on 19 March 2021. In this regard, on 18 May 2021, the Ministry of Interior of the Republic of Albania issued [a second] attestation [that reads]:

"[…] *we confirm that the citizen Nedim Bjrami, born on 28.02.1999, has attained the Albanian nationality pursuant to the Law 113/2020 'On Citizenship'. Moreover, we hereby clarify that the citizen Nedim Bajrami, according to the abovementioned Law, has the Albanian nationality since birth, a right benefited from the applicant's request, or his parents in case of minors under the age of 18, as per legal procedures in force".*

The Player obtained an Albanian passport on 21 March 2021.

The FAA's Second Request, dated 21 May 2021, was filed based on Article 9 para. 2 (a) of the Regulations. In its Request, the FAA submitted that Mr Bajrami (i) had obtained the Albanian nationality by descendance and owned an Albanian birth certificate and passport; (ii) benefited from the Albanian nationality since birth, according to an official statement by the

Ministry of Interior of Albania issued on 18 May 2021; and (iii) has not been fielded by the Swiss national team at "A" level competitions. Furthermore, by communication on 23 February 2021, the Player had previously confirmed his will to play for the representative team of the FAA and was aware that his decision had definitive nature.

It is undisputed that the Player has never represented Switzerland in a match during an official competition at "A" international level and, consequently, the first prerequisite was fulfilled. Besides, when the FAA filed the Second Request, the Player held Albanian nationality. Therefore, the Panel will focus on this legal discussion whether the Player *"already held"* the Albanian nationality on the date of his first appearance for the Swiss national U-15 football team or whether he had to undertake *"further administrative requirements"* to obtain such nationality.

The Panel notes that the Player's parents were of Albanian nationality but, even though he could have filed a request to obtain citizenship under Article 5 of Law 113/2020, the Player's request was filed according to Article 6, triggering the requirements under Article 8 para. 1 (dh) and (ë). The Appealed Decision stated that these two requirements were considered substantial preconditions to obtain Albanian nationality. Therefore, the SJ stated that *"33.* […] *although entitled to obtain the Albanian nationality as from birth – due to Albanian descent, it remains that the Player did not hold it until he formally requested (and obtained) it in March 2021"* and *"34.* […] *(the Player) did in fact not hold the nationality of Albania at the time he played his first match in an official competition for the ASF-SFV on 24 April 2014".*

The Panel finds that, despite the Law conditions under which the request to obtain citizenship was filed (Art. 5 or 6), the Player held Albanian nationality by birth since he was born by Albanian parents.

Firstly, as above outlined, Article 5 of the Regulations provides that nationality by birth, in line with the principle of *ius sanguinis*, is obtained automatically without undertaking *"further administrative requirements"*. These requirements are considered substantial preconditions, and, if needed, the player is considered only eligible to obtain the relevant nationality. The Panel finds that *"substantial preconditions"* are needed to move from a previous legal *status* to the one related to the acquired nationality, namely what is stated in the FIFA's Commentary: *"to abandon another nationality"* or *"substantial waiting period following childbirth"*. In these cases, the player is expected to undertake actions that will bring him into a new status due to his voluntary and conscious choice.

More to the point, the Albanian Ministry of Interior only considered that the Player was born by Albanian parents to grant him the requested citizenship, as clearly stated in the official declaration issued on 18 May 2021. This is the reason why the Albanian authorities never asked for full documentary evidence under Article 8 para. 1 (dh) and (ë).

These findings also comply with the New Eligibility Rules' principles to avoid *"excessive severity or hardship"* in deciding nationality requests. The Player was born by Albanian parents; his mother tongue is Albanian; he was nourished in Albanian culture so much that he spontaneously decided to obtain such nationality as of definitive choice. To deny the Player's will would contradict the spirit of the rule and the

very definition of nationality as outlined by FIFA, far from the undesirable *"nationality shopping"*.

Decision

The appeal filed by the Football Association of Albania and Mr Nedim Bajrami on 23 June 2021 is upheld. The decision rendered by the Single Judge of the FIFA Players' Status Committee on 27 May 2021 is annulled. Mr Nedim Bajrami is an Albanian national and is eligible to represent Albania under Article 9 of the Rules Governing the Application of the FIFA Statutes. All other motions or prayers for relief are dismissed.

CAS 2021/A/8221
Kayserispor KD v. Robert Prosinecki
21 April 2022

Football; Employment-related dispute; Implicit choice of law; Contract modification as a result of change of circumstances; Entitlement to bonus due to non-relegation; Default interest rate under Swiss law

Panel
Prof. Ulrich Haas (Germany), Sole Arbitrator

Facts

Kayserispor Kulübü Derneği (the "Appellant" or "Club") is a professional football club with its registered office in Kayseri, Turkey. The Club is a member of the Turkish Football Federation ("TFF"), which is in turn affiliated with the Fédération Internationale de Football Association ("FIFA").

Roberto Prosinecki (the "Respondent" or "Coach") was born on 12 January 1969 and is of Croatian nationality.

On 13 January 2020, the Club and the Coach signed an employment agreement (the "Employment Agreement"), valid until 31 May 2020, or any other date marking the end of the 2019/2020 Turkish football championship. Pursuant to this Agreement, the Coach was entitled to a total salary of EUR 325,000.00, as well as a bonus payment of EUR 250,000.00, subject to his team remaining in the top-tier Turkish Super League. Any future disputes arising between the Parties were to be resolved by FIFA bodies and the Court of Arbitration for Sport (CAS).

On 19 March 2020, the TFF announced that all football activities in Turkey would immediately be suspended until further notice due to the COVID-19 pandemic.

Between 12 June 2020 and 26 July 2020, the remaining eight football matches of the Turkish football championship were played.

On 26 July 2020, the Club finished the Turkish Super League in the 17th place, synonymous with relegation to the second tier of the championship.

On 29 July 2020, the TFF announced that, due to the COVID-19 pandemic, no club would be relegated to a lower league for the 2019-2020 season in the top-tier Turkish Super League and that the latter would consist of 21 teams for the 2020-2021 season.

On 5 April 2021, the Coach lodged a claim with the FIFA Players' Status Committee (FIFA PSC) against the Club for breach of the Employment Agreement. The Coach submitted that the Club failed to pay his salaries for the months of April and May 2020, and requested to receive additional renumeration for the months of June (in full) and July (in part), for a total amount of EUR 251,333.00. In addition, he claimed the payment of EUR 250,000.00, corresponding to the bonus provided for in case of non-relegation.

On 17 June 2021, the FIFA PSC rendered its decision (the "Appealed Decision"), by which it partially accepted the Coach's claim. It found that the Club was liable to pay him outstanding salary (EUR 130,000.00) and bonus (EUR 250,000.00), plus 5% p.a. interest rate.

On 9 August 2021, the Club lodged an appeal against the Coach in relation to the Appealed Decision pursuant to Article R51 of the CAS Code of Sports-related Arbitration (the "CAS Code").

Reasons

In the case of long-term contracts, the problem often arises that the external circumstances under which the contract was concluded change in the course of time. This problem became even more acute during the COVID-19 outbreak, which led to serious disruptions in the field of football.

The main dispute in these proceedings revolved around the Coach's entitlement to a bonus for non-relegation provided for in the Employment Agreement, whereas no team in the Turkish Super League had been relegated during the 2019-2020 season due to an administrative decision.

The Parties to the dispute had diametrically opposed views on this issue: the Appellant argued that such a clause was only meant to reward sporting merit in light of subjective methods of interpretation internationally, while the Respondent stated that it was operative regardless of the reasons for non-relegation.

For the remainder, the Parties concurred that the outstanding salary had been properly calculated by the FIFA PSC, but disagreed as to the applicable law and overall default interest rate.

This led the Sole Arbitrator to examine the issue of implicit choice of law, the conditions for contract modification as a result of change of circumstances (both generally and in the case at hand) and the relevant default interest rate.

1. Implicit choice of law

With regard to the applicable law, the Appellant maintained that this dispute should primarily be governed by Turkish law. In turn, the Respondent contended that the Parties agreed the dispute to be handled before FIFA and CAS as appeal body and, thereby, implicitly referred to Swiss Law.

The Sole Arbitrator recalled that Article 187(1) of the Federal Act on Private International Law (PILA) enshrines the principle of party autonomy with respect to the applicable law. As a result, the parties are free to choose the law applicable to the merits of the dispute. Such choice of law may be made directly, by referring to a specific law, or indirectly, by referring to a "conflict-of-law" provision designating the applicable law to the merits. In addition, it is not required to take a particular form, and can be entered into either expressly or tacitly.

The Sole Arbitrator observed that the Employment Agreement contained an arbitration clause in favour of FIFA bodies and ultimately, CAS. He held that by doing so, the Parties had implicitly agreed that the arbitration proceedings would be governed by Article R58 of the CAS Code, which in turn led to the application of FIFA regulations and subsidiarily Swiss law, unless the application of Turkish law was deemed more appropriate.

2. Contract modification as a result of change of circumstances

While the Parties focused their argument on the relevant methods of contract interpretation, the

Sole Arbitrator considered that the real question was whether and to what extent their common misconception of the future developments, in particular the consequences of the COVID-19 pandemic, had impacted the Employment Agreement.

The Sole Arbitrator underlined that, under Swiss law, contracts must be performed as agreed pursuant to the principle of *pacta sunt servanda*, regardless of whether the contract has become useless or burdensome for one of the parties. Exceptionally, though, a contract may be modified by a judge or arbitrator if the circumstances have changed fundamentally. To this end, the change must have occurred after the conclusion of the contract, must not have been foreseeable or avoidable by the parties and must result in an obvious imbalance of the interests at stake. Finally, the risk associated with the changed circumstances must not have been assigned to one party by the contract or by law.

The Sole Arbitrator then applied these criteria to the case at hand, in order to definitively decide the issue of the Coach's entitlement to bonus due to his team's non-relegation.

3. Entitlement to bonus due to non-relegation

The Sole Arbitrator observed that the TFF's decision to renounce relegation for all teams at the end of the 2019/2020 season was a circumstance that occurred after the execution of the Employment Agreement and that was not foreseeable. It had the potential to disrupt the equivalence of the contract in that it created a significant windfall profit to the benefit of the Coach regardless of his sporting merit, and was not contractually rooted in the sphere of risk of the Appellant nor the Respondent.

The Sole Arbitrator concluded that the prerequisites for judicial adaptation were fulfilled, and that he could adjust the Employment Agreement to his discretion. In exercising his discretion, he endeavoured to consider the requirement of good faith and hypothetical will of the Parties. He decided to simply reduce the amount of the disputed clause to nothing, as it appeared to him that the Parties would simply not have entered into it had they contemplated the course of events that occurred.

4. Default interest rate under Swiss law

The Appellant challenged the application of Swiss law with regard to the default interest rate, which he considered excessive and inappropriate.

The Sole Arbitrator recalled that FIFA regulations, and more specifically the Regulations on the Status and Transfer of Players (RSTP), did not contain any provisions on the interest rate for outstanding salary claims. In line with his previous reasoning, he found that Swiss law shall apply subsidiarily, where the FIFA regulations contained a lacuna. He added that Swiss law was also the most appropriate law to deal with this matter, since the FIFA adjudicatory bodies constantly refer to the Swiss 5% default interest rate contained in article 73 of the Swiss Code of Obligations (CO) in their decisions.

Decision

In light of the foregoing, the Sole Arbitrator upheld the appeal. He retained that the decision issued by the FIFA PSC on 17 June 2021 should be annulled insofar as it awarded the Coach bonus payments under the Employment Agreement, and dismissed all further requests.

CAS 2021/A/8225
Emilian Hulubei v. Romanian Football Federation (RFF)
11 April 2022

Football; Validity of a decision of a federation's executive committee; Standing to sue according to the RFF Statutes; Standing to be sued in general; Condition to grant declaratory relief; Standing to be sued alone as regards the formal validity of the federation's decision; Standing to be sued alone as regards the substantial issues raised by the appellant

Panel
Mr Alexis Schoeb (Switzerland), Sole Arbitrator

Facts

Mr Emilian Hulubei (the "Appellant") is the president of the football players' union in Romania ("AFAN") and, in that capacity, is a member of the Executive Committee of the Romanian Football Federation.

The Romanian Football Federation (the "Respondent" or the "RFF") is the national governing body of football in Romania.

The "Brasov" case

The Romanian football club "CSM Corona Brasov" ("Corona Brasov") was a public entity owned by the Brasov Municipality and played in the *Liga III* of the Romanian football league system.

At the end of the Liga III 2020/2021 season, Corona Brasov was promoted to play in the *Liga II* of the Romanian football league system.

On 25 June 2021, the Brasov Municipality agreed to transfer Corona Brasov's right to participate in the Liga II to the football club "ACS FC Brasov" ("FC Brasov"), along with all the assets and liabilities of Corona Brasov.

The "Dacia" case

The Romanian football club "ACS Dacia Unirea Braila" ("ACS Dacia") was a privately-owned football club playing in *Liga III* of the Romanian football league system which had entered into insolvency proceedings on 1 October 2018.

In March 2021, the Romanian football club "AFC 1919 Dacia Unirea Braila" ("1919 Dacia") acquired the principal debts of ACS Dacia.

On 19 April 2021, the general assembly of the creditors of ACS Dacia approved a reorganisation plan under which, *inter alia*, ACS Dacia's right to participate in RFF competitions was to be transferred to 1919 Dacia, along with its sporting record and the right to use its name and mark(s).

The Appealed Decisions

No action was filed against the favourable opinions of the RFF's Legal Department in the "Brasov" and "Dacia" case regarding the above-mentioned transfer of rights and obligations, which were both submitted to the RFF's Executive Committee for its approval pursuant to Article 4 par. 6 and 6.4 of the RFF's Regulations for Organizing the Football Activity ("ROFA").

During a meeting held on 19 July 2021 (the "Meeting"), the RFF's Executive Committee passed the following decisions (the "Appealed Decisions"):

"The executive committee of the Romanian Football Federation,

[…]

- Approves with a majority of votes (one vote against) the concession of the right to participate in competition (2nd League) from CSM Corona Brasov to ACS Fotbal Club Brasov – Steagul Renaste. As a consequence, orders the affiliation ACS Fotbal Club Brasov – Steagul Renaste and the disaffiliation of CSM Corona Brasov.

[…]

- Approves with a majority of votes (one vote against) the concession of the right to participate in competition (3rd league) from ACS Dacia Unirea Braila to Asociatia Fotbal Club 1919 Dacia Unirea Braila. As a consequence, orders the affiliation Asociatia Fotbal Club 1919 Dacia Unirea Braila and the disaffiliation of ACS Dacia Unirea Braila".

The Appellant was the only member of the RFF's Executive Committee to vote against the approval of the applications filed by Corona Brasov and ACS Dacia.

On 9 August 2021, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the Respondent with respect to the Appealed Decisions.

Reasons

The present dispute concerns an appeal submitted against decisions issued by the Executive Committee of the RFF and revolves around the preliminary issues raised by the Respondent and, on substance, whether the Appealed Decisions comply with the statutes and regulations of the RFF.

While the Appellant claimed that the Appealed Decisions were null and void on the basis of alleged violations of procedural requirements and were made in breach of Article 70(2) of the RFF Statutes and Article 4(5) of the ROFA, the Respondent argued that the Appellant lacked a legal interest to lodge this appeal, objected that the four clubs involved were not part of these proceedings although they were allegedly directly and legitimately interested and affected by this case and refuted any breach of the RFF regulations.

1. Standing to sue according to the RFF Statutes

The question of whether or not a party has standing to sue/appeal (or to be sued) is – according to the well-established CAS jurisprudence (*see* CAS 2020/A/7356; CAS 2020/A/6694; CAS 2016/A/4602; CAS 2013/A/3047; CAS 2008/A/1639) – an issue of substantive law.

The Sole Arbitrator thus noted, as the Panel did in the case CAS 2019/O/6383, that Article 48 para. 8 of the RFF Statutes expressly confers a right to appeal against a decision of the RFF Executive Committee to any of its members who voted against such decision and requested that his/her position be recorded in the minutes of the meeting.

In the present case, it is undisputed that the Appellant voted against the Appealed Decisions and requested that his position be recorded in the minutes of the RFF Executive Committee's Meeting.

Consequently, the Sole Arbitrator concluded that the Appellant had the right to lodge this appeal and thus that the Respondent's objection shall be rejected.

2. Standing to be sued in general

The Respondent is indeed the organisation (through one of its organs, the Executive Committee) that issued the Appealed Decisions and it is undisputed that it has standing to be sued in the present proceedings. However, the Respondent argued that the four clubs involved were not part of these proceedings although they were legitimately interested and directly affected by this case. The Respondent thus objected that those four clubs should have been present in these proceedings in order to exercise their right of defence, because their sporting, financial and legal situation would be irreparably affected should the appeal be upheld.

The Appellant indicated that he directed his appeal solely against the Respondent alone because the Respondent namely, the Romanian Football Federation represents its members and, since no conclusions were taken against the clubs, there was no need to include them in the present proceedings.

The question at hand is therefore whether the Respondent had standing to be sued alone in the present proceedings. In other words, the question is whether the Appellant had to direct its Appeal also against the potentially affected four clubs, and, if so, what legal consequences follow from the Appellant's failure to do so.

On a general point of view, a sports federation such as the Respondent is deemed to be best suited to represent and defend the interests of its members in cases where a request for relief would have an indirect bearing on all its members (a similar reasoning was adopted in the case CAS 2016/A/4787).

However, this is not necessarily the case where a request for relief directly affects one or several specific members (CAS 2020/A/7061, para. 126). In this scenario, the appeal might also have to be directed against the potentially affected member(s) as co-respondent(s) alongside the sports federation from which the appealed decision emanates. This is indeed essential for an arbitral tribunal to ensure that the right to be heard of the member(s) concerned is respected (CAS 2019/A/6351).

Consequently, while noting that he would be in principle prevented from granting any request for relief that would directly affect the rights of an absent third party, the Sole Arbitrator deemed that he should deal with the Appellant's requests for relief in accordance with the above-mentioned test, *i.e.* in a manner which takes into account all the interests involved, the role assumed by the federation as well as the rights of defence and in particular the right to be heard of the directly affected parties.

3. Condition to grant declaratory relief

The Appellant sought to receive a declaratory award that would declare that the Appealed Decisions (a) were made in breach of the RFF Statutes and/or the ROFA and (b) were null and void.

In accordance with the CAS jurisprudence, declaratory reliefs can be granted only if the requesting party establishes a special legal interest to obtain such declaration (CAS 2009/A/1870, para. 132; CAS 2011/O/2574,

para. 49; CAS 2011/A/2612, para. 48; CAS 2013/A/3272, para. 69).

Consequently, because the Appellant failed to show any further legal interest that he could have in the declarations sought under his prayers for relief (a) and (b), the Sole Arbitrator found such prayers inadmissible.

Secondly, the Sole Arbitrator noted that the Appellant requested *"(c) further or in the alternative, [to] set aside the Decisions"*.

The Sole Arbitrator noted that the Appellant's request for relief (c) rested on two distinct types of arguments. The first set of arguments raised by the Appellant strictly concerned the formal validity of the Appealed Decisions as RFF statutory provisions have been allegedly breached. The second set of arguments concerned the application of the RFF regulations with respect to the RFF Executive Committee's approvals of the requests submitted by the clubs in the "Brasov" and "Dacia" cases. The different types of arguments raised by the Appellant imply a separate analysis of the question of who was best suited to defend the Appealed Decisions, especially considering the administrative nature of the present dispute.

4. Standing to be sued alone as regards the formal validity of the federation's decision

In substance, the Appellant alleged that the Appealed Decisions were null and void as a consequence of several procedural violations of the RFF Statutes.

The Sole Arbitrator considered that, despite the fact that third parties would be directly affected by the potential incorrect application of procedural rules by the Respondent, it seemed in principle, that the Respondent would be best suited to defend alone the application of its own procedural rules. For the sake of this specific issue, the Respondent might have standing to be sued alone in this procedure.

5. Standing to be sued alone as regards the substantial issues raised by the Appellant

The Appellant alleged that the Respondent breached several substantive rules when its Executive Committee decided to approve the "Brasov" and "Dacia" cases.

However, the Sole Arbitrator considered that the Respondent could not be best suited to defend alone the Appealed Decisions on the substantive issues raised by the Appellant and that the clubs concerned should have been part of the present proceedings in order to be able to defend their respective case. Indeed, a CAS panel is not in a position to decide whether the appealed decision complied with a sports federations' substantive rules where the analysis of the compliance of the appealed decision with the sports federation's rules would require a concrete assessment of the applications submitted by the clubs directly affected by the outcome of the appeal as well as an analysis of the supporting documentation. Thus, the federation lacked standing to be sued alone in connection with such appealed decisions, and the appellant erred in filing his appeal only against the federation and not also against the clubs directly affected by the outcome of this appeal.

Decision

In light of the foregoing, the Sole Arbitrator decided to dismiss the appeal filed on 9 August 2021 by Mr Emilian Hulubei against the Appealed Decisions issued by the Executive

Committee of the Romanian Football Federation on 19 July 2021 and to confirm the Appealed Decisions issued by the Executive Committee of the Romanian Football Federation on 19 July 2021.

CAS 2021/A/8296
World Anti-Doping Agency (WADA) v. Fédération Internationale de Football Association (FIFA) & Vladimir Obukhov
16 June 2022

Football; Doping (methandienone); Non-binding force of CAS precedents; Purpose and limits of the provision on substantial assistance; Conditions for finding substantial assistance; Consequences of a finding of substantial assistance; Determination of the period of ineligibility to be suspended

Panel
Prof. Luigi Fumagalli (Italy), President
The Hon. Annabelle Bennett AC SC (Australia)
Mr Manfred Nan (The Netherlands)

Facts

Mr Vladimir Obukhov (the "Player" or the "Second Respondent") is a professional football player of Russian nationality born on 8 February 1992. At the time of the doping control, the Player was playing for Torpedo Moskow FC ("Torpedo" or the "Club"), a club affiliated to the Russian Football Union ("FUR").

On 20 March 2013, the Player underwent an out-of-competition doping control in Novogork (Russia). The sample collected was identified by code No. 2783469. On 30 August 2013, the National Anti-Doping Laboratory – MSU of Moscow, reported in the Anti-Doping Administration Management System ("ADAMS") a negative result for the sample under code No. 2783469.

On 11 March 2021, FIFA sent the Player, through the FUR, a *"Notification regarding a potential anti-doping rule violation"* as follows: *"your sample no. 2783469 was … reported as a "negative" finding in … ADAMS although having resulted in an adverse analytical finding (AAF) for the prohibited substance Methandienone (S1.1a, Exogenous Anabolic Androgenic Steroids (AAS)). There is compelling evidence that efforts were made to cover up this AAF by means of an "alternative disappearing positive methodology" (alternative DPM) and to get rid of traces regarding this cover up. … The presence of the above-mentioned prohibited substance in your sample constitutes a breach of the FIFA Anti-Doping Regulations ("FIFA ADR") and may result in you being charged with an anti-doping rule violation of art. 7 FIFA ADR …. As a consequence you may be sanctioned with a period of ineligibility to play of four years if you cannot establish that the ADRV was not intentional …. On receipt of this letter, you have the opportunity to admit the anti-doping rule violation and potentially benefit from a reduction of the otherwise applicable period of ineligibility, if the FIFA Disciplinary Committee decides that an anti-doping rule violation has been committed, and/or to provide substantial assistance in discovering or establishing other anti-doping rule violations as set out in article 24 par. 1 FIFA ADR. …".*

On the same day, 11 March 2021, FIFA also notified another former player of Torpedo, Mr Ivan Knyazev, of a possible anti-doping rule violation relating to a sample collected on 28 May 2013, reported as negative by the Moscow Laboratory, although it had resulted in an adverse analytical finding for the prohibited substance Methandienone, *i.e.* the same substance as the one detected in the Player's sample.

On 22 March 2021, the Player, in a letter to FIFA, admitted his anti-doping rule violation and expressed his intention to provide

substantial assistance to FIFA. In that regard, the Player stated the following: *"… it is crucial to mention that the Player strongly believes that at the time of the events in question there was a sophisticated doping scheme at FC Torpedo Moscow, where the Player was employed at that time, which included the manipulations with the prohibited substances given to the football players by the team doctor and being covered by all the persons involved. In this context, please note that the Player is willing to provide Substantial Assistance to FIFA as he possesses information which can result in discovering or bringing forward an anti-doping rule violation by another Person, in particular the doctor of FC Torpedo Moscow. …".*

On 24 March 2021, FIFA informed the Player that disciplinary proceedings had been opened against him, for the potential breach of Article 17 of the FIFA Disciplinary Code ("FDC"). Noting the Player's willingness to provide substantial assistance, FIFA invited him to provide the relevant information mentioned in his communication (including corroborating evidence and documentation).

On 4 May 2021, the Player answered the FIFA invitation, requesting the FIFA Disciplinary Committee to reduce the otherwise applicable sanction and impose a six-month period of ineligibility for substantial assistance, on the basis of information regarding a doping scheme allegedly orchestrated within the club of FC Torpedo Moscow by the club's doctor (the "4 May Declaration"). Attached to the 4 May Declaration, the Player submitted to FIFA written statements signed by three other former players of Torpedo.

On 10 May 2021, FIFA informed the Player that his case would be submitted to the Disciplinary Committee for consideration and decision on 27 May 2021.

On 17 May 2021, the Player transmitted to FIFA a letter of the same date from FUR, regarding the results of internal investigation that the latter had conducted at the request of the Player.

On 27 May 2021, the FIFA Disciplinary Committee decided that the Player had provided complete and credible substantial assistance regarding his case and considered that an effective suspension of six months, as proposed by the Player, remained within the acceptable range in the light of the specific circumstances of this case in accordance with the applicable FIFA ADR. As a result, the Disciplinary Committee determined that both the Player and FIFA sign a cooperation agreement, to be thereafter validated by the FIFA Disciplinary Committee, to confirm that the conditions for providing complete and credible substantial assistance had been met and that an effective suspension of six months was within the reasonable range in this matter. On 2 June 2021, the Player agreed to sign the cooperation agreement and accepted the sanction of a six-month period of ineligibility.

On 4 June 2021, the Disciplinary Committee provisionally suspended the Player in order to avoid any irreparable harm that might be caused to him by any delay in the negotiation and conclusion of the cooperation agreement. On 11 June 2021, a cooperation agreement (the "Cooperation Agreement") was signed between FIFA and the Player.

On 14 July 2021, the FIFA Disciplinary Committee issued a decision (the "Decision") as follows:

"1. Mr Obukhov is declared ineligible for a period of six months starting from 2 June 2021 until 2 December 2021.

2. The Cooperation Agreement signed by Mr Obukhov

and FIFA is hereby ratified by the Disciplinary Committee and its terms are incorporated into this decision".

On 20 August 2021, FIFA transmitted the Decision to WADA. On 8 September 2021, WADA filed a Statement of Appeal with the CAS to challenge the Decision. WADA requested the Decision to be set aside and that the Player be declared ineligible for two years.

On 9 November 2021, FIFA, in a letter to the Player, invited him to supplement the already provided information. On 26 November 2021, the Player provided to FIFA three written statements of former players of Torpedo.

A hearing was held on 17 March 2022 by video link.

Reasons

1. Non-binding force of CAS precedents

The first issue to be examined in this arbitration concerned the "cooperation" rendered by the Player and whether it qualified as Substantial Assistance under the mentioned regulations.

The Panel noted that the issues involved in the application of the provisions regarding Substantial Assistance had been the object of a number of CAS awards invoked by the Parties, even though to draw diverging conclusions. In any case, with respect to the force of CAS precedents, the Panel recalled that each case had to be decided on its own facts and, *"although consistency* … [was] *a virtue, correctness remain*[ed] *a higher one".*

2. Purpose and limits of the provision on substantial assistance

As a starting point, the Panel underlined that the existing mechanism was meant to be essential in the fight against doping. It was therefore important that the objective of Article 20 of the FIFA ADR, *i.e.* to encourage athletes, subject to the imposition of an ineligibility period, to come forward if they are aware of doping offences committed by other persons, was not undermined by an overly restrictive application of the provision. At the same time, however, it was important that "benefits" to athletes would not be applied too lightly, without clear evidence of Substantial Assistance: the fight against doping was a serious matter, and only effective assistance in its pursuit could entitle an athlete to obtain a benefit with respect to the ineligibility period he/she had to serve for his/her anti-doping rule violation.

3. Conditions for finding substantial assistance

The Panel recalled that Article 20, read in conjunction with Definition No 54, of the FIFA ADR determined the conditions under which Substantial Assistance given by a player could be recognized: (i) the Substantial Assistance could be provided to FIFA, a national federation, an anti-doping organization, a criminal authority or a disciplinary body; (ii) the Substantial Assistance had to result either in FIFA, the national federation, or the anti-doping organization discovering or establishing an anti-doping rule violation by another person, or in the criminal authority or the disciplinary body discovering or establishing a criminal offence or a breach of professional rules by another person; (iii) the player providing the Substantial Assistance had to both fully disclose in a signed written statement all information he/she possessed in relation to anti-doping rule violations, and fully cooperate with the investigation and

adjudication of any case related to that information; (iv) the information provided had to be credible; and (v) the information provided had to either comprise an important part of any case that was initiated, or, if no case was initiated, have provided a sufficient basis on which a case could have been brought.

Turning to the dispute at stake, the Panel noted that it concerned in fact the final element, mentioned above, that needed to be satisfied in order to establish that Substantial Assistance was given, *i.e.* whether *"the information provided … comprise[d] an important part of any case that is initiated, or, if no case is initiated, … have provided a sufficient basis on which a case could have been brought"*. The other points were not in issue. The Panel was of the opinion that, for this element to be satisfied, it was not necessary that the information given by the Player had in itself been a sufficient basis to secure a finding of an anti-doping rule violation. Under Article 20 of the FIFA ADR, Substantial Assistance could also have resulted in "discovering" an anti-doping rule violation – irrespective of its subsequent "establishment", for which additional elements (such as a hearing of the accused) may have been needed.

On this basis, the Panel remarked that the Player, as soon as he had been notified of his potential anti-doping rule violation, had rendered the 4 May Declaration, giving details of a practice of the Doctor and the treatment he had been made to undergo around the date on which he had provided the urine sample that tested positive. Such declaration was to be read together with the statements signed by four other individuals, provided by the Player together with the 4 May Declaration, as well as by the events with respect to another player of the Club, who had tested positive for the same substance as the Player. The very statements of the Doctor to the FUR, however self-exculpating, had indirectly confirmed the credibility of the Player's indications regarding the medical *routine* followed at the Club. In other words, the Player's declarations appeared to the Panel to offer *"a sufficient basis on which a case could have been brought"* against the Doctor: the fact that no case had eventually been brought by FUR or FIFA went beyond the Player's control and responsibility. For the Panel therefore, the cooperation given by the Player had amounted to Substantial Assistance under Article 20 of the FIFA ADR.

4. Consequences of a finding of Substantial Assistance and determination of the period of ineligibility to be suspended

For WADA, the Decision to "reduce" the period of ineligibility imposed on the Player for his anti-doping rule violation was wrong, firstly, as the FIFA ADR, in fact, only allowed FIFA to "suspend" a portion of the ineligibility period, subject to later reinstatement if the Player ceased to co-operate.

The Panel found the position of WADA to be correct. Indeed, Article 20 of the 2012 FIFA ADR clearly indicated that the FIFA Disciplinary Committee could "suspend" a portion of ineligibility imposed. In other words, the FIFA Disciplinary Committee, if it wished the Player to serve only 6 months of ineligibility, had to impose a sanction of 24 months, and suspend a portion of such period corresponding to 18 months. The Decision, to the extent it had directly imposed a reduced sanction, had to be corrected.

WADA contended that the Decision was also wrong, secondly, to the extent that it had applied the maximum possible "reduction" of 75% in

respect of entirely speculative information, unsupported by concrete evidence and useless. According to WADA, the Player was not entitled to the maximum possible suspension, taking account of the criteria to be applied in the assessment of the measure of "suspension" to be granted.

The Panel recalled that the criteria to be considered in the determination of the extent to which the otherwise applicable period of ineligibility could be suspended were i) the seriousness of the anti-doping rule violation; and ii) the significance of the Substantial Assistance rendered, provided however that iii) no more than three-quarters of the otherwise applicable period of ineligibility could be suspended. In connection with the seriousness of the anti-doping rule violation, any performance-enhancing benefit which the person providing Substantial Assistance could be likely to still enjoy had to be considered, while in the assessment of the importance of the Substantial Assistance, a) the number of individuals implicated, b) the status of those individuals in the sport, c) whether a scheme of trafficking under Article 2.7 or administration under Article 2.8 of the WADC had been involved, and d) whether the violation had involved a substance or method which was not readily detectible in testing, were to be taken into account. As a general matter, the earlier in the results management process the Substantial Assistance was provided, the greater the percentage of the otherwise applicable period of ineligibility could be suspended. The maximum suspension of the ineligibility period was only to be applied in very exceptional cases.

The Panel held that, considering the mentioned relevant factors, FIFA had clearly exceeded the discretion it had in the evaluation of the measure of the benefit to be given to the Player for the Substantial Assistance he had provided. In fact, FIFA had applied a "reduction" in the maximum measure allowed by the rules (i.e., for 18 months). The Panel, however, was of the opinion that the case of the Player was not "very exceptional" and did not warrant such "reduction". Even though qualifying as a Substantial Assistance (because it had offered a sufficient basis to bring a charge against the Doctor, or at least to lead to additional investigation as to the practices at the Club), the information provided had not led to any anti-doping rule violation being imposed or charged, and therefore had proved to be of little significance.

As a result, the Panel, in the exercise of its *de novo* power of review of the facts and the law under Article R57 of the CAS Code, found that the period of ineligibility to be imposed on the Player should be suspended only in the measure of 12 months. Even though the Substantial Assistance had not lead to any further proceedings, it concerned an anti-doping rule violation that had occurred 8 years before it had been rendered, it had promptly been given as soon as the Player had received a notification of his potential anti-doping rule violation, it concerned the practice of a doctor, i.e. of an individual having peculiar responsibilities within a football club, it exposed a potential violation that could involve a number of other players and individuals.

Decision

In light of the foregoing, the Panel found that the Decision had to be partially modified, so that the otherwise applicable ineligibility period of two years was suspended in a measure of 12 months.

Jugements du Tribunal fédéral*
Judgements of the Federal Tribunal
Sentencias del Tribunal federal

* 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
Resúmenes de algunas sentencias del Tribunal Federal Suizo relacionadas con la jurisprudencia del TAS

4A_246/2022
1er novembre 2022
A. SA c. B.

Recours en matière civile contre la sentence rendue le 26 avril 2022 par le Tribunal Arbitral du Sport (CAS 2020/A/7543)

Compatibilité des règles de football en matière de succession sportive avec l'Ordre Public

Extrait des faits

Le 31 décembre 2008, le footballeur de nationalité brésilienne B. (ci-après: le joueur) a assigné le club... C. devant la Chambre de Résolution des Litiges (CRL) de la Fédération Internationale de Football Association (FIFA) en vue d'obtenir le paiement de salaires dus en vertu du contrat de travail conclu par les parties le 27 juin 2008.

Statuant le 18 décembre 2012, la CRL a condamné le club défendeur à verser au demandeur la somme de 400'000 euros, intérêts en sus, dans les trente jours. Ladite décision n'a pas été attaquée et est devenue définitive.

Le 16 juillet 2014, le Secrétariat de la Commission de discipline de la FIFA a ouvert une procédure à l'encontre du club précité en raison du non-paiement des sommes dues au joueur selon la décision rendue par la CRL.

Le 14 janvier 2015, la Commission de discipline a suspendu la procédure après avoir été informée par la Fédération X. de Football que le club en question n'était plus affilié à celle-ci en raison de la procédure d'insolvabilité ouverte à son encontre.

Le 2 décembre 2019, le joueur a demandé à la Commission de discipline d'ouvrir une procédure disciplinaire à l'encontre de A. SA vu sa qualité de successeur sportif du club C. Le 24 juin 2020, la Commission de discipline a donné suite à cette requête.

Par décision du 22 octobre 2020, la Commission de discipline a reconnu A. SA coupable de n'avoir pas respecté la décision rendue le 18 décembre 2012 par la CRL et lui a imparti un dernier délai de grâce de 30 jours pour s'acquitter du montant de 400'000 euros, intérêts en sus, dû au joueur, sous peine de se voir imposer automatiquement une interdiction d'enregistrer de nouveaux joueurs, tant au niveau national qu'international.

Le 25 novembre 2020, A. SA a appelé de cette décision auprès du Tribunal Arbitral du Sport (TAS).
Au terme de la sentence du 26 avril 2022, l'appel a été rejeté et la décision attaquée confirmée.

Le 27 mai 2022, A. SA (ci-après: le recourant) a formé un recours en matière civile, assorti d'une requête d'effet suspensif, en tête duquel il conclut à l'annulation de la sentence précitée.

Extrait des considérants

[…]

3.
Le Tribunal fédéral examine d'office et librement la recevabilité des recours qui lui sont soumis (**ATF 138 III 46** consid. 1)

3.1. Selon l'art. 76 al. 1 let. b LTF, la partie recourante doit avoir un intérêt digne de protection à l'annulation de la décision attaquée. L'intérêt digne de protection consiste dans l'utilité pratique que l'admission du recours apporterait à son auteur, en lui évitant de subir un préjudice de nature économique, idéale, matérielle ou autre que la décision attaquée lui occasionnerait (**ATF 137 II 40** consid. 2.3). L'intérêt doit être actuel, c'est-à-dire qu'il doit exister non seulement au moment du dépôt du recours, mais encore au moment où l'arrêt est rendu (**ATF 137 I 296** consid. 4.2; **137 II 40** consid. 2.1). Le Tribunal fédéral déclare le recours irrecevable lorsque l'intérêt digne de protection fait défaut au moment du dépôt du recours. En revanche, si cet intérêt disparaît en cours de procédure, le recours devient sans objet (**ATF 137 I 23** consid. 1.3.1 et les références citées).

3.2.
3.2.1. Dans sa réponse, l'association intimée expose, sans être contredite par le recourant, que ce dernier a versé à l'intimé, postérieurement au dépôt de son recours, le montant dû selon la décision rendue le 18 décembre 2012 par la CRL, ce qui a eu pour effet de mettre un terme à la procédure disciplinaire visant le recourant. Dans la mesure où ledit paiement aurait été effectué sans la moindre réserve de la part du recourant, l'association intimée est d'avis que l'intérêt digne de protection de l'intéressé a disparu en cours de procédure, raison pour laquelle le recours serait devenu sans objet.

3.2.2. Le recourant conteste vivement ce point de vue. Il fait tout d'abord valoir qu'il n'a pas procédé audit versement sans la moindre réserve. Il soutient, ensuite, qu'il n'a pas eu d'autre choix que de payer l'intimé, faute de quoi il aurait disposé d'un effectif de joueurs insuffisant, étant donné qu'il se serait trouvé dans l'impossibilité de recruter de nouveaux éléments. Se référant à un arrêt rendu par le Tribunal fédéral (4A_604/2010 du 11 avril 2011 consid. 1.2), il prétend que la sanction prononcée à son encontre par la Commission de discipline, entérinée par le TAS, a déployé ses effets jusqu'au moment du paiement, raison pour laquelle il conserve un intérêt résiduel au recours tendant à faire constater les vices affectant la sentence attaquée. Enfin, l'intéressé soutient que rayer la présente cause du rôle reviendrait à le priver du droit à un procès équitable.

3.2.3. L'association intimée rétorque que le recourant n'a jamais été contraint de payer le montant qu'il a versé à l'intimé et qu'il est erroné de soutenir que le club n'aurait pas eu d'autre choix que de procéder de la sorte. Elle fait en outre valoir que la jurisprudence citée par le recourant n'est pas transposable à la présente espèce. A cet égard, elle observe que le recourant n'a même pas allégué que l'interdiction de transfert dont il a été brièvement l'objet lui aurait causé un quelconque préjudice.

3.3. On peut légitimement se demander si le recourant conserve un intérêt actuel, pratique et concret à ce que la sentence attaquée soit annulée, vu le paiement opéré par ses soins postérieurement au dépôt de son recours.

Dans la sentence entreprise, le TAS a confirmé la décision rendue par la Commission de discipline au terme de laquelle celle-ci avait reconnu le recourant coupable de n'avoir pas respecté la décision rendue le 18 décembre 2012 par la CRL et lui avait accordé un délai de grâce de trente jours pour s'acquitter de sa dette à l'égard de l'intimé, sous la menace de se voir imposer automatiquement une interdiction d'enregistrer de nouveaux joueurs, tant au niveau national qu'international. Dès lors qu'il a payé son dû, le recourant ne court plus le risque d'une telle sanction. Il n'a donc, en

principe, plus d'intérêt actuel à faire annuler la sentence en tant qu'elle confirme la validité de la fixation du délai de grâce et lui indique la conséquence liée au non-respect de ce délai. Cela étant, il conserve néanmoins un intérêt à l'annulation de la sentence incriminée. Il appert, en effet, que l'intéressé a effectivement été interdit de recruter de nouveaux joueurs durant la période comprise entre la fin du mois de mai 2022 et le 8 juillet 2022, date à laquelle il a procédé au paiement d'un montant de 400'000 euros en faveur de l'intimé. Il en découle que le recourant n'a pas pu recruter de nouveaux joueurs durant une certaine période alors même que le marché des transferts était ouvert depuis le 14 juin 2022. Il sied, par ailleurs, de relever que le recourant n'était pas partie à la procédure à l'issue de laquelle la CRL a alloué un montant de 400'000 euros à l'intimé. Aussi, s'il s'avérait que c'est à tort que le TAS a confirmé la décision de la Commission de discipline au terme de laquelle celle-ci avait reconnu le recourant, en sa qualité de successeur sportif du club débiteur du montant dû à l'intimé, coupable de n'avoir pas respecté la décision rendue par la CRL, le recourant pourrait tenter d'obtenir, par la suite, le remboursement du montant qu'il a versé par hypothèse, indûment, à l'intimé.

Eu égard aux circonstances tout à fait particulières de la présente cause, il y a dès lors lieu d'admettre que le recourant conserve, en dépit des dénégations de l'association intimée et du paiement intervenu, un intérêt à l'annulation de la sentence querellée.

[…]

5.
Dans un moyen qu'il convient d'examiner en premier lieu, le recourant se plaint de diverses violations de son droit d'être entendu (considérant 5)

5.1. La jurisprudence a déduit du droit d'être entendu, tel qu'il est garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, 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. C'est à elle d'établir, d'une part, que le tribunal arbitral n'a pas examiné certains des éléments de fait, de preuve ou de droit qu'elle avait régulièrement avancés à l'appui de ses conclusions et, d'autre part, que ces éléments étaient de nature à influer sur le sort du litige (**ATF 142 III 360** consid. 4.1.1 et 4.1.3). 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 appartiendra de justifier cette omission dans leurs observations sur le recours (**ATF 133 III 235** consid. 5.2; arrêts 4A_542/2021du 28 février 2022 consid. 5.1; 4A_618/2020 du 2 juin 202 consid. 4.2). C'est le lieu de rappeler que 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).

5.2. Pour étayer son grief, le recourant expose que l'arbitre aurait omis d'examiner un certain nombre d'arguments et de moyens de preuve en lien avec le principe de la succession sportive et son application à la présente espèce. A cet égard, il fait valoir que l'arbitre aurait ignoré trois arguments pertinents et les moyens de preuve y relatifs. Celui-ci n'aurait,

premièrement, pas pris en considération les nombreux éléments avancés dans le mémoire d'appel visant à démontrer que c'était en réalité un autre club (D.) qui était le véritable successeur sportif de C. Deuxièmement, l'arbitre n'aurait pas tenu compte de ce que le recourant n'est, de l'avis de la Fédération X. de Football, pas le successeur sportif de C. Enfin, troisièmement, il n'aurait pas pris en considération les arguments pourtant décisifs tendant à démontrer que l'intimé n'avait pas fait preuve de la diligence requise dans le cadre de la procédure de faillite du C. aux fins de recouvrer le montant que ce dernier lui devait, raison pour laquelle le recourant devait être exonéré de toute responsabilité à l'égard de l'intimé. A en croire le recourant, l'arbitre aurait vraisemblablement statué différemment s'il avait tenu compte de l'ensemble des éléments précités.

5.3. Tel qu'il est présenté, le grief examiné ne saurait prospérer. Il saute d'emblée aux yeux que l'intéressé, sous le couvert du moyen pris de la violation répétée de son droit d'être entendu, s'en prend, en réalité, à l'appréciation des preuves à laquelle l'arbitre s'est livré pour en tirer la conclusion à laquelle il a abouti et tente ainsi d'obtenir, de manière détournée, un contrôle matériel de la sentence, ce qui n'est pas admissible. En tout état de cause, la lecture de la sentence entreprise permet de constater que l'arbitre a rejeté, ne serait-ce que de manière implicite, les éléments prétendument décisifs auxquels fait allusion le recourant. L'arbitre a en effet correctement résumé l'argumentation du recourant selon laquelle ce dernier n'était pas le successeur sportif de C., puisqu'il s'agissait en réalité d'un tiers. Il a en outre exposé la thèse prônée par l'intéressé en vertu de laquelle l'intimé n'aurait prétendument pas fait preuve de la diligence requise au moment de faire valoir ses droits dans la procédure d'insolvabilité menée à l'encontre de C. Lors de l'examen des mérites de l'appel qui lui était soumis, l'arbitre a commencé par énoncer le texte de l'art. 15 al. 4 du Code disciplinaire de l'association intimée (édition 2019; ci-après: CD), lequel a la teneur suivante:

"Le successeur sportif d'une partie coupable de non-respect d'une décision doit également être considéré comme telle et ainsi soumis aux obligations établies par le présent article. Les critères permettant de déterminer si une entité peut être considérée comme le successeur sportif d'une autre entité sont notamment le siège, le nom, la forme juridique, les couleurs de l'équipe, les joueurs, les actionnaires ou parties prenantes ou propriétaires, et la catégorie de compétition concernée".

Après avoir souligné que les critères mentionnés à l'art. 15 al. 4 CD ne sont pas exhaustifs, l'arbitre a procédé à un examen attentif des circonstances du cas d'espèce pour aboutir à la conclusion que le recourant devait bel et bien être considéré comme le successeur sportif de C. Pour aboutir à cette solution, il a notamment relevé que le recourant:

- avait un nom quasiment identique à celui de l'ancien club;
- se présentait publiquement, notamment sur son propre site internet, comme étant le même club que le C;
- utilisait le même logo, évoluait sous les mêmes couleurs et arborait le même maillot que l'ancien club;
- avait recours au même nom de domaine que l'ancien club;
- avait disputé ses rencontres à domicile dans le même stade que celui de l'ancien club jusqu'à sa démolition (sentence, n. 111-119).

Sous n. 120 de sa sentence, l'arbitre a en outre indiqué ce qui suit:

"The arguments as raised by the Appellant that premises, ownership, license football teams, and legal entities are different are fully noted and taken into account by the Sole Arbitrator. However, these arguments will not prevail over the significant number of elements on the other side, as summed up above, that point toward the existence of sporting succession. (...) In addition, whether a club is operated through a different legal entity does not bear relevance on whether a sporting succession has taken place (...). It is undeniable that, by identifying itself as the exact same club that had earned popularity in... for almost a century, the Appellant has benefited from a pre-existing fan base, commercial value, and a legacy that an actual new club could have never obtained from one day to another".

Il résulte de ce qui précède que l'arbitre a rejeté, à tout le moins de manière implicite, la thèse selon laquelle ce serait en réalité une autre équipe de football, à savoir D., qui aurait succédé sportivement à C. Il appert également de la motivation retenue par l'arbitre que celui-ci n'a de toute évidence pas jugé décisive la circonstance selon laquelle la Fédération X. de Football ne considérait prétendument pas le recourant comme le successeur sportif de l'ancien club.

C'est également en vain que le recourant dénonce une violation de son droit d'être entendu au motif que l'arbitre n'aurait pas tenu compte des arguments avancés par lui et des pièces qu'il avait produites aux fins de démontrer que l'intimé n'avait pas fait preuve de la diligence requise en vue de faire valoir ses droits dans la procédure de faillite visant C. Il ressort de la sentence attaquée que l'arbitre a considéré, à tort ou à raison, que l'intimé n'était pas tenu de produire sa créance dans la faillite de l'ancien club, puisque les prétentions qui étaient en l'occurrence fondées sur un contrat de travail devaient, en vertu du droit de l'insolvabilité..., être inscrites d'office dans l'état de collocation. L'arbitre a en outre constaté que l'administrateur de la faillite de l'ancien club avait parfaitement connaissance de la créance de l'intimé à l'encontre du failli. Aussi a-t-il écarté la thèse selon laquelle l'intimé aurait dû produire sa créance dans la faillite et considéré, à tout le moins de manière implicite, que ce dernier ne pouvait pas se voir reprocher une quelconque forme de négligence sous prétexte que sa créance ne figurait pas dans l'état de collocation établi dans le cadre de la faillite (sentence, n. 125-134). Pour le reste, la tentative de l'intéressé visant à démontrer que le contrat conclu par l'intimé avec l'ancien club ne saurait être qualifié de contrat de travail est vouée à l'échec. Il s'ensuit le rejet du grief examiné dans la mesure de sa recevabilité.

6.
Dans un second moyen, le recourant soutient que la sentence attaquée contreviendrait à l'ordre public matériel (art. 190 al. 2 let. e LDIP) (considérant 6)

6.1. 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 144 III 120** consid. 5.1; **132 III 389** consid. 2.2.3). Tel est le cas 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 (**ATF 144 III 120** consid. 5.1). Qu'un motif retenu par un 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 144 III 120** consid. 5.1).

6.2. Le recourant débute sa démonstration d'une prétendue contrariété à l'ordre public matériel en détaillant, sur le plan juridique, le

mécanisme de la succession sportive prévu par l'art. 15 al. 4 CD, en vertu duquel le successeur sportif est tenu de répondre des dettes de l'ancien club et de supporter les conséquences d'un éventuel défaut de paiement. A en croire l'intéressé, la sentence attaquée consacrerait une violation grave et nette de divers principes et droits fondamentaux. Tout d'abord, la figure juridique de la succession sportive revient à faire fi de l'indépendance d'entités juridiquement distinctes et ce, même en l'absence, d'une quelconque forme d'abus de droit. Ensuite, la sentence entreprise est contraire au principe " pas de peine sans loi ", puisque les faits permettant de fonder la succession sportive se sont déroulés avant l'entrée en vigueur de l'art. 15 al. 4 CD. Le recourant prétend que la sentence est contraire aux principes les plus fondamentaux, notamment celui de l'interdiction de l'arbitraire, puisqu'elle confirme la décision lui enjoignant de se conformer à la décision rendue par la CRL avant même que sa qualité de successeur sportif n'ait été établie. Enfin, l'intéressé est d'avis que la sentence querellée porte une atteinte inadmissible à sa liberté économique.

6.3. Semblable argumentation n'emporte pas la conviction de la Cour de céans.

6.3.1. Force est tout d'abord de relever que le recourant ne démontre pas que le non-respect éventuel du principe de l'indépendance juridique des sujets de droit pourrait représenter une violation de l'ordre public matériel au sens de l'art. 190 al. 2 let. e LDIP. En tout état de cause, l'intéressé ne fait rien d'autre que se plaindre de ce que la réglementation édictée par l'association intimée prévoit qu'une entité juridique peut être tenue de répondre des engagements d'une personne juridique distincte même en l'absence de tout abus de droit de la part du successeur sportif. En soutenant que seule l'existence d'un tel abus de droit devrait justifier la mise en oeuvre du mécanisme de la succession sportive, il semble vouloir calquer les règles édictées par une association privée sur le principe de la transparence (" *Durchgriff* ") consacré en droit suisse. Ce faisant, il méconnaît d'une part le principe de l'autonomie de l'association, garanti par l'art. 63 CC, en vertu duquel celle-ci dispose d'une large autonomie dans l'établissement et l'application des règles qui régissent sa vie sociale et ses relations avec ses membres (**ATF 134 III 193** consid. 4.3). Amené à se prononcer sur le grief tiré d'une prétendue contrariété à l'ordre public matériel d'une sentence rendue dans une affaire de succession sportive, le Tribunal fédéral a du reste précisé qu'une association pouvait en principe, en vue d'atteindre son but, édicter des dispositions réglementaires instaurant des sanctions visant à assurer le respect des obligations pesant sur ses membres (arrêt 4A_616/2021 du 1er avril 2022 consid. 5.5). D'autre part, le recourant n'établit nullement en quoi l'application d'une règle prévoyant des conditions distinctes de celles permettant la mise en oeuvre du principe de la transparence en droit suisse aboutirait en l'occurrence à une sentence dont le résultat serait incompatible avec l'ordre public matériel.

6.3.2. Le recourant, qui dénonce une violation du principe de la légalité (" pas de peine sans loi "), ne démontre pas davantage que celui-ci relèverait de l'ordre public matériel visé par l'art. 190 al. 2 let. e LDIP. A cet égard, il sied de rappeler que le Tribunal fédéral ne s'est jamais formellement prononcé sur le point de savoir si le principe *nulla poena sine lege*, qui domine l'interprétation de la loi pénale, fait partie ou non de l'ordre public matériel (arrêts 4A_462/2019 du 29 juillet 2020 consid. 7.1; 4A_600/2016, précité, consid. 3.3.4.2; 4A_488/2011 du 18 juin 2012 consid. 6.2 et les références citées). Quoi qu'il en soit, le présent grief, à le supposer recevable, ne

saurait prospérer. Force est tout d'abord de souligner que le recourant n'a visiblement jamais soulevé pareil moyen lors de la procédure arbitrale. Aussi ne saurait-il réparer pareille omission, en faisant valoir ce grief, pour la première fois, devant le Tribunal fédéral. En tout état de cause, l'intéressé fait l'amalgame entre la sanction susceptible d'être prononcée en cas de non-respect d'une décision rendue par un organe juridictionnel de l'association intimée et le statut de successeur sportif. Le mécanisme de la succession sportive ne constitue pas, à proprement parler, une sanction mais un principe en vertu duquel le successeur sportif est tenu de répondre des divers engagements et obligations du club auquel il a succédé. En l'occurrence, la sanction pouvant être infligée à un club en cas de refus de se conformer à une décision existait déjà au moment des faits litigieux, puisqu'elle était prévue par l'art. 64 al. 1 de l'ancienne édition du CD. Quant au mécanisme de la succession sportive, si celui-ci a certes été codifié à l'art. 15 al. 4 de l'édition 2019 du CD, il avait déjà été consacré depuis plusieurs années par la jurisprudence du TAS (cf. à cet égard, VITUS DERUNGS, Insolvency of Football Clubs and Sporting Succession: Financial Claim Proceedings before FIFA and the Court of Arbitration for Sport, 2022, n. 115). Le recourant concède du reste lui-même, dans son mémoire de recours, que le mécanisme en question trouvait sa source dans ladite jurisprudence lorsque les faits pertinents ont eu lieu. Dans ces conditions, il est malvenu de venir soutenir, pour la première fois devant le Tribunal fédéral, qu'il n'était ni prévisible ni compréhensible pour lui d'anticiper les sanctions susceptibles d'être prononcées à son encontre.

6.3.3. Le recourant ne peut pas davantage être suivi lorsqu'il prétend que la sentence attaquée est contraire aux principes les plus fondamentaux, notamment celui de la prohibition de l'arbitraire, dans la mesure où elle valide la décision disciplinaire lui imposant de verser une certaine somme d'argent à l'intimé avant même que sa qualité de successeur sportif n'ait été établie. L'intéressé fait en effet fausse route lorsqu'il semble vouloir assimiler la prétendue violation du principe de l'interdiction de l'arbitraire à une contrariété à l'ordre public au sens de l'art. 190 al. 2 let. e LDIP, dès lors que l'incompatibilité de la sentence avec l'ordre public est une notion plus restrictive que celle d'arbitraire (**ATF 144 III 120** consid. 5.1; arrêts 4A_318/2018, précité, consid. 4.3.1; 4A_600/2016, précité, consid. 1.1.4). Au demeurant, l'association intimée fait valoir, à juste titre, que le recourant a eu tout loisir de faire valoir ses arguments devant les instances précédentes aux fins de démontrer qu'il ne pouvait pas être assimilé à un successeur sportif de C.

C'est également en vain que l'intéressé dénonce une atteinte inadmissible à sa liberté économique. Pour qu'une restriction de la liberté économique puisse être considérée comme excessive au sens de la jurisprudence du Tribunal fédéral, il faut qu'elle livre celui qui s'est obligé à l'arbitraire de son cocontractant, supprime sa liberté économique ou la limite dans une mesure telle que les bases de son existence économique sont mises en danger (arrêt 4A_312/2017 du 27 novembre 2017 consid. 3.1 et les références citées). Or, force est de constater que la sentence attaquée n'entraîne pas de telles conséquences pour le recourant. Celui-ci conserve effectivement le droit de déployer ses activités économiques. Il ne s'expose du reste, en l'état, à aucune sanction de la part de l'association intimée puisqu'il a d'ores et déjà versé le montant qui était dû à l'intimé. Par ailleurs, on ne discerne pas en quoi la sentence attaquée aurait pour effet de livrer le recourant à l'arbitraire de l'association intimée. L'argumentation du

recourant selon laquelle la sentence attaquée porterait atteinte à son avenir professionnel puisqu'elle donnerait l'impression aux tiers qu'il serait un mauvais payeur ne permet pas davantage de qualifier le résultat auquel a abouti l'arbitre de contraire à l'ordre public matériel. Pour le reste, la position du recourant n'est, contrairement à ce qu'il prétend, pas comparable à celle du footballeur brésilien Matuzalem, lequel s'était vu menacer d'une suspension illimitée de toute activité footballistique pour le cas où il ne paierait pas une indemnité supérieure à 11 millions d'euros, intérêts en sus, à son ancien club à bref délai (**ATF 138 III 322**). La situation est sensiblement différente en l'espèce puisque la sentence attaquée n'a pas pour effet d'empêcher l'intéressé d'exercer son activité économique normalement.

Décision

Le recours est rejeté dans la mesure où il est recevable.

4A_420/2022
30 March 2023
Cardiff City Football Club Limited v. SASP Football Club de Nantes

Appeal against the arbitral decision by the Court of Arbitration for Sport of 26 August 2022 (CAS 2019/A/6594)

Limits in the FIFA PSC jurisdiction to hear set-off claims for damages against contractual claims in football transfer disputes

Introductory note and translation of the Tribunal Federal judgement from French to English by Despina Mavromati[1]

This case relates to the international transfer of the Argentinean football player Emiliano Sala to FC Cardiff ("**Appellant**") from FC Nantes ("**Respondent**", jointly referred to as the "**Parties**") in January 2019 and his tragic plane crash which occurred shortly afterwards. The SFT judgment essentially relates to the scope of the arbitration clause between the parties to a transfer agreement but also to the interpretation of the scope of disputes that can be decided by the FIFA dispute resolution bodies and, subsequently, by the CAS.

The Parties had agreed on a transfer price of EUR 17,000,000, to be paid in three installments, with the first installment of EUR 6,000,000 payable within five days after the registration of the player with FC Nantes. Hours after the finalization of the transfer agreement with the FIFA Transfer Matching System ("**TMS**"), the player tragically died in a plane crash over the English Channel.

FC Nantes filed a claim before the FIFA Players Status Chamber ("**PSC**") requesting payment of the first instalment, but FC Cardiff argued that FC Nantes was liable for the circumstances that led to the player's death, thus it intended to claim set-off for damages against the claims raised by FC Nantes. The FIFA PSC upheld FC Nantes' claim and held that it had no jurisdiction to hear the claim for damages.

FC Cardiff appealed against the FIFA PSC decision to the CAS which dismissed the appeal. The CAS panel bifurcated the procedure and decided, as preliminary matters, the validity of the transfer contract, the PSC and CAS had jurisdiction to hear the claim for damages, and the possibility to extinguish a contractual claim by a set-off tort claim. After declaring that the transfer had already taken place before the player's accident, the panel held that neither the FIFA PSC nor the CAS had jurisdiction to rule on a claim of extra-contractual nature (i.e., the claim that FC Nantes was responsible for the player's death).

In the subsequent appeal to the SFT, the Appellant invoked a violation of Art. 190 (2) (b) of the Federal Act on Private International Law ("**PILA**") considering that the CAS panel had erroneously interpreted the arbitration agreement enshrined both in the contract and in the FIFA regulations. In a very interesting analysis, the SFT reiterated the various

[1] Attorney-at-Law, of Counsel, BianchiSchwald LLC; CAS Arbitrator; Lecturer at the Law School of the University of Lausanne.

principles of statutory interpretation applying to the regulations of large sports federations, such as FIFA.

This note discusses the key findings in the SFT judgement. An English translation of the SFT judgement can also be viewed below.

Interpretation of the contractual agreement by the CAS and the SFT

The SFT confirmed the CAS panel's view that its own jurisdiction could not go beyond the jurisdiction of the FIFA PSC. Even though Art. 377 para. 1 Swiss Code of Civil Procedure ("**CPC**") provides for the right of the panel to deal with a counterclaim for damages, there were no reasons that justified the concurrent ruling on claims based on the transfer agreement and on (the unrelated) set-off against a tort claim (at 5.3). Notwithstanding the broad formulation of the arbitration agreement in the transfer contract (*"Any dispute arising out of or in connection with this transfer agreement…"*), the contract did not extend to the clearly distinct set-off claim for damages based on the plane crash (at 5.4.3).

Interpretation of the FIFA Regulations

Refraining from rendering a general judgment, and while acknowledging that it is in principle possible to invoke a claim for a set-off in international arbitration for indirectly related claims (cf. 4A_482/2010), the SFT then dismissed the Appellant's arguments on the interpretation of the arbitration agreement based on the FIFA Regulations. In fact, and even though the latter reserve the possibility to file a counterclaim (asserting a set-off claim), the FIFA dispute resolution bodies are not "true" arbitral tribunals and, as such, they are not bound by the arbitration provisions enshrined in the Swiss Code on Civil Procedure (at 5.5.4).

Accordingly, the jurisdiction of the CAS panel in appeal could not be broader than that of the association's tribunal that had first ruled on the matter (in this case, the FIFA PSC). After analyzing the pertinent FIFA regulations, the CAS – and the SFT – confirmed that the possibility to file a counterclaim before the FIFA PSC could not *bind* the latter to rule on any claim for damages raised in this context (at 5.5.5).

Employing various instruments of statutory interpretation, the SFT further confirmed the limited material scope of the FIFA PSC jurisdiction, which does not extend to ruling on civil disputes of football stakeholders that are unrelated to football. The timely limits for the rendering of the FIFA decisions along with a cap on the procedural costs were also considered in order to conclude that FIFA did not intend to include the hearing of complex and unrelated set-off claims by its dispute resolution bodies and, subsequently, by the CAS (at 5.5.5.4).

Other grievances: violation of the parties' right to be heard and of material public policy

FC Cardiff further raised the issue of a violation by the CAS panel of the principle of equality of the parties for refusing to adjourn the hearing of its expert witness. Such plea was swiftly dismissed by the SFT to the extent that the panel had included the expert report in the file and that such report was found to have no influence on the outcome of the proceedings. The SFT equally dismissed all other pleas on violation of the Appellant's right to be heard, holding that the panel had rejected – at least implicitly – the various arguments raised by the Appellant (at 7).

Finally, the SFT thoroughly dismissed the Appellant's claim for violation of public policy alleging the Panel's refusal *"to examine (or even*

investigate) acts of corruption" (at 8.2.2). After reiterating the very restrictive scope of substantive public policy, the SFT held that such violation could only be admitted if the corruption had been established but the Panel still refused to take it into account, which was clearly not the case (judgment 4A_532/2014 of January 29, 2015, at 5.1).

Conclusion

Overall, this is an interesting and thorough judgment rendered by the SFT that highlights the specificities of sports arbitration with respect to the scope of the arbitration agreement but also delves into the jurisdictional scope of the FIFA decision-making bodies, which draw the limits of the subsequent jurisdiction of the CAS.

English Translation[2]

Extracts of the facts

On July 20, 2015, SASP Football Club de Nantes (hereinafter: FC Nantes), a football club playing in the French first division championship, member of the Ligue de Football Professionnel (LFP) and the Fédération Française de Football (FFF), itself affiliated to the Fédération Internationale de Football Association (FIFA), entered into an employment contract with Argentine striker Emiliano Raul Sala Taffarel (hereinafter: the player or footballer), the term of which was set at June 30, 2020.

On January 18, 2019, Cardiff City Football Club Limited (hereinafter: CCFC), an English company managing a football club based in Cardiff, a member of the Football Federation of Wales (FGF), which was then playing in the First Division of the English league, submitted the player to a medical examination. At the end of the examination, the parties signed a three-and-a-half year employment contract expiring on June 30, 2022. The next day, FC Nantes and the player signed a document, entitled "Termination Agreement", under which the parties agreed, under certain conditions, to terminate the employment contract that bound them.

On January 19, 2019, FC Nantes sent CCFC a countersigned copy of the Player Transfer Agreement (hereinafter: the Transfer Agreement). According to this contract, the transfer amount consisted of a fixed amount of EUR 17,000,000, to be paid in three instalments, - the first instalment of EUR 6,000,000 to be paid within five days after the registration of the player with CCFC, the other two instalments to be paid on January 1, 2020 and January 1, 2021 respectively. Both clubs publicly announced the player's transfer on the same day.

On January 21, 2019, at 12:00 p.m. (Swiss time), the legally autonomous entity managing the English Premier League informed CCFC that it could not endorse the player's contract of employment because the signing bonus clause in the contract required certain amendments. On the same day, at 6:30 p.m. (Swiss time), the FGF confirmed that it had received the player's ITC and registered it with CCFC, with the status of the transfer in the FIFA Transfer Matching System (TMS) now being "Closed — awaiting payment". At 9:08 p.m. (Swiss

[2] The decision 4A_420/2022 was issued in French. The full text is available at the website of the Federal Tribunal, www.bger.ch.

The English translations & introductory notes of the Federal Tribunal judgment in sports arbitration cases are drafted by Dr. Despina Mavromati and are available at www.lawinsport.com

time), the player's agent, C., agreed to the changes in the employment contract, including the signing bonus. At 9:35 p.m. (Swiss time), CCFC sent an e-mail to the Premier League notifying them of the changes. The Premier League did not respond and later confirmed that they had never registered the player in the English Premier League.

During the night of January 21-22, 2019, at an undetermined time after the e-mail was sent, the player tragically died in a plane crash over the English Channel. The other occupant of the plane, the pilot D., also died in the air crash.

On February 26, 2019, FC Nantes brought an action against CCFC before the FIFA Players' Status Committee (PSC), seeking payment of EUR 6,000,000 plus interest, which is the first instalment of the compensation fixed in the transfer contract. The defendant raised the lack of jurisdiction. It argued, among other things, that the circumstances that led to the player's death were attributable to FC Nantes, which is why it intended to set off the amount of the claim for damages resulting from the footballer's death against the claims raised by the plaintiff. In its decision of September 25, 2019, the FIFA PSC ordered the defendant to pay FC Nantes the sum of 6,000,000 euros, with interest at 5% per annum, under penalty of a ban on the registration of new players. It further declared itself incompetent to hear the claim for damages raised the defendant.

On October 4, 2021, the Panel decided to split the proceedings and to examine, as a preliminary matter, whether the transfer contract entered into by the parties was valid (i), whether the FIFA PSC and CAS had jurisdiction to hear the Appellant's claim for damages in compensation (ii), and whether, according to the law applicable in the case, a claim of a contractual nature could be extinguished through a claim in tort (iii).

The Panel dismissed the appeal with its award dated August 26, 2022.

The Panel then examined whether it had jurisdiction to rule on the claim of an extra-contractual nature made by the Appellant, who claimed that the other party was responsible for the death of the player and therefore liable for the resulting damages (Award, n. 102-190). The Court considered that the FIFA PSC and the CAS Appeals Division did not have the competence to rule on the tort claim asserted by the Appellant (Award, n. 189 et seq.).

Having settled these issues, the Panel turned to the merits of the appeal (Award, n. 312-389). In order to determine whether the Transfer Agreement had come to an end, the Panel first reproduced the text of Clause 2.1 of the Transfer Agreement, which reads as follows (Award, n. 313):

"This Transfer Agreement is conditional upon:

2.1.1. the player successfully completing medical examination with [CCFC];

2.1.2. FC Nantes and the Player agreeing all the terms of a mutual termination of FC Nantes contract of employment with the Player;

2.1.3. the mutual termination of FC Nantes contract of employment with the Player is registered by the LFP;

2.1.4. the LFP and the FAW [FGF] have confirmed to [CCFC] and FC Nantes that the Player has been registered as a [CCFC] player and that the Player's International Transfer Certificate [ITC] has been released".

Examining successively the conditions provided for in Art. 2.1 of the transfer contract, the Panel considered that they

were all fulfilled before the death of the player, for which reason FC Nantes was entitled to the payment of the first instalment of the agreed transfer compensation (Award, n. 333-389).

On September 26, 2022, CCFC (hereinafter: the Appellant) filed an appeal in civil matters, with an request for suspensive effect, in order to obtain the annulment of the above-mentioned award.

Extract of the legal considerations

[…]

5.
In a first plea, the Appellant, invoking Art. 190 para. 2 let. b LDIP, maintains that the Panel wrongly refused to admit its jurisdiction to rule on the claim for damages that it had put forward.

[…]

5.4.
5.4.1. In support of its plea of violation of Art. 190 para. 2 let. b LDIP, the Appellant maintains, first of all, that the claim that it has set off falls within the scope of the arbitration clause provided for in Art. 8.2 of the transfer contract. Stressing that the interpretation of the scope of an arbitration agreement must be carried out in accordance with the ordinary rules of Art. 18 para. 1 of the Swiss Code of Obligations (CO; SR 220), it argues that the parties, when they provided for a broadly formulated arbitration clause, intended to submit to an arbitral tribunal all claims arising out of - or directly related to - the contracts governed by their agreement. According to the Appellant, who refers to the opinion expressed by certain authors, there is thus a presumption that an arbitration clause which is not of a restrictive nature also covers extra-contractual claims arising from the contract containing the clause. It then insists on the broad wording of the arbitration agreement inserted in Art. 8.2 of the Transfer Agreement, which reads as follows: *"Any dispute arising out of or in connection with this Transfer Agreement shall be subject to the jurisdiction of the FIFA Dispute Resolution Chamber... and on appeal (or in the event that FIFA declines jurisdiction) to the Court of Arbitration for Sport..."*.

Thus, it claims that the facts surrounding the Respondent's tort liability are undoubtedly related to the Transfer Agreement. In its opinion, the Panel should have concluded that the claim for set-off fell within the scope of the arbitration clause entered into by the parties. The Appellant then seeks to demonstrate that the reasoning of the arbitrators, which in its opinion was guided by reasons of expediency, does not stand up to scrutiny.

5.4.2.
In Swiss law, the interpretation of an arbitration agreement is governed by the general rules of contractual interpretation. Like a judge, the arbitrator or arbitral tribunal will first of all try to ascertain the real and common intention of the parties (cf. Art. 18 para. 1 CO), if necessary empirically, on the basis of surrounding elements, without stopping at any inaccurate expressions or names they may have used. In this sense, evidence is not only the content of the declarations of intent, but also the general context, i.e., all the circumstances that make it possible to discover the will of the parties, whether it is a question of declarations made prior to the conclusion of the contract, draft contracts, correspondence exchanged, or even the attitude of the parties after the conclusion of the contract. This subjective

interpretation is based on an assessment of the evidence. If it is conclusive, the result, i.e. the finding of a common and real intention of the parties, is a matter of fact and is therefore binding on the Federal Court. If this is not the case, the interpreter will have to determine, by applying the principle of trust, the meaning that the parties could and should have given, according to the rules of good faith, to their mutual expressions of intent in the light of all the circumstances (BGE 142 III 239, para. 5.2.1 and references cited; judgment 4A_174/2021 of July 19, 2021, para. 5.2.3). If it is not disputed, as in the present case, that an arbitration agreement exists, there is no reason to resort to a particularly restrictive interpretation. On the contrary, the parties' willingness to have the dispute decided by an arbitral tribunal must be taken into account (BGE 138 III 681, JdT 2013 II 452 at 4.4; 128 III 675, JdT 2004 170 at 2.3). If an arbitration agreement is drafted in such a way that it also covers disputes arising "in connection with" the contract, it must be concluded, according to the parties' stated intention, that they intended to submit to the exclusive jurisdiction of the arbitral tribunal all claims arising out of or directly affecting the state of affairs governed by the contract (BGE 138 III 681, Journal of Administrative Law 2013 II 452, § 4.4).

5.4.3.
The first part of the Appellant's argument does not convince the Federal Tribunal. The wording of the arbitration clause is certainly not restrictive, in the sense that it covers not only disputes that may arise out of the transfer agreement, but also those that are only related to this agreement ("in connection with"). That there is a chronological link between the death of the player and the transfer agreement is undeniable, as the death would not have occurred if the transfer agreement had not been executed. However, the same connection would also exist if the player had bought his own plane ticket to his new club by an ordinary flight. In this case, however, it is clear from the findings of the Panel that the transfer contract was executed before the player's death and that this contract did not impose on the Respondent the obligation to arrange the flight on which the player died. In these circumstances, the Appellant cannot be followed when it claims that the claim for damages has a tortious basis and relates to the consequences of the flight in question, which took place after the transfer contract was executed, and therefore falls within the scope of the arbitration agreement concluded by the parties, since the organization of the flight was independent of the contractual obligations set out in the transfer contract.

In a landmark decision published in ATF 138 III 681, the Federal Court, called upon to rule on the material scope of an arbitration clause with a wording similar to that of the present case, certainly held that, when an arbitration agreement is worded in such a way that it must also cover disputes arising in connection with the contract, this is to be understood, according to the rules of good faith, as meaning that the parties did not intend that claims arising under several legal headings from their relationship governed by the contract should be the subject of proceedings conducted on the one hand before the Arbitral Tribunal and on the other hand before the State authorities. This being the case, it appears that the tort claim asserted by the Appellant for compensation due to the consequences of the aviation accident in January 2019 is, on the basis of the findings of the Panel, clearly distinct from the

Respondent's claim for payment under the Transfer Agreement. In other words, the claim for damages does not relate to the relationship governed by the transfer contract. It should also be noted that the interested party bases its demonstration on facts that are not apparent from the contested award, in particular when it asserts that the transfer had not been finalized at the time of the accident or when it maintains that it was B., acting as the Respondent's sports agent, had organized and booked the flight on which the player and the pilot tragically died before the transfer contract was signed.

5.5.1.
In a second part of its argument, the Appellant claims that the CAS should have recognized, according to the FIFA regulations, the competence of the FIFA PSC and, consequently, its own competence to recognize the claim for damages in the present case. In this respect, it argues that Art. 17 RSTP expressly reserves the possibility of filing a counterclaim and therefore allows a party to assert a claim by way of set-off. It also states that no statutory or regulatory provision of FIFA limits in any way the right of a party to file counterclaims, which is why there is no reason to exclude the jurisdiction of the FIFA PSC and, consequently, that of the CAS to examine the claim that it has filed by way of set-off. The Appellant furthermore argues that the Panel should in any case have declared itself competent to rule on the claim asserted in compensation, by virtue of the principle according to which *"the judge of the action is the judge of the exception",* or by applying, by analogy, Art. 377 para. 1 CPC. Referring to the decision 4A_482/2010 of February 7, 2011, it observes that the Federal Court has recognized that the trend is towards the generalization of the said principle in international arbitration. It then argues that there is no evidence to suggest that the parties intended to exclude the claim for damages in the present case from the jurisdiction of the FIFA PSC and the CAS. In the meantime, the arbitral tribunal was obliged to declare itself competent to examine a claim for set-off, as it was obliged to interpret article 377 paragraph 1 CPC. In the alternative, it tries to show that any exceptions to the application of Art. 377 para. 1 CPC could not be taken into account in this case. Alternatively, it argues that the CAS should have accepted jurisdiction even if Art. 377 para. 1 CPC was a potestative norm.

5.5.2.
It should be emphasized at the outset, and once and for all, that it is not for the Federal Tribunal to rule on the jurisdiction of an arbitral tribunal located in Switzerland to decide on a claim for set-off brought before it in the context of an international arbitration. It would indeed be illusory to hope to be able to lay down, on this point, general rules of jurisprudence, applicable to all conceivable situations and for any type of arbitration (commercial, sports, investment, etc.). The only question to be resolved here is that of knowing whether, in the present case, the CAS has violated Art. 190 para. 2 LDIP by denying the jurisdiction of the FIFA PSC - and consequently its own - to recognize the claim for set-off asserted by the Appellant. It is not disputable that, in principle, it is possible for the Respondent to invoke a claim for set-off in an international arbitration and to require, under certain conditions, that the arbitral tribunal take it into consideration and examine its merits (cf. *CHRISTOPH ZIMMERLI,* Die Verrechnung im Zivilprozess und in der Schiedsgerichtsbarkeit, 2003, p. 25 f.; *LUC*

PITTET, Compétence du juge et de l'arbitre en matière de compensation, 2001, p. 303; *FLORA STANISCHEWSKI,* Die Verrechnung im Zivilprozess unter der Schweizerischen Zivilprozessordnung, 2020, n. 159; *HEIDI KERSTINJAUCH, Aufrechnung und Verrechnung in der Schiedsgerichtsbarkeit, 2001, p. 163; POUDRET/BESSON,* Comparative law of international arbitration, 2nd ed. 2007, n. 325; *KAUFMANN-KOHLER/RIGOZZI,* International arbitration, 2015, n. 3.149; *BERGER/MOSIMANN,* in Commentaire bernois, Internationale Schiedsgerichtsbarkeit, 2023, no. 74 ad Art. 186 LDIP; *PIERRE-YVES TSCHANZ,* inCommentaire romand, Loi sur le droit international privé, 2011, no. 58 ad Art. 187 LDIP; *COURVOISIER/JAISLI-KULL,* in Commentaire bernois, Internationales Privatrecht, 4th ed. 2021, no. 85 ad Art.186 LDIP; *BERGER/KELLERHALS,* International and domestic Arbitration in Switzerland, 4th ed. 2021, no.526 ff; *MARCO STACHER,* in Commentaire bernois, Schweizerische Zivilprozessordnung, vol. III, 2014, no. 2 ad Art. 377 CPC; *GABRIEL/MEIER,* Set-off defenses in arbitration - Conclusions from a Swiss civil lawperspective, in Indian Journal of Arbitration Law 2017 p. 67; *PHILIPP HABEGGER,* in Commentaire bâlois, Schweizerische Zivilprozessordnung, 3rd ed. 2017, no. 4 ad Art. 377 CPC; more nuanced: *GIRSBERGER/VOSER,* International arbitration, 4th ed. 2021, no. 421a). The Federal Court has long recognized this, notably in an obiter dictum to the decision 4A_482/2010, where it noted the following: *"In the same vein and with respect to set-off, the trend is towards the generalization of the principle, rendered by the adage 'the judge of the action is the judge of the exception', according to which, to use the text of Art. 21 para. 5 of the Swiss Rules of International Arbitration, the arbitral tribunal has jurisdiction to hear a set-off exception even if the relationship which forms the basis of the claim invoked as set-off does not fall within the scope of the arbitration agreement or a choice of forum clause... "(at* 4.3.1).

In Switzerland, Art. 377 para. 1 CPC, which is inspired by the solutions adopted by the arbitration rules of various Swiss chambers of commerce (Message of 28 June 2006 on the Swiss Code of Civil Procedure, FF 2006 p. 7007), codifies from the outset the rules of arbitration of the Swiss Chamber of Commerce. It is true that, in its jurisprudence, the principle of the right to a fair hearing is not always applied. It is true that in its case law, the Federal Tribunal has on several occasions applied the rules of the CPC concerning Swiss domestic arbitration to international arbitration. However, it has only done so by analogy, which already calls for a certain caution in applying the conditions laid down by this provision for domestic arbitration to international arbitration. This caution is all the more justified since the last amendment of the LDIP in the field of international arbitration, which came into force on January 1, 2021, was aimed at improving legal certainty and clarity, The Federal Council emphasized the desire expressed during the consultation process to maintain a dualism between international and domestic arbitration. In this respect, it emphasized that Chapter 12 of the LDIP provides for the most liberal and succinct rules possible, while the more dense and detailed rules of Part III of the CPC are intended to make the procedure more predictable for the parties (Message of 24 October 2018, FF 2018 p. 7165).

[…]

5.5.4.

According to the constant jurisprudence of the Federal Court, the decision rendered by the jurisdictional body of a sports association, even if this body is called an arbitral tribunal, constitutes in principle only a simple expression of will issued by the association concerned (ATF 148 III 427, para. 5.2.3; 147 III 500, para. 4; 119 II 271, para. 3b; decision 4A_344/2021 of January 13, 2022, para. 5.2, and the references cited therein). The Court of Appeal also had the opportunity to clarify that the FIFA PSC does not constitute an arbitral authority, but only the internal jurisdictional body of a private association (BGE 148 III 427 at 5.2.4; judgment 4A_344/2021, supra, at 5). It thus appears that the jurisdictional bodies of FIFA do not constitute real arbitral tribunals, as the party concerned expressly acknowledges in its appeal (Appeal, n. 134). Thus, in this case, the FIFA tribunal was not obliged to apply Art. 377 CPC, which regulates the question of whether an arbitrator is competent to rule on a claim for set-off, irrespective of whether the aforementioned provision is applicable mutatis mutandis in international arbitration (see, among others, *TARKAN GÖKSU,* Schiedsgerichtsbarkeit, 2014, no. 611; *GASSER/RICKLI,* "The Arbitration of the Swiss Confederation"). The appellant cannot be followed either when it argues that the so-called "universal" principle according to which "the judge of the action is the judge of the exception" should be applied in this case, since the FIFA PSC is precisely not an arbitral tribunal and the proceedings conducted by it cannot be qualified as arbitral proceedings. The case law has certainly recognized that it is in principle incumbent upon the judicial authority responsible for ruling on the principal claim to rule on the existence of the claim invoked in compensation (ATF 124 111207 c. 3b/bb; 85 II 103 at 2b; 63 II 133 at 3c), while sometimes reserving certain exceptions to this principle (ATF 85 11 103 at 2c). In an isolated decision, the Federal Court also indicated that the tendency was to generalize the principle in the field of arbitration (decision 4A_482/2010, supra, para. 4.3.1). However, it must be emphasized once again that the FIFA PSC is neither a state authority nor an arbitral tribunal, but only the jurisdictional body of a private law association. In addition, it is not possible to simply transpose a principle of Swiss civil procedure - which is otherwise not enshrined in the LDIP or the CPC except in matters of internal arbitration (cf. Art. 377 CPC) - to disputes submitted to the dispute resolution body of a private association.

5.5.5.
In this case, the CAS rightly emphasized that, insofar as it was called upon to rule in the present case as an appeal body, its own competence to examine the claim invoked implied that the FIFA PSC had itself been competent to hear such a claim. In other words, the jurisdiction of the appeal court could not be broader than that of the court of the association concerned which had first ruled on the matter.

The answer to the question at issue thus depended, in reality, on whether the FIFA regulations governing, in particular, the powers and jurisdiction of the FIFA PSC, as well as the procedures conducted before it, required this court to declare itself competent to examine the claim asserted in compensation by the appellant, which the Panel denied. It should be recalled here that an association under Swiss law enjoys, by virtue of the principle of the autonomy of the association guaranteed by Art. 63 CC, a large degree of autonomy in the establishment and application of the rules governing its social life and its relations with

its members (ATF 134 III 193, para. 4.3; decision 4A_246/2022 of November 1, 2022, para. 6.3.1). In order to solve the controversial problem, it is therefore necessary to interpret the topical rules laid down by the association concerned.

5.5.5.1.
According to the jurisprudence of the Federal Court, the statutes of a major sports association, such as FIFA, in particular the clauses relating to questions of jurisdiction, must be interpreted according to the rules of interpretation of the law (judgments 4A_618/2020 of June 2, 2021, para. 5.4.3; 4A_462/2019 of July 29, 2020, para. 7.2 and the references cited). The same applies to the interpretation of rules of a lower level than the statutes of a sports association of this importance (judgments 4A_314/2017 of May 28, 2018, at 2.3.1; 4A_600/2016 of June 29, 2017, at 3.3.4.1). In this case, the interpretation relates to rules that were issued by the world football governing body. Therefore, they must be interpreted in accordance with the methods of statutory interpretation.

5.5.5.2.
The interpretation begins with the letter of the law (literal interpretation), but this is not the decisive factor: it must also restore the true scope of the norm, which also derives from its relationship with other legal provisions and its context (systematic interpretation), from the aim pursued, in particular the interest protected (teleological interpretation), as well as from the will of the legislator as it results in particular from the preparatory work (historical interpretation). The judge will depart from a clear legal text insofar as the other methods of interpretation mentioned above show that this text does not correspond in all respects to the true meaning of the provision in question and leads to results that the legislator could not have intended, that offend the sense of justice or the principle of equal treatment. In short, the Federal Supreme Court does not favor any particular method of interpretation and does not establish a hierarchy, but is inspired by a pragmatic pluralism in order to seek the true meaning of the norm (BGE 142111 402, para. 2.5.1 and the references cited therein).

5.5.5.3.
[…]

5.5.5.4.
It appears from this overview of the various rules enacted by FIFA that these do not expressly settle the question whether the FIFA PSC is necessarily bound to rule on any opposing claim for damages, regardless of the legal nature thereof. Art. 17 of the Rules of the PSC, which concerns the issue relating to the advance of the costs of procedure, certainly mentions the possibility of filing a counterclaim before the FIFA PSC. On the other hand, it in no way sets the conditions to which the filing of a counterclaim is subject, neither rules on the fate of the opposing claims for damages and their processing by the FIFA PSC.

It can hardly be disputed that it is possible for the defendant to bring a counterclaim or to invoke claims by way of set-off before the FIFA PSC that the latter would have had the competence to examine if these had been submitted to it by this same party, as plaintiff, by means of a direct action for payment. However, we cannot retain, on the basis of a purely literal argument of Art. 17 of the Rules of the PSC, that the mere allusion to a "counterclaim" would mean that the FIFA PSC would be absolutely

bound to rule on any claim invoked in compensation before it.

A systematic interpretation of the rules enacted by FIFA confirms that the FIFA PSC does not have of unlimited jurisdictional competence but that it has, on the contrary, competences limited to certain legal aspects related to the field of football. It must indeed be clearly seen that the FIFA PSC is a body of the governing body of football at world level, which has as its statutory purpose to establish rules and regulations governing football and related matters, and to ensure that they are enforce (Art. 2 let. c of the Articles of Association) but is not intended to settle civil disputes dividing football stakeholders unrelated to enforcement issues in football. Art. 46 par. 1 of the Statutes also provides that the FIFA PSC establishes and ensures that the RSTP and that its jurisdiction is determined therein. However, Art. 1 RSTP, titled "Scope" specifies, in its first paragraph, that the said regulation establishes universal rules and binding rules regarding the status of players and their qualification to participate in organized football, as well as their transfer between clubs belonging to different associations. It thus appears that the jurisdictional mission assigned to the FIFA PSC is to ensure compliance with the provisions of the RSTP, in accordance with Art. 1 RSTP, within the limits of its competences provided for by Art. 22 RSTP. It is also worth observing that FIFA wished to create specialized jurisdictional bodies, since it decided to distribute the football-related disputes, depending on their type, between the FIFA PSC and the Dispute Resolution Chamber of FIFA.

The teleological interpretation of the rules adopted by FIFA also confirms that the governing bodies settlement of disputes instituted within it are not intended to hear any claim raised by one football team against another, whether by way of action or exception. As the Panel rightly pointed out, the dispute resolution mechanism established by the FIFA aims not only to ensure compliance by its members with the rules laid down by it, but also enables it to ensure the uniform application of the provisions governing football in the interest of all actors in this sport. However, FIFA's role as "football policeman" cannot go beyond the borders of this sport, because its task does not consist precisely in settling disputes totally unrelated to the regulations adopted in relation to football governance. In other words, the FIFA PSC cannot hear any dispute dividing two football clubs, but only of those which fall within the scope application of the RSTP. Moreover, such an interpretation is corroborated by the association which adopted the said regulations, since FIFA indicates the following on page 375 of its published RSTP Commentary, 2021 edition:
"Besides disputes between clubs relating to training compensation and the solidarity mechanism, FIFA is also competent to hear other disputes arising between clubs affiliated to different member associations. Once again, the international dimension is the key element in determining jurisdiction. The dispute concerned must also fall within the general scope of the Regulations for FIFA to hear it (...)" (emphasis added).

Contrary to what the Appellant maintains, it is not clear why the 2021 edition of the RSTP's comment would not be relevant for the interpretation of the 2018 edition of the RSTP, since the relevant provisions of the RSTP, namely Arts. 1 par. 1 and 22 lit. f RSTP, have not undergone any modification. It also appears that the procedural rules applicable before the FIFA

PSC were designed with a view to ensuring a rapid and inexpensive resolution of disputes. Art. 25 par. 1 RSTP states, in effect, that the FIFA PSC must in principle render its decision within sixty days. The costs themselves may not exceed 25,000 fr. (Art. 25 par. 2 RSTP and 18 of the Rules of the PSC). However, the objective pursued by the FIFA tending to guarantee the parties a quick and inexpensive settlement of disputes among them would be compromised if we accepted that the FIFA PSC was required to rule on any claim invoked, including when it has no connection with the football regulations. It must indeed be seen that the FIFA PSC, in its capacity as a judicial body specializing in monitoring compliance with certain aspects of the football regulations, has neither the necessary expertise nor sufficient means, in particular in terms of investigative measures, to rule, as in this case, on legally complex tort claims, with foreign elements, unrelated to the provisions of the RSTP or to the interests of the governing body of football. Capping costs to a relatively low amount of 25,000 fr. constitutes an additional element demonstrating that the FIFA PSC is not intended to examine claims requiring the implementation of various expertise in the aeronautical field for the purpose of elucidating the causes of an air crash. The requirement provided for by the RSTP according to which a case submitted to the FIFA PSC must be dealt with quickly would further not be satisfied if the plaintiff, whose claims were ready to be decided at the moment of the referral to the FIFA PSC, saw the rendering of its decision significantly postponed due to the fact that its opponent invoked claims in compensation, unrelated to the football regulations.

In these circumstances, it cannot be accepted that the Appellant could validly invoke a claim for damages based on a claim that the FIFA PSC did not have jurisdiction to examine whether it had been submitted to it by this same party, as plaintiff, by means of a direct action in payment brought against the Respondent.

5.5.6.
In view of the foregoing, the Panel's finding in holding that the FIFA PSC had rightly denied its jurisdiction to rule on the claim for damages must be upheld. It follows that the grievance based on the violation of Art. 190 par. 2 lit. b LDIP is dismissed.

6.
In a second plea, the Appellant, invoking Art. 190 par. 2 lit. d LDIP, accuses the Panel of violating the principle of the equality of the parties.

6.1.
According to case law, the equality of the parties implies that the procedure be settled and conducted so that each party has the same opportunity to present its case (ATF 142 III 360 at 4.1.1).

6.2.
In support of its grievance, the Appellant argues that the Panel refused, without justification, to adjourn the hearing of its expert in English law, E., even though it decided to hear the Respondent's expert. In its opinion, the hearing of E. was likely to influence the outcome of the dispute, to the extent that the expert had to specify whether English law permitted the invocation in set-off of a claim having a tort basis for the purpose of opposing the payment of a transfer fee.

6.3.

As presented, the grievance must be dismissed.

It must first be noted that the Panel recounted, in detail, the procedural steps in connection with the hearing of E. and the reasons why it had decided not to adjourn the hearing for such expert (Award, n. 248-269). On the basis of the facts found by the arbitrators, it does not appear that the Appellant would not have benefited from the same possibilities as its opponent to present its case, as evidenced by the convincing demonstration made by the Respondent (Answer, n. 44-52). The CAS recalls moreover, quite rightly, that a written report by expert E. was placed in the arbitration file, so that the Panel was able to take into consideration the opinion of this expert.

In any event, it should be noted that the violation invoked by the Appellant had no influence on the outcome of the proceedings. The arbitrators only discussed the arguments of English substantive law on a purely subsidiary basis ("On a purely subsidiary level "; Award, n. 176). The Panel, moreover, indicated the following, under n. 268 of its Award: "268. (...) The Panel further notes that - at the end of the day - the testimony of Mr E. QC is not material for the outcome of this case, since the Panel has found that, for procedural reasons, the FIFA PSC [FIFA PSC] had no mandate to adjudicate CCFC's set-off claim...".

7.
In a third plea, divided into several branches, the Appellant complains of various breaches of its right to be heard (Art. 190 para. 2 let. d LDIP).

7.1.
Jurisprudence has deduced from the right to be heard a minimum duty for the arbitral tribunal to examine and address relevant issues. This duty is breached when, through inadvertence or misunderstanding, the arbitral tribunal does not take into consideration allegations, arguments, evidence and offers of evidence presented by one of the parties and important for the award to be made. It is incumbent on the so-called party aggrieved to demonstrate, in its appeal against the award, how an inadvertence on the part of the arbitrators prevented from being heard on an important point. It is up to it to establish, on the one hand, that the court arbitrator failed to consider some of the factual, evidentiary or legal evidence that it had regularly advanced in support of its conclusions and, on the other hand, that these elements were likely to influence the fate of the dispute (ATF 142 III 360 at 4.1.1 and 4.1.3). If the Award completely ignores elements apparently important for the resolution of the dispute, it is up to the arbitrators or the respondent party to justify this omission in their observations on the appeal. They can do this by showing that, contrary to the Appellant's assertions, the omitted elements were not relevant to resolving the case concrete or, if they were, that they were implicitly refuted by the arbitral tribunal (ATF 133 III 235 at 5.2). Moreover, the grievance alleging violation of the right to be heard should not serve, for the party which complained of defects affecting the reasoning of the award, thereby causing an examination of the application of the substantive law (ATF 142 III 360 at 4.1.2 and the references cited).

7.2.
7.2.1.
In the first limb of the plea in question, the interested party maintains that the Panel breached its right to be heard by failing to examine the question of its jurisdiction

ratione materiae arising of the arbitration clause contained in the transfer contract.

This criticism is flawed. The Panel has, in fact, referred to the aforementioned argument under n. 111 of the disputed Award. When examining the question of the jurisdiction of the FIFA PSC - and, therefore, of its own jurisdiction - to decide on the claim for damages, it indicated that there was no link between the claim and the opposing claim for damages ("... *The set-off claim is not linked to the breach of contract. The only arguable nexus is the crude and obvious causal one: if there had been no transfer, then there would not have been a plane crash. However, there is no substantive link between the two matters... ";* Award, n. 172). The Panel also held that the transfer contract had been executed before the player's departure by plane and that this contract did not impose on the Respondent the obligation to organize the flight during which the player perished (Award, n. 186 f.). In view of the foregoing, it is admitted that the arbitrators rejected, at least implicitly, the thesis that the claim for damages fell within the scope of the arbitration clause inserted in the transfer contract, which moreover corresponds to the conclusion reached by the Federal Court (see at 5.4.3 above).

7.2.2.
In the second part of the grievance examined, the Appellant again complains, but this time in terms of an infringement of its right to be heard, the refusal to postpone the hearing of its expert E.. Such criticism is unfounded and we can repeat here, *mutatis mutandis,* the considerations already issued in connection with the violation of the principle of equality of the parties invoked by the Appellant (see at 6.3 above).

7.2.3.
In the third and last limb of the plea in question, the Appellant maintains that the Panel allegedly violated its right to be heard by deciding to split the proceedings in order to deal with three issues determined, to then take a decision on a point outside the framework of the separate instruction of these three legal questions, namely the examination of allegations of acts of corruption around the conclusion of the transfer contract. Such an argument does not convince the Federal Court. In this case, the decision of bifurcate the proceedings was worded as follows (Award, n. 61):
"The Panel has decided to bifurcate the proceedings and, therefore, to preliminarily deal with the following legal issues on the merits:
(i) If the transfer agreement entered into by the Parties is valid (with all conditions preceding being complied with);
(ii) If the CAS / FIFA PSC [FIFA PSC] is competent to decide on the set-off with a damage claim;
(iii)Under the applicable law - as a matter of principle - a claim for transfer fee can be set-off against a wrong claim. "

The Appellant cannot be followed when it claims, in essence, that the allegations of corruption allegedly related to a separate theme, were intended to be tackled later and for its own sake. Possible facts of corruption clearly fell within the first of the three questions supposed to be the subject of a prior separate examination, i.e. that relating to the validity of the transfer contract. In these conditions, the Appellant cannot reasonably maintain that it could not have expected to substantiate such allegations and plead them during the arbitration hearing, especially since it was itself that had put forward this argument in order to conclude that the transfer contract was void.

8.

In a fourth and final plea, the Appellant argues that the award under appeal would be contrary to the public policy referred to in Art. 190 par. 2 lit. and LDIP.

8.1.

An award is incompatible with public policy if it disregards the essential values and widely recognized which, according to the conceptions prevailing in Switzerland, should form the basis of any legal order (ATF 144 III 120 at 5.1; 132 III 389 at 2.2.3). There is a procedural and a substantive public policy.

8.1.1.

An award violates substantive public policy when it violates fundamental principles of substantive law to the point of no longer being reconcilable with the determining legal order and system of values (ATF 144 III 120 at 5.1; 132 III 389 at 2.2.1). Is does not constitute a breach of public policy when one of the grounds of the arbitral tribunal breaches public policy; it is rather the result of the award which must be incompatible with public policy (ATF 144 III 120 at 5.1). The incompatibility of the award with public policy, referred to in Art. 190 par. 2 lit. e LDIP, is a more restrictive notion than that of arbitrariness (ATF 144 III 120 at 5.1; judgments 4A_318/2018 of March 4, 2019, at 4.3.1; 4A_600/2016, cited above, at 1.1.4). According to case law, a decision is arbitrary when it is manifestly untenable, seriously disregards a standard or a clear and undisputed legal principle, or shockingly offends the sense of justice and equity; it is not enough that another solution appears conceivable, or even preferable (ATF 137 I 1 at 2.4; 136 1316 at 2.2.2 and cited references). For an incompatibility with public policy, it is not enough that the evidence was misjudged, that a finding of fact was manifestly false or a rule of law has been clearly violated (judgments 4A_116/2016 of December 13, 2016 at 4.1; 4A_304/2013 of March 3, 2014 at 5.1.1; 4A_458/2009 of June 10, 2010 at 4.1). The annulment of an international arbitration award for this ground of appeal is extremely rare (ATF 132 III 389 at 2.1).

8.1.2.

There is a violation of procedural public policy when fundamental principles and generally recognized have been violated, leading to an unbearable contradiction with the feeling of justice, of such that the decision appears incompatible with the values recognized in a State governed by the rule of law (ATF 141 III 229 at. 3.2.1; 140 III 278 at 3.1; 136 III 345 at 2.1). According to consistent case law, procedural public policy, within the meaning of Art. 190 par. 2 lit. e LDIP, is only a subsidiary guarantee that cannot be invoked only if none of the grounds of Art. 190 par. 2 lit. a-d LDIP can be applied (ATF 138 III 270 at 2.3)

8.2.

8.2.1.

The interested party argues, first, that the award under appeal enshrines a violation of the order procedural public, because it would contravene the adversarial principles (right to be heard and equality of parties) and procedural fairness, in relation, on the one hand, to the scope of the division of the procedure, and, on the other hand, with the hearing of its expert E..

As presented, the argument based on Art. 190 par. 2 lit. e LDIP, whose admissibility is more than doubtful, must be dismissed. It consists, in fact, exclusively of a presentation, from another angle, of the criticisms made previously in support of

other grievances. In doing so, the Appellant disregards the subsidiary character of the guarantee of procedural public policy. There is therefore no need to consider the criticisms formulated by the Appellant in respect of the violation of procedural public policy which overlap with those who have already been discarded previously.

8.2.2.
Secondly, the Appellant seeks the annulment of the Award on the grounds that it would be incompatible with material public policy, inasmuch as the Panel would have refused "to examine (or even to investigate) acts of corruption".

Such an argument does not stand up to scrutiny. According to case law, the violation of substantive public policy for corruption can only be admitted if a case of corruption is established, but the Arbitral tribunal refused to take it into account in its award (judgment 4A_532/2014 of January 29, 2015, at 5.1 and cited references). However, that is clearly not the case here. Under n. 387 of its award, the Panel indeed indicated that the Appellant had certainly alluded to acts of corruption but had not sufficiently substantiated its related allegations. Such a conclusion, based on an assessment of the evidence that this Federal Court cannot review, excludes the possibility of blaming the CAS of having disregarded public policy by ordering the payment of the first installment of the transfer. It is also in vain that the Appellant accuses the Panel of having violated substantive public policy, by refusing to suspend the procedure until the closure of investigations carried out by another authority over these corruption charges. In the absence of sufficiently substantiated allegations from the appellant, the Panel could, in fact, refuse to accede to its request for a stay of proceedings, it being specified that such a decision was not, in this case, of an imperative nature.

Decision

In view of the foregoing, the appeal can only be dismissed to the extent it is admissible.

4A_434/2022
13 décembre 2022
A1 et consorts c. B1 et consorts

Recours contre la "sentence d'accord-parties" rendue le 23 août 2022 par le Tribunal Arbitral du Sport (TAS 2021/A/8338).

Une sentence d'accord parties peut-elle faire l'objet d'un recours ordinaire devant le Tribunal federal?

Extrait des faits

La Fédération X. de Football est la fédération nationale qui dirige le football dans l'État X. Elle est membre de la Fédération Internationale de Football Association (FIFA).

La présente affaire s'inscrit dans le contexte beaucoup plus large des difficultés que traverse la Fédération X. de Football depuis 2013 et qui sont à l'origine de nombreux litiges, le Tribunal Arbitral du Sport (TAS) ayant déjà enregistré plusieurs procédures en rapport avec ceux-ci. Les élections organisées par la Fédération X. de Football en 2013, en vue du renouvellement de ses instances fédérales et départementales, constituent le point de départ de ces querelles intestines, plus précisément l'annulation de ces élections par la Chambre de Conciliation et d'Arbitrage (CCA) du Comité National Olympique et Sportif de X. (ci-après: la CCA/CNOSC).

Dans ces circonstances, la FIFA s'est vue contrainte d'intervenir, ce qu'elle a fait en décidant de suspendre la Fédération X. de Football et de nommer un Comité de Normalisation chargé de gérer les affaires courantes de la fédération et d'organiser de nouvelles élections. Les activités déployées par ledit Comité ont toutefois été systématiquement annulées, raison pour laquelle la FIFA a été contrainte de constituer un second Comité de Normalisation (ci-après: CDN) pour une durée de six mois jusqu'au 28 février 2018, qui avait notamment pour mission d'identifier les délégués de l'Assemblée générale de la Fédération X. de Football et des ligues régionales afin d'organiser l'élection d'un nouveau Comité Exécutif de la Fédération X. de Football.

Le 12 décembre 2018, le Président et les membres du Comité Exécutif de la Fédération X. de Football ont été désignés par une assemblée générale élective.

Le 15 janvier 2021, le TAS a annulé les décisions relatives à l'adoption des nouveaux statuts de la Fédération X. de Football et a également annulé les élections du 12 décembre 2018 du Président et des membres du Comité Exécutif de la Fédération X. de Football. Il a en revanche refusé de réintégrer les membres de l'assemblée générale de la Fédération X. de Football élus en 2009, parmi lesquels figuraient notamment toutes les personnes physiques mentionnées dans le *rubrum* du présent arrêt. Dans sa sentence, il a néanmoins indiqué qu'il appartenait aux "organes actuellement en place" de finaliser le processus d'adoption des nouveaux statuts, ce qu'a confirmé la FIFA par courrier du 16 janvier 2021.

Du 2 au 4 février 2021, 51 personnes dont le nom figurait sur la liste des membres de l'assemblée générale de la Fédération X. de Football de 2009 ont convoqué une session extraordinaire afin d'élire un "Comité Exécutif Provisoire" et de remplacer les personnes élues le 12 décembre 2018.

Le 24 février 2022, D., élu le 11 décembre 2021 en qualité de Président de la Fédération X. de Football, a tenu une réunion de concertation avec 44 membres de l'assemblée générale de la Fédération X. de Football de 2009, au cours de laquelle ceux-ci ont notamment reconnu et pris acte de son élection.

Le 28 mars 2022, une assemblée générale de la Fédération X. de Football de 2009 s'est tenue en présence de 44 membres et de 12 membres représentés. Au cours de celle-ci, il a notamment été décidé ce qui suit:

"Résolution N o 6:
A l'unanimité des membres présents et représentés, l'Assemblée Générale de 2009 reconnaît la légitimité de l'assemblée générale ayant adopté les statuts et les textes de 2021. Elle valide en conséquence lesdits Statuts et textes subséquents de la Fédération X. de Football adoptée (sic) le 13 juillet 2021 conformément aux prescriptions de la FIFA afin de lever définitivement l'équivoque sur les textes applicables en matière de football dans l'État X.

Résolution N o 7:
A l'unanimité des membres présents et représentés, l'Assemblée Générale a décidé d'accompagner le Président D. dans sa politique d'apaisement, de réconciliation et de réforme du football X. Elle prend par conséquent acte de son élection à l'issue de l'Assemblée Générale élective tenue le 11 décembre 2021.

Résolution N o 8
A l'unanimité des membres présents et représentés, l'Assemblée Générale a décidé de se désister de toutes les procédures pendantes devant les juridictions nationales et internationales en l'occurrence le Tribunal Arbitral du Sport (TAS) dans les procédures TAS 2021/A/8338; TAS 2021/A/8456.
(...)
Elle interdit enfin qu'un membre de l'Assemblée Générale de 2009 puisse agir individuellement au nom et pour le compte de l'Assemblée Générale de 2009 dans les procédures en cours devant le TAS (...)".

Le 31 mars 2022, les parties à la procédure conduite par le TAS ont signé une convention reconnaissant la légitimité de l'assemblée générale de la Fédération X. de Football du 13 juillet 2021 ainsi que l'élection de D. à la présidence de la Fédération X. de Football.

Le 8 juin 2022, le TAS a fait droit à la requête en restitution de délai de l'appelante pour payer l'avance de frais complémentaire et a imparti un nouveau délai à l'appelante pour verser ladite avance de frais.

Le même jour, le TAS a avisé les parties qu'une "sentence d'accord parties" serait rendue dans la présente procédure à réception du paiement de l'avance de frais.

Le 9 juin 2022, le conseil de A1. et consorts a indiqué au TAS que ses mandants n'avaient pas adhéré à la convention passée le 31 mars 2022 et qu'ils sollicitaient, partant, une reconsidération de la décision de rendre une "sentence d'accord parties". La demande de reconsidération a été rejetée le même jour par le TAS.

Le 13 juin 2022, A1. et consorts ont estimé que si le TAS venait à confirmer que sa décision d'accorder la restitution de délai requise n'était justifiée que par "l'accord de la majorité des intimés", cela consacrerait notamment une violation de l'ordre public procédural.

Le 16 juin2022, l'arbitre s'est estimé suffisamment renseigné pour rendre une "sentence d'accord parties" sans tenir au préalable une audience.

Le même jour, A1. et consorts ont indiqué qu'une telle sentence ne leur serait pas opposable, dès lors qu'ils n'avaient pas signé la convention passée le 31 mars 2022.

Le 22 juin 2022, le TAS a confirmé avoir reçu le solde de l'avance de frais.

Le 23 août 2022, l'arbitre unique désigné par le TAS a rendu une "sentence d'accord parties", en application de l'art. R56 al. 2 du Code de l'arbitrage en matière de sport (ci-après: le Code), au terme de laquelle il a ratifié la convention conclue entre les parties le 31 mars 2022 et a dit que la procédure arbitrale était terminée et rayée du rôle.

Le 30 septembre 2022, A1. et consorts (ci-après: les recourants) ont formé un recours en matière civile aux fins d'obtenir l'annulation de ladite sentence.

Extrait des considérants

[…]

3.
Le Tribunal fédéral examine d'office et librement la recevabilité des recours qui lui sont soumis (**ATF 138 III 46** consid. 1).

3.1. En l'occurrence, l'arbitre a rendu une décision, intitulée "sentence d'accord-parties", au terme de laquelle il a ratifié la convention conclue le 31 mars 2022 et a rayé la cause du rôle.

3.2. Dans leur mémoire de recours, les intéressés font valoir que l'acte attaqué est une décision finale sur le fond contre laquelle un recours en matière civile au Tribunal fédéral est ouvert. Il convient d'examiner le bien-fondé de cette affirmation.

3.3.
3.3.1. Le recours en matière civile visé par l'art. 77 al. 1 let. a LTF en liaison avec les art. 190 à 192 LDIP n'est recevable qu'à l'encontre d'une *sentence*. L'acte attaquable peut être une sentence finale, qui met un terme à l'instance arbitrale pour un motif de fond ou de procédure, une sentence partielle, qui porte sur une partie quantitativement limitée d'une prétention litigieuse ou sur l'une des diverses prétentions en cause ou encore qui met fin à la procédure à l'égard d'une partie des consorts (arrêt 4A_222/2015 du 28 janvier 2016 consid. 3.1.1 avec une référence à l'**ATF 116 II 80** consid. 2b), voire une sentence préjudicielle ou incidente, qui règle une ou plusieurs questions préalables de fond ou de procédure (sur ces notions, cf. l'**ATF 130 III 755** consid. 1.2.1). En revanche, une simple ordonnance de procédure pouvant être modifiée ou rapportée en cours d'instance n'est pas susceptible de recours (**ATF 136 III 200** consid. 2.3.1; arrêt 4A_596/2012 du 15 avril 2013 consid. 3.3). Il en va de même d'une décision sur mesures provisionnelles visée par l'art. 183 LDIP (**ATF 136 III 200** consid. 2.3 et les références citées).

Pour juger de la recevabilité du recours, ce qui est déterminant n'est pas la dénomination du prononcé entrepris, mais le contenu de celui-ci (**ATF 142 III 284** consid. 1.1.1; arrêt 4A_222/2015, précité, consid. 3.1.1).

3.3.2.Selon le droit suisse de procédure civile, la transaction judiciaire elle-même, en tant qu'acte juridique des parties, met fin au procès (**ATF 139 III 133** consid. 1.2; arrêts 4A_640/2016 du 25 septembre 2017 consid. 2.5; 4A_254/2016 du 10 juillet 2017 consid. 4.1.1). Le tribunal se borne à en prendre acte; il ne rend pas de décision judiciaire, même si, formellement, il raye la cause du rôle. Une décision de radiation de la cause du rôle, au sens de l'art. 241 al. 3 du Code de procédure civile du 19 décembre 2008 (CPC; RS 272), est dès lors un acte n'ayant qu'une portée déclaratoire (**ATF 139 III 133** consid. 1.2; arrêts 4A_640/2016, précité, consid. 2.5; 4A_254/2016, précité, consid. 4.1.1). L'invalidité de la transaction judiciaire ne peut être invoquée, notamment pour vices du consentement (art. 23 ss CO), que par la voie de la révision (art. 328 al. 1 let. c CPC; **ATF 139 III 133** consid. 1.3; arrêt 4A_254/2016, précité, consid. 4.1.1). La décision de radiation au sens de l'art. 241

al. 3 CPC n'est en revanche pas susceptible d'un recours ordinaire, hormis sur la question des frais de la procédure (**ATF 139 III 133** consid. 1.3).

Jugeant cette solution insatisfaisante, le Conseil fédéral, dans son Message du 26 février 2020 relatif à la modification du code de procédure civile suisse, a toutefois proposé de créer une voie de recours contre une décision de radiation du rôle prise sur la base de l'art. 241 al. 3 CPC. Dès lors qu'il n'existe aucun moyen de droit permettant de contester une transaction, un acquiescement ou un désistement d'action, hormis celui de la révision (art. 328 al. 1 let. c CPC), l'instauration d'une voie de recours à l'encontre de la décision judiciaire de radiation du rôle permettrait à la partie concernée d'invoquer les vices conduisant à la nullité de la transaction (Message du 26 février 2020 relatif à la modification du code de procédure civile suisse [Amélioration de la praticabilité et de l'application du droit], FF 2020 p. 2670 s.).

3.3.3. En matière d'arbitrage interne, l'art. 385 CPC dispose que lorsque les parties mettent fin au litige pendant la procédure d'arbitrage, le tribunal arbitral leur en donne acte, sur requête, sous la forme d'une sentence. Cette disposition s'inspire de l'ancien art. 34 du concordat sur l'arbitrage du 27 mars 1969 (CA). La formulation de l'art. 385 CPC vise à inclure toute forme de règlement du litige par les parties (l'acquiescement, le désistement ou la transaction). Ainsi, le tribunal rend sur requête une sentence constatant que les parties ont mis fin au litige. A cet effet, le tribunal arbitral incorpore dans le dispositif de la sentence arbitrale la partie de la transaction réglant le litige ou y constate l'acquiescement ou le désistement (Message du 28 juin 2006 relatif au code de procédure civile, FF 2006 p. 7009).

Selon l'art. 396 al. 1 let. c LDIP, une partie peut demander la révision d'une sentence entrée en force en faisant notamment valoir que la transaction judiciaire n'est pas valable. Plusieurs auteurs estiment que la révision est la seule voie de droit à disposition de la partie souhaitant contester la validité de la transaction, la sentence prenant acte de l'existence d'une telle transaction n'étant pas susceptible d'un recours en matière civile au Tribunal fédéral (PHILIPPE SCHWEIZER, in Commentaire romand, Code de procédure civile, 2e éd. 2019, no 8 ad art. 385 CPC; TARKAN GÖKSU, in Code de procédure civile, Petit commentaire, Chabloz et al. [éd.], 2020, no 5 ad ad art. 385 CPC; GASSER/RICKLI, Schweizerische Zivilprozessordnung, Kurzkommentar, 2e éd. 2014, no 3 ad art. 385 CPC; BRUNNER/STEININGER, in Schweizerische Zivilprozessordnung, Brunner et al. [éd.], 2e éd. 2016, no 8 ad art. 385 CPC; d'un avis contraire: MATTHIAS WIGET, Vergleich, Klageanerkennung und Klagerückzug vor Schiedsgerichten, 2007, p. 90 s.; DANIEL GIRSBERGER, in Commentaire bâlois, Schweizerische Zivilprozessordnung, 3e éd. 2017, no 16 ad art. 385 CPC; FELIX DASSER, in Kurzkommentar ZPO, 3e éd. 2021, Oberhammer et al. [éd.], no 8 ad art. 385 CPC; BAECKERT/WALLMÜLLER, Rechtsmittel bei Beendigung des Verfahrens durch Entscheidsurrogat [Art. 241 ZPO], in PCEF 2014-2015 p. 27; FORNARA/COCCHI, in Commentario pratico al Codice di diritto processuale civile svizzero, Trezzini et al. [éd.], 2e éd. 2017, no 9 ad art. 385 CPC; MICHAEL LAZOPOULOS, in Commentaire bernois, Schweizerische Zivilprozessordnung, 2014, no 38 ad art. 385 CPC; PLANINIC/ERK-KUBAT, in ZPO Kommentar, Gehri et al. [éd.], 2e éd. 2015, no 5 ad art. 385 CPC).

3.3.4. Après ce bref survol des moyens de droit à disposition d'une partie souhaitant remettre en cause une transaction judiciaire conclue dans le cadre d'un procès civil ordinaire ou d'un arbitrage interne soumis aux règles du CPC, il sied de relever que la

LDIP ne règle nullement la question des succédanés ou ersatz de décision que sont les actes des parties mettant fin à la procédure sans décision, tels la transaction, l'acquiescement ou le désistement. L'absence de base légale dans la LDIP ne signifie toutefois pas que les parties ne peuvent pas mettre fin au litige qui les divise par une transaction (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 4e éd. 2021, n. 1540; MARKUS WIRTH, in Commentaire bâlois, Internationales Privatrecht, 4e éd. 2021, no 55 ad art. 189; LAZOPOULOS, op. cit., no 5 ad art. 385 CPC; DIETER GRÄNICHER, in Kommentar zur Schweizerischen Zivilprozessordnung [ZPO], Sutter-Somm et al. [éd.], 3e éd. 2016, no 2 ad art. 385 CPC; RONNIE BETTLER, Der gerichtliche Vergleich nach Art. 241 ZPO, in PJA 2018 p. 1491). Rien n'empêche ainsi *a priori* les parties de demander au tribunal arbitral qu'il rende une sentence entérinant les termes de leur accord (PIERRE-ANDRÉ MORAND, La transaction, 2016, n. 661). Certains auteurs soutiennent que la LDIP contient une lacune sur ce point qu'il convient de combler en appliquant l'art. 385 CPC par analogie (TARKAN GÖKSU, Schiedsgerichtsbarkeit, 2014, n. 1769 et les références citées). D'autres font valoir que le point de savoir si un tribunal arbitral peut rendre une sentence constatant l'existence d'une transaction conclue par les parties, souvent qualifiée de " sentence d'accord parties " (*Schiedsspruch mit vereinbartem Wortlaut*; *consent award* ou *award on agreed terms*), dépend du droit régissant la procédure d'arbitrage (art. 182 LDIP; WIGET, op. cit., p. 39 s.; LE MÊME, Der Schiedsspruch mit vereinbartem Wortlaut im schweizerischen Schiedsgerichtsrecht, in PCEF 2010 p. 248; GABRIELLE NATER-BASS, Praktische Aspekte des Vergleichs in Schiedsgerichtsverfahren, in Bull. ASA 2002 p. 430; IRMA AMBAUEN, Eine Gegenüberstellung im Kontext der Opting-out-Möglichkeiten - Unter besonderer Berücksichtigung der zwingenden Bestimmungen, der Schiedsfähigkeit und der Anfechtbarkeit von Schiedssprüchen, 2016, n. 237; WIRTH, op. cit., no 55 ad art. 189 LDIP). A cet égard, il sied de relever que de nombreux règlements d'arbitrage internationaux réservent expressément cette possibilité (cf. art. 33 du règlement d'arbitrage de la Chambre de commerce internationale; art. 36 al. 1 du règlement suisse d'arbitrage international; art. 36 al. 1 du règlement d'arbitrage de la Commission des Nations Unies pour le droit commercial international; art. 26.9 des règles d'arbitrage de la London Court of International Arbitration [LCIA Rules]; art. 56 al. 2 du Code).

S'agissant des éventuelles voies de droit permettant de remettre en cause une sentence entérinant une transaction conclue par les parties dans le cadre d'un arbitrage international soumis aux règles de la LDIP, plusieurs auteurs sont d'avis qu'un recours en annulation fondé sur l'art. 190 LDIP est possible (WIGET, op., p. 89 s. et les références citées; ANDREAS BUCHER, Die neue internationale Schiedsgerichtsbarkeit in der Schweiz, 1989, n. 337; STEPHEN BERTI, Rechtsmittel gegen Schiedsentscheide nach IPRG, in Schiedsgerichtsbarkeit, Andreas Kellerhals [éd.], 1997, p. 348; HORVATH/FISCHER/PRANTL, in Praxishandbuch Schiedsgerichtsbarkeit, Hellwig Torggler et al. [éd.], 2e éd. 2017, n. 1331; BERGER/KELLERHALS, op. cit., n. 1548; RÜEDE/HADENFELDT, Schweizerisches Schiedsgerichtsrecht nach Konkordat und IPRG, 2e éd. 1993, p. 271; PFISTERER/SCHNYDER, Internationale Schiedsgerichtsbarkeit, 2e éd. 2020, p. 143; KARL SPÜHLER, Der gerichtliche Vergleich, 2015, p. 53 s.). Certains auteurs estiment que les griefs susceptibles d'être invoqués dans le cadre d'un recours dirigé contre une sentence entérinant un accord transactionnel sont toutefois limités (SPÜHLER, op. cit., p. 57). D'autres soulignent qu'un recours en annulation ne permettra de toute manière pas au Tribunal

fédéral d'examiner si la transaction a été valablement conclue (BERGER/KELLERHALS, op. cit., n. 1555). Un auteur est d'avis qu'une sentence d'accord parties ne peut pas faire l'objet d'un recours en annulation fondé sur l'art. 190 al. 2 LDIP, puisque le dispositif de ladite sentence correspond à l'accord des parties, raison pour laquelle celles-ci n'ont par conséquent aucun motif de contester le contenu de la sentence (MORAND, op. cit., n. 680).

3.3.5. On peut raisonnablement s'interroger sur le point de savoir si un recours en annulation fondé sur l'art. 190 al. 2 LDIP dirigé contre une sentence ne faisant qu'entériner l'accord transactionnel conclu par les parties est effectivement recevable. Il est vrai qu'un tel acte revêt formellement la forme et les caractéristiques d'une sentence arbitrale. Cela étant, il peut paraître quelque peu paradoxal, de prime abord, d'admettre qu'un recours en annulation de la sentence soit possible dans un tel cas en matière d'arbitrage international - domaine dans lequel les règles particulières qui régissent le recours au Tribunal fédéral sont en principe plus restrictives que celles applicables au recours en matière civile dirigé contre un arrêt cantonal de dernière instance - alors que la jurisprudence considère qu'il n'existe aucune voie de recours, hormis celle de la révision, à l'encontre d'une décision par laquelle le juge étatique suisse prend acte de la transaction passée par les parties et raye la cause du rôle.

Il faut également bien voir qu'en matière d'arbitrage interne, le législateur a expressément prévu un cas de révision permettant de remettre en cause une sentence arbitrale au motif que le désistement d'action, l'acquiescement ou la transaction judiciaire n'est pas valable (art. 396 al. 1 let. c CPC). D'aucuns jugent que ce moyen de droit est exclusif, raison pour laquelle tout recours en annulation fondé sur l'art. 393 CPC dirigé contre une sentence d'accord visée par l'art. 385 CPC n'entrerait pas en ligne de compte. La LDIP ne règle pas cette question et ne prévoit pas de cas de révision similaire à celui de l'art. 396 al. 1 let. c CPC. On peut dès lors légitimement se demander s'il faut y voir là un indice de la volonté du législateur d'exclure toute possibilité de remettre en cause une transaction passée dans le cadre d'une procédure arbitrale internationale que ce soit par la voie du recours ou par celle de la révision ou s'il s'agit là, au contraire, d'une preuve supplémentaire de ce qu'un recours en annulation fondé sur l'art. 190 al. 2 LDIP est également ouvert dans un tel cas pour attaquer une sentence entérinant une transaction passée les parties. Cela étant, point n'est besoin d'approfondir ici l'examen de la question qui vient d'être évoquée du moment que le présent recours, fût-il recevable, devrait de toute façon être rejeté pour les motifs indiqués plus loin.

[…]

6.
Invoquant en premier lieu le motif de recours prévu par l'art. 190 al. 2 let. b LDIP, les recourants soutiennent que le TAS n'était pas compétent pour rendre la sentence attaquée (considérant 6)

6.3. Tel qu'il est présenté, le grief ne saurait prospérer. C'est en vain que les intéressés soutiennent que le TAS n'était pas compétent pour rendre la sentence attaquée. Il ressort, en effet, des constatations de fait opérées par l'arbitre que l'appelante a requis et obtenu une restitution de délai pour verser l'avance de frais supplémentaire exigée par le TAS. Or, l'intéressée s'est exécutée en temps utile. Dans ces conditions, la restitution de délai et le paiement effectué dans le respect du délai imparti ont fait échec à la fiction irréfragable de retrait de l'appel. Pour le reste, les recourants font fausse route lorsqu'ils tentent de soutenir que le TAS ne pouvait pas fonder sa compétence sur la clause d'arbitrage insérée dans la convention passée

le 31 mars 2022. La compétence du TAS reposait en effet sur la réglementation édictée par la Fédération X._____ de Football. C'est également en pure perte que les recourants font valoir que les prétentions visées par la procédure arbitrale étaient exorbitantes de l'objet de la convention précitée, dès lors que l'arbitre a constaté que les parties à la procédure avaient toutes expressément accepté que ladite convention soit incorporée à la sentence querellée.

7.
En deuxième lieu, les recourants dénoncent diverses violations de leur droit d'être entendus (art. 190 al. 2 let. d LDIP) (considérant 7)

7.1 (…) 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). Or, le Tribunal federal a souligné le caractère appellatoire marqué du mémoire de recours soumis à la Cour de céans.

[…]

7.3. (…), l'argumentation développée par les recourants n'emporte pas la conviction de la Cour de céans. N'en déplaise aux intéressés, l'arbitre a visiblement considéré qu'il pouvait faire droit à la demande de restitution de délai présentée par les recourants, vu non seulement l'absence d'opposition de la part des intimés mais également l'accord exprès signifié par les intervenants à la procédure. Ce faisant, il a rejeté, à tout le moins de manière implicite, les arguments avancés par les recourants tendant à démontrer que les conditions d'octroi d'une restitution de délai n'étaient pas remplies. Qu'il l'ait fait à juste titre ou non importe peu sous l'angle du moyen pris de la violation du droit d'être entendu des recourants.

C'est également en vain que les intéressés, sous le couvert d'une atteinte à leur droit d'être entendus, se plaignent de ce que l'arbitre ne pouvait pas rendre une sentence d'accord parties. L'arbitre a en effet retenu que la décision de se désister de toutes les procédures arbitrales pendantes devant le TAS, adoptée lors de la session de l'assemblée générale de la Fédération X. de Football de 2009 tenue le 28 mars 2022, s'imposait à tous les membres de celle-ci, à l'instar de la convention signée le 31 mars 2022. Il a aussi indiqué que les parties à la procédure avaient accepté que ladite convention soit incorporée à la sentence attaquée. Il appert ainsi que l'arbitre a établi que la convention litigieuse liait tous les membres de l'assemblée générale de la Fédération X. de Football de 2009, y compris ceux qui avaient manifesté ultérieurement leur opposition à celle-ci, et que les parties à la procédure avaient consenti à ce que cette convention soit intégrée à la sentence querellée. Il s'agit là de constatations de fait qui lient le Tribunal fédéral, qu'elles soient fondées ou non. Aussi les recourants tentent-ils en pure perte de les remettre en question en proposant une appréciation différente des pièces ressortant du dossier de l'arbitrage. C'est également en vain que les intéressés prétendent que l'arbitre aurait procédé à de telles constatations en faisant fi des arguments qu'ils avaient avancés aux fins de démontrer qu'ils n'avaient personnellement ni manifesté leur volonté de se retirer de la procédure ni accepté le prononcé d'une sentence entérinant la convention conclue le 31 mars 2022 en application de l'art. R56 al. 2 du Code. A la lecture de la sentence attaquée, il appert, en effet, que l'arbitre a considéré que les intervenants n'agissaient pas en leur nom propre mais bel et bien au nom de l'assemblée générale de la Fédération X. de Football de 2009. Or, la majorité de ses membres avait décidé de se désister de la procédure et de conclure une convention transactionnelle, dont l'art. 3, reproduit dans la sentence attaquée, prévoyait notamment ce qui suit:

"Les parties requièrent respectueusement l'auguste Tribunal Arbitral du Sport (TAS) qu'il ratifie la présente convention (...)".

Sur la base de ce qui précède, l'arbitre a visiblement considéré que les parties au litige avaient clairement manifesté leur intention que la convention litigieuse soit incorporée à la sentence. Il a ainsi rejeté, à tout le moins de manière implicite, la thèse des recourants selon laquelle l'accord individuel de tous les membres de l'assemblée générale de la Fédération X. de Football élus en 2009 ayant pris part à la procédure était nécessaire pour rendre une sentence d'accord parties fondée sur l'art. R56 al. 2 du Code. Quant à la circonstance selon laquelle le CNOSC n'était pas partie à ladite convention, il l'a visiblement jugé, à tort ou à raison, non décisive et, partant, a considéré qu'elle ne faisait pas obstacle au prononcé d'une sentence d'accord parties, ce qui apparaît défendable, dès lors que le CNOSC a en l'occurrence joué, *mutatis mutandis*, le même rôle que celui qui est dévolu d'ordinaire, dans une procédure cantonale, à un tribunal de première instance dont le jugement est soumis à la juridiction d'appel compétente.

Pour le reste, il saute aux yeux que les recourants, lorsqu'ils se plaignent, sous le couvert d'une prétendue violation de leur droit d'être entendus, de ce que l'arbitre n'aurait prétendument pas contrôlé la bonne foi de l'accord transactionnel, s'en prennent exclusivement à la motivation du TAS et tentent d'obtenir un examen matériel de la sentence par l'autorité de recours, ce qui n'est pas admissible. Quoi qu'il en soit, il ressort de la sentence attaquée que l'arbitre a bel et bien examiné cette question, puisqu'il a considéré que rien n'indiquait que la convention litigieuse n'avait pas été conclue de bonne foi entre les parties ou qu'elle était contraire à l'ordre public. C'est à tort que les intéressés qualifient pareille motivation de formule stéréotypée ne revêtant pas plus de valeur qu'une simple clause de style, étant précisé que les recourants ne sauraient obtenir des considérations précises sur chaque détail du raisonnement tenu par l'arbitre. C'est dès lors en pure perte que les intéressés se lancent, sur près de sept pages, dans une démonstration appellatoire visant à démontrer que l'issue du litige aurait été différente si l'arbitre n'avait pas omis de respecter son devoir de contrôle.

8.
En troisième et dernier lieu, les recourants font valoir que la sentence entreprise serait incompatible avec l'ordre public (art. 190 al. 2 let. e LDIP) (considérant 8)

[…]
8.2.1 (…) [L]e moyen pris de l'incompatibilité avec l'ordre public, au sens de l'art. 190 al. 2 let. e LDIP et de la jurisprudence y afférente, n'est pas recevable dans la mesure où il tend uniquement à établir la contrariété de la sentence attaquée à une norme juridique. Aussi est-ce en vain que les intéressés se livrent à une critique purement appellatoire aux fins de démontrer que l'assemblée générale de la Fédération X. de Football de 2009 tenue le 28 mars 2022 n'aurait pas été convoquée conformément aux règles édictées par la Fédération X. de Football.

Force est par ailleurs de relever que l'arbitre est parvenu à dégager la réelle et commune intention des parties puisqu'il a constaté que celles-ci avaient toutes accepté que la convention passée le 28 mars 2022 soit incorporée dans la sentence entreprise, ce qui est du reste corroboré par le texte même de la clause 3 de ladite convention reproduite dans la sentence querellée. Ce faisant, l'arbitre a procédé à une interprétation subjective de la volonté des parties, dont il a tiré la conclusion que les intéressés s'étaient mis d'accord quant à l'issue de la procédure. Or, l'interprétation subjective relève du domaine des faits, si bien qu'elle lie le Tribunal fédéral (**ATF 142 III 239** consid. 5.2.1). Au demeurant, ressortirait-elle au droit que le

Tribunal fédéral ne pourrait pas non plus la revoir dans le cadre de l'examen du grief fondé sur l'art. 190 al. 2 let. e LDIP. C'est dès lors en pure perte que les recourants critiquent certaines constatations de fait opérées par l'arbitre en soutenant qu'ils n'auraient jamais consenti à ce que celui-ci rende une sentence d'accord parties, étant précisé que, même à supposer que les constatations de fait en question fussent manifestement fausses, ce qui n'est pas établi, cela ne suffirait pas à taxer la sentence entreprise de contraire à l'ordre public.

Enfin, c'est à tort que les recourants soutiennent que le non-respect de l'art. R56 al. 2 du Code serait constitutif d'une contrariété à l'ordre public procédural. Ce faisant, ils perdent de vue que le Tribunal fédéral, lorsqu'il statue sur un recours en matière d'arbitrage international, n'est pas compétent pour vérifier le respect des règles ou principes procéduraux exorbitants des motifs énumérés limitativement à l'art. 190 al. 2 LDIP, étant précisé que l'application manifestement erronée d'une règle de procédure n'est pas constitutive d'une violation de l'ordre public procédural au sens de l'art. 190 al. 2 let. e LDIP, sauf lorsqu'il s'agit d'une violation d'une règle essentielle pour assurer la loyauté de la procédure, ce que ne démontrent nullement les intéressés (arrêts 4A_416/2020 du 4 novembre 2020 consid. 3.1; 4A_612/2009 du 10 février 2010 consid. 6.3.1).

[…]

Décision

Au vu de ce qui précède, le recours doit être rejeté dans la mesure de sa recevabilité.

Informations diverses
Miscellanous
Información miscelánea

Publications récentes relatives au TAS/Recent publications related to CAS

- Aumeran X., Football, premières contestations des sanctions devant le TAS, Jurisport, no. 231, juin 2022, p. 8

- Blackshaw I., Settling sports disputes by "med-arb", Sports Law and Taxation, no. 3, September 2022, p. 13 – 16

- Blackshaw I., Mediating sports disputes, Handbook on international sports law / ed. By Nafziger J. A. R. and Gauthier R. – second edition. – Cheltenham: Elgar, 2022. – p. 242 – 265

- Böhm F., Zulassung und Teilnahme an Olympishen und Paralympishen Spielen als Rechtsproblem, Schriften zum Sportrecht 61, 2022

- Boisson de Chazournes L., Couturier s., Questions de preuve et droit applicable devant le TAS, Les Cahiers de Droit du Sport, N° 61 2022, p.101

- Brägger R., The 2022 amendments to the CAS Code, Sports Law and Taxation, no. 13, no. 4, December 2022, p. 19 – 22

- Cambreleng Contreras j., Samarth S., Vandellos Alamilla, Sporting succession in football, Sports Law and Policy Center, 2022, European sports law and policy bulletin, 1/2022

- Chanda S., Saha K., An analytical study of the human rights concerns before the CAS with reference to Caster Semenya, The International Sports Law Journal, vol. 22, no. 4, December 2022, p. 314 - 331

- Chaussard C., Le choix de l'arbitre, Les Cahiers de Droit du Sport, N° 61 2022, p.108
- Clay T., Maisonneuve M., Rogozzi A., Le consentement à l'arbitrage dans le sport, Les Cahiers de Droit du Sport, N° 61 2022, p.89 – 99

- Crespo Ruiz_Huerta j., Costantini G., Riego Mier G., Commentary on award CAS 2019/A/6594, Revista aranzi de derecho de deporte y entretenimiento, Num. 78 Enero-Marzo 2023, p. 239

- Diaconu M., Kuwelkar S., Kuhn A., The court of arbitration for sport jurisprudence on match-fixing: a legal update, The International Sports law Journal Electronical periodical], 17 March 2022

- Duval A., Lost in translation? : The European Convention on Human Rights at the Court of Arbitration for Sport, The International Sports law Journal, vol. 22, no. 2, p. 132 – 151

- Favre-Bulle X., Case notes on international arbitration, Swiss Review of International and European Law, 2022, p. 675 – 701

- Guillaumé J., Loquin E., Tribunal arbitral du sport: Chronique des sentences arbitrales, Journal du droit international, n°. 1, janvier-février 2023, p. 287 – 343

- Gut E., Gasser C., CAS award on the issue of legal aid: pro bono legal representation confirmed by the Federal Supreme Court (Federal Supreme Court decision NO 4A_166/2021), Sweet and Maxwell's

International Sports Law Review, vol. 22, no. 2, 2022, p. 18 – 21

- Haynes J., The indefensible demise of Caster Semenya and the danger of a single story!, Sports Law and Taxation, vol. 13, no. 2, June 2022, p. 18 – 23

- Heerman P., "Beipackzettel" für Schiedsklauseln zum Court of Arbitration for Sport, Causa Sport, Jg. 19, Nr. 1, 2022, p. 15 – 21

- Hovell M., Financial and disciplinary consequences of sporting succession, International Sports Law and Policy Bulletin, no. 1, 2022, p. 169 – 182

- Ibarrola J., Hungarian and Russian Canoe Federations v. International Canoe Federation: comment on the CAS award of 23 December 2021, Sports Law and Taxation, vol. 13, no. 4, December 2022, p. 23 - 24

- Jacotot D., Le choix du droit applicable, Les Cahiers de Droit du Sport, N° 61 2022, p. 100

- Latty F., Foucher B., Les questions liées à la liste fermée d'arbitres du TAS, à leur indépendance et impartialité ainsi qu'à leur déontologie, Les Cahiers de Droit du Sport, N° 61 2022, p. 110

- Legendre C., Le Tribunal arbitral du sport et le droit au procès equitable dans l'après Pechstein, Les Cahiers de Droit du Sport, N° 61 2022, p.121

- Lercari Effio F., The system for the recognition of awards of the Court of Arbitration for Sport in Spain, Revista aranzi de derecho de deporte y entretenimiento, Num. 78 Enero-Marzo 2023, p. 141

- Lewis A., Taylor J., Sport: Law and Practice, Part D Disciplinary and Arbitral Proceedings, Chapter D2 The Court of Arbitration for Sport (Beloff M., Netzle S., Haas U., with Hessert B. and Koller Trunz M.), p. 1150 – 1228

- Loquin E., L'application des règles de droit appropriées dans l'arbitrage du TAS, Les Cahiers de Droit du Sport, N° 61 2022, p. 104
- Maisonneuve M., Le Tribunal arbitral du sport et le droit de l'Union européenne, Mélanges en l'honneur du Professeur Gérald Simon, LexisNexis, 2021, pp. 383-404

- Moyerson P., de Dios Crespo Perez J., La question du choix des arbittres par les avocats des parties, Les Cahiers de Droit du Sport, N° 61 2022, p.115

- Pavot D., La lacune en était-elle vraiment une? L'interprétation incertaine du Tribunal arbitral du sport dans l'affaire Kamila Valieva, Les Cahiers de Droit du Sport, N° 61 2022, p.38

- Rabu G., La concurrence juridictionnelle des fédérations sportives, Les Cahiers de Droit du Sport, N° 62 2023, p. 27

- Reeb M., Simon G., Pourquoi l'arbitrage dans le sport?, Les Cahiers de Droit du Sport, N° 61 2022, p. 84

- Rietiker D., Defending athletes, players, clubs and fans, Manual for human rights education and litigation in sport, in particular before the European Court of Human Rights

- Rigozzi A., L'assistance judiciaire devant le Tribunal arbitral du Sport, Les Cahiers de Droit du Sport, N° 61 2022, p.127

- Soria F., Commentary on the award CAS 2020/6617 "Manuel Burga Seoane v. FIFA", Revista aranzi de derecho de deporte y entretenimiento, Num. 77, Octubre-Diciembre 2022, p. 209

- Tschanz P.-Y., Spoorenberg F., Franchini D., Chronique de la jurisprudence étrangère, Revue de L'Arbitrage 2022 – N°4 p. 15566 – 1574

- Sporting succession at national level, International Sports Law and Policy Bulletin, issue entitled "Sporting succession in football", no. 1, 2022, p. 227 – 315

- Vereinbarkeit von verbandlichen Genehmigungsvorbehalten mit Sanktionsandrohung mit EU-Kartellrecht (Fall ISU), Spurt 1/2023, p. 42